A Code of Conduct for Collective Sale Committees:
***Kok Yin Chong and others v Lim Hun Joo and others* [2019] SGCA 28**

I. Executive Summary

In *Kok Yin Chong v Lim Hun Joo* [2019] SGCA 28, a group of subsidiary proprietors[1] (the "**Dissenting SPs**") attempted to block the collective sale of the residential development Goodluck Garden, by challenging the conduct of three (out of six) members of the Collective Sale Committee ("**CSC**"). Specifically, they appealed against a decision by the High Court ("**HC**") to order the collective sale of the development, on the basis that the three members of the CSC (the "**Respondents**") had breached the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) (the "**LTSA**") in their conduct of the sale.

The Third Schedule of the LTSA governs the composition, constitution and proceedings of collective sale committees ("**Third Schedule**"), including rules regarding conflict of interest, voting requirements, and transactions in good faith. The Dissenting SPs argued that:

(i) The election of two of the Respondents to the CSC was void because they had not declared that their relatives also owned units in the development; this amounted to an actual or potential conflict of interest, making the Respondents' application as a whole to the HC *ultra vires* (or beyond their legal authority);
(ii) As certain voting requirements in the Third Schedule were breached, the HC had no jurisdiction (or power) to hear and award the application for the sale; and
(iii) The transaction was not in good faith.

The CA dismissed the appeal, finding that:

(i) There was no actual or potential conflict of interest. The mere fact that relatives of the CSC owned units in the development did not give rise to a conflict of interest;
(ii) Despite the breach of voting requirements, the HC had jurisdiction to grant the application; and
(iii) The Dissenting SPs failed to show that the transaction was not in good faith.

Additionally, the sale and purchase agreement for Goodluck Gardens set strict timelines for the court proceedings; the agreement would be rescinded if they were not met. Fortunately, the courts were able to resolve the case on an expedited basis. However, the CA cautioned against parties making privately-agreed court deadlines that are unrealistic. It noted that future collective sale committees would have to bear the consequences if a sale agreement was rescinded when private deadlines were not met.

II. Material Facts

The proceedings for the collective sale of Goodluck Gardens began on 27 May 2017, when marketing agent Knight Frank Pte Ltd ("**Knight Frank**") presented an overview of the collective sale process to Goodluck Gardens' subsidiary proprietors. They were informed that the estimated sale price was at least $455.8 million, and the estimated development charge ("**DC**") was $48.4 million. The DC is a tax paid by developers to authorities, when planning permission is granted for a development project which increases the value of the land. This affects the attractiveness of a sale, as a lower DC will translate into a higher sale price.

An extraordinary general meeting ("**EGM**") of the management corporation of Goodluck Gardens was convened in July 2017. The CSC of six members, including the Respondents, was

[1] Generally, a subsidiary proprietor is the owner of a unit or apartment in a residential development.

constituted to act jointly on behalf of the subsidiary proprietors for the sale. At a subsequent EGM in September 2017, Knight Frank shared a proposed reserve (or minimum) price of $500m, and an estimated DC of around $58.5m, which was subject to verification. Knight Frank also explained the apportionment method for the sale proceeds, while the lawyers went through the terms and conditions of the collective sale agreement ("**Sale Agreement**").

Then, in November 2017, Knight Frank informed the subsidiary proprietors that the CSC had resolved to increase the reserve price to $550m. By 15 January 2018, subsidiary proprietors of lots with not less than 80% of the share values and not less than 80% of the total area of all lots had signed the Sale Agreement.[2] This meant that the 80% consent threshold for making a collective sale application pursuant to section 84A(1)(*b*) of the LTSA was reached.

On 25 January 2018, Knight Frank informed the subsidiary proprietors that Goodluck Gardens would be launched for sale through public tender, and that the estimated DC was now $63.19m. It also appointed an architect to carry out the DC verification. The tender would close on 7 March 2018. Knight Frank then sent emails to 652 potential bidders informing them of the launch – the emails mentioned that the reserve price was $550m, that there was an estimated DC of $63.2m, and that it was awaiting a reply regarding the verification of the DC.

On 26 February 2018, it turned out that no DC would be payable. Knight Frank immediately updated potential bidders on the change and commenced urgent discussions with the CSC. However, the subsidiary proprietors were not informed of this change. Knight Frank also advised the CSC that there was no need to extend the closing date of the tender; if any potential bidder requested for an extension, Knight Frank would discuss the matter with the CSC. The CSC did not object. There were no requests for extension.

The tender closed on 7 March 2018 as scheduled. There was one bid at $580m, a second bid at $610m and one expression of interest for $480m. On the same day, an independent valuation report valued the property at $542m, taking into consideration that there was no DC payable. The next day, the CSC awarded the tender to the $610m bid. Knight Frank then informed the subsidiary proprietors that a sale and purchase agreement (the "**SPA**") for $610m had been entered into. It did not mention that there was no DC payable.

The first time that the subsidiary proprietors were informed that there was no DC payable was during an owner's meeting on 19 March 2018. Despite some queries as to why they were not informed more promptly, there were no withdrawals from the sale. Instead, the owners of an additional ten units signed the Sale Agreement.

The Respondents were appointed by the subsidiary proprietors to act jointly as their authorised representatives for the collective sale application. On 25 April 2018, the Respondents applied to the Strata Titles Board (the "**Board**") for an order for the collective sale of Goodluck Gardens. Various objections were filed. Section 84A(6A) LTSA requires the Board to mediate matters between applicants and objectors for an order for collective sale, and the Board held two mediations. Eventually, the Board ordered that all the proceedings before it be discontinued. The Respondents then applied to the HC for an order for a collective sale; the Dissenting SPs filed their objections.

[2] Generally, each lot is assigned a share value, and each unit in a lot is assigned a proportion of that value (based on its floor area). E.g., if the share value of a unit in a lot is represented by the figure 5/350, then 350 represents the share value of all the units in the lot and 5 is the share value allotted to the unit.

The HC was told that the Respondents had to obtain an order for the sale by 26 November 2018, failing which the purchaser might treat the SPA as rescinded. The HC granted the application for the sale on 26 November 2018. The Dissenting SPs then appealed to the CA.

III. Discussion

A. Conflict of Interest

Paragraph 2(1) of the Third Schedule states that if any person standing for election to a collective sale committee "is aware of any actual or potential conflict of interest, **if any**" with his or her duties or interests as a member of such committee, arising from certain circumstances, the person should declare the nature and extent of these conflicts before the election. Such circumstances include (a) his or her ownership, together with that of any "associates", of any property that may be the subject of the sale, or (b) an "associate's" ownership of any property that may be the subject of the sale. Failure to disclose would render void the election of such person to the collective sale committee.

It was undisputed that two of the three Respondents, Mr Lim and Mr Chan, had relatives who each owned other units in Goodluck Gardens, and that these units were the same type as those of Mr Lim's and Mr Chan's. It was also undisputed that these relatives were Mr Lim's and Mr Chan's "associates", and that neither of them had declared these relationships while standing for election. The Dissenting SPs argued that their appointments as CSC members were void. As such, the Respondents had no standing (or right) to apply for the collective sale as they were jointly appointed as representatives.

The CA disagreed. It held that there was no actual or potential conflict of interest which Mr Lim or Mr Chan should have declared, and hence their appointments were not void. In any case, the application could have continued with the remaining Respondent (Mr Awe) as the sole representative of the CSC.

(i) Actual or potential conflicts of interest.

The CA held that the words "if any" in paragraph 2(1) meant that the existence of the stated circumstances alone would not necessarily give rise to an actual or potential conflict of interest. Instead, whether a conflict arose would depend on the facts of the case. If not, the words "if any" would serve no practical purpose. Thus, the Dissenting SPs had to show how the associates' ownership of other units created a conflict of interest.

However, there was no evidence of such conflict of interest. There was no indication that (i) the associates had owned the lots beyond being residents or had purchased lots to take advantage of the collective sale, or that (ii) Mr Lim and Mr Chan had conducted the sale in a hasty or otherwise unsatisfactory manner due to their associates' ownership. The CA also dismissed the Dissenting SPs' argument that the associates' ownership of the same type of unit would result in a overrepresentation of that type of unit in the CSC and hence result in a conflict, since the Dissenting SPs accepted that the Respondents were not challenging the apportionment of the sale proceeds (which depended on the type of unit owned).

The CA rejected the Dissenting SPs' other arguments, which focused on the failure to disclose (rather than whether there was a conflict of interest). The argument that disclosure was necessary to enhance the transparency of the sale process lacked force: while it was important for the CSC to be transparent, here there was no actual or potential conflict of interest. In addition, the argument that it would be difficult to assess whether there was an actual or potential conflict was an overstatement, as a reasonably clear answer could usually be obtained

through logic and common sense. Finally, the CA rejected the argument that a stricter approach would help to extinguish temptation: the result of a failure to declare a conflict was the voiding of the candidate's election, which was already a significant deterrent against poor behaviour.

(ii) Void appointments.

The CA stated that even if Mr Lim's and Mr Chan's appointments were void, the HC application could still have been made by the remaining Respondent Mr Awe. With regard to the Dissenting SPs' argument that all three Respondents had been appointed to be their joint representatives in the sale and thus all three had to act together, the CA stated that there was nothing in section 84A of the LTSA which would render the application *ultra vires* (i.e. beyond the Respondents' legal authority) if any one of the representatives had been wrongly appointed, or if the number of representatives fell below three.

The CA did note that the CSC could have been more forthcoming at the EGM on September 2017, when they were asked if Mr Lim and Mr Chan had relatives who owned other lots in the property. In such situations, it was natural that any reticence by them in disclosing associate ownership would arouse the suspicions of the Dissenting SPs.

B. The Voting Issue

Paragraphs 7(1)(*b*) and 7(1)(*c*) require the CSC to convene a general meeting to approve the apportionment of sale proceeds, as well as the terms and conditions of the Sale Agreement. While the CA accepted that there was a breach of the voting requirements in paragraphs 7(1)(*b*) and 7(1)(*c*) of the Third Schedule, it held that the HC nonetheless had the jurisdiction to validate and approve the application.

(i) HC had jurisdiction to approve the application.

The CA first rejected the argument that the HC did not have jurisdiction to hear and approve the application, due to the non-compliance with the above requirements. Addressing the arguments that the HC derived its authority from the LTSA, the CA held that the HC derived its jurisdiction and powers primarily from Article 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) and the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). Further, it possessed inherent powers (i.e. powers which are not expressly conferred through legislation). Thus, the fact that the LTSA did not specifically confer certain powers onto the HC, did not necessarily mean that the HC did not have those powers. The CA held that since nothing in the LTSA indicated otherwise, the HC did have the power to approve the application even if there was non-compliance with the Schedules. In any case, applications were still subject to the good faith requirement under section 84A(9)(*a*) of the LTSA.

However, the CA stressed that this power of the HC (to order collective sales despite breaches) would not extend to situations where fundamental statutory requirements are not met. For instance, if the subsidiary proprietors of marginally *less than* 80% of the share values or the total area of all the lots signed a sale agreement, the court would not grant an order for collective sale; without the requisite 80%, there could be no sale in the way contemplated in the LTSA.

(ii) Approval of application.

The CA found that it was fair and appropriate for the HC to approve the application, despite the breach of the Third Schedule (i.e. failure to convene a general meeting to approve the apportionment of sale proceeds, as well as the terms and conditions of the Sale Agreement). A majority of the subsidiary proprietors who attended the EGM had signed the Sale Agreement that same day. Subsequently, the requisite number of subsidiary proprietors for making a

collective sale was reached. As a matter of common sense, the subsidiary proprietors would not have voted differently in a formal vote. Thus, this breach was only technical in nature and did not prejudice the subsidiary proprietors.

The CA cautioned that this did not mean that there was no need to put such matters to a vote for future collective sales. Whether an application will be approved or invalidated in any particular case depends on the facts and circumstances.

C. Good Faith

Under section 84(9)(*a*)(i) of the LTSA, the HC cannot approve a transaction which is not in good faith, after taking into account: the sale price; the method of distributing the proceeds of sale; and the relationship of the purchaser to any of the subsidiary proprietors. The CA rejected the argument that the transaction was not in good faith.

The CA first observed that where an applicant for a collective sale has complied with the relevant requirements for such a sale, has spelt out all relevant facts which indicate compliance with his duties, and nothing untoward appears on the face of the record, it is for the objector to show, with credible evidence, that the transaction was not in good faith.

With this in mind, the CA found that the Dissenting SPs' strongest points were those relating to the DC, as this had a clear bearing on the sale price (which is a factor the court must consider in determining whether there was good faith). The DC is a cost that must be paid as a result of acquiring the property. That Knight Frank acted urgently to inform potential bidders that there was no DC payable, further proved that the DC was material information to bidders.

The CA also agreed with the HC (and the Dissenting SPs) that the CSC had made a number of "missteps", including failing to: (a) verify the DC before the launch of the sale; (b) inform and consult with the subsidiary proprietors about the fact that no DC was payable promptly when it was discovered; and (c) extend the tender period by at least one week, to allow potential bidders more time to consider.

However, the CA held that these missteps, even when considered together with the failure to put the approval of the apportionment of sale proceeds and the terms and conditions of the Sale Agreement to a formal vote, were insufficient to show a lack of good faith. A "want of probity" (i.e. dishonesty or improper motives) would be present in the vast majority of cases where there is a lack of good faith. Here, the missteps were the result of "eagerness (or perhaps anxiety)" on the part of the CSC, the lawyers, and Knight Frank to conclude the sale, especially given the unexpectedly high bid of $610m (compared to the final reserve price of $550m). In addition, the CSC had not wilfully denied the subsidiary proprietors an opportunity to vote. Its lawyers had actually advised that no approval vote was needed. At most, the parties involved had acted negligently (which was not the same as not acting in good faith).

The CA also stressed that the test for the sale price was whether it was "appropriate in the circumstances." The sale price of $610m was 12.55% higher than the independent valuation price, and 10.9% higher than the reserve price of $550m. The difference between the sale price and the reserve price was $60m, which was close to the expected DC of $63.2m stated in the publicity materials. Thus, any potential bidder who was unable to afford the reserve price would also have been unable to submit a bid higher than the winning bid. Hence it was unlikely that any higher bids would have been received, even if the CSC had acted conscientiously.

With regard to the failure to extend the tender period, the CA noted that potential bidders had been promptly told about the lack of a DC and had seven days to respond. There was also no evidence that even with an extended tender period, a higher bid would have been received.

IV. Privately-agreed timelines

The appeal was heard and decided on an expedited basis, as the SPA would be treated as rescinded unless the HC gave a decision within five months, and on appeal, unless the CA gave its decision within four months of the HC decision. The CA found these deadlines unrealistic, as they did not take into account the rules regulating appeals. The CA thus highlighted two points for future collective sales committees and advisors to note.

First, even if all the requisite documents can be filed quickly, an early hearing date before the CA may not be available. There is little justification for the courts to confer priority to such private matters, where the urgency only arises due to parties agreeing to unrealistic timelines. Here, it was only fortuitous that an early hearing date was available. *Second*, even if there is an early hearing date, the CA may not be able to arrive at a decision within a compressed time span. This is especially so in proceedings which involve many parties and complex issues. Here, it was again fortuitous that all the Dissenting SPs were represented by one set of solicitors who consolidated the more pertinent issues for appeal, allowing the CA to reach a decision before the privately agreed deadline.

The CA warned that in future cases (whether before the CA or HC), if a collective sales committee agreed to unrealistic timelines for court proceedings which, if not met, could lead to recession of the sale agreement, such committee would just have to bear the consequences.

V. Lessons Learnt

The CA has acknowledged the importance of the DC in assisting subsidiary proprietors to determine what the appropriate reserve price should be. In future, it would be prudent for marketing agents for collective sales to verify DCs before the launch of the sale, and to promptly inform the subsidiary proprietors of any significant changes to the DC. Where there are significant changes, the CSC and advisors should also consider extending the tender period, to give potential bidders more time to consider the changed sale price.

CSCs and their advisors, as well as other parties in private arrangements, should also be cautious about privately-agreed timelines for court proceedings. These should be realistic, and account for the time needed for proceedings, so as not to endanger the sale.

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