DREW & NAPIER

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NAVIGATING COLLECTIVE SALES – IMPORTANT CONSIDERATIONS

SUMMARY

2017 was a bumper year for collective sales, with 31 residential, commercial and industrial sites reportedly sold for nearly S$8.7b. Although this is less than the almost 170 collective sale deals in the last collective sales boom in 2007, there are suggestions that 2018 will see record-breaking transactions as developers flush with cash replenish their land bank.

This note highlights key changes in the regulatory and legal landscape since the last collective sale boom, and the resulting implications for the various stakeholders in the current wave of collective sales.

COMPARISON OF KEY ASPECTS OF STATUTORY FRAMEWORK IN 2007 AND 2018

The Land Titles (Strata) Act (Cap 158, Rev Ed 2009) ("**LTSA**") has been amended twice since the last collective sale boom, once in late-2007, and more recently in 2010. The purpose of the amendments, in general, was to introduce transparency and make the collective sale process fairer for both minority and majority subsidiary proprietors ("**SPs**"), but without causing the process to become unduly unmanageable or too onerous. We summarise and elaborate below a few of the key changes to the statutory framework as a result of the amendments.

2007

- To obtain approval of the collective sale, the following consent is required:
  - SPs representing not less than 90% of the share value, where the property is less than 10 years old
  - SPs representing not less than 80% of the share value of the property, where the property is 10 years or older
- No cooling-off period after a SP signs the Collective Sale Agreement ("**CSA**")
- In contested collective sale applications before the Strata Titles Board ("**STB**"), the STB mediates and adjudicates on objections from dissenting minority SPs
- No restrictions on attempting a new collective sale after a failed attempt
- Silent on formation and proceedings of a Collective Sale Committee ("**CSC**")

2018

- To obtain approval of the collective sale, the following consent is required:
  - SPs representing not less than 90% of the (1) share value and (2) the total area of all lots of the property, where the property is less than 10 years old
  - SPs representing not less than 80% of the (1) share value and (2) the total area of all lots of the property, where the property is 10 years or older
- SP can rescind his agreement to be a party to the CSA within 5 days of signing the CSA
- In contested collective sale applications, the STB only has a mediatory role between the objecting SPs and the majority SPs
- New restrictions on attempting a new collective sale after a failed attempt
- More extensive regulations on formation and proceedings of CSCs

(A) ALL CONTESTED COLLECTIVE SALES CAN ONLY BE APPROVED BY THE COURT

Previously, in an application to the STB by the representatives of the majority SPs ("**Applicants**") for an order for collective sale, the STB had the power to adjudicate objections filed by those who oppose the collective sale ("**Objectors**"), and, if appropriate, approve the sale. However, owing to a sizeable number of contested applications which stretched the STB's resources and ultimately ended up in the Courts anyway, the process was streamlined and the adjudication of contested applications was left to the Courts entirely.

Thus, the STB's role is now limited to mediating between the Objectors and the Applicants. If the mediation is successful, *ie* all objections are withdrawn, the STB can grant an order for collective sale. However, as long as there is one objection remaining after 60 days from the first day of mediation, at the latest, the STB shall discontinue the collective sale application proceedings. In that event, the Applicants must apply to the High Court for an order for collective sale within 14 days if they wish to proceed with the collective sale.

(B) RESTRICTIONS ON ATTEMPTING COLLECTIVE SALE AFTER A FAILED ATTEMPT

The 2010 amendments imposed stricter requirements on SPs seeking to re-start collective sale attempts after a preceding failed attempt. In particular, SPs may not form a CSC to initiate another collective sale for two years if any "relevant event" (as defined in paragraph 2(8)(a) of the Second Schedule to the LTSA) has occurred in relation to the failed attempt, namely: (a) there was no quorum of SPs at a general meeting to constitute the CSC; (b) the motion for the constitution of the CSC was defeated at the general meeting; (c) the CSA executed among the SPs expired; or (d) the CSC was dissolved.

This restriction was introduced to address growing complaints against SPs who repeatedly initiated sale attempts despite not receiving the requisite support from other SPs in previous attempts. By this restriction, it was hoped that sale attempts which have little to no prospect of getting off the ground would be discouraged, and SPs are not harassed or worn down by frivolous attempts.

Nonetheless, it is worth noting that a CSC may be formed within the two-year period if at least 50% of (a) the total number of SPs or (b) the SPs by share value requisition for a general meeting for that purpose. If this first requisition is not signed by the requisite number of SPs, a second or subsequent requisition within the two-year period to convene a general meeting to constitute the CSC must be made by at least 80% of (a) the total number of SPs or (b) the SPs by share value.

(C) RULES CONCERNING THE FORMATION AND PROCEEDINGS OF A CSC

Prior to the 2007 amendments, the LTSA was silent on the formation and proceedings of a CSC. This resulted in uncertainty over the formation and role of CSCs. This changed with the 2007 amendments which introduced rules to regulate the formation and proceedings of CSCs. Among other things:

(a) a CSC is required to be constituted to act jointly on behalf of the SPs;

(b) the approval of the constitution of the CSC, its duties or functions, has to be passed by an ordinary resolution at a general meeting convened for the purpose of initiating the sale;

(c) members of the CSC will be elected at the general meeting. In this regard, persons standing for election to the CSC must meet certain eligibility criteria (*eg* at least 21 years of age and not an undischarged bankrupt), and comply with, among other things, the rules governing disclosure of conflict of interest; and

(d) after it is constituted, the CSC must convene general meetings to, among other things, update the SPs generally, provide information of any sale proposal, and seek approval on a wide range of issues such as the appointment of lawyers, property consultants and marketing agents, apportionment of sale proceeds, and the terms of the CSA.

The rules governing the conduct of CSCs were revisited in 2010 amidst concerns that CSCs were overly burdened by the new requirements.

The LTSA was therefore amended to make it less onerous for CSCs to function. In particular, the requirement that the CSC must convene general meetings to address key issues was relaxed.

Now, after its constitution, the CSC is only required to convene a general meeting for the purpose of approving the apportionment of sale proceeds and the terms and conditions of the CSA. The CSC may be authorised to appoint any lawyer, property consultant or marketing agent at the first general meeting approving the constitution of the CSC.

COURT DECISIONS ON ISSUES AFFECTING COLLECTIVE SALES

(A) MEANING OF "FINANCIAL LOSS" UNDER SECTION 84A(7)(A) OF THE LTSA

Subject to the STB and the Court's power to dismiss any collective sale application under the limited grounds stipulated in section 84A(9) of the LTSA, section 84A(7)(A) of the LTSA provides that the Court "shall" approve a contested application, except where one of the following two conditions are present:

(a) any objector, being a SP, will "incur a financial loss"; or

(b) the "proceeds of sale" for any lot to be paid to the objector, who may be a SP, mortgagee or chargee, are insufficient to redeem the mortgage or charge in respect of the lot.

Under section 84A(8) of the LTSA, a SP incurs a "financial loss" if the proceeds of sale for his lot, less "such deduction as the High Court may allow" are less than the price he paid for his lot. In this regard, the LTSA provides a non-exhaustive list of four allowable deductions, which includes stamp duty paid or payable, and legal fees paid in relation to the purchase of the lot. There are three points to highlight.

First, it is unclear what other deductions the Court may allow in ascertaining whether a SP will suffer financial loss under the proposed sale. For instance, it would appear that renovation costs and early repayment penalty fees on a housing loan are generally not deductible, but CPF funds used to pay towards the purchase price and monthly instalment of the principal bank loan would be.

Second, the meaning of "proceeds of sale" is not limited to the purchase price that a SP will receive under the sale and purchase agreement. Rather, as explained by the High Court in the collective sale concerning Regent Court, a wider interpretation which takes into account efforts to make good an individual SP's financial loss is preferable, in light of the object of the collective sale regime to "make it easier for collective sales to go through in order to promote better utilisation of scarce land resources in Singapore". Thus, "proceeds of sale" includes other monetary compensation which a SP may receive from the purchaser, over and above the purchase price, upon the completion of the sale.

Third, there is some uncertainty whether the Court has any discretion to approve the collective sale application notwithstanding one of the conditions under section 84A(7) of the LTSA is present. Under a literal interpretation of the words used in section 84A(7), it would seem that it is not mandatory for the Court to dismiss the collective sale application despite one of the conditions being present. Section 84A(7) may be contrasted with section 84A(9) which provides that the Court "shall not approve an application" if, among other things, the Court finds that the collective sale transaction was not in good faith. Section 84A(7) only states that the Court shall approve the application unless it is satisfied that either of the two conditions are satisfied.

Nevertheless, from the case involving Regent Court, it would appear that the Court will dismiss the application as long as one of the conditions is satisfied. This conclusion is also supported by the parliamentary debates which suggest that the intention behind section 84A(7) of the LTSA was to ensure that "none" of the SPs "should lose out financially", *ie* the sale the will not go through as long as just one SP suffers a financial loss.

(B) WHETHER THE COLLECTIVE SALE TRANSACTION WAS IN "GOOD FAITH"

As mentioned above, a collective sale application shall not be approved by the STB or the Court if the transaction is not in good faith. There are three points to highlight in this regard.

First, once *prima facie* evidence of lack of good faith is produced by the Objectors, the party accused of bad faith bears the burden of

establishing that the transaction was in good faith. In the majority of cases, the conduct complained of was found by the Court to be consistent with the requirement of good faith. Thus, for example, it is not a lack of good faith for the CSC to (a) commit to exclusive negotiations with a single purchaser (after exhausting offers by way of public tender or public auction) and where not committing to such negotiations could have resulted in the prospective purchaser walking away; (b) perform its duties hurriedly, if it is out of a genuine attempt to meet imposed statutory timelines; or (c) refrain from making counter-offers to interested purchasers, especially when the circumstances support the inference that these purchasers were unlikely to raise their previous bids by a material margin.

There have however been at least three instances where the Courts have found that the collective sale transaction was not in good faith. These cases involved the failure to disclose a potential conflict of interest on the part of key CSC members who had purchased additional units in the property with bank financing while spearheading the sale; the failure by the CSC to disclose to all SPs that the CSC was privy to an arrangement with the marketing agent under which members of the CSC had agreed to contribute sums to the marketing agent which would be paid to one of the objecting SPs as an incentive payment; and the CSC's inclusion of, and determined effort to enforce clauses in the CSA relating to the apportionment of the sale proceeds which were intended to unfairly prejudice the interest of the objecting SPs.

Invariably, in a contested application, the conduct of CSCs will come under close scrutiny. CSCs (and their individual members) should therefore take every effort to ensure that they have discharged their duty of loyalty and fidelity, to be even-handed, avoid any conflict of interest, make full disclosure of relevant information, and act with conscientiousness.

Second, there is some uncertainty over the type of conduct that an objector can rely on in alleging that the collective sale transaction was not in good faith. On the one hand, the express language in section 84A(9)(a)(i) of the LTSA states that, in assessing whether the transaction was in good faith, the STB or the Court can only take into account "only the following factors": (a) the sale price; (b) method of distribution of the sale proceeds; and (c) the relationship of the purchaser to any of the SPs. Yet, the Court has on occasion considered conduct that appears not to directly engage any of the three prescribed factors. For instance, in the case concerning Shunfu Ville, the Court considered whether the CSC had exerted pressure on or harassed the SPs to consent to the collective sale. In the case involving Horizon Towers, the Court considered whether there was a potential conflict of interest on the part of the CSC where a member of the CSC had taken out substantial loans to purchase additional units in the development.

Third, a purchaser does *not* ordinarily owe the SPs a duty of good faith. However, this does not mean that the purchaser's conduct and relationship vis-à-vis SPs is always irrelevant. On the contrary, the relationship between the purchaser and any of the SPs will be scrutinised closely as it is one of the three prescribed types of conduct under section 84A(9)(a)(i) of the LTSA that can give rise to a finding that the transaction was not in good faith.

(C) FIDUCIARY DUTIES OF THIRD PARTY CONSULTANTS ENGAGED BY THE CSC

Last but not least, it is now clearly established that third party consultants engaged by the CSC, such as marketing agents, may also owe fiduciary duties to *both* the CSC and the SPs on whose behalf the CSC acts. Whether the consultant is a fiduciary of the CSC, and the precise content and scope of the fiduciary duties owed, depend on, among other things, whether the consultant is exercising a power for the benefit of the CSC as their principal, and in doing so, is not subject to the immediate control and supervision of the principal in that exercise. Thus, it has been held that marketing agents are required to act with transparency and openness in their dealings with *all* the SPs and to avoid possible conflicts of interest in relation to *all* the SPs.

CONCLUSION

As the current collective sale cycle enters its second year, participants of collective sales such as SPs, CSCs, marketing agents and purchasers, would do well to pay attention to the content and scope of their respective duties, and to discharge the same in accordance with the standards expected of them under the LTSA and general law.

Further, they should seek legal advice early when confronting potential disputes arising under the current collective sale framework to better protect their rights and interests.

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