TOWARDS FAIRLY APPORTIONING SALE PROCEEDS IN A COLLECTIVE SALE OF STRATA PROPERTY

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Cake-cutting is a longstanding metaphor for 'a wide range of real-world problems that involve' the division of anything of value.[1] Unsurprisingly, where owners of a strata scheme wish to end the strata scheme and collectively sell their development, one of the most contentious issues may be the apportionment of sale proceeds.[2] In Singapore, this problem is compounded in mixed developments which have both commercial and residential elements as well as in developments with different sized units, often with disproportionate strata share values; even differing facings and the state of one's unit may attract disenchantment when trying to apportion proceeds. This article critically analyses how New South Wales ('NSW') and Singapore allocate proceeds pursuant to a collective sale of strata property. In this respect, the Strata Schemes Development Act 2015 (NSW) and Strata Schemes Management Act 2015 (NSW) are significantly clearer than Singapore's Land Titles (Strata) Act (Singapore, cap 158, rev ed 2009) as the latter does not prescribe any statutory formula for apportionment. In examining the jurisprudence and respective strata frameworks, this article proposes how proceeds in a collective sale could be more fairly apportioned.

I INTRODUCTION

Under a strata scheme, each strata owner is the registered proprietor of their own unit and equitable tenant-in-common[3] of the land on which the building is constructed. Strata unit owners thus hold a form of 'dualistic' ownership.[4] From a legal perspective, the ingeniousness of strata was in the grant of a separate Torrens

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1 Erica Klarreich, 'The Mathematics of Cake Cutting', *Scientific American* (online, 13 October 2016) <https://www.scientificamerican.com/article/the-mathematics-of-cake-cutting/>.

2 Loo-Lee Sim, Sau-Kim Lum and Lai Choo Malone-Lee, 'Property Rights, Collective Sales and Government Intervention: Averting a Tragedy of the Anticommons' (2002) 26(4) *Habitat International* 457, 462.

3 *Carre v Owners Corporation – Strata Plan No 53020* (2003) 58 NSWLR 302, 310–11 [28]–[29] (Barrett J).

4 Martti Lujanen, 'Legal Challenges in Ensuring Regular Maintenance and Repairs of Owner-Occupied Apartment Blocks' (2010) 2(2) *International Journal of Law in the Built Environment* 178, 179.

certificate of title for each unit – this 'facilitate[d] mortgage lending against apartment dwellings', the 'original rationale' for strata legislation.[5] Partition of land by strata was first conceived in Victoria in 1960 and New South Wales ('NSW') in 1961; it was quickly adopted by the rest of Australia shortly after.[6] In particular, the influence of NSW's strata legislation has been 'immense'[7] and has proved an influential export, being rapidly adopted in many other jurisdictions, including Singapore in 1967, just two years after her independence. Strata law is no doubt profoundly impactful. In Australia, 25% of Sydneysiders live in strata title properties, and it 'is estimated that by 2040 half of Sydney's residential accommodation will be strata titled'.[8] In absolute terms, this translates to more than 1 million people in Sydney living in strata or community title scheme properties, and 'both the number and the proportion are only going to increase'.[9] In Singapore, the proportion is also very significant – the most recent data shows that some 16% of residents stay in strata schemes.[10]

Although '[a]llowing a strata development to be terminated and sold via anything less than unanimous consent' has been said to be 'controversial',[11] numerous jurisdictions permit a supermajority of unit owners (75% upwards) to have a strata scheme terminated and the land sold for redevelopment. While the pioneer in the development of the world's first strata laws, NSW has only fairly recently legislated[12] for a collective sale of a strata development by special majority. NSW was the second Australian state to provide for this; the Northern Territory ('NT') has permitted strata termination by a special majority vote since 2008.[13] Western Australia has considered the matter since 2014[14] but has yet to provide for the enabling legislation. Queensland appears still undecided.[15] Singapore has enabled the collective sale of a strata development via an 80% or

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5 Hazel Easthope and Bill Randolph, 'Collective Responsibility in Strata Apartments' in Erika Altmann and Michelle Gabriel (eds), *Multi-Owned Property in the Asia-Pacific Region: Rights, Restrictions and Responsibilities* (Palgrave Macmillan, 2018) 177, 178.

6 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 951–2.

7 Justice Mark Leeming, 'Launch of "Strata Title Property Rights: Private Governance of Multi-Owned Properties" by Cathy Sherry' (Speech, University of New South Wales, 2 August 2017) 3 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Leeming_20170802.pdf>.

8 New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 4305 (Victor Dominello).

9 Leeming (n 7) 1.

10 'Households', *Department of Statistics Singapore* (Web Page, 20 February 2020) <https://www.singstat.gov.sg/find-data/search-by-theme/households/households/latest-data>.

11 Edward SW Ti, 'Collective Best Interests in Strata Collective Sales' (2019) 93(12) *Australian Law Journal* 1025, 1026.

12 Following a spirited debate in the NSW Lower House (with considerable opposition by Labor and the Greens), the *Strata Schemes Development Act 2015* (NSW) ('*SSD Act*') came into force on 30 November 2016.

13 The *Termination of Units Plans and Unit Title Schemes Act 2014* (NT) requires consensus of between 80–95% of owners by strata share, depending on the age of the building (minimum 15-years): at s 4 (definition of 'required percentage').

14 Landgate, '*Strata Titles Act* Reform' (Consultation Paper, October 2014).

15 Commercial and Property Law Research Centre, 'Queensland Government Property Law Review: Body Corporate Governance Issues' (Options Paper, Queensland University of Technology Law, 15 December 2014).

90% majority[16] since 1999, and in doing so followed in the footsteps of several other jurisdictions. Nova Scotia, New Brunswick and Ontario (80%), British Columbia (75%), Hawaii (80%) and Hong Kong (80% or 90%) all predated Singapore in allowing a strata collective sale by supermajorities.[17] Dubai (75%),[18] Japan (80%)[19] and New Zealand (75%)[20] now also permit strata developments to be sold by supermajorities.

It is apposite to briefly outline how collective sales are administered in NSW and Singapore. Under NSW law, a strata renewal proposal (suggesting either a collective sale or redevelopment) must first be presented[21] to the Strata Committee, which then decides whether to present the proposal to the Owners Corporation at a general meeting for further consideration. Section 158(2) of the *Strata Schemes Development Act 2015* (NSW) ('*SSD Act*') nevertheless provides for the convening of a general meeting if at least 25% of owners by strata share value have requested for the proposal to be considered, regardless of the view of the Strata Committee. The purpose of the general meeting is to determine whether the Owners Corporation considers the strata renewal proposal warrants investigation by another committee called the Strata Renewal Committee ('SRC');[22] at the general meeting, a simple majority determines whether an SRC is established.[23] The SRC is tasked to translate the strata renewal proposal into a strata renewal plan and it is the strata renewal plan which gets put to the vote by the Owner's Corporation.[24] The renewal plan that has to be prepared by the SRC is required to be comprehensive,[25] and in respect of a collective sale, cannot recommend that any strata owner receive less than what they would theoretically have obtained under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ie, fair market value. At least 75% of the strata owners must support the collective sale or development for the plan to take place. Once the requisite majority of strata owners support the collective sale, an application to dissolve the strata scheme is made to

16 Buildings younger than 10 years old require a 90% majority while buildings older than 10 years require an 80% majority: *Land Titles (Strata) Act* (Singapore, cap 158, 2009 rev ed) ss 84A(1)(a)–(b).

17 *Singapore Parliamentary Debates*, *Official Report* (31 July 1998), vol 69 at col 602, <https://sprs.parl.gov.sg/search/report?sittingdate=31-07-1998> (accessed 7 April 2020) (Ho Peng Kee, Minister of State for Law) ('Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 31 July 1998').

18 *Strata Title Law* (Dubai International Financial Centre) Law No 5 of 2007, sch 2 cl 2 (definition of 'special resolution').

19 *Act on Building Unit Ownership* (Japan) Act No 69 of 1962, art 62(1):

> A resolution to the effect that the building will be demolished, and a new building will be constructed on the grounds of the building to be demolished or on part of its land, or on the land that includes the whole or part of the grounds of the building to be demolished (hereinafter such resolution shall be referred to as the "resolution to reconstruct") may be adopted at a meeting by at least a four fifths majority of the unit owners and at least a four-fifths majority of the votes.

20 *Unit Titles Act 2010* (NZ) s 192(a).

21 The person making this written proposal need not be an owner of a strata lot, ie a developer: *SSD Act 2015* (NSW) s 156(1).

22 Ibid s 160(1).

23 Ibid s 158(3).

24 Ibid s 164.

25 It must include among others, the purchaser/developer (if known), the proposed/reserve price, timelines for completion and vacant possession, planning approvals and the nature of the proposal: ibid s 170.

the Registrar-General[26] and a petition to the Land and Environment Court of NSW to terminate the strata scheme is made.[27] The Court has the ultimate power to approve the renewal proposal on grounds that the proposal is 'just and equitable in all the circumstances'.[28]

In Singapore, a two-step process is needed to commence a collective sale. At the first stage, at least 20% by share value or 25% by number of strata owners seek an extraordinary general meeting for the purposes of constituting a collective sale committee.[29] At the second stage, the convened meeting needs at least 30% by share value of the strata owners to form the requisite quorum.[30] If quorum is met, a simple majority of attendees may elect from amongst themselves a sales committee numbering from 3 to 14 persons.[31] It is the Collective Sale Committee ('CSC') distinct from the Management Council[32] that administers the collective sale. Section 84A(1) of the *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) states that the requisite majority of strata owners (80% or 90%) makes an application for the sale of the whole strata property in an agreement that 'specifies the proposed method of distributing the sale proceeds'. The approval for apportionment is done at a general meeting of the management corporation,[33] with the rules requiring that the general meeting must be convened before any strata owner signs the collective sales agreement.[34]

Following this introduction, Part II compares collective sales with compulsory acquisitions – while collective sales remain contentious as the law allows a supermajority to compel a minority to sell, the section considers whether a collective sale is, normatively speaking, not all that different from a compulsory acquisition. In Parts III and IV, the aim of the article and the major issues to be discussed are articulated. Part V critically examines how the distribution of sale proceeds is implemented in NSW and Singapore, while Part VI considers weaknesses in both jurisdictions before making a suggestion on a possible method of fair apportionment. Part VII concludes.

II COMPARING STRATA RENEWAL WITH COMPULSORY ACQUISITION

It should be noted that the focus of this article is on the fair apportionment of proceeds pursuant to a collective sale rather than on the normative merits on whether a collective sale should be permitted in the first place. Having said that,

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26 Ibid s 176(2).
27 Ibid s 179.
28 Ibid s 182(1)(d). See also New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2015, 4639 (Niall Blair).
29 *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) sch 2 cl 2.
30 Ibid sch 2 cl 5.
31 Ibid sch 3 cl 1.
32 Though there is no prohibition against double-hatting.
33 The body corporate of all the strata owners: *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 10A.
34 Ibid sch 3 cl 7(2).

the following is a brief comparison of the termination of a strata scheme by a supermajority with compulsory acquisition. Is the former significantly more controversial than the latter? Easthope and Randolph explain that the 'dualistic'[35] nature of ownership in a strata scheme brings with it 'an inherent tension' due to the 'paradox' of simultaneously being 'individual owners' of one's own unit and 'collective owners in the same property'.[36] Such a conflict of interest is typically observed between owners who are seeking to have the strata property collectively sold and those who want to remain undisturbed in their homes, regardless the sale price. This conflict has been the focus of most commentators.

In NSW for example, an opposition Member of Parliament has stated that the collective sale laws 'constitute a new exception to indefeasibility of title'.[37] Edgeworth has observed that strata renewal by majority consensus is 'at odds with the general rationale for private property rights, namely that they should be created or transferred only with the consent of the owner'.[38] In relation to British Columbia, Harris has described the dissolution of a strata scheme by a supermajority as a taking, or 'stripping' of property interests from those who oppose the sale.[39] In Singapore, Rajah has described a collective sale as 'tyranny of the majority'.[40] Laudably, Sherry adopts a pragmatic approach – mindful of important urban planning goals, she appears accepting of the termination of a strata scheme, though only if it results in countervailing gains in housing.[41]

It is worth noting, however, that a collective sale of strata property is a form of private takings not altogether dissimilar to that of a public takings of land via compulsory acquisition. As an incursion to property, both forms of takings lie outside the ambit of the common law.[42] Thus, it has been said that in both England[43] and Australia,[44] 'compulsory acquisition and compensation for such acquisition is entirely the creation of statute'.[45] Notwithstanding, all major jurisdictions have a form of compulsory purchase and the correctness of such executive power has broad acceptance. A collective sale and compulsory acquisition are both urban planning tools meant to rejuvenate cities and increase land use efficiency, the main difference being that compulsory acquisition is State-led while a collective sale of

35 Lujanen (n 4).
36 Easthope and Randolph (n 5) 178.
37 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, 4566 (Guy Zangari) ('Strata Schemes Development Bill Second Reading Speech, 20 October 2015').
38 Edgeworth (n 6) 1149–50.
39 Douglas C Harris, 'Owning and Dissolving Strata Property' (2017) 50(4) *UBC Law Review* 935, 944.
40 KS Rajah, 'En Bloc Sales: Tyranny of the Majority' (March 2009) *Singapore Law Gazette* 3.
41 Cathy Sherry, 'Strata Law Overhaul a Step Too Far', *The Sydney Morning Herald* (online, 23 August 2015) <https://www.smh.com.au/opinion/strata-law-overhaul-a-step-too-far-20150823-gj5mz5.html>.
42 Blackstone said that the common law would not authorise the 'least violation' of private property notwithstanding the public benefit that might follow, though he was of the view that the legislature could compel acquisition: Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) bk 1 ch 1 135.
43 *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214 (Lord Pearson).
44 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 [29] (Gleeson CJ, Gummow, Hayne, Heydon and Crennnan JJ).
45 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [41] (French CJ) ('R & R Fazzolari').

strata property is market-led, albeit State supported. As observed by Pocock, an unconditional 'reliance on the free market does not promote an optimal level of land assembly'.[46]

No doubt, strata owners seeking a collective sale are typically motivated by the expectation of supernormal profits which typically '[occur] because the maximally allowed built-density of a strata building' has increased, or upzoned, through the years.[47] But at least even non-consenting strata owners enjoy the financial windfall of a collective sale – the same cannot be said for compulsory purchase which is a forced sale at current market value with the State choosing the timing of the transaction. Even if not by intentional design, the fact remains that compulsory acquisitions 'generally occur during an economic slowdown when public [infrastructure] projects are … introduced to pump-prime the economy'.[48] The compulsory act of taking land in such bearish conditions forces owners to give up their properties at a time not of their choosing, when they may not have the option of rearranging their financial plans to meet cash flows. Owners may thus lose out financially as they can be forced to relinquish their property when land prices are low or at a time when it is inconvenient for the owner to vacate their property.[49] From a utility perspective, a collective sale is also less draconian than compulsory acquisition – while a supermajority of strata owners wish to sell their land, the land owner in a compulsory acquisition presumably does not. Fair market value does not adequately compensate landowners whose land is compulsorily acquired because such landowners do not view land and wealth as perfect substitutes – if they did, the landowner in question would already have sold at market value. Posner and Weyl explain that the heterogenous nature of real estate means that a land parcel in the hands of a particular owner will generally yield that owner an idiosyncratic value that is on top of the market value.[50]

It is also not the case that compulsory acquisition is for necessarily more pressing social ends than a collective sale. Sherry remarks that the protection afforded to private property from expropriation in the Anglo-Australian legal tradition is extremely thin.[51] In *Griffiths v Minister for Lands, Planning and Environment* ('*Griffiths*'), a 5-2 majority of the Australian High Court held that in the compulsory acquisition of native title,[52] the justificatory phrase 'for any purpose whatsoever' in the *Lands Acquisition Act 1978* (NT) section 43(1) meant that land can be taken solely to enable the Territory to grant such land to another

46 Melissa Pocock, 'Compulsory Acquisition, Public Benefits and Large-Scale Private Sector Redevelopments: Can Australia Learn from the United Kingdom?' (2014) 19(3) *Local Government Law Journal* 129, 141.

47 Ti (n 11) 1031.

48 Bryan Chew et al, 'Compulsory Acquisition of Land in Singapore: A Fair Regime?' (2010) 22 (Special Issue) *Singapore Academy of Law Journal* 166, 177.

49 Robin Goodchild and Richard Munton, *Development and the Landowner, an Analysis of the British Experience* (George Allen & Unwin Ltd, 1985) 35.

50 Eric A Posner and E Glen Weyl, 'Property Is Only Another Name for Monopoly' (2017) 9(1) *Journal of Legal Analysis* 51, 103.

51 Cathy Sherry, 'How Indefeasible Is Your Strata Title? Unresolved Problems in Strata and Community Title' (2009) 21(2) *Bond Law Review* 159, 165–6.

52 Pursuant to the *Native Title Act 1993* (Cth) s 24MD.

person for private use.[53] *R & R Fazzolari Pty Ltd v Parramatta City Council* ('*R & R Fazzolari*') is another decision of the Australian High Court which on first blush appears to contrast *Griffiths* as it held that approval by a landowner was needed if the land was acquired for the purpose of resale.[54] However, the Court in *R & R Fazzolari* was interpreting the more restrictive *Local Government Act 1993* (NSW) section 188 which specifically prevented the Council from acquiring land compulsorily without the approval of the land owner if it was being acquired for the purpose of resale; such approval is obviated if the land taken is contiguous or lies in the vicinity of other land acquired at the same time for a purpose other than the purpose of resale. In reaching their decision, Gummow, Hayne, Heydon and Kiefel JJ declined to answer whether the 'purpose of re-sale' must be the 'sole', 'dominant' or 'substantial' purpose in question. Instead, they held that because the '"other land" acquired' by the Council was not to be taken at the same time as the land in question, approval by the landowner was still needed, thus preventing the compulsory acquisition.[55] Given the differences in the respective empowering legislation between the *Local Government Act 1993* (NSW) and *Lands Acquisition Act 1978* (NT), it can be fairly concluded that the ambit of judicial latitude permitting compulsory acquisitions seen in *Griffiths* is not diminished by *R & R Fazzolari*.

Even in the United States, thought to be the bastion of rights, the Supreme Court in *Kelo v City of New London* held that the city of New London in Connecticut was permitted to condemn 15 residential properties and transfer them to the pharmaceutical giant, Pfizer, even though there were no immediate plans for redevelopment.[56] The Court held that although the takings clause in the 5th Amendment only permits the taking of private property for 'public use', the transfer of the acquired land to Pfizer was for legitimate economic development, even if the government could not prove that the expected development would ever actually happen. In this regard, the jurisprudence in Singapore is similarly deferential to the executive. In interpreting the phrase 'public purpose' as required to justify a compulsory acquisition under the *Land Acquisition Act* (Singapore, cap 152, rev ed 1985) section 5, the High Court in *Galstaun v Attorney-General*[57] held:

> Government is the proper authority for deciding what a public purpose is. When the Government declares that a certain purpose is a public purpose it must be presumed that the Government is in possession of facts which induce the Government to declare that the purpose is a public purpose.

Why then do commentators appear to be more accepting of compulsory purchase or eminent domain than sale of strata property by a supermajority? One possible reason could be that *all* landowners are subject to the risk of compulsory acquisition while only strata owners are subject to the forced sale of a collective sale: the issue being that strata owners appear to have less autonomy than that which comes with a certificate of title of a non-strata property. However, even this

53 (2008) 235 CLR 232, 243 [29] (Gummow, Heydon and Hayne JJ).
54 (2009) 237 CLR 603, 631 [93] (Hayne, Heydon and Kiefel JJ).
55 Ibid 636 [115]–[116].
56 545 US 469, 487–90 (The Court) (2005).
57 [1980–1] SLR 345, 346–7 (Chua J).

argument may be tepid. An owner's property rights are determined by the property ownership they possess as different types of ownership confer different property rights.[58] Strata owners can be said to have purchased their property with the deemed knowledge that their unit was subject to sale by majority consensus.[59] Sale by a supermajority can be seen as a statutory covenant which the owner consented to. From a bundle of rights perspective, it could be argued that upon reaching the requisite majority needed to effect a collective sale statutorily, the legislation effectively recasts the rights of possession and ownership *in specie* replacing them with the right to receive a fair apportionment of the collective sale proceeds.

The foregoing has suggested that if compulsory purchase is an acceptable urban planning tool, then by analogy, a collective sale of strata property effected by a supermajority may also achieve broader acceptance. Having set this context, I next set out the aim of this article, achieving fair apportionment of proceeds vis-à-vis strata owners in a collective sale.

III AIM OF THE ARTICLE

Previously, I have discussed the nature of the duty of care imposed on the owner's strata committee empowered to administer the collective sale in NSW (the SRC) and Singapore (the CSC).[60] Thus far, there is no NSW case law discussing the contents of this duty of care in relation to the apportionment of sale proceeds – this is due to the fact that collective sales have only just started gaining momentum (having been recently legislated) and perhaps more importantly the fact that NSW statutorily provides how sale proceeds should be apportioned, thus reducing discretion on the part of the SRC in this respect.

In Singapore, the 'method of apportioning the sale proceeds is one of [the] three factors relevant to the issue of good faith' expected of a CSC.[61] This is particularised in the *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) section 84A(9):

> The High Court or a Board shall not approve an application … (a) if the High Court or Board, as the case may be, is satisfied that –
>
> (i) the transaction is not in good faith after taking into account only the following factors:
>
> (A) the sale price for the lots and the common property in the strata title plan;
>
> (B) the method of distributing the proceeds of sale; and
>
> (C) the relationship of the purchaser to any of the subsidiary proprietors …

58 Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347, 354.

59 At least those who purchased strata units after the collective sale mechanism was enacted.

60 Ti (n 11).

61 Ter Kah Leng, 'A Man's Home Is [Not] His Castle: En Bloc Collective Sales in Singapore' (2008) 20(1) *Singapore Academy of Law Journal* 49, 90 [116].

The jurisprudence in Singapore is clear that the nature of the duty of care owed by the collective sale committee is fiduciary in nature.[62] In this regard, a sales committee has a duty of even-handedness to ensure that the actual proceeds received by each strata owner, particularly those who oppose the sale, is fair and equitable. In *Lim Li Meng Dominic v Ching Pui Sim Sally*, it was held that a clause which permitted the deduction of various administrative sums from the share of the sale proceeds that would otherwise be payable to the non-signatory strata owners (but for the fact these owners had not signed the collective sale agreement), which had been inserted by one of the sale committee members, affected the method of distributing sale proceeds in a manner that lacked good faith. The sale was thus set aside even though the sums in question (S$1,000–S$2,000) were small.[63]

While the method of distributing sale proceeds is one of three factors by which a supervisory tribunal will adjudge the duty of good faith expected of a sale committee in Singapore, this is *not* the scope of the article. Sales committees in Singapore must work within existing laws in devising a method of apportionment that satisfies both the requisite majority as well as the good faith requirement. Rather, I consider the legislative framework in NSW and Singapore to canvass something more fundamental – potential weaknesses in the current way apportionment of sale proceeds are done and suggestions for improvements.

Unlike the conflict between those who want to sell and those who do not, the dualistic nature of being a strata owner also attracts a less apparent conflict – the problem of division upon the conclusion of a collective sale. This issue attracts conflicts not only between consenting and dissenting owners but also between consenting owners *inter se* due to differences in the types of lots owned. In Singapore, a former Deputy Prime Minister has acknowledged that the matter of apportionment in a collective sale is 'one of the most common grounds of objection raised by minority owners'.[64] In NSW, there has been no case law on this particular point yet, though in the very recent case of *Application by the Owners – Strata Plan No 61299* ('*Strata Plan No 61299*'),[65] the Land and Environment Court of NSW has, in endorsing the collective sale, made an important pronouncement on interpreting two sub-sections dealing with the distribution of sale proceeds when a strata scheme is terminated. These will be discussed in greater detail in Part V below.

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62 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109, 157 [108] (VK Rajah JA for the Court) ('*Horizon Towers*').

63 [2015] SGCA 54, [85] (Leong JA). While the requisite majority was already achieved (~86%), the motivation of the sales committee in that case was to encourage all owners to consent to the collective sale so as to reduce administrative costs. In Singapore, where 100% of strata owners agree to sell, an application to court is not needed: at [10] (Leong JA). This differs from the position in NSW which always needs court approval.

64 *Singapore Parliamentary Debates*, *Official Report* (20 September 2007), vol 83 at col 2028, <https://sprs.parl.gov.sg/search/topic?reportid=003_20070920_S0003_T0002> (accessed 7 April 2020) (Siew Kum Hong, Nominated Member) ('Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007').

65 [2019] NSWLEC 111 ('*Strata Plan No 61299*').

Any dispute surrounding a collective sale is essentially a fight between neighbours and these contests extort considerable emotional toll[66] from the litigants, time and money aside. In *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes*, the Singapore High Court held that en bloc sales will continue 'to strike raw nerves, especially from those who do not view their property as investments but as homes to be kept regardless of price'.[67] The motivation of this article is thus to articulate a defensible method to fairly distribute sale proceeds in a collective sale so as to, *inter alia*, reduce administrative and social costs which ultimately culminate in unnecessary litigation. Owners who oppose a collective sale at all costs will of course continue to pursue their rights in court – and this is their prerogative. It is hoped however that if improved valuation and distribution mechanisms pursuant to a collective sale could be conceived, this would satisfy concerns of fairness and thus reduce the pool of would-be litigants.

IV THE PROBLEM DEFINED

> One of the stumbling blocks in en-bloc sale is the obtaining of consensus among subsidiary proprietors or owners with regard to the sharing of the sale proceeds. Subsidiary proprietors or flat owners often have differing opinions as to the methods of sharing the proceeds. This has indeed hampered a number of potential en-bloc sales. The Bill has not addressed this problem. To facilitate en-bloc sale, the Bill should state clearly the method or formula for sharing the sale proceeds.[68]

Where there are intentions for a strata development to be dissolved and collectively sold to a developer for redevelopment, a key concern among strata owners is *how* the sale proceeds would be apportioned amongst themselves. In Singapore, during the introduction of legislation more than two decades ago permitting the dissolution of strata property via a supermajority (as opposed to unanimity), Teo Ho Pin MP (quoted above), observed that differences in opinion concerning the methodology of apportionment have scuttled a number of collective, or more colloquially, *en bloc* sales. These sentiments, one imagines, stem from some strata owners feeling that they may be treated less fairly than their neighbours. Practically, this may affect a collective sale in two ways – the owners as a whole may fail to get the requisite supermajority to effect a sale, or, in the case where the supermajority is established, an unsatisfied owner may lodge a protest with the Strata Titles Board or the court on the basis that the method of apportionment was arrived in bad faith.[69] Having a statutory formula for apportionment would mean that sale committees would have no discretion in

66 Sim, Lum and Malone-Lee (n 2) 458, 462; Leng (n 61) 50 [3].

67 [2007] SGHC 84, [101] (Assistant Registrar Paul Tan).

68 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 31 July 1998 (n 17), col 620 (Teo Ho Pin, Member of Parliament).

69 *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 84A(9)(a)(i)(B).

determining what the method of distribution should be and consequently allegations of bad faith in that regard would not be sustained.[70]

Adding to this complication is the fact that in Singapore, while strata share values (the equivalent of NSW's unit entitlements) are often a factor in the allocation of proceeds, there is again no statutory requirement in allocating share values to strata units. Instead, Singapore's Building and Construction Authority ('BCA') has created a set of guidelines for developers in recommending[71] how strata shares are to be apportioned – these guidelines have changed over the years. For residential strata schemes, this has led to at least three categories of share allocations: Old estates (1967–circa 1980) which had no guidance – this led to developers typically allocating one share per strata unit, regardless of unit size;[72] middle-aged estates (circa 1980s–2008) which adopted the previous edition of the guidelines[73] and new estates (2008–present), which have adopted the present set of guidelines.[74] Intricately, in the current set of guidelines, the BCA also recommends different methods of share allocation for residential, commercial and mixed-use schemes; some of these afford developers broad discretion in allocating strata shares.

There is thus no fixed method for apportioning strata shares and no fixed method for distributing sale proceeds in a collective sale. The Singapore Government's view regarding why a standard apportionment method is not statutorily provided for is 'because there are a multitude of factors to consider … including share value, size of unit, market value … it would be very difficult to specify one standard method that you could apply to all sizes, designs and types of

70 Of course having a statutory formula for apportionment could reduce collective sales if the supermajority of lot owners disagree with the prescribed formula; at the very least however, certainty will be achieved and there will be fewer grounds for contention among lot owners.

71 While described as 'guidelines', they are in practice adhered by developers as binding.

72 See *Re Eng Lok Mansion (Strata Titles Plan No 1871)* [2006] SGSTB 41. The tribunal noted that while the 64-unit Eng Lok Mansion (constructed in 1966) consisted of lots ranging from 118–46 m2, all strata units were allocated 1 share value: at [3]–[5]. Interestingly, this was also the method of apportionment adopted by the majority of owners and endorsed by the Board, ie each owner received a $\frac{1}{64}$ share of the sale proceeds: at [10], [59]. Conversely, in *Re Spottiswoode Apartment (Strata Title Plan No 626)* [2007] SGSTB 90, all 92-units also had 1 share value (units ranging from 592–1,141 square feet): at [1]. However, the Board endorsed the decision of the majority to adopt a 70% by strata area and 30% by share value method of apportionment: at [12], [15].

73 See Building and Construction Authority (Singapore), 'Key Changes Introduced in the *Building Maintenance and Strata Management Act* (BMSMA)' (Policy Document, 2008) Annex A <https://www.bca.gov.sg/BMSM/others/Annex_A.pdf>. Under the pre-2008 guidelines, the share value for residential units are allotted based on floor area groupings of 100 m2 intervals; 'the base share value is 3 for units up to 100 m2 increasing by 1 for each block of 100 m2 thereafter': at viii. In *Re Parkview Condominium (Strata Title Plan No 877)* [2003] SGSTB 50, the Tribunal noted that the 1986-built development comprised of units ranging from 94 m2 (with a share value of 3) to 163 m2 (with a share value of 4): at 1 [1]. The Tribunal in that case endorsed a blended approach to apportionment of sale proceeds (combination of share value and floor area): at 5 [19].

74 Under the current guidelines, the share value for residential units are allotted based on floor area groupings of 50 m2 intervals; the base share value is 5 for units up to 50 m2 increasing by 1 for each block of 50 m2 thereafter: see Building and Construction Authority (Singapore), 'Guidelines for Filing Schedule of Share Values under the *Building Maintenance and Strata Management Act*' (Guideline Document, May 2008) 3 ('BCA Guidelines').

developments'.[75] This is an unsatisfactory response as this uncertainty was created by the State in the first place. If share values are to be considered in the allocation of sale proceeds but the allocation of strata shares is in the first place itself not determinatively provided for, it is patent that there can be no standard apportionment method.

The Singapore framework thus allows the requisite supermajority of strata owners to decide for themselves how sale proceeds should be apportioned. Share values (ie unit entitlements), built-in area and even appraisals (including combinations thereof) have all been used in Singapore. As noted by the Board in *Re Flamingo Valley (Strata Title Plan No 1493)*, 'there is no one method of apportionment which must necessarily be applied in any given case and each case before the Board must be judged on its own facts and circumstances'.[76] The flexibility on the part of strata owners to decide the apportionment method means an additional responsibility on the part of the collective sale committee, which must manage the valuers and communicate with all owners the appraisal and distribution method chosen. Being owners themselves, certain methods of apportionment may benefit some members of the sale committee over other owners. This is why under the current flexible system, the ideal make-up of the sale committee should be diverse, being representative of the various types of units in the development. Should there be a statutory method of apportionment, this would alleviate one aspect of the committee's duty and remove an often core source of contention from strata owners. The need for a legislative formula is all the more pressing considering that there are no prerequisites for the members of the sales committee to have any particular set of skills or expertise yet are saddled with administering something as complex as the division of proceeds from the collective sale.

The framework for distributing proceeds in NSW is certainly clearer than Singapore's. NSW statutorily provides that the allocation of unit entitlements must represent the proportionate value of each unit,[77] as certified by a qualified valuer.[78] Further, under the *SSD Act* section 171(1), it is stated that sales proceeds from a collective sale are apportioned among the owners of the lots according to their respective unit entitlements, provided that no lot shall receive compensation any less than what it would have had it been compulsorily acquired under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) section 55. This implies that the allocation of unit entitlements also represents proportional shares of the common property. Unlike Singapore, therefore, NSW provides how unit entitlements are to be allocated to strata units as well as how proceeds from a collective sale are to be distributed.

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75 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007 (n 64), cols 2050–1 (Shunmugam Jayakumar, Minister of Law).

76 [2007] SGSTB 49, [25].

77 *SSD Act 2015* (NSW) sch 2. The unit entitlement must be rounded to an integer.

78 Ibid ss 90(3)(d), 4(1) (definition of 'qualified valuer').

Like NSW,[79] the developer in Singapore is the party which initially proposes the number of strata share values for each unit; the schedule of strata units indicating the type of property use, size, unit number, floor and respective share value must be filed with the Commissioner of Buildings[80] who grants approval for the schedule if satisfied that the allocation of strata shares is done 'in a just and equitable manner'.[81] Once approved, the share value of a unit is not to be changed unless there was an administrative error in the entry,[82] in which case the Registrar may correct the certificate of title;[83] or the share value was obtained by fraud, in which case the court may order an amendment.[84] The rigidity in permitting changes to the allocation of strata share values in Singapore appears consistent with the application of the mirror principle. The Torrens system of land registration is statutorily provided for under the *Land Titles Act* (Singapore, cap 157, rev ed 2004); section 46 of the Act expressly providing for the paramountcy of the registered proprietor.[85] In turn, the *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2008) section 4 provides that the *Land Titles Act* (Singapore, cap 157, rev ed 2004) applies, *mutatis mutandis*, to land registered in any folio of the subsidiary strata land register. This means that the State-guaranteed indefeasibility of title guaranteed under the Torrens system of land registration also applies to strata property. One of the three principles underpinning the Torrens system is the mirror principle which encapsulates the idea that the register should reflect the 'full character of the land',[86] ie the totality of rights and interests concerning title.[87] As mentioned above, a strata owner is the registered proprietor of his or her own unit and a tenant-in-common of the common property. The *Building Maintenance and Strata Management Act* (Singapore, cap 30C, rev ed 2008) section 62(1)(b) provides that the share value of a lot determines the quantum of the undivided share of the strata owner of that lot in the common property comprised in that strata title plan. The fact that share values of a strata lot can only be changed in the case of a clerical error or fraud is thus internally consistent with the certainty demanded by the mirror principle, ie share values represent the undivided share in the common property.[88]

Similarly, strata title in NSW is of course Torrens title: the *SSD Act* section 8 provides that the *Real Property Act 1900* (NSW) applies to strata schemes, both lots and common property. This means that strata property comes with the section 42 indefeasibility provision of Torrens title. As mentioned earlier, each lot in a

79 Bronwen Leroy, 'Strata Title, Community Title and Residential Tenancies: Changing How We Live' in Hossein Esmaeili and Brendan Grigg (eds), *The Boundaries of Australian Property Law* (Cambridge University Press, 2016) 165.

80 *Building Maintenance and Strata Management Act* (Singapore, cap 30C, rev ed 2008) s 11(1).

81 Ibid s 11(5).

82 *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 11(1).

83 Ibid s 11(2).

84 Ibid s 11(3).

85 The relevant section in the Singapore statute is in *pari materia* with the *Real Property Act 1900* (NSW) s 42.

86 Martin Dixon, *Modern Land Law* (Routledge, 10th ed, 2016) 34.

87 Ibid.

88 To clarify, a collective sale is defined as the sale of all the (strata) lots *and* common property in a strata scheme: *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 84A(1).

strata plan is allocated a unit entitlement based on its value relative to the other lots in the scheme. Like Singapore, the unit entitlement also represents that lot's share of the common property.[89] Interestingly, however, NSW adopts a more flexible position in permitting the court to readjust the allocation of unit entitlements if the developer's initial allocation is unreasonable or has over the years, due to urban planning changes, become unreasonable.[90] In effect, this allows the court to substantively affect how much a strata owner would receive from a collective sale since proceeds from a collective sale are to be distributed according to unit entitlements. The capacity for judicial readjustment is a double-edged sword. While this power allows the court to dispense substantive justice when the need arises, it also attracts controversy as property rights in both the relative value of the unit as well as the share in the common property may be affected. Arguably, this affects the mirror principle aspect of indefeasibility for Torrens title in NSW. While there is no published case law dealing with owners discontent with the allocation of sale proceeds, it is likely that this will surface in the near future. Already, the Land and Environment Court of NSW has made clear that it will intervene to adjust the allocation of unit entitlements if there is a conflict between what a strata unit would command if it were compulsorily acquired with what its original unit entitlement value pursuant to a collective sale would be. Remarkably, the Court did so by going beyond the ambit of the *Strata Schemes Management Act 2015* (NSW) ('*SSM Act*') section 236.[91] Having outlined the main problem this article tackles, I now turn to analyse in greater detail certain aspects of concern in NSW and Singapore, before suggesting what improvements could be considered.

V ANALYSIS OF THE APPORTIONMENT OF SALE PROCEEDS IN A COLLECTIVE SALE

A New South Wales

NSW's statutory framework is significantly clearer than Singapore's as there are rules determining how many unit entitlements each lot should be allocated. In relation to the distribution of sale proceeds, the *SSD Act* provides that this is to be done in proportion to the relative number of unit entitlements of each lot.[92] NSW's collective sale framework requires the preparation of two independent valuations,[93] with each valuation required to determine the market value of the whole of the strata property as well as the values of the individual lots within the strata scheme with reference to the *Land Acquisition (Just Terms Compensation) Act 1991*

89 New South Wales Land Registry Services, 'Strata Schemes', *Registrar General's Guidelines* (Web Page) <https://rg-guidelines.nswlrs.com.au/strata_schemes>.

90 *Strata Schemes Management Act 2015* (NSW) s 236.

91 *Strata Plan No 61299* [2019] NSWLEC 111, [110].

92 *SSD Act 2015* (NSW) s 171(1).

93 Ibid ss 170(1)(e), 179(1)(e)(ii); *Strata Schemes Development Regulation 2016* (NSW) reg 33(c); *Strata Plan No 61299* [2019] NSWLEC 111, [82].

(NSW).[94] This is because the rule that sale proceeds are to be distributed proportional to unit entitlements is coupled with the requirement that all lots are to receive at least fair market compensation value.[95]

The recent case of *Strata Plan No 61299*[96] is an interesting decision (and the only one so far) which deals squarely with these issues. The facts concerned the collective sale of a serviced apartment building known as the 'Seasons Harbour Plaza Sydney'. Significantly, it was the first time that the Land and Environmental Court of NSW dealt with an application for an order for a strata renewal plan. The substantive issue before the Court was an application for an ancillary order[97] to increase the unit entitlements of 5 utility lots[98] whose market values had become greater than the sum attributable to their original unit entitlements. Pain J assessed the valuation reports before her and held that the 5 utility lots had values significantly higher than the rates applicable to the other lots. As the original unit entitlement allocation did not reflect this difference in value between the 5 utility lots and the remaining lots,[99] the Court found that there was a conflict between the requirement to ensure that each lot receive compensation no less than what it theoretically would have under compulsory acquisition with the general rule that each lot is to receive a share of the collective sale proceeds proportional to its unit entitlement. The Court accepted that the requirement that each lot should minimally receive compensation equivalent to that of compulsory acquisition is mandatory. Pain J thus approved the collective sale by taking a small proportion of the unit entitlements of each serviced apartment and car parking lot and reallocated these to the 5 utility lots. In this way, the Court held that it was able to satisfy both subsections in the *SSD Act*, sections 171(1) and 182(1)(d).[100]

While there was no substantive injustice on the facts, Pain J's decision is not without controversy. In coming to its decision, the Court made an ancillary order under the *SSD Act* section 186(1). The relevant parts read as follows:

> (1) The court may make an order to provide for any ancillary or consequential matter (an *ancillary order*) that it considers appropriate or necessary to ensure the effectiveness of the order giving effect to a strata renewal plan.
>
> (2) Without limiting subsection (1), an ancillary order may include directions about the following matters –
>
> (a) – (d) …

94 *Strata Schemes Development Regulation 2016* (NSW) regs 27, 28; *Strata Plan No 61299* [2019] NSWLEC 111, [82].

95 *SSD Act 2015* (NSW) s 170(3).

96 *Strata Plan No 61299* [2019] NSWLEC 111.

97 Ibid [57]; *SSD Act 2015* (NSW) s 186(1).

98 These were the lots where the cafe, storage, reception, office and gymnasium were; these were provided for the benefit of the guests staying in the serviced apartment. A 'utility lot' is defined in s 4(1) of the *Strata Schemes Management Act 2015* (NSW) as 'a lot designed to be used primarily for storage or accommodation of boats, motor vehicles or goods and not for human occupation as a residence, office, shop or the like'. While an office is specifically defined as not constituting a utility lot, the Court grouped the office (lot 124) in its collective description of the 5 lots as 'utility lots': see *Strata Plan No 61299* [2019] NSWLEC 111, [100].

99 *Strata Plan No 61299* [2019] NSWLEC 111, [100]–[101].

100 Ibid [100]–[112].

> (e) the reallocation of unit entitlements among the lots that are subject to the strata scheme for a reason set out in section 236 (1) of the *Strata Schemes Management Act 2015*.

The referenced *SSM Act* section 236(1) reads:

> (1) The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots –
>
> (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or
>
> (b) was unreasonable when a revised schedule of unit entitlement was lodged at the conclusion of a development scheme, or
>
> (c) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the whole or any part of the parcel could lawfully be used, whether with or without planning approval.

It is interesting to note that the *SSM Act* section 236(1) does *not* contemplate a scenario where the allocation of unit entitlements has become unreasonable due to relative changes in market price: this may have happened in the facts before her Honour. We are told that development of the building was completed in 1999[101] and it may well be that the comparative values of certain types of land use could have changed since then; the most drastic amendment was made to the café (lot 120) when the Court almost doubled its unit entitlement from 180 to 358.03 (out of 100,000).[102] Accordingly, the Court could not rely on the *SSD Act* section 186(2)(e). The learned Pain J noted that none of the scenarios permitting an order for reallocating unit entitlements under the *SSM Act* section 236(1) arose. The Court said that it is unknown whether the allocation of unit entitlements to the 5 utility lots was unreasonable when the strata plan was registered (section 236(1)(a)). As for sub-sections (b) and (c), the Court expressly ruled these did not apply as a revised schedule of unit entitlements was not lodged at the conclusion of the building's development (section 236(1)(b)) nor were there any planning changes to the lots (section 236(1)(c)).[103] Instead, the Court relied on the introductory phrase in the *SSD Act* section 186(1) which states that 'the court may make an order … that it considers *appropriate or necessary* to ensure the effectiveness of the order giving effect to a strata renewal plan'.[104] Pain J thus reasoned that while the *SSD Act* section 186(2)(e) expressly provides for the reallocation of unit entitlements for the reasons set out in the *SSM Act* section 236(1), her Honour was nevertheless able to rely on the general powers in the *SSD Act* section 186(1) which extended to reallocating unit entitlements.[105] This reasoning may attract dissension for a couple of reasons.

First, as a matter of interpretation, a statute should not be interpreted in a way that renders the section otiose. In *Project Blue Sky v Australian Broadcasting*

101 Ibid [2].
102 Ibid Annexure A.
103 Ibid [109].
104 *SSD Act 2015* (NSW) s 186(1) (emphasis added).
105 *Strata Plan No 61299* [2019] NSWLEC 111, [110].

Authority, the Australian High Court materially held that a statutory provision must be construed in a harmonious way and that a Court must strive to 'give meaning to every word of the provision … [and that it was] a known rule in the interpretation of Statutes that … no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.[106] In the same vein, the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* held that the interpretation of a statute is highly contextual, rather than merely literal in nature.[107] Pain J's interpretation of the *SSD Act* section 186(1) is more acceptable in the literal rather than the contextual sense. If a broader scope of reallocating unit entitlements were available under the *SSD Act* section 186(1) than contemplated under the three grounds stated in the *SSM Act* section 236(1), the *SSD Act* section 186(2)(e) is effectively rendered otiose. It is submitted that the words 'without limiting subsection (1)' found in the *SSD Act* section 186(2) merely clarifies that the sub-sections (a) through (f) are not *numerus clausus*.

Second, as a matter of policy, it is questionable whether the legislation was meant to easily allow for the reallocation of unit entitlements beyond the scope contemplated under the *SSM Act* section 236(1). As a matter of general principle, Australian law provides 'a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights'.[108] In *Nintendo Co Ltd v Centronics Systems Pty Ltd*, a case dealing with intellectual property interpreting the *Circuits Layouts Act 1989* (Cth), the Australian High Court held that unambiguous statutory language is needed to infringe vested property rights.[109] Applying this presumption to the *SSM* and *SSD Acts*, it seems unlikely that this threshold has been reached. More specifically, I had earlier stated that allowing for unit entitlements to be amended by the court may be an affront to the mirror principle. Notably, the grounds permitting a readjustment of unit entitlements under that section are fairly narrow – unreasonableness in the allocation in the strata schedule of unit entitlements because the developer made an initial mistake, at the conclusion of a development scheme (in the case of staged developments) or because there was a change in planning laws. As the *SSD Act* section 8 specifically states that when dealing with inconsistencies between the *SSD Act* and the *Real Property Act 1900* (NSW), the former prevails, it can be rationalised that amendments to the allocation of unit entitlements under the *SSM Act* section 236 as provided under the *SSD Act* section 186(2)(e) is a permitted overriding interest. Infringements of the mirror principle should be minimised, thus calling for a narrow interpretation of the *SSD Act* section 186(1). The content of property rights for a strata unit certainly includes its relative share of unit entitlements, thus auguring against going beyond the scope of the *SSM Act* section 236(1) in the reallocation of unit entitlements. Perhaps the most principled way for Pain J to have reached the same conclusion that her Honour would have been if she were able to rely on the *SSD Act* section 186(2)(e) read with the *SSM Act* section

106 (1998) 194 CLR 355, 381–2 [70]–[71] (McHugh, Gummow, Kirby and Hayne JJ).
107 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
108 *R & R Fazzolari* (2009) 237 CLR 603, 619 [42] (French CJ).
109 (1994) 181 CLR 134, 146 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

236(1)(a) and conclude that the allocation of unit entitlements among the lots was unreasonable when the strata plan was first registered.

In concluding the analysis of the case, it is noted that the application for *Seasons Harbour Plaza Sydney* to be collectively sold was heard ex parte. While support for the collective sale did not receive unanimity, Pain J noted that none of the non-consenting owners appeared in the proceedings.[110] It thus remains to be seen what will happen if there were non-consenting owners resisting the collective sale and whether future courts will wholly embrace Pain J's reasoning in the reallocation of unit entitlements.

B Singapore

Part VA of the *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) provides that an application for a collective sale is to be made by at least 80% (in the case of buildings older than 10 years) or at least 90% (in the case of buildings 10 years or less) of the subsidiary proprietors of a strata scheme. While the original formulation of these sections in 1999 provided that these percentages referred only to the respective strata share values, amendments in 2010 were made to ensure that the percentages in question must satisfy the given proportions on a share value as well as on a floor area basis.[111] For a strata building older than 10 years for instance, the Act provides states that the sale must be approved by '*the subsidiary proprietors of the lots with not less than 80% of the share values and not less than 80% of the total area of all the lots*'.[112] This amendment may be viewed as an acknowledgement (or a makeshift solution to the problem) that the allocation of strata shares for a particular unit may have a disconnect with the market value of the unit.

While the Act is clear how the supermajority of votes needed is computed, there is no statutory formula on how sale proceeds are to be distributed. Rather, the Act simply provides that the sale and purchase agreement signed by the requisite majority must specify 'the proposed method of distributing the sale proceeds to all the subsidiary proprietors'.[113] Because the apportionment method is not statutorily provided, it creates an additional point of potential contention among owners as it ties the question of sale price with apportionment in a single decision. Owners unhappy with the mode of distribution may vote 'no' even if satisfied with the sale price of the building as a whole. Even if they are otherwise satisfied with the quantum of proceeds they will personally receive, they may be unhappy if their neighbours appear to be getting a better deal. Such behaviour should be avoided, being inimical to the policy objective of urban renewal. If subjective discretion in relation to apportionment is replaced by a statutorily provided method that is seen as fair, this would better align interests, improve efficiency, reduce disagreements and encourage strata owners who want to sell the incentive to work together to secure the best price for their strata scheme.

110 *Strata Plan No 61299* [2019] NSWLEC 111, [7].

111 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007 (n 64), col 1996 (Shunmugam Jayakumar, Minister of Law).

112 *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 84A(1)(b) (emphasis added).

113 Ibid s 84A(1).

In terms of administration of the collective sale, the rules require the Sale Committee to submit 'a report by an independent valuer on the proposed method of distributing the proceeds of sale due under the sale and purchase agreement' to all the subsidiary proprietors.[114] This is done before the committee makes an application to the Board, and a copy of the valuer's report is also attached in the application to the Board. While the statutory intent behind requiring an independent valuer to comment on the distribution method is apparent, it is far from sufficient to cure the deficiencies inherent in a system lacking a statutory method of apportionment. Additionally, the candour expected of the valuer's report has also been criticised. A Parliamentarian has observed that the valuation report serves more as a perfunctory attempt to justify the method adopted rather than a truly independent and critical evaluation and consideration:[115]

> Let me just cite the example of a valuation report that I have seen. In this case, the report basically set out and described the different methods of apportionment, without any critical analysis of the applicability or suitability of each method to the development in question. The valuer then proceeded to state its recommendation, which just happened to be the method that the sale committee had already chosen. The valuer opined, and I quote:
>
> 'In view of the above methods and having regard to all relevant information, we are of the opinion that the 50% share value and 50% strata area method is a fair and equitable method of apportionment. We also understand that this method of distribution has also obtained the endorsement of more than 80% of the owners in the Collective Sale Agreement.'
>
> There was no analysis, no explanation, no justification. Just a bald assertion that the method in question is a fair and equitable method, with a telling reference to the endorsement of the majority owners. No reference to the other methods of apportionment recommended by the SISV [Singapore Institute of Surveyors and Valuers]. No comparison of the relative merits of each method. No statement as to whether this method is more fairer and more equitable than the others, or whether any other method would be more fairer and more equitable. Sir, if that is not simply going through the motion, I do not know what is.

The same Parliamentarian also questioned the degree of independence of such valuation reports:[116]

> It does not help that Singapore is small and the industry is small. Everybody knows everybody else. A valuer who provides a report that does not meet a marketing agent's requirements will probably not receive any more work from that agent and probably any other agent. Bearing in mind the critical role played by marketing agents in this entire process, including suggesting and recommending valuers for such reports, everyone has a vested interest in not rocking the boat. Indeed, I have been told by a minority owner who was in the pro-tem CSC for his estate that the marketing agent in his case actually told him that the agents will always ensure that their regular surveyors are engaged and that their regular surveyors will always agree with their proposed method. Sir, all this simply means that when it comes to the single most important issue in an en bloc sale, minority owners are left with little protection from the law.

114 Ibid sch 1 cl 1(e)(vi).

115 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007 (n 64), col 2030 (Siew Kum Hong, Nominated Member).

116 Ibid col 2031.

While there is no statutory formula for the distribution of sale proceeds, in practice most collective sales take guidance from the methods of apportionment listed by the Singapore Institute of Surveyors and Valuers ('SISV'). This still does not cure the uncertainty given the broad-brush application of the apportionment methodology. The SISV Guidelines state that there are four methods of distribution 'more commonly used':[117]

> 1. Based purely on share value
>
> This may be used when the units are of the same or similar strata/floor areas with same or similar share values.
>
> 2. Based purely on strata/floor area
>
> This may be used when the units are of the same or similar strata/floor areas or the unit value rates are similar for various sizes.
>
> 3. Based on a combination of share value and strata/floor area
>
> This may be used where there are wide differences in the share value and/or strata/floor area among the various units.
>
> 4. Based on valuation
>
> This method may be used when the general attributes of the property are to be considered. A valuation is made of a typical unit of each type or category disregarding renovations, facing, floor level, etc. All units in the development are assumed to be in a fair and reasonable state of repair and maintenance.

Somewhat irresolutely, the SISV Guidelines also go on to state that, '[a]lternatively, the valuation of the individual units can be carried out, taking into account differences in unit size, orientation and storey/level, etc. In the case of retail units, the Valuer should also take into consideration the location, floor level, frontages, configuration and orientation of the unit',[118] and further, '[i]t should be noted that besides the normal distribution methods, there may be other variations or a combination of the above methods. In all cases, the Valuer should justify in the report the recommended approach for the distribution of sale proceeds'.[119]

While the SISV Guidelines are intended to help develop 'best valuation practices that meet international requirements',[120] the lack of detail in relation to apportionment methodologies has not gone unnoticed. For instance, the SISV Guidelines have been criticised for failing to provide recommendations and guidelines on when each of the stated methods should be used, leading to sale committees 'inevitably … selecting the method which is most likely to achieve the requisite majority to approve a sale'.[121] Further, in respect of each of the methodologies, there are no detailed recommendations concerning how to apply the respective apportionment method in a fair and equitable manner.[122]

A statutory formula of apportionment obviates the concerns raised by the Parliamentarian. Taking away the discretion of apportionment reduces the

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117 Singapore Institute of Surveyors and Valuers, *Valuation Standards and Practice Guidelines* (2nd ed, SISV, 2015) 128–9 ('SISV Guidelines').

118 Ibid 129.

119 Ibid.

120 Ibid vi.

121 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007 (n 64) col 2029 (Siew Kum Hong, Nominated Member).

122 Ibid.

likelihood of either the majority abusing their position or a minority position intentionally holding out. It aligns interests amongst the owners who wish to sell while not prejudicing owners who wish to reject a collective sale regardless the price. Importantly, disputes regarding apportionment can be avoided. Fairness and certainty would be attained and it is thought that the proportion of successful collective sales would increase, leading to the important policy that underlies the exercise – 'redevelopment of ageing estates in … land-scarce [Singapore]'.[123] As the SISV apportionment methods adopted in Singapore refer to 'strata share values', it is important to explain how strata share values are allocated in Singapore – these do not directly correspond to a unit's value. To add to the complexity, the allocation of strata share values in turn depend on the type of property – single-use residential developments, single-use commercial developments, or mixed use developments.

C Allocation of Strata Share Values

Unlike the level of certainty afforded by the NSW legislation, the allocation of strata shares (equivalent to NSW's unit entitlements) in Singapore lack precision and consistency. This often leads to a disconnect between the strata share allocation and property value, and consequently the distribution of sale proceeds. The share value of a strata unit represents the proportionate share entitlement assigned to each strata unit in the same development. The example given by Singapore's BCA is as follows: 'If the share value of an apartment unit in a condominium is represented by the figure 5/350, then 350 represents the share value of all the units in the condominium and 5 is the share value allotted to the unit'.[124] Section 62 of the *Building Maintenance and Strata Management Act* (Singapore, cap 30C, rev ed 2008) states that the share value of a lot determines the voting rights of that lot's subsidiary proprietors, the amount of contributions that may be levied by a management corporation on the subsidiary proprietor of that lot and importantly, the quantum of the undivided share of the subsidiary proprietor of that lot in the common property of the strata scheme.

The basis on which share values are allocated to a particular lot depend on the type of strata building it is part of: (i) single use residential developments, (ii) single use commercial developments and (iii) mixed developments. Each will be considered in turn.

1 Single Use Residential Development

According to the BCA Guidelines, '[i]n a wholly residential strata development, the share value (SV) allotted to strata units [are] based on floor area groupings of 50 m^2 interval in an ascending order as follows':[125]

123 Ibid col 2006 (Alvin Yeo, Member of Parliament).

124 Building and Construction Authority (Singapore), 'Strata Living in Singapore: A General Guide' (Guideline, 2005) 3.

125 BCA Guidelines (n 74) 3 [3].

Floor area (m^2)	**Share Value**
50 and below	5
51 to 100	6
101 to 150	7
151 to 200	8
201 to 250	9
251 to 300	10
and so on	

Two observations can be immediately made. First, because the minimum share value that can be allocated is 5, smaller units hold a larger proportion of the total shares. Second, the floor area grouping intervals of 50 m^2 are quite large, meaning that units just below or above the interval lines (eg, 51 m^2 or 99 m^2) are allocated the same share value (and by definition hold equal undivided shares in the common property) – this can also cause disagreements when seeking to apportion sale proceeds pursuant to a collective sale.

2 Single Use Commercial Developments

In a single use commercial development (eg *all* strata office or *all* strata shops, etc), the share value is allocated on a floor basis area, though the share value allocated to the building as a whole must be in units of 10. The formula given by BCA is as follows:[126]

$$\text{Share Value of Strata Unit} = \frac{Floor\ Area\ of\ Strata\ Unit}{Floor\ Area\ of\ All\ Strata\ Units} \times Share\ Value\ alloted\ to\ the\ building$$

The example given by BCA involves computing the share value of a 500 m^2 shop and a 1,500 m^2 shop in a building with a total floor area of 4,500 m^2.[127] Using the example of a total share value of 100,[128] the BCA Guidelines require that the share value of each strata unit must be an integer; they compute the share value of the two units as follows:

$$\text{Share value of 500 } m^2 \text{ shop} = \frac{500}{4500} \times 100 = 11.11 \approx 11$$

$$\text{Share value of 1,500 } m^2 \text{ shop} = \frac{1500}{4500} \times 100 = 33.44 \approx 34$$[129]

126 Ibid 4 [4.2].
127 Ibid 5 [4.3].
128 The BCA Guidelines do not explain why 100 rather than 1,000 or 10,000 were chosen.
129 The BCA Guidelines do not explain this rounding error. See BCA Guidelines (n 74) 5 [4.3].

While perhaps more principled than the allocation of share values in a single use residential development, the requirement that the share value of each strata unit must be a whole number can lead to rounding differences depending on the total share value chosen. For instance, in the above example, if the share value allocated to the building by the developer was 1,000 instead of 100, the 500 m^2 shop would have 111 out of 1,000 shares while the 1,500 m^2 shop would have 334 out of 1000 shares. If 10,000 shares had been chosen, this would translate to 1,111 and 3,334 shares respectively, which would be the most accurate allocation.

3 Mixed Developments

In mixed strata developments (ie, more than one type of user groups), the allocation of share values to each unit is the least prescriptive, being largely qualitative. According to the BCA Guidelines, the allotment of share values is to be made based on a combination of the floor area of the strata units and the use of 'weight factors' for each type of strata units. The computation of weight factors for each user group (eg, residential, shop, office, etc) is based on the 'share of the maintenance costs proportionate to the expected use or benefit each user group will derive from or the risk it will contribute to the common property'. The Guidelines provide a non-exhaustive list of factors that the developer should consider:

(a) Total area
(b) Common area
(c) Strata area
(d) Frequency of usage
(e) Human traffic
(f) Risk factors (eg, insurability)[130]

In coming to an appropriate apportionment of shares, the BCA Guidelines recommend that the developer should consult a professional such as a 'registered surveyor, architect, M&E consultant and managing agent in computing the weight factors' and may also consult the BCA before filing the schedule of share values.[131] This flexible, subjective approach means that different developers are likely to come to different allocation methods of share values. This is especially true if the developer intends to retain some of the strata units on their balance sheet, allowing for potential conflicts of interest to arise.

Comparing the method of allocating shares in a single-use commercial development with that of a mixed development also attracts serious queries. The list of factors recommended by the BCA Guidelines for a mixed development include 'frequency of usage' and 'human traffic'. That is to say, a shop unit directly visible from an elevator exit is likely to experience more human traffic than one tucked away in a corner of the building; all things being equal, the more visible unit should be allocated more strata shares by the developer. Similarly, a shop unit on the ground floor should hold more shares than a shop unit of the same size on a higher floor since the ground floor unit will have more human traffic than a higher floor unit. No doubt, strata shops in a single-use commercial development

130 Ibid 5–6 [5.1].
131 Ibid 6 [5.1].

with a good facing or near an entrance/exit will also similarly benefit from greater footfall and hence be valued at a higher price. Curiously however, in a single-use commercial development however (eg all strata shops), these factors are to be ignored, since the BCA Guidelines state that only floor area should be taken into account.

As evidenced in the forgoing, the requirements under the BCA Guidelines in respect of apportionment of strata shares for units are lacking and somewhat arbitrary. For single-use residential developments, smaller units are allocated a disproportionately higher share of the common property with the relatively broad floor intervals problematic. There are also internal inconsistencies in the allocation of strata shares between single-use commercial buildings and mixed buildings. The host of factors that may be taken into consideration in allocating strata shares in a mixed building may also make implementation challenging. As share value is typically a factor in the distribution of proceeds of a collective sale in Singapore, the difficulties in establishing a fair initial share allocation inevitably leads to problems when dividing sale proceeds.

VI ANALYSIS AND RECOMMENDED APPORTIONMENT METHOD

There are potential problems in the way sale proceeds are apportioned in a collective sale of strata property in both Singapore and NSW. This predicament is more pronounced in Singapore given that there is no statutory formula for the allocation of strata shares, and neither is there one for the division of proceeds from a collective sale. Fundamentally, as the decision to sell is coupled with the issue of apportionment, strata owners unhappy with the latter may simply vote 'no', hampering the policy goal of urban rejuvenation – the very purpose of allowing collective sales. Though the scope of this problem has never been empirically measured, the unhappiness caused by the lack of a fair apportionment of sale proceeds has been observed by a number of Singapore Parliamentarians.[132] Providing for a statutory method of apportionment would go some way towards resolving this aspect of gridlock caused by the problem of an 'anticommons', a situation where owners effectively exclude one another from taking a share in a larger pie because they cannot agree how much of the pie each owner should get.[133] The variability in allocating strata shares for strata units differs across building types (single-use residential, single-use commercial or mixed buildings), as well as across vintages (when the strata building was constructed). In turn this has led to an equally multitudinous array of distributing sale proceeds. The requirement of having a valuer comment on the chosen apportionment method is lacklustre, doing little more than perfunctory endorsement of the supermajority's view, potentially leading to the views of the minority in this regard being disregarded. It has been

132 See, eg, Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 20 September 2007 (n 64), cols 2002 (Teo Ho Ping, Member of Parliament), 2027 (Siew Kum Hong, Nominated Member).

133 See Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard Law Review* 621, 624.

observed by the Court of Appeal that 'bitter acrimony and strained relationships'[134] have often arisen between neighbours in the context of a collective sale exercise. Given the reality that collective sales are very likely to remain part of the strata framework (whether in Singapore or NSW),[135] something as critical as the method of apportionment should not be left to the vicissitudes of chance or human nature. To better support the policy goals of collective sales and reduce wasteful litigation, a statutory model of apportionment that treats all owners fairly is surely needed.

The position in NSW is preferable to Singapore's given that there are statutory formulae for allocating unit entitlements as well as proceeds from a collective sale. This is not to say that the NSW framework is without fragility. The generous interpretation of the *SSD Act* section 186(1) by Pain J in the recent case of *Strata Plan No 61299*[136] in reallocating unit entitlements is not uncontroversial. As the case was heard ex parte, it remains doubtful that there will be no further development of the law in this respect. Apart from stipulating that every lot is to receive a sum proportional to the number of unit entitlements it holds, NSW law also requires that every lot receive at least its compensation value on a theoretical compulsory acquisition basis. On one hand this justice consideration is laudable. On the other however, there is a lack of 'horizontal equity', a term put forth by Phang to refer to treating like cases alike.[137] While the lot owner of the café in the case appeared to benefit from an almost doubling of unit entitlements, the owner ultimately only received the base value for the lot. In comparison, the other lot owners have comparatively received a windfall.

A Recommended Method of Apportionment

The method of apportionment this article proposes is one based solely on lot valuations. This is meant to ensure that every lot benefits from any value premium on a proportional basis. By value premium, I do not mean that all strata owners will necessarily make a profit. Rather, it simply means that the sum is greater than its parts. This is a reasonable assumption as it would be highly improbable, if not impossible, for a strata unit to be worth more if it were sold alone than if it were sold collectively. Even during an economic downturn or should the strata building be struck by a calamity, the collective sale of the building gives the new owner a valuable 'option'[138] of redevelopment over and above the combined value of all the strata units. Rationally, if units were worth more individually than collectively, a supermajority would not agree to terminate the strata scheme, as unit owners would simply sell their own units. Thus, in the event that the sum of all the individual lots in a strata scheme are appraised at $10 million (consisting of 3 lots valued at $2 million and 4 lots valued at $1 million) but is worth $15 million collectively to a developer, the suggested method of apportionment would hold

134 *Horizon Towers* [2009] 3 SLR(R) 109, 115 [2] (VK Rajah JA for the Court).
135 Ti (n 11) 1038.
136 See *Strata Plan No 61299* [2019] NSWLEC 111.
137 Sock-Yong Phang, 'Economic Development and the Distribution of Land Rents in Singapore: A Georgist Implementation' (1996) 55(4) *American Journal of Economics and Sociology* 489, 493.
138 Joseph T Williams, 'Real Estate Development as an Option' (1991) 4(2) *Journal of Real Estate Finance and Economics* 191, 191.

that *all lots equally receive a 50% premium.* This method seeks to ensure that all lots enjoy the same percentage premium above the existing market value of what their lot is worth individually.[139] While this suggestion is simple to implement as it does away with any calculations involving unit entitlements or share values, it is not without weaknesses and further research, both in the form of theoretical analysis and stakeholder engagement.

A collective sale comprises the sale of all the lots in a strata scheme *and* the common property. A unit entitlement or share value represents a proportional share in the common property of the strata scheme and doing away with any reference to these may be theoretically unprincipled. Although one possible counter to that would be to value the lots and the common property separately, with the division of the sale proceeds from the common property in proportion to unit entitlements, it would appear difficult, if at all possible, for a valuer to appraise the common property separately from the lots.[140] At the least however, as provided in both NSW[141] and Singapore law,[142] the distribution of any money and other commonly held assets remaining with the Owners Corporation is done in accordance with the proportion of unit entitlements of each lot. This mitigates the fact that over the years, owners had contributed to the maintenance of the strata building pursuant to their respective unit entitlements or strata share values.

Another implementation problem of the suggested method of apportionment is that the factors that should be considered in appraising each lot under the suggested apportionment method are not exhaustive. Singapore's SISV Guidelines are equivocal as to the characteristics that should be taken into account when valuing lots.[143] Apart from size and land use, there are many unique factors that could affect a lot's value including an unobstructed sea view,[144] close proximity to a prestigious elementary school[145] or even 'lucky' unit numbers.[146] One approach that could be adopted is for at least two independent valuers to appraise each lot on an 'as is where is' basis, taking into account all attributes of the lot – the valuer's job is simply to assess what the *ex-ante* collective sale or baseline value of each lot is. Any other method adopted to value lots individually would necessarily require the

139 Presumably, if the collective value of the strata scheme was not worth more than the lots individual, the majority of owners would not agree to sell.

140 Solving the issue of this 'common property' problem is beyond the scope of this article.

141 *SSD Act 2015* (NSW) s 136(2)(f).

142 *Land Titles (Strata) Act* (Singapore, cap 158, rev ed 2009) s 81(13)(a).

143 SISV Guidelines (n 117).

144 In Shi-Ming Yu, Sun-Sheng Han and Chee-Hian Chai, 'Modelling the Value of View in High-Rise Apartments: A 3D GIS Approach' (2007) 34(1) *Environment and Planning B: Planning and Design* 139, the authors find that based on Singapore data, an unobstructed sea view adds an average premium of 15% to the property price: at 152.

145 In Sumit Agarwal et al, 'School Allocation Rules and Housing Prices: A Quasi-Experiment with School Relocation Events in Singapore' (2016) 58 *Regional Science and Urban Economics* 42, the authors find that houses within a 2 km radius of a prestigious primary school experience declines of approximately 6% when the school relocates elsewhere: at 56.

146 Research on housing transactions in Auckland, New Zealand between 1989 to 1996 has shown that in areas with a relatively high percentage of Chinese households, 'lucky' house numbers have a statistically significant positive effect on home values: Steven C Bourassa and Vincent S Pheng, 'Hedonic Prices and House Numbers: The Influence of *Feng Shui*' (1999) 2(1) *International Real Estate Review* 79, 88.

valuer to artificially exclude certain characteristics of the lot (eg the state of repairs). Such adjustments may result in an unsatisfactory valuation. In the context of compulsory acquisition, the Land Acquisition Appeals Board in Singapore held in *Tan Chwee Hor v Collector of Land Revenue* that making many adjustments would render a valuation arbitrary.[147] Similarly, the Appeals Board in *P Subramaniam and two others, Trustees of the Settlement of V Pakirisamy v Collector of Land Revenue* cautioned that as adjustments are a matter of opinion, the more adjustments the valuer has to make the larger the margin of error.[148]

While some details may require refinement, the recommended method of apportionment addresses the vital issue of fairness thus ensuring that all strata owners share proportionately in the total value of the collectively sold strata scheme.

VII CONCLUSION

This article has considered, from NSW's and Singapore's perspective, the vexing issue of distributing proceeds in a collective sale of strata property and has highlighted both theoretical inconsistencies and practical weaknesses in both jurisdictions. Given the pervading need for housing and urban policy goals, collective sales will remain as an organic planning tool in the supply of land for redevelopment. In NSW, one of the justifications for permitting a collective sale by a supermajority given by the Parliamentary Secretary was the 'great need across the Sydney metropolitan area to provide housing'.[149] In the same vein, a member of the House in Singapore went so far as to state that not providing the enabling legislation for a collective sale by a supermajority would 'not be the responsible approach in land scarce Singapore'.[150] The growing ubiquity of strata renewals in turn portends disputes not only between owners who 'do not view their property as investments but as homes to be kept regardless of price'[151] and those who wish to sell, but also within owners in the pro-sale camp; disputes may arise as to what the appropriate methodology of apportionment should be. It is hoped that the suggested 'valuation-only' apportionment method contributes towards the search for a fair distribution of proceeds in a collective sale of strata property.

147 [1999] SGAB 1, [37].
148 [1972] SGAB 1.
149 Strata Schemes Development Bill Second Reading Speech, 20 October 2015 (n 37) 4305 (Ray Williams).
150 Land Titles (Strata) Amendment Bill Second Reading Speech, Singapore, 31 July 1998 (n 17), col 607 (Chng Hee Kok, Member of Parliament).
151 *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes* [2007] SGHC 84, [101] (Assistant Registrar Paul Tan).