A Disincentive to Service — Committee Members' Personal Liability under the Unit Titles Act

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This article explores the issue of committee members' personal liability to third parties, the body corporate, and individual owners under both the Unit Titles Act 2010, and at general law. The extent of this potential liability is significant and acts as a disincentive to service on body corporate committees. The law in this area is out of kilter with comparable areas of legal liability in both New Zealand and overseas strata title jurisdictions. This is a concern as bodies corporate cannot function without owner participation. Appropriate amendments to the Act are proposed and practical suggestions are made as to how the risk of liability being incurred by committee members can be minimised.

I Introduction

This article explores the extent of body corporate committee members' personal liability to third parties, the body corporate, and other owners under the Unit Titles Act 2010 (2010 Act) and under general law.

Exposure to liablity is shown to be significant, causing disquiet in three respects. Committee members are invariably volunteers with little "hands

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on" experience in terms of performing a role which is a cross between property management and corporate governance. Being volunteers, they often give their time under a sense of social obligation. Experience indicates they usually have minimal comprehension of the workings and requirements of the 2010 Act, which can be difficult to understand and apply.

Secondly, in terms of quantum, committee members may be liable for potentially substantial amounts, possibly extending to millions of dollars for even fairly modest developments located in the suburbs. In this regard, to date, an extensive amount of leaky building litigation involves bodies corporate, from high-rise developments of some hundreds of units down to relatively modest, multi-unit developments.[1] Conceivably, remediation costs may amount to rebuild costs,[2] comparable to or exceeding the purchase price paid of any unit at issue. Personal liability, once incurred, could expose individual committee members to the risk of being sued even after they have exited the development and purchased elsewhere.[3]

Finally, this article shows that in key respects, liability on these issues is out of kilter with comparable areas of both domestic New Zealand law and law in similar strata title jurisdictions overseas.

Together, these factors provide a significant disincentive to service. This gives rise to a need for a better understanding of how to counter the risks, and for amendment of the 2010 Act. In the following discussion, the reasons for committee members' lack of comprehension on these issues are considered. Core statutory provisions contained in the 2010 Act are then examined, to enable us to better understand the difficulties that committees face in both comprehending and applying statutory powers. The threefold issue of committee members' personal liability is then discussed. First, personal liability to third parties, then to the body corporate, and finally to other owners within the development. Of these, it is argued the present position which accepts that committee members may be sued by owners in the development is incorrect and requires further reconsideration. The issue of whether committee members must act in the best interests of the body corporate is discussed and, somewhat surprisingly, is shown to be uncertain. Following this, the issue of committee members' liability in equity is shown to be an unsettled area of law. Finally, other comparable areas of

1 Steve Alexander "The process of building remediation" in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011).

2 Rod Thomas "Repairing leaky unit titles, *Tisch*, and appointment of administrators" in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at [10.2].

3 The obvious limitations to this would include defences available under the Limitation Act 2010.

New Zealand law, recent suggestions by the New Zealand Law Commission for incorporated societies, and overseas jurisprudence are identified to indicate legislative measures which could be adopted to overcome identified problem areas. The article concludes by suggesting practical steps that could be undertaken to minimise personal risk to committee members.

II Liability Issues

Experience to date indicates that few owners readily comprehend the extent of a committee member's exposure to liability. Annocdotal evidence suggests owners may struggle to understand the extent to which strata title ownership under the 2010 Act is not comparable to more conventional forms of property ownership.[4] This lack of comprehension often leads to bad practices and shortcuts being undertaken in terms of statutory compliance. These are often justified to committee members as avoidance of unnecessary fuss or undue formality between parties who are neighbours. The body corporate committee members (if there is a committee) may not readily comprehend that they act in a representative capacity, and are required to place the interests of the development as a whole above their own personal agendas.

Body corporate developments may range from a development of some hundreds of units in a central business district down to a two-unit development in the suburbs. A development may be mixed use, residential, commercial, or industrial in its character. Indeed, the nature of the use may alter over the life of the development from, for example, residential to even industrial.[5] Depending on size, use, and intensity of development, annual expenditure can extend from some millions of dollars per annum down to a few thousand dollars. The nature of committee responsibilities is consequentially a cross between corporate and property management. Where developments are not well funded, even commercially minded committee members often seek to create "savings" by not obtaining appropriate legal advice as a prerequisite to committing to what may, with the benefit of hindsight, amount to significant commercial risk. This attitude is no doubt exacerbated by the fact that the cost of obtaining any such advice will impact on the quantum of levies raised, which are funded by all the owners, including committee members.

4 Rod Thomas "Damage to common property in a unit title – who suffers the loss?" in *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at [11.2] summarises the differences between strata title rights and obligations and land ownership at common law.

5 Unit Titles Act 2010 [2010 Act], s 105; *Brookers Unit Title Handbook with an analysis by Rod Thomas* (Thomson Reuters, Wellington, 2011) [*Brookers Handbook*] at 27–29.

As indicated, the possibility of significant commercial risk is exacerbated by the present "leaky building" fiasco, where significant remediation costs extending to millions of dollars may be required for even relatively modest developments.

At its heart, the Act provides enabling machinery to facilitate a form of land title ownership unknown at common law.[6] Owners have only limited rights in terms of occupation, use, refurbishment, maintenance, repairs, and the like. Body coporate decisions must be made with the due formality required by the legislation, and in furtherance of the statutory purposes set out in the legislation.[7] Thus valid decisions often require committee votes or whole member participation by votes undertaken under a validly constituted annual general meeting (AGM) or an extraordinary general meeting (EGM). In the context of this schema, the body corporate committee acts as an agent of the body corporate, and has no separate legal identity or powers, unlike company directors.[8] Given this dependent existence, committee members may be personally liable only when they step beyond the bounds of their given powers. Indeed, the consequences of bad committee decisions are often not understood until years later, at which time the then owners seek to recoup losses caused by earlier decisions. Thus, years later, prior committee members may face claims, despite having exited the development.[9]

A *Committee composition and status*

The body corporate exercises its powers by owners' resolutions passed at an AGM or EGM unless the powers are validly delegated to the body corporate committee.[10] If the body corporate consists of 10 or more principal units, a committee is required, unless the body corporate, by special resolution, decides not to form a committee.[11] The committee has no separate legal

6 See *Brookers Handbook*, above n 5, at [Intro2.1]–[Intro3].

7 2010 Act, s 3.

8 See below, at part II A.

9 Subject, of course, to provisions contained in the Limitation Act 2010, limiting the right to commence causes of action.

10 See *Guardian Retail Holdings Ltd v Buddle Findlay* [2013] NZHC 1582, [2013] NZAR 988 at [24]; Unit Titles Regulations 2011 [2011 Regulations], regs 22 and 28. Liza Fry-Irvine and Tim Jones "Body Corporate Governance — Knowledge is Power" (paper presented to the New Zealand Law Society Unit Titles Intensive Conference, April 2013) 3 at 7–8 discuss the further complications that may arise concerning a delegation from the body corporate to its chairperson.

11 2010 Act, s 112(2).

identity[12] as all its powers are delegated from the body corporate.[13] Thus it acts as an agent, subject to the dictates of its principal. In terms of legal consequences, valid decisions of the committee are decisions of the body corporate.[14] This was recently affirmed in *Guardian Retail* in which the High Court explained that the body corporate was vicariously liable for the conduct of the committee.[15] Legitimate committee decisions are consequentially underwritten by the corpus of all the members and, as with incorporated societies, damages are obtained against the body corporate and not the committee members per se.[16]

Given the committee has no separate legal status, owners in either an AGM or EGM can override decisions of the committee, taken in earlier meetings, and also validate procedural irregularities, so long as those

12 This is comparable with the Australian position. In *Owners of Johnson Court – Strata Plan no 5493 v Dumancic* (1990) NSW Titles Cases 80–001, the Western Australian Industrial Appeal Court confirmed that the executive committee of the defendant body corporate had no separate legal status. See further Alex Ilkin *NSW Strata and Community Schemes Management and the Law* (4th ed, Lawbook Co, 2007) at [424] n 3.

13 Many of the powers and duties of the body corporate are set out in s 84 of the 2010 Act, with those of the committee (if there is one) at ss 112 –114 where the powers are delegated.

14 In *Manning v Body Corporate 126411* HC Auckland CP89sd01, 29 November 2001 [*Manning* (HC)] at [68] and [71], the Court opined the body corporate committee may be sued by members where their actions are challenged, to avoid the member having the inconvenience of suing the body corporate. For the reasons given, this conclusion is not supported. The members will only be the proper defendant when they have acted outside their given authority, thus being personally liable for their actions.

15 *Guardian Retail,* above n 10, at [24]. This issue readily expands to a discussion of the limits of ostensible or apparent authority, which is beyond the scope of this article. See generally Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) at ch 3. The principal represents that another has authority, even though no such authority exists. See at [3-004].

16 *Henderson v Kane and the Pioneer Club* [1924] NZLR 1073 (SC); *Kerehi v The Hiona Club Inc* [1998] DCR 1083. See also Mark von Dadelszen *Law of Societies in New Zealand: Incorporated, Unincorporated and Charitable* (3rd ed, LexisNexis, Wellington, 2013) at [6.55]. Contrast *Manning* (HC), above n 14, at [69], where the Court suggests committee members will be personally liable to owners in the development for their decisions. *Guardian Retail*, above n 10, at [24] accepts that the body corporate will be vicariously liable for the conduct of its committee. However, the Court then endorses the reasoning in *Manning* that committee members may be sued directly by owners "for losses caused by breaches of duties" (at [25]–[26]). It is not clear whether the Court in *Guardian Retail* appreciated that the point being made in *Manning* was that owners should be permitted to sue committee members personally instead of the body corporate to overcome the inconvenience of the body corporate (to which they belong) facing a liabilities claim. See *Manning* at [69]–[70] and [72].

irregularities are a matter of mere form and do not exceed a body coporate's powers, as granted by the legislation.[17]

A committee's position can be contrasted with that of directors under corporations law. Company directors are entitled to exercise powers given to them by either the company constitution or applicable statute, and conventionally, are employees of companies.[18] Further, directors can bind the company, notwithstanding a shareholder vote that the company should not commit itself to the obligation.[19]

The issue of whether the 2010 Act clearly sets powers that may be exercised by a committee is considered next.

III Statutory Regime

A *Core provisions*

Sections 77 and 78 of the 2010 Act are illustrative of some of the difficulties a committee may have in understanding the restricted nature of what, at first blush, may appear to be open-ended powers granted to a body corporate. The drafting is clumsy, and requires careful analysis. Section 77 states:

> **Core things body corporate may do**
> (1) A body corporate may do anything authorised by this Act or any other Act.
> (2) A body corporate may do anything a natural person of full age and capacity may do except as provided for in this Act or any other Act.

If subs (1) is to be given its apparent reading, a body corporate *may* do anything the 2010 Act (or another Act) authorises it to do. Read literally, this is so self-evident as to render the provision otiose. Such a meaning also renders subs (2) largely superfluous, as it cannot be necessary for the statute to then record that "[a] body corporate *may* do anything a natural person of

17 Ratification of earlier committee decisions which have since been found to be defective through lack of correct procedure being followed may be an example of a "procedural irregularity" that subsequently could be validated by the body corporate acting together as a corpus. Decisions from earlier meetings remain valid for acts taken up to the time the decision is overridden by member vote. See the discussion by Ilkin, above n 12, at [423].

18 See generally the discussion in AS Sievers "The Liability of Directors and Committee Members of Non-Profit Associations in the [1990s]" (1995) Queensland University of Technology ePrints <www.eprints.qut.edu.au>.

19 See generally Peter Watts *Directors' Powers and Duties* (LexisNexis, Wellington, 2009) at ch 5, particularly at [5.3.2].

full age and capacity may do except as provided for in this Act or any other Act" (emphasis added). Why is subs (1) necessary if it is already established that a body corporate may do anything a natural person can do, except where the 2010 Act, or another relevant Act, prohibits the activity?

However, arguably s 77(1) can be read in a more restricted manner. The expression "may" could be read as meaning a body corporate *can only do* acts (which it "may" or may not elect to do) in so far as they are "authorised by this Act or any other Act". This secondary meaning is supported by s 78, which provides:

> **Act must be for purpose of performing duties or exercising powers**
> A body corporate may do an act under section 77 only for the purpose of performing its duties or exercising its powers.

What then, are these "duties" or "powers"? Patently, they must be those given by the 2010 Act "or any other Act". Indeed, any other *relevant* Act. Thus the expression "anything" authorised under s 77(1) is limited to performance of the "powers" and undertaking of "duties" prescribed by relevant legislative provisions.

If this is taken to be the meaning of s 77(1), then s 77(2) also requires reconsideration. The statement that "[a] body corporate may do anything a natural person of full age and capacity may do except as provided for in this Act or any other Act" may be no more than a rather clumsy way of expressing the important issue of legal formalities. In other words, properly understood, an action (which a body corporate is empowered to undertake by s 77(1)) will be binding on it in the same way such actions are binding on a "natural person", unless provisions can be found in the 2010 Act "or any other [relevant] Act" which require more formal procedures to be adopted.[20] Whilst such a secondary analysis is not beyond debate, it does have the advantage of giving s 77(1) and (2) purpose.

The key point of this discussion is that a committee which has recourse to the legislation in order to obtain guidance on the important issue of its legal powers will face confusion and uncertainty on reading such provisions. This increases the risk of the body coporate entering into obligations beyond its powers.

An illustration of the importance of this issue follows. This article argues a body corporate should be entitled to take out indemnification insurance

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20 Reg 17 of the 2011 Regulations limits the way in which a body corporate may contract. It applies internal (reg 17(1)) and external controls (reg 17(4)–(5)). Third parties may have constructive notice of the statutory requirements required for a body corporate to enter into contracts. See the further discussion concerning the application of the ultra vires doctrine, below at part III D.

for the benefit of past and present committee members. Also that a body corporate should have the ability to pay committee members some form of remuneration for services rendered.[21] If we use these two issues as an example of the operation of s 77, we need to first establish whether there is a statutory authority for either of these actions to occur.

Section 135(2) of the 2010 Act authorises the body corporate to carry "additional insurance if it considers it practical to do so". However, s 135 deals with insurances related to physical structures or improvements. Consequently, a court may read this provision restrictively, holding that by "additional insurance" the legislature intended additional cover to be limited to physical structures and not other insurances, such as policies protecting committee members from personal liability.[22] Returning to s 77(1), this also requires us to consider whether "other Act[s]" would enable the body corporate to hold such insurances. In this regard, no other statutory provisions come to mind. The issue as to whether such additional cover may be carried is therefore debatable, which is not a desirable outcome.

As for payment of reasonable remuneration to committee members, there is nothing on point to be found in the 2010 Act, and no other legislation dealing with this issue comes to mind.

B *How extensive is the s 78 constraint on performing duties or exercising powers?*

It could be argued that the language of s 78 also recognises that a body coporate can be required to show it acted for a "proper purpose" when exercising its statutory powers. Such an approach mirrors the judicial approach taken with somewhat similar wording in s 133 of the Companies Act 1993, which provides that:

> A director must exercise a power for a proper purpose.

"[P]roper purpose" in terms of s 133 of the Companies Act is directed at ensuring that a bona fides intent exists for use of directors' powers. Consequently, it could also be argued that a committee is not acting for the

21 The body corporate may be a shopping mall, airport or mixed-use development of some complexity run on a strictly commercial basis in order to ensure its success.

22 Section 15(1)(c) of the Unit Titles Act 1972 [1972 Act] gave more general authority to the body corporate to undertake insurance cover. It enabled the body corporate to "effect such other insurance as it is required by law to effect or as it may consider expedient".

"purpose of performing its duties or exercising its powers" under s 78 if a dominant ulterior motive can be shown for the exercise of that power.[23] In this vein, in order to determine what a court may consider to be a proper purpose, s 3 of the 2010 Act usefully sets out the purpose of the statute. Consequently, its provisions may well influence a court in determining whether a power that was exercised was a legitimate use of that power, within the confines of s 78.

Thus, again by way of illustration, although a body corporate may incur debt under s 130(1)(a), it must act prudently in doing so. Too much debt may put the development at risk, which would be contrary to the purpose of the legislation set out in s 3, which requires a body corporate to proceed on an "economically sustainable basis".[24] If the debt is not sustainable in terms of the eyes of a court, the decision to incur that debt may be found to not be a legitimate exercise of body corporate power under s 78, even though technically it is within s 130(1)(a).

C *Prescriptive measures in the legislation*

In stark contrast to the apparently broad scope of ss 77 and 78, the 2010 Act is highly prescriptive in other respects. This may be a tacit acceptance by the legislature that, in the majority of developments, bodies corporate will often be run by lay people with no expertise in the task of administration who need clear direction on detail.[25] However, such a high level of prescription may cause problems where the required methodologies set out in the legislation have not been followed. This may lead to challenges that lack of due formality or due process may result in the action being found to be unauthorised and thus outside of the statutory requirements. This leads us to consider the application of the ultra vires doctrine to bodies corporate.

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23 Watts, above n 19, at [11.3.8] describes this as a "but for" test. See generally the useful discussion of the application of the equitable principle of "fraud on a power" by Rachel PS Leow "Minority Protection Doctrines: From Company Law and Equity to Strata Title" [2011] 75 Conv 96.

24 2010 Act, s 3. Here a purpose of the legislation is to "provide a legal framework for the ownership and management of land … [on an] economically sustainable basis". See also para (d) which requires the protection of "the integrity of the development as a whole".

25 See generally Rod Thomas "Bodies corporate: who can do what?" [2012] NZLJ 243 ["Bodies corporate: who can do what?"].

D *Ultra vires doctrine*

The ultra vires doctrine is a tool primarily designed to provide a judicial check on the exercise of power by the executive.[26] Under the doctrine, statutory powers must be exercised for their intended purpose.[27] This doctrine is a blunt instrument, in the sense that if the criticised decision is overturned on the basis that it lacks the required legal foundation, any act which is the result of the impugned decision has no legal basis and, therefore, is not binding on the body corporate. Thus, in such circumstances, a plaintiff must look elsewhere for recovery. If the actions were undertaken by the committee, purporting to act for the body corporate, its members are obvious targets. As such, the application of this doctrine to body corporate committees can result in rather brutal outcomes. The impugned action may well have been inadvertent and have been carried out in good faith under a belief that the results were beneficial to the body corporate. Finding the action to be ultra vires can therefore lead to very harsh results, given the committee members may have acted in good faith.

On the other hand, the use of the doctrine reasonably protects present and future members of a body corporate. It can be argued they have a legitimate expectation that they will not be bound by body coporate actions not authorised by the statute.[28] Under this latter analysis, losses arising from the unauthorised act fall on those who were instrumental in the illegitimate actions having occurred — which may well be the body corporate members who authorised those actions.

In terms of a policy discussion on where the risk should fall, recently the New Zealand Law Commission has proposed a statutory enactment to largely negate the effects of the ultra vires doctrine as it affects incorporated societies.[29] By promoting this, the Law Commission accepts it is reflecting a trend in recent case law against liability being found based on the doctrine, based on a perception that the doctrine's policing function unreasonably impedes the achievement of worthwhile societal goals.[30] However, in stark

26 The doctrine has come under increased criticism as being something of an artificial legal construct that provides a very blunt form of legal control over what are seen to be inappropriate executive decisions. See William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 30–31 and 33–34.

27 At 30–31.

28 See discussion in Rod Thomas "Degraded Unit Title Property Rights – a Judicial Trend" (2013) 25 NZULR 1023 ["Property Rights"].

29 Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) [Law Commission Report] at [5.18]–[5.23] and R16–R17.

30 Fisher J in *Bridgecorp Finance Ltd v Proprietors of Matauri X Incorporation* [2004] 2 NZLR 792 (HC) at [55] opined that "[a]n ultra vires doctrine limiting a corporate entity's

contrast to this approach, the use of the doctrine is well entrenched in both New Zealand strata title law and in other comparable strata title jurisdictions such as Australia and Singapore.[31] This difference in approach may be purely historic in origin, or due to a judicial realisation that property rights are invariably interwoven with strata title ownership. Given this, owners may reasonably have a legitimate expectation that the statutory powers will be properly exercised.[32]

An explanation of the operation of the doctrine to bodies corporate in New Zealand is explained in *Low v Body Corporate 384911* in the following way:[33]

> … those dealing with a corporation have constructive knowledge of publicly available rules governing its activities and ought to be prevented from enforcing any contract that was entered into beyond the powers conferred by the relevant Act and rules.

For our purposes, ultra vires acts as they affect bodies corporate can be separated into two areas. The first is a lack of due process from what is required under the relevant legislation. The second is where there is an absence of legal power for the body corporate to undertake the impugned action, so the act itself is beyond the authorised powers of the body corporate.

In theory the first is the less troubling area, as the queried decision may subsequently be ratified by the body corporate acting as a corpus, in an AGM

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powers by reference to objects stated in its constitution no longer had any place in the modern legal world". The statutory object provisions were therefore seen as merely empowering. Miles Agmen-Smith and Mark von Dadelszen "Advising Not-for-Profit Organisations" (New Zealand Law Society Seminar, March 2005) at 26 suggest a court will, in future, take a similar view with regard to incorporated societies or charities. Contrast *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673 (CA).

31 *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597, (1994) 121 ALR 1; *Low v Body Corporate 384911* [2011] 2 NZLR 263 (HC) at [28]–[29] and [31]; *Russell Management Ltd v Body Corporate No 341073* (2008) 10 NZCPR 136 (HC); *Atrium Management Ltd v Quayside Trustee Ltd (in rec and in liq)* [2012] NZCA 26, (2012) 13 NZCPR 69; *Body Corporate 201036 v Broadway Developments Ltd* (2010) 11 NZCPR 627 (HC); *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957, (2012) 13 NZCPR 418; *Birstar Pty Ltd v The Proprietors "Ocean Breeze" Building Units Plan No 4745* [1996] 1 QR 117 (CA); *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] SGCA 13, [2002] 1 SLR(R) 418.

32 See discussion in Property Rights, above n 28.

33 *Low*, above n 31, at [29]. See also *Broadway Developments Ltd*, above n 31, at [28]–[56].

or EGM, validating the lack of proper process.[34] Consequentially, by this means, committee members may be protected, providing the body corporate members are not divided by factional politics, making the ratification untenable.

The second area is potentially more concerning. Here the action cannot subsequently be ratified,[35] as it was never capable of being undertaken in the first place.[36] In such circumstances, the body corporate cannot bind itself to honour the representation, as this would have the effect of circumventing the statutory restriction prohibiting the impugned act.[37] Thus, in the absence of a liability finding based on unjust enrichment grounds,[38] a party who has suffered loss is likely to seek recourse against the party who represented the body corporate had authority to enter into the obligation. In many situations, this will be the committee members who authorised the act.

An example of how liability issues could arise is in the area of routine maintenance contracts. Bodies corporate invariably contract with third parties on issues such as removal of waste, cleaning, or painting around the development. Anecdotal evidence suggests that committee members often enter into the required contracts on behalf of the body corporate, based on a general authorisation given by the proprietors at either a prior AGM or EGM.[39] The monetary amounts may be significant, as say when a multi-storey complex is being refurbished. However, reg 17 of the Unit Titles Regulations 2011 (2011 Regulations) provides (inter alia) that a body corporate may not enter into "an obligation"[40] without approval of the body corporate,

34 *Body Corporate 126411 v Manning* DC Auckland NP2832/99, 3 February 2000 [*Manning* (DC)]. It remains uncertain whether a unanimous resolution of proprietors may be required to ratify an earlier irregularity, where the party prejudiced by the irregularity voted against the ratification. See also Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) at 1046.

35 *Bamford v Bamford* [1970] Ch 212 (CA) at 238; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 (SC) at 672 and 704; *Miller v Miller* (1995) 16 ACSR 73 at 89. See a recent discussion of this in *Guardian Retail*, above n 10, at [39].

36 Ilkin, above n 12, at [115].

37 This is a standard application of estoppel principles. See *Owners — Strata Plan No 51487 v Broadsand Pty Ltd* [2002] NSWSC 770 at [36].

38 *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 (HC); *Chippindale v Owners Corporation Strata Plan 7260* [2013] NSWSC 951; *Wong v Network Pacific Real Estate Pty Ltd (Owners Corporation)* [2012] VCAT 791.

39 2010 Act, s 88.

40 **Method of contracting**

… a body corporate may not enter into an obligation without the body corporate's approval by ordinary resolution.

evidenced by ordinary resolution.[41] This has led some commentators to suggest that, as a consequence of the operation of the ultra vires doctrine, in the absence of a resolution being passed for each specific contract (or in the absence of subsequent ratification by the owners), such contracts will not bind the body corporate.[42] Such a debate may arise where factions within the development fight for control, and refuse to ratify earlier committee actions as a tool to gain an upper hand. However, it could be argued with some strength that if the body corporate has, by its earlier resolution, approved general expenditure for routine issues up to a specified limit, implementation of that expenditure by the committee in the normal way without any further, explicit resolutions may be implicit in the earlier resolution.

Again, such uncertainty is unsatisfactory, dealing as it does with the very basic issue of how a body corporate functions on a day-to-day basis. A committee reading the terms of reg 17 may legitimately take either proffered view on the issue of a body corporate's power to contract, and act in good faith according to their understanding.

IV Committee Members' Personal Liability

A *Liability to third parties outside the development*

Given the committee has no separate legal status, any individual committee member will only be personally liable where he or she acted outside of the authority given by the body corporate. Thus, an argument that the body corporate should be liable for an agent's actions is unlikely to succeed where those acts went beyond the legal powers of the body corporate. This is because, by operation of the ultra vires doctrine, the body corporate cannot be bound by its agent's actions, where it was incapable of undertaking the act itself.[43]

Examples of how committee members may incur personal liability to third parties are provided by case law. Bodies corporate have been excused performance of obligations in disputes between it and third parties, such as managers,[44] or excused liability as a result of resolutions found to be ultra

41 Unless it is necessary to avoid serious damage to property or prevent injury. See 2011 Regulations, reg 17(2).

42 DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross-Leases* (LexisNexis, Wellington, 2013) at [3.36].

43 Roderick Munday *Agency Law and Principles* (2nd ed, Oxford University Press, Oxford, 2013) at [4.22].

44 *Russell Management*, above n 31; *Low*, above n 31; *Sentinel Management*, above n 31.

vires,[45] or due to illegitimate body corporate rule changes.[46] However, to date, cases have not tended to proceed to examine the issue of committee members' personal liability.

Proceedings against committee members may be pleaded in terms of a breach of an implied warranty of authority by the agent (being the committee) that it could legally bind the principal (the body corporate).[47] In essence, this amounts to a form of "collateral" contract with the third party receiving the representation, capable of sounding in damages.[48] However, recovery under such proceedings may prove problematic. Given that the effect of the ultra vires doctrine is to give third parties constructive notice of the legal incapacity of the body corporate,[49] a claimant would have to overcome argument that it had constructive notice of the body corporate's inability to enter into the impugned transaction. A claimant can hardly assert that it relied upon the committee's assurance it had power to bind the body corporate, where it is deemed at law to have notice of the body corporate's lack of capacity in that regard. Patently, the issue is not made any easier where there is doubt as to what a body corporate can and cannot do under the 2010 Act. This has already been discussed in terms of ss 77 and 78 of the Act.

Alternatively, committee members may also face liability to third parties under the provisions of the Fair Trading Act 1986. Where a body corporate is found to be "in trade",[50] perhaps by undertaking commercial activity, such as running a strata-titled shopping mall,[51] or other activities,[52] it may seek indemnification from committee members who were causative in the loss,

45 The requirements for valid resolutions are set out in the 2010 Act. See general discussion by McMorland and Gibbons, above n 42, at [3.41]–[3.46]. For Singapore, see *Management Corporation Strata Title Plan 473 v De Beers Jewellery Pte Ltd*, above n 31.

46 *Chambers v Strata Title Administration Ltd* (2003) 5 NZCPR 299 (HC); *Body Corporate No 199883 v Clarke Family Associates Ltd* (2004) 5 NZCPR 947 (HC); *Russell Management*, above n 31.

47 DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) [*Sale of Land*] at [1.18].

48 Watts and Reynolds, above n 15, at 583–584.

49 *Low*, above n 31, at [29]. See earlier discussion, above part III D.

50 Fair Trading Act 1986, s 11.

51 Again, this is a change from the 1972 Act, s 16, where a body corporate was not permitted to carry on any "trading activities". See generally McMorland and Gibbons, above n 42, at [3.53(c)(iv)].

52 The body corporate may also be found to be "in trade" where the development is not strictly of a commercial nature. This may occur as a consequence of the body corporate operating a coffee shop, gym or laundry facility for the benefit of its members. See generally "Bodies corporate: who can do what?", above n 25, at 243; Thomas Gibbons *Unit Titles Law and Practice* (LexisNexis, Wellington, 2011) at 4.1 n 4.

and may even have a right of indemnification under the Act, even if it is not found to be "in trade".[53]

B *Liability to the body corporate*

Given the committee members act as agent for the body corporate, a finding that they are liable to the principal where they exceed that authority is unremarkable.[54] However, the claim could only be made where the body corporate actually suffers loss. Given the preceding discussion concerning the effect of the ultra vires doctrine excusing the body corporate from performance, this loss may occur only in limited circumstances; primarily where the body corporate did have legal capacity, and the committee acted within principles of ostensible authority, but without the actual approval of the body corporate.

A claim may be made by the body corporate against the committee members under the provisions of the 2010 Act,[55] or by recognition of general duty of care obligations imposed under the general law.[56] In *Guardian Retail*, the High Court confirmed "the committee members … have personal obligations to act in accordance with the relevant statutory powers and rules".[57] To date, there is no case law to indicate how damages for breach of statutory duties will be assessed, although the existence of such liability has been recognised.[58] A choice of which claim is best asserted may be remedies driven, if more extensive recovery is thought to be available by application of tort negligence principles.

Although committee members invariably serve as volunteers, this should not, by itself, impact on whether those parties should be held accountable, and for significant quantum.[59] Under standard *Anns* reasoning they will be

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53 Even if the body corporate is not "in trade", a right of indemnification can be sought from members of the committee under s 43 of the Fair Trading Act who are found to have acted "in trade". See *Sale of Land*, above n 47, at [2.14]; *Dee v Dean* DC Auckland NP1209/96, 26 September 1997.

54 See generally Watts and Reynolds, above n 15, at [6-003].

55 2010 Act, s 171(1) and (2). See also *Manning* (HC), above n 14, followed in *Guardian Retail*, above n 10, at [26]. See above n 9.

56 There is unlikely to be a finding based on breach of contract, as there is unlikely to be an agency contract between committee members and their body corporate.

57 *Guardian Retail*, above n 10, at [24].

58 At [24].

59 It could be argued that the courts may show leniency because members have assumed duties as volunteers, acting in a public-spirited manner. However, such an assumption may be challenged where the degree of risk to the members is significant, or the sums to be expended are significant. In *Commonwealth Bank of Australia v Friedrich* (1991)

taken to have assumed responsibility to act on behalf of the body corporate.[60] In this capacity, they are also agents, and patently a principal may sue an agent for breach of agency, irrespective of the adequacy of any agreed retainer.[61]

Given committee members will also be owners in the development, the more interesting issue is trying to comprehend what duties a court may impose on members. For incorporated societies, the Law Commission has concluded that officers' duties[62] should be legislated as a set of standards in a new Incorporated Societies Act.[63] Indeed, it considered its proposal in this regard to be an "irreducible set of obligations".[64] The duties suggested by the Law Commission are as follows, and show a clear similarity to director duties recognised under the Companies Act:[65]

- to act in good faith and in the best interests of the society, and use his or her powers for a proper purpose;
- to comply with the Incorporated Societies Act and with the society's constitution, except where the constitution contravenes the Act;
- to exercise the degree of care and diligence that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time;
- not to allow the activities of the society to be carried on recklessly or in a manner that is likely to create a substantial risk of serious loss to the society's creditors; and
- not to allow the society to incur obligations that the officer does not reasonably believe will be fulfilled.

How influential should this "irreducible" core be in establishing comparable duties for body corporate committee members? Arguably, they are not an exact fit. For incorporated societies, the Law Commission

9 ACLC 946, 5 ACSR 115 (VSC), Mr Eise acted in an honorary capacity as the Chair of the National Safety Council (Victoria). He was found liable for a sum in excess of AUD $97,000,000 as the result of a breach of his duty of care to the (not-for-profit) company. In the position of Chair, he assumed responsibility to act with due care.

60 *Anns v Merton London Borough Council* [1978] AC 728 (HL).

61 Watts and Reynolds, above n 15, at [6-025].

62 The definition of "officer" proposed by the Law Commission includes members of a society's committee. See Law Commission Report, above n 29, at R30.

63 At [6.29]–[6.86].

64 At [6.69].

65 Law Commission Report, above n 29, at 6. Sections 131–137 of the Companies Act 1993 set out a code for directors' obligations. The Law Commission Report, above n 29, at [6.29]–[6.86] considered that director duties were broadly analogous to those of officers of an incorporated society.

considered officers may be chosen for individual expertise, say in a sports club.[66] Thus, the Law Commission suggested that such a person should have a commensurate level of responsibility in accordance with his or her chosen expertise.[67] This may be contrasted with bodies corporate committees where the sole function is one of governance and property management. Nevertheless the Law Commission comments remain useful.

In terms of general competence, as previously discussed, some unit title developments may be commercial or industrial in nature, whereas others may be small-scale and residential. Given this, it is arguable that any imposed standard of care should be sensitive to both the nature of the development and its relative complexity in terms of ongoing functions and legitimate owner expectations. Thus, a more business-focused set of skills will be appropriate for a development which is a shopping mall, compared with a development of two stand-alone residential dwellings in the suburbs.[68]

Committee members are also property owners so, either directly or indirectly, committee decisions impact on their ownership, liabilities and privileges. Thus the issue of conflict of interest may arise in almost any decisions that are considered.

C *Conflicts of interest — must committee members act in the best interests of the body corporate?*

There is uncertainty as to what amounts to a sufficient conflict of interest and what additional obligations this imposes for an affected committee member. The New Zealand position on conflicts generally is unsettled, as the Law Commission acknowledges in its report.[69] Given this, the 2010 Act appears

66 An incorporated sports organisation may vote members onto the committee who are skilled to (say) grow club membership, obtain funding, or increase sporting prowess within the membership.

67 As per the third duty suggested by the Law Commission.

68 See generally Teo Keang Sood *Strata Title in Singapore and Malaysia* (3rd ed, LexisNexis, Singapore, 2009) [Teo] at 333–337. It appears that where individual committee members have professional expertise, the standard should not be set at a higher level for that reason only. See Law Commission Report, above n 29, at [6.58]. However, where a committee member invites reliance based on his or her expertise, increased liability may flow, as a consequence of an assumption of greater responsibility.

69 Law Commission Report, above n 29, at [6.123]–[6.124] and see [R34]–[R42]. In *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 168, the Privy Council suggested that for incorporated societies a "full and frank disclosure" may suffice to overcome a conflict of interest that arises. This thinking may not now reflect the law. The position is certainly clearer in corporations law, where a company

to be seriously deficient in failing to clarify the applicable law for unit titles on this important point.

Given committee members must be owners in the development,[70] overheated accusations of conflict can easily be made in the hothouse environment that can arise in committee meetings.[71] Gamesmanship can lead to litigation threats being made in an attempt to garner a more sympathetic vote or to try to force an unsympathetic committee member to recuse himself or herself from the meeting.

Prior to the new Act, the Court in *Manning* obliquely suggested that the body corporate chairperson should not be unduly concerned with conflict issues. The issue arose in response to a submission made to the Court that the body corporate chairperson could, given the circumstances before the Court, owe fiduciary duties to the plaintiff, an owner in the development. The Court disagreed that such a duty could be made out as a matter of law, explaining its reasoning in the following way:[72]

> The effect of the plaintiff's argument [that the chair owed fiduciary duties] would be that the chairman, who must be a proprietor, would have to sacrifice his interests for the benefit of the plaintiff. This does not fit with the scheme of the rules, which are designed to facilitate the administration of the body corporate by those who share mutual interests therein.

With respect, this obiter statement cannot be correct. A person who chairs a body corporate should surely "sacrifice his interests for the benefit of the plaintiff" when acting in his or her capacity as the elected chair. Committee members may vote for their own selfish purposes in their capacity as owners at either an AGM or EGM.[73] However, when they are voting on committee business, they are acting in a representative capacity.

On standard agency principles, committee members owe duties of loyalty to their principal which, in strata title law, is the body corporate. This being the case, the committee members must place the interests of the body corporate ahead of their own interests. As a matter of logic, the same argument may be applied where a chairperson, or other committee member,

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may avoid contracts on the basis of a conflict of interest regardless of disclosure. See Watts, above n 19, at [8.1]–[8.2].

70 2011 Regulations, reg 24(6)(a).

71 This issue is alluded to in *Guardian Retail*, above n 10, at [33]–[47] as being a live issue, but not analysed in any depth in the judgment which was, in part, a strike-out action.

72 *Manning* (HC), above n 14, at [76].

73 2010 Act, s 79(c).

acting in an official capacity, proceeds in a manner that detrimentally affects the interests of any individual owner. An illustration of this would be where the committee chair directed that his or her unit be remediated ahead of more badly damaged units out of a desire to achieve a personal advantage. A recent example is the New South Wales decision *Eastmark Holdings Pty Limited v Kabraji*, where committee members used proxies to support their own interests, without a sufficient direction to that effect being given by the proxy givers.[74] This was found to be an improper use of the proxies.[75] This issue of conflicts will be discussed further in terms of possible breaches of fiduciary obligations.[76]

What then, constitutes a sufficient conflict of interest, so as to require disclosure and further action? Too inflexible an approach may give rise to a lack of representative participation by owners at committee meetings. Too vague an appreciation of the legal threshold may lead to confusion, uncertainty and litigation risk.

The Law Commission dealt with this issue in the context of incorporated societies by recommending that anyone with a financial interest should not be permitted to vote, but may remain available to contribute to discussions leading to the decision.[77] Taking a different tack, the relevant Singaporean strata title legislation requires disclosure of any potentially conflict interests, and requires that an affected committee member then withdraw from the meeting.[78]

What can be stated with some degree of confidence is that any "conflict" assertion can only be justified if the committee member in question may be prejudiced or advantaged in a manner greater than arises by virtue of his or her ownership in the development. It is hoped a court would take a robust view more akin to that of the Law Commission's proposal of allowing discussion, but requiring the compromised member to recuse when it comes to voting. This appears to be a reasonable compromise, enabling all views to be aired before a vote occurs. Otherwise, truly representative decision-making at committee meetings may become an illusory concept.[79]

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74 *Eastmark Holdings Pty Ltd v Kabraji* [2012] NSWSC 802. This was a strike-out application.

75 The Court further held that where express instructions to the proxy holder are not given regarding the use of a vote, the proxy holder is to exercise the vote in the best interests of the body corporate (at [161]).

76 See part V below.

77 Law Commission Report, above n 29, at [6.97]–[6.143]. See also at R34–R35.

78 Teo, above n 68, at 334–335.

79 It should not be forgotten that some developments may have only two or more units, or be run on a very informal casual basis, given the low-density, residential nature of the development.

D *Liability to other owners in the development*

The more contentious issue is whether committee members can be sued by owners in the development for breach of their statutory obligations. This is a different issue from whether owners can sue each other as owners in terms of breaches of the 2010 Act.[80]

Given the nature of inter-neighbour relationships, the prospect of a disgruntled owner suing a committee member with regard to decisions made on the committee is an unsettling thought. Such liability is not generally possible in corporations law,[81] or for breaches of trust,[82] where officers and trustees are found to owe duties to the company or trust (as the case may be). In its report on incorporated societies, the New Zealand Law Commission firmly concluded that officers should owe duties to the society and not individual members.[83]

Case law holding that committee members can be sued by owners for breaches of duties whilst serving on the committee arguably arises from a misunderstanding of provisions within the old Unit Titles Act 1972 (1972 Act) and the 2010 Act. The most current authority on point is *Guardian Retail*. Here the High Court confirmed that an owner may sue a committee member for breaches of "statutory powers and rules".[84] The Court also stated that "members of the body corporate may look to individual committee members for losses caused by breaches of their duties".[85] The Court explained the liability in the following terms:[86]

> Individual members of a body corporate must act in accordance with the body corporate rules and are personally exposed for their wrongful acts. If that were not the case then … there would be no constraint on committee members and, importantly, any claim brought by a member of the body corporate would be devalued by the fact that the member would be required to meet a proportion of the claim himself.

80 2010 Act, s 171(2) lists the parties who are made subject to the jurisdiction of the Tenancy Tribunal to hear disputes. This includes the body corporate (s 171(2)(d)) and the owner of a principal unit (s 171(2)(a)).

81 *Foss v Harbottle* (1843) 2 Hare 461, (1843) 67 ER 189 (Ch).

82 John McGhee (ed) *Snell's Equity* (32nd ed, 2010, Sweet & Maxwell, London) at [29-025].

83 Law Commission Report, above n 29, at R29.

84 *Guardian Retail*, above n 10, at [24].

85 At [24].

86 At [26].

This finding was said to flow from the Court's earlier reasoning in *Manning*, where, in the context of a strike-out application, it was accepted that committee members under the 1972 Act could be sued for breaches of body corporate rules.[87] However, the legal basis of both findings is argued to be incorrect.[88]

Dealing with *Guardian Retail* first. The suggestion that *Manning* is authority for the proposition that committee members may face personal liability for breaches of "relevant statutory powers" or "breaches of [committee members'] duties"[89] overextends the actual ratio decidendi of this earlier case. *Manning* stands only for the more restricted principle that committee members are accountable for breaches of body corporate *rules*, as opposed to breaches of "duties" under the Act, which is a more extensive liability concept.[90] Consequentially, if correctly decided, *Manning* has less impact than is suggested in *Guardian Retail*.[91]

Secondly, and more potently, it is argued *Manning* is not correctly decided. In *Manning* the Court set out its reasons at some length:[92]

> [69] Finding that the committee, and individual committee members, are not bound by the rules would undercut the statutory scheme for control and administration of the body corporate. A proprietor who had suffered loss as a result of a breach of the rules by the committee would have an action against the body corporate. This is insufficient, however. By virtue of s 14(4) of the Act, individual proprietors, including the plaintiff in this action, are liable to pay any sum awarded against the body corporate. This substantially diminishes the worth of the proprietor's ability to sue the body corporate.
>
> [70] The committee exercises the powers and duties of the body corporate. … Accordingly individual committee members must be under a duty to perform the duties of the body corporate. Where the rules are breached the body corporate has breached the rules and the committee members have breached their obligation to abide by the same rules. Any other construction

87 At [25]–[26].

88 There is also a statement in *Guardian Retail*, above n 10, at [1] regarding allegations of misfeasance against committee members, which were made in parallel proceedings brought by owners in the development. However, the judgment provides no guidance on how such allegations would be advanced on the facts.

89 At [24].

90 *Manning* (HC), above n 14, at [69]–[72]. The issue was whether the defendant proprietors were bound by the body corporate rules under the 1972 Act, s 37.

91 This is relevant because, under the 2010 Act, many issues, which were previously rules in the 1972 Act, are now incorporated into the substantive provisions of the legislation.

92 *Manning*, above n 14, at [69]–[71].

> would render a court order enforcing the rules, or a variation in the rules by the proprietors and the committee itself, nugatory. The committee members could act as they saw fit, breaching rules and asserting that the body corporate was exclusively liable.
>
> [71] The Act does provide mechanisms for controlling wayward committee members … Section 51(2) makes it an offence for committee members to knowingly infringe the rules. This indicates that the committee members are under a duty above and beyond their obligations as proprietors to obey the rules.

Cumulatively, three reasons exist to suggest this reasoning should not be supported.

First, whilst an owner who has obtained a costs award against the body corporate also has to contribute to levies to pay that award, an unsuccessful owner facing a costs award is equally disadvantaged. He or she will also have to contribute to the body corporate's unrecovered litigation costs — as well as paying the costs award and his or her lawyer's litigation costs.[93] Thus, the risk of having to contribute to the body corporate costs arises for owners whether their litigation is successful or not.[94] Indeed, such exposure is just an incident and illustration of the nature of the interweaving rights and obligations an owner accepts in purchasing into a unit title development.[95] Thus the Court's concern as to the unfairness of any potential costs award is overstated.

Secondly, although the Court in *Manning* noted that all members are bound by the body corporate rules,[96] this is not remarkable in any way. This flows from owners' obligation under both the 1972 Act and the 2010 Act to comply with the statutory scheme.[97] Whilst this understanding supports a finding that the committee members may have liability to the body corporate, this is not a sufficient justification for finding committee members have additional, personal liability to individual owners. After all, committee members are acting as agents of the body corporate, and not the owners. They should be accountable only to their principal.

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93 This arises by virtue of that member also being a member of the body corporate, which is the defendant.

94 *Body Corporate 85403 v Magill* (2008) 9 NZCPR 399 (HC) at [27].

95 *Mid City Apartments Ltd v Body Corporate No 162791* HC Auckland CIV-2003-404-7104, 15 March 2010, at [5].

96 *Manning* (HC), above n 14, at [71].

97 1972 Act, s 37(11). This is s 105(3) of the 2010 Act which makes the rules binding on the body corporate, the owners of principal units, and occupiers and mortgagees.

Finally, the Court in *Manning* justified its reasoning by reference to s 51(2) of the 1972 Act.[98] This is a penal provision which has not been carried forward to the 2010 Act. Section 51(2) creates a statutory offence for committee members who are "knowingly a party" to a breach of the 1972 Act.[99] Thus it deals with a different issue from whether committee members have civil liability to owners and does not give a civil right of recourse to owners to claim damages where committee members are considered to have fallen short in performance of their duties to the body corporate.

For the preceding reasons, it is hoped that the finding of committee owners' personal liability, articulated in *Manning*, and expanded and accepted in *Guardian Retail*, will not stand.[100]

V Liability Findings in Equity?

To date, there seems to be a reluctance to find that committee members owe duties in equity to their body corporate, or to individual owners in the development.[101] The reason for this is not clearly articulated, but may reflect a perception that equity's prophylactic approach to remedies is ill-suited to a model of ownership where committee members are volunteers and also co-owners. Thus, in *Manning*, the Court faced a submission that, on the facts before it, the body corporate chair owed fiduciary duties to an owner. The Court disagreed, stating as follows:[102]

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98 *Manning* (HC), above n 14, at [71].

99 1972 Act, s 51(2):

Default by body corporate

…

(2) If default is made by the body corporate in complying with any requirement or duty imposed on it by this Act or any regulations made under this Act, the body corporate, and the secretary to the body corporate if he is knowingly a party to the default, and each member of the committee who is knowingly a party to the default, commits an offence, and is liable on summary conviction to a fine not exceeding $400.

100 Where committee members act in a manner that is clearly outside of the terms of their agency role, they may be argued to have not in fact acted as committee members at all. They may then be personally liable. This issue is not discussed further.

101 *Re Steel* [1968] 2 NSWR 796 is the key authority for this proposition in Australia. It was expressly not followed in *Manning* (HC), above n 14, nor the District Court in *Body Corporate 197217 v Dang* (2003) 6 NZCPR 74 (DC). But see Fogarty J's dissent in *Jewett Investments Ltd v Body Corporate 20496* [2011] NZCA 232 at [59].

102 *Manning* (HC), above n 14, at [76]. This finding has subsequently been confirmed with regard to the position of a body corporate secretary under the 1972 Act. See *Body Corporate 197217 v Dang*, above n 101. This was a case involving a body corporate manager.

> The plaintiff's contention that the chairman is a fiduciary who must exercise his voting rights in her interests is unpersuasive. The nature of the position of chairman, as one proprietor amongst many whose sole responsibility is to chair meetings, is inconsistent with the nature of a fiduciary — a person committed to acting in the best interests of another.

This approach is not easy to understand. Agents invariably owe fiduciary duties to their principals, and committee members are agents of the body corporate. Fiduciary duties are recognised as having application in Australian jurisdictions, based on comparable strata title law.[103] Committee members may also have fiduciary duties to owners, when acting as a committee member. Thus, in *Eastmark*, the New South Wales Supreme Court recently found a committee member breached fiduciary obligations by using a proxy to support a resolution to deprive an owner of a benefit.[104]

In corporations law directors owe fiduciary duties to companies,[105] and so do officers of incorporated societies.[106] Fiduciary duties have even been recognised in New Zealand as arising between directors of companies and classes of shareholders, where this did not breach the directors' duties owed to the company and all the shareholders as a class.[107]

A liability finding based on breach of fiduciary obligations is patently a very attractive option for a plaintiff. The prime duty of a fiduciary is one of loyalty, which does not extend to exercising competence[108] so that issues

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103 *Re Steel*, above n 101, has been followed by numerous courts and different jurisdictions in Australia.

104 *Eastmark*, above n 74. This was a strike-out application. The case is interesting as it stipulates the proxy should have been exercised in the best interests of the body corporate if no particular instructions as to its use are given. See [161] of the judgment. See also similar legal issues being canvassed in a Singaporean dispute concerning a proposed collective sale: *Ng Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14, [2009] 3 SLR(R) 109; *Then Khek Khoon v Arjun Permanand Samtani* [2012] SGHC 17, [2012] 2 SLR 451.

105 Watts, above n 19, at [6.2].

106 See *Kuys*, above n 69, at 166. The subject matter over which the fiduciary obligations extends is to be determined by the nature and scope of the position. This is to be ascertained not merely from the express agreement of the parties but also the actual course of dealing. See also Law Commission Report, above n 29, at [6.35].

107 *Coleman v Myers* [1977] 2 NZLR 225 (SC and CA) at 323. The duties arose in this case because of the family character of the company, the high degree of inside knowledge, and the way in which the directors (who were family members) went about the takeover. Arguably, similar situations of vulnerability and reliance may be found in bodies corporate developments.

108 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.2.2].

of fraud or lack of bona fides are not germane.[109] A fiduciary must suborn his or her interests to that of the principal. A liability finding leads to a total disgorgement of any benefits received by the fiduciary.[110]

Also, for different reasons, committee members may have liability as trustees. Under the 2010 Act, body corporate funds are held for a discrete purpose and must be invested as "trust funds".[111] Given this, a court is likely to hold the funds are "trust" funds.[112] Where this occurs, the committee members who allow the funds to be used for unauthorised purposes will have breached "trustee" duties in equity.[113] Consequentially, unauthorised dealings with those funds may have personal consequences for those committee members, or any other party who assists in the breach, such as a body corporate manager,[114] or parties who received the benefit of the payments.[115]

VI What Should Be Done?

A *Insurance cover for committee members*

In its report, the Law Commission proposed that an incorporated society, if authorised by its constitution, should be able to arrange insurance for an officer in respect of civil liability for any acts or omissions committed by that officer.[116] The Commission considered this to be a necessary measure to guard against the possibility that some or all of the committee would be held

109 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL) at 144–145 per Lord Russell of Killowen; *Boardman v Phipps* [1967] 2 AC 46 at 105.

110 The above cases are seminal authorities on this issue.

111 2010 Act, s 130(1)(b).

112 *Brookers Handbook*, above n 5, at 33.

113 Such a duty would be owed to the body corporate as a whole as the "beneficiary" of the trust funds, and not to individual owners in the development. This is because the funds, being accumulated for the purposes of the legislation, are held for all the members pursuant to their status as members of the body corporate. Given this, owners' interest is, at best, a contingent interest in seeing the funds used for the correct purpose.

114 Watts and Reynolds, above n 15, at [9-134]–[9-135] — see Rule (1).

115 Liability may also be fixed where a party received the trust funds. *Owners Corporation No 1579 v Giurina (Owners Corporation)* [2012] VCAT 643 is a case where the body corporate manager mixed the body corporate funds with his own funds, in breach of trust. Section 122 of the Owners Corporations Act 2006 (Vic) expressly recognised the funds were trust funds.

116 Law Commission Report, above n 29, at R33.

personally liable for an occurrence not covered under standard insurance cover.[117]

Indemnity cover for committee members appears to be common in Australia[118] and in Singapore.[119] The relevant statutory provision for New South Wales extends to any act or omission, committed or omitted in good faith, while "holding the office of chairperson, secretary, treasurer or member of the executive committee of the owners corporation and performing the functions of the office".[120] Ilkin addresses the issue in some depth and argues that cover also needs to extend to "wrongful" acts carried out by committee members.[121] He notes that insurance policies in Australia commonly extend to provide protection for:[122]

- incorrect acts;
- making an incorrect or misleading statement;
- failing to comply with a duty;
- failing to act as required;
- not carrying out a legal duty; and
- legal costs associated with the above.

Ilkin continues:[123]

> This insurance is comparatively inexpensive. For example, as at November 2005 a major strata insurer provided indemnity cover for $1 million at a premium of $342 for the year. Such policies do not provide automatic

117 At R33.

118 Ilkin, above n 12, at 266.

119 Teo, above n 68, at 319. See also Hairani Saban *Strata Living — Governance and Management* (LexisNexis, Singapore, 2010) at 170–171.

120 Strata Schemes Management Act 1996 (NSW), s 88(2)(a).

121 Ilkin, above n 12, at 266–267. The Strata Schemes Management Act 1996 (NSW), s 88 provides as follows:

> (1) An owners corporation may insure any property that it is not required to insure by this Part and in which it has an insurable interest.
>
> (2) An owners corporation may take out insurance, at its own expense, in respect of either or both of the following:
>
> (a) damage to property, death or bodily injury for which a person holding the office of chairperson, secretary, treasurer or member of the executive committee of the owners corporation could become liable in damages because of an act or omission, committed or omitted in good faith, in performing the functions of that office,
>
> (b) misappropriation of money or other property of the owners corporation.

122 At 107 and 226.

123 At 267.

> cover for defamation and so a policy extension needs to be obtained for this additional protection.

Given uncertainty on this issue under the 2010 Act, comparable legislation should be introduced for committee members. For the reasons discussed, any enactment should ensure the cover can extend to both current and past members of the body corporate committee.

B *Statutory indemnification*

When the 2010 Act was in gestation, one of the main submissions to the relevant government department argued that the statute should permit the body corporate to indemnify committee members so long as they acted in good faith.[124] This was not taken up.

Once again, this places unit titles law out of symmetry with corporations law which allows a limited form of indemnification,[125] and also the Law Commission proposal for incorporated societies, which recommends that an incorporated society may:[126]

- indemnify an officer for the costs incurred in defending criminal or civil proceedings relating to liability for his or her actions as an officer where judgment is given in favour of the officer or he or she is acquitted; and

- indemnify an officer against liability to third parties for the officer's actions … [but] not including any criminal liability or any liability resulting from any breach of the duty to act in good faith and in the best interests of the society … .

The question must be asked: if such an indemnification is suitable for officers and members of incorporated societies, why should different considerations apply for body corporate committee members? If anything, the argument for indemnification may be more compelling, given that potential exposure to significant claims may occur more frequently given the real property interest affected by decisions. It must be remembered that bodies corporate cannot function without owner participation, and that owner participation cannot be forced.

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124 Property Council of New Zealand Inc "Submission to the Social Services Committee on the Unit Titles Bill" at [51]–[56].

125 Companies Act 1993, s 162.

126 Law Commission Report, above n 29, at R33.

C *Remuneration*

In late 2013 the Singapore Building and Construction Authority released a paper proposing that council members should be able to be paid an honorarium, to be determined by the members at an AGM, capped at SG$250 per annum, per council member.[127] This proposal was seen to be a recognition of time and effort put in by council members, as well as a move to attract more owners to offer their services, leading to an improvement to the quality of decision-making.[128] The Singaporean initiative is worth emulating. Placing value on services (even if only in terms of nominal remuneration) acknowledges contribution. It provides a tacit acceptance that the services have value, and a subtle reminder of accountability.

VII Conclusions

Anecdotally, it is often difficult to persuade proprietors to serve on a body corporate committee. This trend is exacerbated when committee members understand they will be unpaid and face significant and ongoing personal liability, commensurate with their assumption of responsibilities. This is a particularly bitter pill to swallow when one considers committee members may be public-spirited volunteers,[129] untutored in the technicalities of the legislative requirements.

The preceding discussion makes clear that there are significant confusions surrounding the extent of bodies corporate powers, coupled with significant personal risk for committee members. This potential risk is threefold: liability to third parties, to the body corporate, and to other owners within the development. It is a point of interest that the New Zealand Law Commission in its recent report for incorporated societies raises many of the concerns discussed in this article and concludes that legislative change is necessary to deal with key issues also raised in this analysis. This is helpful as incorporated societies require member participation in order to thrive, as do bodies corporate.

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127 Building and Construction Authority *Public Consultation on the Proposed Amendments to the Building Maintenance and Strata Management Act* (25 September 2013) at "Recommendation 2".

128 At [16].

129 One recalls *R v Andersen*, where an organiser of a cycle race was convicted of criminal nuisance in relation to the death of a competitor during the Le Race 2001 cycling event, which she organised. This conviction was overturned, as a finding of recklessness rather than negligence was required: *R v Andersen* [2005] 1 NZLR 774 (CA).

In particular, there is an overwhelming argument that even modest bodies corporate should be able to carry appropriate and comprehensive officer and director insurance. In this regard, there is a strong case for statutory amendment to give express authority for such insurance to be held. The 2010 Act should also be amended to provide a statutory form of indemnification operating in favour of committee members found to have acted in good faith.

Before a body corporate committee commits to any level of significant risk it should seek legal advice regarding both due process and potential outcomes. Reliance on such advice will, in many situations, reduce the possibility of subsequent personal liability being imposed on committee members. Further, where there is doubt as to whether a body corporate can legally undertake a particular course of action, committees should seek endorsement from the owners in the development by resolution at either an EGM or an AGM. Although this may prove an inefficient way of operating, the more directive the body corporate is, the better protected the committee will be in terms of any future liability claims, whether the claims be made by third parties, the body corporate, or owners within the development. If the decision to commit to expenditure or commercial risk is unquestionably that of the body corporate acting as a corpus, and not the committee, it will be the members themselves who collectively underwrite the risk, rather than those who serve on the committee.