

THE DUTY OF CARE IN COLLECTIVE SALES OF STRATA DEVELOPMENTS

The question of the existence of a duty of care and therefore one link in the chain towards establishing liability in the context of the *en bloc* sale of strata developments is considered in this article. It argues that professional advisers to the sale committee are likely to be under a duty of care to the subsidiary proprietors. It further argues that the members of a sale committee are under a more limited scope of duty of care towards the subsidiary proprietors.

Glen KOH*

LLB (King's College, London);

Associate of King's College, London;

Barrister (Middle Temple), Advocate & Solicitor (Singapore).

I. Introduction

1 Part A of this article expresses the writer's views on what appears to be a point which has not been decided in any jurisdiction, *viz*, whether members of a sale committee, constituted for the purposes of meeting the requirements under s 84A of the Land Titles (Strata) Act¹ ("LTSA") (or any other equivalent law), or the professional advisers to the sale committee ("Professional Advisers") are under a duty of care to the owners of a strata development. In this relationship, it should be noted that the reasonably foreseeable type of loss is pure economic loss rather than physical damage, and the focus of this article is accordingly on the problem of the existence of a duty of care. With the coming into force of the amendments to the LTSA on 4 October 2007, one point of considerable importance seems to have been settled into statutory form in s 84(1A)(a) of the LTSA, *viz*, the relationship between the sale committee and the owners. Part B of this article is devoted to the position of the sale committee *vis-à-vis* the owners under the new law. Subject to this qualification, Part A attempts to set out the rights and obligations of the parties as they were before the coming into force of s 84(1A)(a) of the

* The writer expresses his gratitude to Mr Michael Hwang SC for kindly sharing his views on certain aspects of this paper. Special thanks are accorded to Mr Ernest Balasubramaniam who, to say the least, introduced the writer to this area of legal practice. Responsibility for any shortcomings and errors in this paper, however, are solely the writer's.

1 Cap 158, 1999 Rev Ed.

LTSA. All references to the LTSA in Part A are therefore also references to the earlier version of the statute as unamended.

II. Part A

2 One preliminary point to note is that the sale committee did not have any form of statutory or judicial recognition, in the sense that statute or case law did not create or recognise its formation.² The sale committee was formed by members who are owners of the development, and it would appear that the rights and obligations of the members are not formalised or created, at least under contract, until the execution of a collective sale agreement by an owner or owners. Henceforth, the owners and the sale committee overcome any privity of contract problem. One recognises that the sale committee usually enters into conditional contracts with Professional Advisers, *viz*, at least a firm of solicitors and a marketing agent, which is “ratified” by the owner upon executing the collective sale agreement. As stated above, what then is the juridical basis for the sale committee’s existence, and more importantly, what are its rights and obligations? The further question then is what are the rights and obligations of the Professional Advisers?³

3 This article seeks to provide some possible answers to the question of what are the obligations of the Professional Advisers and the sale committee to the owners. It postulates the situation where the sale committee or the Professional Advisers have by want of reasonable care caused the owners to suffer financial loss.

4 To put matters into perspective, a short introduction as to how the problem considered in this article may arise is set out.

5 It is now the main avenue for those owners who wish to dispose of a strata development *en bloc* to do so by way of an application under s 84A of the LTSA. Two other avenues exist. One, by resolution of the management corporation.⁴ “Where this method is employed, the subsidiary proprietors will become tenants in common of the land and they can, by unanimous resolution, direct the management corporation

2 The formation of the sale committee is not prescribed for under the unamended LTSA. It is also unlikely that the by-laws of the strata development will contain rules pertaining specifically to the formation of a sale committee.

3 The writer’s research into Australian law (where the strata title system is also in place) has not yielded any answers.

4 Section 81 of the LTSA, in conjunction with s 84 of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004).

to sell the land.”⁵ The other is by way of an application to court, for an order that the strata scheme be terminated and sold.⁶

6 Both methods were considered cumbersome, since the former required a unanimous decision, which was usually wanting, and the former, required what might turn into a lengthy and tenuous application to court.

7 Section 84A of the LTSA was passed so as to streamline the process, and could be seen as a hybrid of the former two avenues. It was important always to bear in mind that an application to the Strata Titles Board would only succeed if the Strata Titles Board was satisfied that the criteria set out in s 84A(9) of the LTSA could be met.

8 With this in the background, it became the practice that a number of owners who were interested in selling their strata title in a development would form a “sale committee”⁷, with a view to orchestrating a collective sale under s 84A of the LTSA. The impetus for a collective sale as opposed to an individual sale is commercial. A unit price for the sale of the entire development and the land on which it was premised would fetch a higher price on the market than the market for the sale of an individual unit.

9 The sale committee would then proceed to engage the Professional Advisers. The Professional Advisers would be involved in various aspects of the transaction, but the milestones are: (a) the signing of a collective sale agreement by the participating owners; (b) the sale of the development public tender or public auction; (c) the execution of a conditional sale and purchase agreement between the representatives of the owners, usually the sale committee, and the purchaser if more than 80%⁸ of the collective owners have endorsed the collective sale agreement; and (d) the application by the sale committee and the solicitors to the Strata Title Board to sanction the collective sale under the sale and purchase agreement.

10 A number of contentious points can arise in the run up to or after the run up to the sale. To take an example of one scenario prior to a purchaser executing a sale and purchase agreement: who, if any one, shall

5 See Teo Keang Sood, *Strata Title in Singapore and Malaya* (Butterworths Asia, 2nd Ed, 2001) at p 464; see also s 81(5) and (6) of the LTSA.

6 LTSA, s 78.

7 As mentioned above, there does not appear to be any legal basis for such a “sale committee”.

8 Since 4 October 2007, see s 84A(1)(a) and (b) of the LTSA for the requisite approval levels of 90% and 80% of the total share value and no less than the same percentage of the total area of the development. The percentage thresholds stated are for developments of less and more than ten years of age respectively.

be liable as a result of any untoward delay in the run up to the sale? In other words, where is the liability risk in the event of a failure to exercise reasonable diligence or care in pressing the sale through? This can be important should the property market stagnate or fall during the period when the sale committee and the Professional Advisers are attempting to or fail to press the collective sale process through. It may be even more pertinent when the stagnation or fall in the market is foreseeable so that it is recoverable in the tort of negligence as enunciated in *South Australia Management Corporation v York Montague Limited*⁹. Do the owners have a right to claim against the sale committee and the Professional Advisers for loss of opportunity as a result of delay? It may not be purely a market risk, but a legal one.

11 With regard to a possible contentious point raised after the sale, one scenario in which financial loss may be incurred is from the making of negligent misstatements or misrepresentations to a purchaser, in which case, assuming that the purchaser has a valid claim against the owners, can the owners then bring an action against the sale committee and its advisers who failed to exercise reasonable care in making those statements?¹⁰

12 A second scenario may be the failure to incorporate certain terms in the sale and purchase agreement with the purchaser for the benefit of the owners. A third scenario is where the claim is for loss of bargain because the sale committee or its advisers have failed to exercise reasonable care in securing the best price for the development. Issues of causation aside, it does not seem logical to draw a distinction between loss which is incurred as a result of a third party's (namely, the purchaser's) claim which is recoverable under s 15(1) of the Civil Law Act,¹¹ and loss suffered directly by the owners.

13 This article does not consider the other question of whether a duty of care is owed by the sale committee or the Professional Advisers to the purchaser.¹²

9 [1997] AC 191.

10 A claim against the Professional Advisers or sale committee would probably be for the "same" damage suffered by the owner to the purchaser under s 15(1) of the Civil Law Act. See *Ball v Banner & Ors, Healey & Baker Part 20 Defendant* [2000] Lloyd's Rep PN 569 and the cases therein on the Civil Liability (Contribution) Act 1978 (UK).

11 Cap 43, 1999 Rev Ed.

12 The sale committee, Professional Advisers and the owners are counterparties to the purchaser under the sale and purchase agreement. As such, the principle of *caveat emptor* applies and even then, the purchaser will need to be independently advised. There is no established relationship of *uberimmae fidei* between these counterparties.

III. The nub of the problem in the recovery of pure economic loss

14 The policy consideration which underpins the reluctance of the courts to find liability for pure economic loss has been echoed in the jurisprudence of the United Kingdom, United States, Singapore and many other commonwealth jurisdictions. It found its classical exposition in the American case *Ultramares Corporation v Touche*¹³ by Cardozo J. This was the concern by the courts of extending liability, in the absence of any physical damage, for acts or omissions which might give rise to indeterminate liability to indeterminate claimants for an indeterminate time, *viz*, the floodgates argument. It was argued that a statement unlike an act, which could be relied on by a great number of individuals, might give rise to a very large amount of liability by a very large number of claimants. The acceptance of this policy consideration can be found in the United Kingdom, and was recognised in *Caparo Industries plc v Dickman*¹⁴. In Singapore, the same consideration was met with approval in *Standard Chartered Bank v Coopers & Lybrand*.¹⁵

15 As a result of this policy consideration, the courts were cautious to extend liability in cases where it felt that the common law merited the recovery of pure economic loss. It was the *locus classicus* *Hedley Byrne & Co Ltd v Hellers & Partners Ltd*¹⁶ that the courts fully enunciated the principle that a negligent mis-statement could give rise to liability. Since then, the law has developed considerably, applying, as it seems, to be an amalgamation of the principles relating to ordinary duty of care (the “Threefold Test”)¹⁷, the development of jurisprudence according to legal reasoning (the “Incremental Test”)¹⁸ and by more modern principles (the “Assumption of Responsibility Test”)¹⁹. It is now generally established that the *Hedley Byrne* principle does not apply merely to the provision of information and advice but to include the performance of other services.²⁰

13 255 NY 170 (1931).

14 [1990] 2 AC 605.

15 [1993] 3 SLR 712.

16 [1964] AC 465 (“*Hedley Byrne*”); see also *Esso Petroleum Ltd v Mardon* [1976] 1 QB 801 on the possibility of a collateral warranty.

17 As stated by Lord Griffiths in *Smith v Eric S Bush* [1990] 1 AC 831.

18 The “incremental approach” as stated by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605.

19 The “Assumption of Responsibility Test” as enunciated in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 by Lord Goff.

20 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180 and *Clerk & Lindsell on Torts* (A Dugdale ed) (Sweet & Maxwell, 18th Ed, 2001) at para 7-87.

IV. The problem in relation to the sale committee and the Professional Advisers

16 Determining whether a duty of care is owed by the sale committee or Professional Advisers to the owners, appears to be a combination of the three tests rather than exclusively one of them.²¹ One needs to understand the circumstances surrounding the work and appointment of the sale committee and Professional Advisers. The following would seem to be important features.

17 First, the sale committee will not usually be paid any remuneration for their work. They carry out their work *ex gratis*.²²

18 Second, the sale committee is not usually protected under any form of insurance for their work, whereas the Professional Advisers will usually be insured.²³

19 Third, the sale committee does not usually profess to be endowed with any special skills or knowledge and are reliant on the Professional Advisers to steer them through the process of meeting the legislative requirements for a collective sale. There are undoubtedly many other matters which may be outside the normal experience and competence of the sale committee not specifically required under the statute but which must be dealt with, such as settling the terms of the sale and purchase agreement with the purchaser, which will require the Professional Advisers' expertise.

20 Fourth, the quantum of liability would normally be very large. In a scenario where the contract of sale and purchase is rescinded by the purchaser on the grounds of negligent misrepresentation, the purchaser could claim damages against the owners under s 2(1) of the Misrepresentation Act,²⁴ the measure of which would be akin to that of the tort of fraud.²⁵ Likewise, the direct loss suffered by the owners, eg, because of a sale below actual market valuation as a result of a

21 See *Clerk & Lindsell on Torts* (A Dugdale ed) (Sweet & Maxwell, 18th Ed, 2001) at para 7-95.

22 Even though work is carried out *gratis*, this *per se* is not sufficient to preclude a finding of liability as was the case in *Hedley Byrne & Co Ltd v Hellers & Partners Ltd* [1964] AC 465. It is more important to determine whether the adviser has held himself out to have special skills to undertake the work. Cf *Koh Keow Neo v Chee Johnny* [2004] 3 SLR 385 relates to the gratuitous agent and where the court held that no duty of care was owed by such agent to the principal.

23 The existence or availability of insurance is usually also relevant in determining whether a disclaimer satisfies the s 11 test of "reasonableness" under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

24 Cap 390, 1994 Rev Ed.

25 See *Ng Buay Hock v Tan Kim Huat* [1997] 2 SLR 788, applying *Royscot Trust Ltd v Rogerson* [1991] 3 All ER 294.

negligent statement by the sale committee or the Professional Advisers could be considerable.

21 Fifth, a collective sale agreement would usually set out the rights of the sale committee, including the unfettered power to settle the sale and purchase agreement and the tender document. This is a balancing exercise of convenience, for the sale committee must have, on the one hand, sufficient power to deal with the necessary work such as to settle the sale and purchase agreement and, on the other hand, the owners must feel that their interests are not wantonly usurped. As an equilibrium position, most collective sale agreements allow the owners to intervene, by requisitioning a meeting of the owners. It is noteworthy that the amending legislation²⁶ provides that Extraordinary General Meetings must be called to settle specific points in the process running up to completion of the collective sale.

22 These are ostensibly protective measures that are built in to ensure that the requirements of s 84A(9)(a) of the LTSA can be satisfied at the hearing before the Strata Titles Board. Subject to such intervention, the sale committee is largely left to carry out its work. It is noteworthy that many collective sale agreements will contain disclaimers of liability for negligence by the sale committee which, in the absence of express language excluding liability for negligence, may be subject to the principle in *Canada Steamship Lines v R*²⁷ if the words are broad enough to exclude other forms of liability.

V. The imposition of a duty of care

23 The critical point which needs to be dealt with is the question of when a duty of care will be imposed in a situation where only pure economic loss has been incurred. An understanding of the three tests is important, but even then, it is submitted that the courts will take a practical view of the factual matrix and apply a combined approach.²⁸ One test may be more appropriate than the other depending on the factual matrix. Each test is considered in turn below before the combined approach is considered.

VI. The Threefold Test

24 In applying the Threefold Test, the Court will ask whether the imposition of a duty of care would satisfy the test of “foreseeability,

²⁶ See Sched 3 para 7(1) of the LTSA and Sched 2 para 2 of the LTSA.

²⁷ [1952] AC 192.

²⁸ See the comments made in *Clerk & Lindsell on Torts* (A Dugdale ed) (Sweet & Maxwell, 18th Ed, 2001) at para 7-95.

proximity and fairness”.²⁹ The court in considering “foreseeability” will ask whether the type of harm could reasonably be foreseen by the defendant. “Proximity” is a question of whether the plaintiff and the defendant are in a type of relationship whereby liability could be justified. “Fairness” is a test of whether, looking at the overall circumstances of the case, justice would be done by imposing liability or not.

VII. The Incremental Test

25 The Incremental Test approach³⁰ belies legal reasoning. The court will consider decided cases with a particular emphasis on the factual matrix and the *ratio decidendi* to determine whether the reasoning in those cases can be applied to the novel factual matrix before it. The test can be summarised as determining liability in accordance with analogously decided cases.

VIII. The Assumption of Responsibility Test

26 The Assumption of Responsibility Test³¹ requires the court to determine whether the defendant had assumed responsibility for the accuracy of the statement and that the plaintiff had reasonably relied on the defendant’s assumption of responsibility to provide accurate information.

IX. The combined approach

27 In spite of the considerable care with which the courts have applied and formulated the above approaches, each test has been subject to criticism. For example, the Threefold Test was said to rest on a “fiction” by Lord Steyn in *Williams v Natural Life Health Foods Ltd.*³² The Assumption of Responsibility Test could be subsumed within the question of proximity in the Threefold Test.

29 As stated by Lord Griffiths in *Smith v Eric S Bush* [1990] 1 AC 831.

30 As stated by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605.

31 The Assumption of Responsibility Test was enunciated in *Hedley Byrne & Co Ltd v Hellers & Partners Ltd* [1964] AC 465 itself (*per* Lord Devlin), but has found greater support in the leading cases *White v Jones* [1995] 1 AC 207 (*per* Lord Goff); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (*per* Lord Goff) and *Spring v Guardian Assurance plc* [1995] 2 AC 296 (*per* Lord Browne-Wilkinson).

32 [1998] 1 WLR 830.

28 This article adopts the approach suggested by *Clerk & Lindsell*,³³ viz, that a combination of the three tests should be applied according to the special facts of the case. Two considerations will weigh in the balance. First, whether the lack of privity of contract between the plaintiff and the defendant, of which the claim in negligence would circumvent, is one in which the common law will allow liability to ensue. Second, whether the case involves the rendering of a public service by the adviser.³⁴ In the former, the assumption of responsibility approach may take precedence over the other tests, whilst in the latter, the Incremental Test approach and the Threefold Test approach may come to the fore. It seems that “[w]hatever approach is being applied, there are certain common issues that the court is likely to consider.”³⁵ Six matters of likely importance as to whether or not a duty exists were identified in *James McNaughton Paper Group Ltd v Hicks Anderson & Co.*³⁶

- (a) the purpose of which the statement was made;
- (b) the purpose for which the statement was communicated;
- (c) the relationship between the adviser, the advisee and any relevant third party;
- (d) the size of any class to which the advisee belongs;
- (e) the state of knowledge of the adviser; and
- (f) reliance by the advisee.

29 These six factors were set out in the 18th edition of *Clerk & Lindsell*; whilst the later, 19th edition, only sets out three factors: (a) the purpose of the statement or service; (b) the knowledge of the defendant; and (c) reasonable reliance and dependence. The six factors are considered here for a more comprehensive analysis. The 19th edition has continued to cite these six factors, but in a footnote.³⁷

33 *Clerk & Lindsell on Torts* (A Dugdale ed) (Sweet & Maxwell, 18th Ed, 2001) at para 7-95; and see *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2007) at para 8-90.

34 Such as the case in *White v Jones* [1990] 1 AC 831, where the plaintiff was a beneficiary under a will. The defendant solicitor was so negligent that the plaintiff lost his benefit. The court considered this to be a case of “assumption of responsibility”. The editors of *Clerk & Lindsell on Torts*, (Sweet & Maxwell, 18th Ed, 2001) have commented that it was a special case where policy matters regarding a solicitors’ duty to the public were considered.

35 *Clerk & Lindsell on Torts* (A Dugdale ed) (Sweet & Maxwell, 18th Ed, 2001) at para 7-96.

36 [1991] 2 QB 113 at 125.

37 *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2007) at para 8-91.

X. Application of the matters to the sale committee and the Professional Advisers

A. *The purpose for which the statement was made*

30 Statements of fact or even opinion may be made by the defendant for purposes other than for the purpose used by the owner. To take two poles, a statement which is specifically intended for use by the owner may be one which is likely to draw an inference of a duty of care; on the other hand, a statement which is made by the defendant for a purpose, say X, but is used for an ulterior purpose by the claimant, say Y, is not likely to draw an inference of a duty of care.

31 One interesting question which arises is whether a valuation produced by a marketing agent for the sale committee, which the sale committee relies on to determine the reserve price, is also a statement which can be relied upon by the owners to decide whether to endorse the collective sale agreement.³⁸ Should the owner engage his own property agent to value the property before deciding whether to endorse the collective sale agreement? One argument is that the valuation is for the sole use of the sale committee and therefore no duty of care is owed to the owners. The counter argument is that the valuation could reasonably be foreseen to have been relied upon by the owner even if for a different but related purpose, in which case, a duty of care might arise.

B. *The purpose for which the statement was communicated*

32 Again statements of fact or even opinion may be used for different purposes from which they were communicated. Where the purpose for communicating the statement corresponds with the purpose for which the owner has relied upon it, the inference of a duty of care is very strong. The strength of the inference regresses as the purpose inclines away from which it is relied upon.

33 One example is to take the purpose of the valuation report of the development produced by the marketing agent, which is also affirmed by the sale committee, irrespective of whether the sale committee has taken reasonable care in ensuring that the marketing agent has prepared the report diligently.

38 To the writer's best knowledge and belief, the same marketing agent undertakes both the valuation and the marketing of the development. Unless there is a Chinese Wall, it may be prudent to segregate the two functions between two firms to avoid any potential conflict of interest.

34 Here, it may be argued by the owner, that the purpose of the valuation report is to inform him as when making a comparison between the reserve or valuation price and the price offered by the purchaser to decide whether the latter is fair and acceptable. It would follow that should the valuation in the report be, in the obvious case, substantially below the actual market value at the time, then the owner's decision to sell on or about the price in reliance on the valuation report could give rise to liability.

35 On the other hand, where the financial loss arises from the decision to sell based on a statement in the valuation report as to the future value of the development, it is likely that there are issues of whether the valuation was inaccurate or false at all. Furthermore, a prudent marketing agent would limit any liability for its opinion as to the future value of a development. A statement as to the future value of the development is less likely to give rise to liability because it is not clear how a forecast may affect the owner's decision³⁹ as to whether or not to sell. Whilst this may be a causation argument, it could also be taken into account at the stage of determining whether a duty of care exists.

36 Another example, where the inference may be weaker, is where the solicitors fail to insert in the sale and purchase agreement a clause which would protect the owners' rights, such as an allowance for postponing vacant possession to a date after completion of the sale and purchase agreement.⁴⁰ Likewise, there may be a need to insert a clause limiting liability in the event of default of giving vacant possession. It is not entirely clear whether such a clause would benefit all the owners, and may indeed be divisive as between some of them, since some may have been able to give vacant possession on or before completion and sought a higher price as a result. In such an instance, the purpose of the clause may not be identical to what an owner may have required at the time of entering into the sale and purchase agreement, even if another owner may have intended to have it for that purpose. In real practice, there is a possibility that the owner may not even have considered the need for the

39 The different principles governing the measure of damages if the information was incorrect as contrasted to negligent advice was enunciated by Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] 1 AC 191. See also *BCCI v Price Waterhouse (No 3)* The Times (2 April 1998) for an example where economic loss was not recoverable when the defendants' advice was not sought. Cf *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2000] Lloyd's Rep PN 1 where the full loss was recoverable because of negligent advice.

40 This is similar to the case in *Allied Maples Group plc v Simmons and Simmons* [1995] 1 WLR 1605. Whether the Professional Adviser would have been able to negotiate the protective clause *vis-à-vis* the purchaser is one which needs to be proven on the balance of probabilities, and if it is proven that there was a substantial chance rather than speculative likelihood of so doing, the claim will succeed. Damages should thereafter be assessed as a matter of loss of chance as in *Chaplin v Hicks* [1911–13] All ER 224.

clause but then the counter argument is that the solicitor ought to have advised the owner of it.

C. *The relationship between the adviser, the advisee and any relevant third party*

37 It is quite important to understand the relationship between the parties. Under this heading, the question begs, who is being advised and who is advising? If an action is brought by the owner against the sale committee then the corollary is the owner is the advisee and the adviser is the sale committee, whereas, if an action is brought by the owner against the Professional Adviser, then the owner is the advisee and the Professional Adviser is the adviser. The question, which can be the claimant's Achilles' heel, is who should be sued? That is in turn dependent, as set out above, on what the purpose of the statement was and whether that statement was directed towards the claimant. Are statements which are made by the Professional Advisers, who are advisers only to the sale committee, communicable to the owners?

38 As stated above, there is a paucity of case law in respect of the relationship between the sale committee, the Professional Advisers and the owners. Whilst there may be tempting areas of law which could be considered and juxtaposed on this factual matrix, it is submitted that the better approach is to carry out an analysis entirely afresh. It may be worth noting that s 84A(9)(a) gives the Strata Titles Board power to intervene in the proposed sale of the development to the purchaser on the question of whether the sale is in "good faith". It may be argued that this will require some disputes between the *dramatis personae inter se* in connection with or arising from the factors set out in s 84A(9)(a)(i), (ii) and (iii) of the LTSA⁴¹ will impinge on the "good faith" of the proposed sale. If this is correct, it might exclude the application of any common law or equitable principles in that the only requirement is to ensure that the proposed sale is in "good faith". On the other hand, it may be that the Strata Title Board, is not the correct forum to determine the positions of the *dramatis personae inter se*, and it was not intended by the LTSA to restrict common law or equitable principles. These, according to this argument, would run parallel to the statute⁴². *Quaere* whether the Strata Title Board's order for the sale has the effect of exonerating the sale committee and the Professional Advisers from liability in negligence,⁴³ whether towards the purchaser or the owners, since it is the Strata Title Board which has the

41 Those factors are: (a) the sale price of the lots and 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.

42 This argument is fortified by s 112 of the LTSA which preserves the rights and remedies which a subsidiary proprietor would have "but for" the Act.

43 See s 112 of the LTSA.

final power to grant an order for the sale.⁴⁴ The statute is silent on this point.⁴⁵

39 Parallels with agency, where it might be argued that the sale committee is an agent of the owners,⁴⁶ whilst attractive, may not hold much water. The relationship of agent and principal can be derived from the terms of the collective sale agreement⁴⁷ or by estoppel. Two consequences flow from this finding of agency. First, the agent (the sale committee, collectively) is liable in respect of any wrong committed by himself to a third party, including a breach of contract, unless the principal (the owners) have ratified or given the agent the authority to do that act.⁴⁸ Second, the agent is not liable for any wrongdoing on the part of a subagent or co-agent (in this case, being the Professional Advisers) to a third party unless the agent is privy or party to that wrongdoing.⁴⁹ These rules would apply to determine liability as between the owners, as principal, and a purchaser, as a third party.

40 It is pertinent to note here that under s 84(1A)(a) of the LTSA, the sale committee shall act for and on behalf of the owners, and under the new law, this point is settled, although not necessarily according to the common law principles set out in this paragraph. To this, the reader is referred to Part B below.

41 Between the agent and the principal, a duty of care in tort and implied in contract was found in *John D Wood (Agriculture and Residential) v Knatchbull*.⁵⁰ The defendant was the owner of real estate. It engaged the claimant estate agent to market and sell the property. The estate agent sold the property for £1.5m. In fact the estate agent was aware that a nearby property was asking for £1.95m at an earlier date and was sold for £1.8m on the same day as the defendant's property. On a counterclaim by the defendant, the court held that the estate agent owed a concurrent duty of care in tort and contract to advise the defendant of any event that might affect the principal's instructions.

44 Except on a point of law, in which case an appeal lies to the High Court. See s 108(1) of the LTSA.

45 As to whether the Strata Title Board may owe a duty to the owners, depends on the distinction between whether the statutory body performs a judicial or administrative function, which in turn depends in part on whether such a body acts in resolving a dispute or not. Whether there is a right of appeal against the decision of the body under the Act is also pertinent: *Jones v Department of Employment* [1989] 1 QB 1 and *Beatty v Rent Tribunal* [2005] IESC 66. Both cases decided against liability. Where the body performs an administrative function, a duty of care may arise.

46 One recognises that in most collective sale agreements, the terms specify that the owners agree to "ratify" the acts of the sale committee.

47 For example, where the owners have "ratified" the acts of the sale committee.

48 See *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 9-112.

49 *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 9-129.

50 [2002] EWHC 2822 (QB).

42 Corporate law, where the board of directors, are under, *inter alia*, fiduciary duties to the shareholders and, where the board of directors' rights and obligations are entrenched under statute and contract is another interesting analogy. Could there be a parallel with the Board which negligently advises its shareholders as to whether to accept a takeover bid⁵¹ and the factual matrix where the sale committee, under the advice of the Professional Advisers, negligently advises the owners to accept, or themselves unilaterally accepts,⁵² the tender offer? The directors' duty of care and fiduciary duties, aside from case law, is entrenched in s 157 of the CA, *viz*, to act "reasonably and honestly". Whether an analogy can be drawn is, it is submitted, a difficult point since company law has had a life of its own since the 19th century and now much of it is governed by the detailed provisions of the CA.

43 Perhaps, another question is whether there is a fiduciary duty owed by the Professional Advisers or the sale committee to the owners. That question is not considered in this article.

44 Before proceeding, it is worth mentioning that one key feature distinguishes the sale committee from the Professional Advisers. The latter are professionals in the specific field of collective sales, whereas the former, albeit its members may be professionals in their own respective occupations, are not likely to be professionals in the field of collective sales. Indeed the Professional Adviser stands to gain substantial fees for his services, whilst the sale committee does not. This feature may be the fulcrum upon which liability tilts. On the other hand, the sale committee is at least the *de facto* if not *de jure* client,⁵³ and to some extent, it may be argued that it should bear some responsibility to the owners who have delegated the exercise of their rights to the sale committee. It seems to be relevant to determine whether the mis-statement to owners was made by the Professional Adviser or the sale committee and, in the case of the former, whether it was reasonable that the sale committee had control over the making of the statement by the Professional Adviser.

45 It is submitted that whilst the courts may take into account a variety of factors in determining whether a duty of care exists, so far as the relationship of the parties are concerned, one cannot strain the legal

51 There is a shadowy reflection of this question in *Pilmer v Duke Group Ltd* [2001] BCLC 773 where the purchaser company sued a firm of accountants for a negligent report which overvalued the target company and its directors for negligently recommending the offer based on the value made in the report. The court (Kirby J dissenting) held that the accountants did not owe any fiduciary duty to the purchaser company and was therefore not liable.

52 This depends on whether the collective sale agreement gives the sale committee that power or not.

53 The point being that the owners contribute proportionately to the total sum of the professional fees and therefore are arguably the *de jure* client.

intentions provided for in the collective sale agreement. There is probably privity of contract between the owners and the Professional Advisers as their terms and conditions are usually attached and referred to in the collective sale agreement. This aside, the problem between the owner, *vis-à-vis* the Professional Advisers, is that under the specific terms of the collective sale agreement, it may be construed that the Professional Adviser's obligation to provide advice is to the sale committee rather than the owners.⁵⁴ On the other hand, in the absence of clear terms to the contrary, however, it would be open to a court to find that the Professional Advisers are advising the owners also.

46 In the event that the advice is given only to the sale committee and not the owners, an owner cannot have a claim under a contract to which they were not entitled to any benefit.⁵⁵ If this is accepted, then it may cut both ways. On the one hand, it may be argued that the owner and the Professional Advisers were in a relationship "akin to a contract" so that liability should ensue. On the other hand, it might be argued that since the parties were already in privity of contract, there is no reason to superimpose liability in negligence since the parties had reduced their legal obligations into a written agreement.⁵⁶

D. The size of any class to which the advisee belongs

47 The larger the class of persons to which the advisee belongs the weaker is the inference of a duty of care. McHugh J, pointed out in *Perre v Apand Pty Ltd*,⁵⁷ that it is the indeterminacy of the claimants rather than the number of claimants which is the main concern.

48 It was held in *Aiken v Stewart Wrighton Member's Agency Ltd*⁵⁸ that Lloyds managing agents owed a duty of care when placing run off reinsurance policies to names who joined the particular syndicates after the policy had been effected although the identity of those individuals would not have been known at the time the policy was effected. Part of the purpose of the policies was to benefit incoming members. It has been said that "[w]here the defendant's lack of knowledge that the purpose of his work was to benefit the claimant as a member of a limited class of persons, no duty will arise."⁵⁹

54 A cause of action in contract however is fortified by any rights conferred to the owners under the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).

55 That is when it is also not possible to imply any benefit of the advice to the owners as provided for under the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).

56 But see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 which establishes that liability may arise concurrently in contract and tort.

57 (1999) ALR 606 at 633.

58 [1995] 1 WLR 1281.

59 *Clerk & Lindsell on Torts* (Sweet & Maxwell, 18th Ed, 2001) at para 7-112.

49 So far as the *dramatis personae* in a collective sale process are concerned, it is submitted that the issues are sufficiently clear to draw a conclusion. It is an indubitable point of fact that the Professional Advisers will be aware that their advice will be relied on by the owners. Furthermore, the owners will form part of a restricted and identifiable class of persons from the outset. Even if there are many owners, this seems irrelevant. The same consideration and conclusions would apply as between a claim by the owners against the sale committee.

E. *The state of knowledge of the adviser*

50 The adviser must know or ought to have known that the statement would be relied upon by the claimant. Merely foreseeing or intending that the advisee should rely on the statement will not suffice. Furthermore, it seems that the advisee would need to prove that the adviser knew that the advisee would rely on that advice without seeking other independent advice.⁶⁰

51 When the relationship of the owners, sale committee and the Professional Advisers are considered, in contract and in practice, it is submitted that there is very little to be said that the Professional Advisers and the sale committee must have known that the owners would be relying on their advice.

F. *Reliance by the advisee*

52 A number of relevant factors were identified by Clerk and Lindsell⁶¹ in relation to the factor of whether the advisee had relied on the statement. First, there should be reasonable reliance as opposed to merely actual reliance. In other words, could it be said that the claimant was unreasonable in relying on the advice. Second, the availability of independent advice to the advisee may be an indicator excluding liability and it could be said that a claimant ought to or did avail himself of independent advice. Third, the failure to seize an opportunity to secure contractual safeguards, such as a warranty that a valuation report was fair and accurate could weigh against the claimant. Fourth, where the adviser holds himself out to have special skills, he is more likely to be liable. This consideration would be more apt in the case of the Professional Advisers and is more likely to exonerate the sale committee. Fifth, where the statement is made in a professional context, there is a greater likelihood of liability.

60 *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 at 125 per Neill LJ.

61 *Clerk & Lindsell on Torts* (Sweet & Maxwell, 18th Ed, 2001) at paras 7-111–7-116.

53 The above factors are questions of mixed fact and law. Nevertheless, it is submitted that those factors, when applied to the factual matrix in the sale committee, Professional Adviser and owners context, will more probably indicate liability.

XI. Part B

54 Section 84(1A)(a) of the LTSA states that “there shall be constituted a collective sale committee to act jointly on behalf of the subsidiary proprietors”. The intuitive reaction is that the section creates some form of “statutory agent”, and indeed, there are parallels in the appointment of a liquidator under the Limited Liability Partnerships Act⁶² (s 20) and CA (s 272) to carry out specific functions.

55 The question remains, is the “statutory agent” liable to the owners for statements made without reasonable care? Assume that the statute takes precedence over the common law position in contract and tort, of which has already been considered in Part A,⁶³ what is the stand alone position under the statute?

56 One can quote extensively from GHL Fridman in *The Law of Agency*:⁶⁴

It can be argued that, under certain statutes, other categories of agents by operation of law have been created. For example, under the Sale of Goods Act 1979, an unpaid seller may have the right to re-sell goods, even if title to such goods has already passed to the buyer who has not paid the seller. It is questionable, however, whether the effect of these various provisions is to create a relationship resembling that of principal and agent as understood at common law.

57 So far as Singapore case law is concerned, there does not appear to be any cases which have ruled on the issue of liability of such a “statutory agent” to its “principal”.

XII. Conclusion

58 It is submitted that whether one applies the Threefold Test or the Assumption of Responsibility Test, a duty of care should be imposed upon the Professional Advisers to the owners. The Incremental Test may be useful in at least it will allow the courts to draw from decided cases. But the limits are delineated since the factual matrix here is quite unique.

62 Cap 163A, 2006 Rev Ed.

63 See para 39 of the main text above.

64 (7th Ed, 1996) at p 150.

59 With regard to the sale committee, by reason of the factors set out above⁶⁵ it is submitted that it would not ordinarily owe a duty of care to the owners. The caveat is in relation to decisions which are solely in the hands of the sale committee, for example, if it is provided that the sale committee shall decide which of a number of competitive tenders to accept, or whether to sell by private treaty. Financial loss arising from those decisions which are a result of a lack of care may give rise to liability against the sale committee. Under the new law, it seems to be an open book as to what the position may be.

60 Finally, it should always be borne in mind that the question of duty of care is not determined in *vacuo*, but in relation to a specific act or omission. No specific act or omission was considered in full by this article. Accordingly, it remains for our courts to determine the question should and when it is tested.

65 See paras 17–21 of the main text above.