

LEGALUPDATE

A DREW & NAPIER PUBLICATION

CASE UPDATE**COURT OF APPEAL UPHOLDS COLLECTIVE SALE SECURED BY INCENTIVE PAYMENTS MADE TO MINORITY OWNERS*****Chua Choon Cheng & Ors v Allgreen Properties Ltd & Anor Appeal [2009] SGCA 21*****Executive Summary**

The Court of Appeal has, in a landmark decision, ruled that a developer did not breach an agreement for the collective sale of a property by paying the minority owners incentive monies to secure their consent to the sale. The law, as it now stands, does not prohibit the making of such incentive payments to minority owners.

Davinder Singh *SC* successfully represented the respondent developer in the appeal.

Background

The majority owners (the "**Majority Owners**") of Regent Garden Condominium (the "**Property**") agreed, pursuant to a collective sale agreement (the "**CSA**"), to a collective sale of the Property. A Sale Committee (the "**SC**") was duly constituted to represent the Majority Owners.

The SC entered into a sale and purchase agreement (the "**SPA**") with Allgreen Properties Limited ("**Allgreen**") under which Allgreen agreed to purchase the Property for \$34 million (the "**Sale Price**").

For reasons centring on the inadequacy of the sale proceeds they would each receive, a group of owners (the "**Minority Owners**") objected to the collective sale at the Sale Price. The Majority Owners then applied to the Strata Titles Board (the "**STB**") for approval to proceed with the collective sale under section 84A of the Land Titles Strata Act (the "**LTSA**") (the "**STB application**").

The Majority Owners subsequently alleged that the sale was at a gross undervalue due a discrepancy between the anticipated and actual development charges. The Majority Owners attempted – but failed – to convince Allgreen to increase the Sale Price.

Meanwhile, unknown to the Majority Owners and the SC, Allgreen secured the Minority Owners' agreement to the collective sale by offering them additional incentive payments (the "**Additional Payments**").

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Upon receiving the Additional Payments, the Minority Owners withdrew their objections to the sale.

Allgreen then requested the Majority Owners to withdraw the STB application on the grounds that unanimous consent for the sale process had been obtained. The Majority Owners refused to do so. They asserted, among other things, that Allgreen had breached the SPA by making the Additional Payments. Despite the Minority Owners having withdrawn their objections to the sale, the SC was now opposed to the collective sale and appeared before the STB to block their own collective sale application.

The High Court proceedings

The Majority Owners commenced an action in the High Court to seek, among other things, a declaration that Allgreen had breached the SPA by making the Additional Payments to the Minority Owners.

The High Court held that there was no express or implied term in the SPA or CSA which prohibited Allgreen from making the Additional Payments to the Minority Owners and ordered the completion of the collective sale.

The Majority Owners appealed to the Court of Appeal where they repeated their case that the making of the Additional Payments was prohibited and/or was in breach of the CSA, the SPA or the LTSA.

The Court of Appeal's decision

The Court of Appeal dismissed the Majority Owners' appeal. There was nothing in the CSA or SPA or at law which prohibited the making of Additional Payments to the Minority Owners.

The Majority Owners had argued that a term prohibiting the making of the Additional Payments to Minority Owners should be implied into the SPA, both in fact and in law.

The Court of Appeal rejected the Majority Owners' arguments.

No implied term in fact prohibiting Additional Payments to Minority Owners

The Majority Owners argued that in order to give effect to the legislative intent that sale proceeds should be distributed fairly and equitably pursuant to section 84A(9)(a)(i)(B) of the LTSA, a term should be implied to prohibit the making of the Additional Payments to the Minority Owners.

The court disagreed. The court agreed with Allgreen's counsel that the parties must have contemplated that continuing efforts (including the making of Additional Payments) could be

made to obtain the Minority Owners' consent, especially in circumstances "*where the main objection is centred on the inadequacy of the financial consideration being received*".

The court therefore declined to imply the term sought to be implied, and observed that "*what the [Majority Owners] are seeking to do under the guise of invoking an implied term is to persuade the Court to rewrite the SPA to rescue them from an improvident bargain. This we cannot and will not do*".

No implied term in law prohibiting Additional Payments to Minority Owners

The Majority Owners also contended that a term prohibiting the making of Additional Payments to the Minority Owners without the Majority Owners' consent should be implied in law to give effect to the legislative intent and objective behind the collective sale regime. The proposed implied term was to incorporate three interlinked core features:

- (a) a term prohibiting the making of Additional Payments to the Minority Owners;
- (b) a term requiring that the purchaser negotiate in good faith; and
- (c) a term requiring the purchaser to disclose to the Majority Owners that it intended to make Additional Payments to the Minority Owners.

The court rejected all of the above arguments.

No implication of term prohibiting Additional Payments to Minority Owners | In the court's view, such a prohibition might have the consequence of preventing even the majority owners from incentivising any or all of the minority owners to "*alter their stances for the wider common good*". There could even be instances where the majority owners might *welcome* such payments to the minority owners to facilitate the completion of a sale. The court also emphasised that the collective sale regime existed to protect minority owners and not the interests of *all* the parties. It certainly did not, in any event, exist to protect the majority owners from themselves and their own errors.

No implication of term requiring purchaser to negotiate in good faith | A purchaser does not owe any duty of care, much less a duty of good faith, to a vendor of property in relation to the price of property. The general principle is *caveat emptor*. It is impossible to imply any overarching duty of good faith in law on parties to a collective sale, especially since "*Parliament has expressly considered the concept of good faith and carefully limited its application in this collective sale scheme*".

No implication of term requiring purchaser to disclose to Majority Owners intention to make Additional Payments to Minority Owners | The Court of Appeal agreed with Allgreen's counsel that there was no general duty of disclosure in the performance of a concluded contract at common law. Nor should a duty of disclosure be exceptionally implied in the context of collective sales as there was nothing peculiar about the relationship between the majority owners and a purchaser which warranted the implication of a continuing duty to disclose from the latter to the former. Allgreen was therefore under no duty to disclose the

making of the Additional Payments to the Minority Owners given the absence of any express provisions in the SPA to that effect.

Comment

The case clearly establishes that the LTSA was designed to ensure that the interests of minority owners are not prejudiced. It also confirms that the LTSA does not prohibit a purchaser from making additional payments to minority owners to procure their consent to a collective sale. Further, unless the contract provides otherwise, purchasers who intend to make such payments to the minority owners to obtain their consent do not have to disclose these payments to the majority owners or to obtain their consent.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

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