Chu Said Thong and another *v* Vision Law LLC
[2014] SGHC 160

Case Number : Suit No 735 of 2011

Decision Date : 14 August 2014

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC (as he then was)

Counsel Name(s) : Tan Gim Hai Adrian and Ms Yeoh Jean Wern (Drew & Napier LLC) for the plaintiffs; Mr N Sreenivasan, SC and Mr K Gopalan (Straits Law Practice LLC) for the defendant.

Parties : Chu Said Thong and another — Vision Law LLC

Tort – Misrepresentation – Fraud and Deceit

Tort – Misrepresentation – Negligent Misrepresentation

Agency – Agent's warranty of authority

14 August 2014 Judgment reserved.

Vinodh Coomaraswamy J:

Overview

1 Victor Tan is an audacious identity thief. In September 2010, he fabricated in its entirety an option which purportedly gave him the right to buy the property known as 13A Jalan Berjaya from Lum Whye Hee, its true owner. He wrote a note on the "option" addressed to Susan Chua, a conveyancing secretary employed by the defendant law firm. In that note, he pretended to be Lum Whye Hee, instructed the defendant to act for him in selling the property and set out his own mobile phone number. At the foot of the note, he fraudulently signed Lum Whye Hee's name. He then faxed a copy of the "option" to the defendant.

2 Victor Tan used his fabricated "option" to defraud the plaintiffs into agreeing to acquire from him his non-existent right to buy 13A Jalan Berjaya. Before they agreed to do so, the first plaintiff called the defendant and spoke to Susan Chua about the "option". It is the plaintiffs' case that Susan Chua in this conversation made three critical misrepresentations. These misrepresentations, the plaintiffs say, gave them the confidence to enter into the transaction with Victor Tan by which he defrauded them and have thereby caused them loss and damage.

3 The plaintiffs now seek compensation from the defendant for that loss and damage under two heads. First, they seek to recover from the defendant the sum of $105,200 which Victor Tan tricked them into handing over to him to buy his right under his fabricated "option". Second, their case is that their ill-fated transaction with Victor Tan caused them to lose the opportunity to buy an alternative property in their desired area in September and October 2010. Although they resumed house hunting in January 2011, no property came on the market in that area until in December 2011. The plaintiffs bought that property, 13 Jalan Berjaya, at a price of $8m. That price was more than double the price at which Victor Tan had fraudulently offered 13A Jalan Berjaya to them. The increase reflected, at least in part, the steep rise in property prices in that area between September 2010 and

December 2011. The plaintiffs therefore seek damages from the defendant for their lost opportunity to purchase a property until December 2011. They value their compensation for this lost opportunity as being over $2m.

4 The plaintiffs submit that the defendant is liable to compensate them for these losses either because the defendant, through Susan Chua, made her three misrepresentations to them fraudulently or negligently; alternatively because the defendant, through Susan Chua, falsely warranted to them that it had authority to act for Lum Whye Hee in a sale of 13A Jalan Berjaya.

5 I dismiss the plaintiffs' claim against the defendant in fraudulent misrepresentation on the grounds that the defendant quite obviously did not defraud the plaintiffs. I dismiss also the plaintiffs' claim against the defendant in negligent misrepresentation on the grounds that the defendant did not owe the plaintiffs a duty of care. I hold, however, that the defendant did warrant to the plaintiffs through Susan Chua that it had authority to act for Lum Whye Hee in a sale of 13A Jalan Berjaya. I therefore allow the plaintiffs' claim to recover from the defendant the sum of $105,200 as damages for the defendant's breach of warranty of authority, as that loss was caused by the defendant's warranty of authority and is not too remote to be irrecoverable. I hold, however, that the plaintiffs' lost opportunity to purchase a property in their desired area until December 2011 was not caused by the defendant's warranty and, is in any event, too remote to be recoverable from the defendant as damages for breach of that warranty.

The facts

The plaintiffs look for a property in the Bishan/Thomson area

6 The plaintiffs are husband and wife. The first plaintiff is an oil trader with British Petroleum plc. The second plaintiff is a homemaker. In 2010, they lived in a semi-detached house in the Bishan/Thomson area. For various reasons, they love that area and would never consider moving out of it. In early 2010, they realised that they needed a bigger house. So began their search for a larger, detached house in the same area.

7 Large, detached properties in that area rarely come onto the market. From April 2010 to September 2010, only two did. The plaintiffs made offers on both but were unsuccessful both times. The first property came on the market in April 2010. This was a 6,340 square foot property at 29 Jalan Binchang. The plaintiffs made an offer of $5m, or $788 per square foot, for this property. They were outbid by another purchaser who offered $5.3m. Soon after that, the second property came on the market. This was a 7,111 square foot house at 23 Jalan Berjaya. The plaintiffs made an offer of $6.5m, or $921 per square foot, for this property. The owner did not accept the offer. The plaintiffs were prepared to improve their offer, but the owner withdrew the property from the market before they could do so.

Victor Tan places an advertisement

8 On Saturday, 18 September 2010, Victor Tan fraudulently advertised 13A Jalan Berjaya for sale in the classified advertisements in the Straits Times. His advertisement read as follows: "OPP BISHAN MRT! Old bunglw 5600 sqft. For rebuild/ subdivide. $690 psf neg. [XXX]". For a property of 5,600 square feet, $690 per square foot worked out to a total price of $3.864m. That was the price Victor Tan had inserted in his "option".

9 The second plaintiff saw this advertisement on the same day it was published. She told the first plaintiff about it. Both plaintiffs were very excited. [note: 1] The property was just what the

plaintiffs were looking for: a large, detached property in a very good location within their desired area. And the asking price was a reasonable one: significantly lower than the asking prices of both properties on which the plaintiffs had made unsuccessful offers in the first half of 2010 (see [7] above).

10 The second plaintiff telephoned the number in the advertisement. The man who answered the call introduced himself to her as "Steven Sim". That was a lie: he was almost certainly Victor Tan. He told her that he was a property broker with DTZ Debenham Tie Leung (SEA) Pte Ltd ("DTZ"). That too was a lie. There was no property broker named "Steven Sim" associated with DTZ. He told her that the address of the property he had advertised was 13A Jalan Berjaya. That at least was true. But he had no connection whatsoever with that property or with Lum Whye Hee, its true owner.

11 The plaintiffs viewed the outside of the property from the street that very day. Since their intention was to demolish and rebuild, their external viewing was sufficient for the plaintiffs to know that this was just the property they were looking for.

The plaintiffs talk to Victor Tan, posing as "Steven Sim"

12 After the viewing, but still on 18 September 2010, the first plaintiff called "Steven Sim" back. "Steven Sim" told him that the owner of 13A Jalan Berjaya had granted an option to purchase it to a man called Victor Tan at a price of $3.864m. That was yet another lie. The true owner of 13A Jalan Berjaya, Lum Whye Hee, was then over 89 years old. She had suffered a serious stroke in 2006, leaving her bed-ridden and entirely unable to communicate. She did not intend to sell the property and had not issued an option to purchase it to anyone, let alone to Victor Tan.

13 "Steven Sim" told the first plaintiff that Victor Tan was keen to sell his right to purchase 13A Jalan Berjaya under the option because he needed money to pay his gambling debts. "Steven Sim" urged the plaintiffs to act fast. If they did not, he told them, Victor Tan might sell his option to somebody else. Given the price and location, "Steven Sim" told the plaintiffs, the property was a bargain.

14 After a short negotiation, the first plaintiff and "Steven Sim" agreed that the plaintiffs would pay Victor Tan $105,200 to buy his right under the "option" to purchase 13A Jalan Berjaya. This comprised $35,200, being 1% of the agreed sub-sale price, as option money; and an additional sum of $70,000 as goodwill money to Victor Tan for parting with his right under the "option".

15 "Steven Sim" told the first plaintiff that the defendant acted for Lum Whye Hee in selling the property and gave him Susan Chua's number. The plaintiffs say that the very mention of a law firm's name was crucial to them: "With the involvement of a law firm, [the plaintiffs] felt reassured that the transaction would be smooth" and that "everything was above board". [note: 2] The plaintiffs agreed to "Steven Sim's" suggestion that he send his assistant that very evening to see them and to show them the original "option". "Steven Sim" gave his assistant's name as "Lucas Ong". In fact, "Lucas Ong" was to be yet another one of Victor Tan's guises.

The plaintiffs meet Victor Tan, posing as "Lucas Ong"

16 On the evening of 18 September 2010, Victor Tan went to the plaintiff's house posing as "Lucas Ong". The plaintiffs did not suspect anything because they had never met Victor Tan at all. At that point, they had dealt only with "Steven Sim", and even then only over the phone. "Lucas Ong" gave the plaintiffs "Steven Sim's" business card. Like the "option", the business card was a complete fabrication. It described "Steven Sim" as a sales director with DTZ, complete with a false Housing

Agency Licence number. "Lucas Ong" also showed the plaintiffs the original "option" dated 16 September 2010. It was ostensibly granted by "Lum Whye Hee" as vendor to "Victor Tan" as purchaser, witnessed by a "Lock Sau Lain".

17 "Lucas Ong" told the plaintiffs that if they went ahead and purchased the option from Victor Tan, Victor Tan would prepare a letter of nomination and authority to be issued to the vendor to transfer Victor Tan's right under the option to them. The plaintiffs say that they did not want to commit to the purchase before they could check with the defendant whether it indeed acted for Lum Whye Hee as the vendor and whether the vendor had indeed granted Victor Tan an option to purchase the property. So the plaintiffs deferred their decision on the purchase until 20 September 2010. That was the next working day, a Monday, when they expected the defendant's office to be open.

Victor Tan faxes the "option" to the defendant

18 Susan Chua works for the defendant as a conveyancing secretary. She often works on Saturdays and so believes she was in the office on Saturday, 18 September 2010. Either on 18 September 2010 [note: 3] or on 20 September 2010 – Susan Chua cannot now recall which – the defendant's receptionist handed her a faxed copy of the "option." [note: 4] This was a facsimile of what "Lucas Ong" had shown the plaintiffs on the evening of 18 September 2010 (see [16] above).

19 At the top of the first page of the fax was Victor Tan's handwritten note to Susan Chua:

> Attn: Susan Chua
>
> Kindly act on this for
>
> ē sale of my pty. Tks!
>
> [illegible signature] h/p: [XXX] [note: 5]

Crucially, no title was attached to the name of Lum Whye Hee on the "option". It thus gave no indication on its face that Lum Whye Hee is a woman.

20 On 20 September 2010, Susan Chua conducted a title search on 13A Jalan Berjaya [note: 6] to verify that the owner of that property as named in the "option" matched the owner that property as registered with the Singapore Land Authority. The search confirmed that the names matched, both being Lum Whye Hee. Immediately after confirming this, Susan Chua rang the number set out on her copy of the "option" in order to speak to Lum Whye Hee. [note: 7] That number, of course, was Victor Tan's mobile telephone number. Victor Tan answered Susan Chua's call. Not knowing from the "option" or from the title search that Lum Whye Hee is a woman, Susan Chua asked to speak to "Mr Lum". [note: 8] Victor Tan confirmed to Susan Chua – fraudulently – that he was "Mr Lum". Susan Chua asked "Mr Lum" to confirm that he had faxed an option to the defendant and that he wanted the defendant to represent him in selling 13A Jalan Berjaya. [note: 9] Victor Tan confirmed this. Susan Chua ended the call by telling "Mr Lum" that the defendant would let him know once the option had been exercised. [note: 10]

The first plaintiff calls the defendant

21 Also on 20 September 2010, the first plaintiff called the defendant at the number given to him by "Steven Sim" and had the critical conversation with Susan Chua on which the plaintiffs' entire claim turns. He recounts this fateful conversation in his evidence in chief as follows:

> 45. Chua asked me for my identity. I told her my name.
>
> 46. Chua then asked me what the reason for my call was. I told Chua that I was planning to purchase [13A Jalan Berjaya]. I then asked Chua to confirm if Vision Law acted for the owner of [13A Jalan Berjaya].
>
> 47. Chua confirmed that Vision Law acted for Lum (the "1st Misrepresentation"). Chua also confirmed that Lum issued the Option to Tan (the "2nd Misrepresentation").
>
> 48. I told Chua that my wife and I would be purchasing the Option from Tan. I also told Chua that apart from paying the Option Money to Tan, my wife and I would also be paying Tan the Goodwill Money.
>
> 49. I specifically asked Chua whether there were any problems with my wife and me purchasing the Option from Tan.
>
> 50. Chua said that there were no problems with my wife and me purchasing the Option from Tan. Chua also told me that she did not see any problem with our paying Tan the Option Money and the Goodwill Money (the "3rd Misrepresentation").

22 I set out Susan Chua's account of this crucial telephone conversation and resolve the differences between the two witnesses' accounts below at [50]-[71].

The plaintiffs hand over the money

23 The plaintiffs say that as lay persons, they "trust law firms to verify matters and ensure that everything is done legally and properly." [note: 11] They therefore say they believed Susan Chua's three representations set out at [21] above precisely because they came from a law firm. Thus assured, the first plaintiff then called "Steven Sim" back to confirm that they agreed to purchase Victor Tan's rights under his "option" to acquire 13A Jalan Berjaya. "Steven Sim" told them that he would arrange for "Lucas Ong" to meet them that evening to conclude the transaction.

24 That evening, the plaintiffs handed over to Victor Tan – who was again pretending to be "Lucas Ong" – their crossed cheque for $105,200 drawn in his favour. In exchange, they got Victor Tan's "option", his letter of nomination [note: 12] and "Lucas Ong's" acknowledgment of receipt. [note: 13]

The plaintiffs seek legal advice

25 At 10.51 pm on 20 September 2010, after meeting Lucas Ong, the second plaintiff sent an email attaching copies of these documents to a conveyancing solicitor known to the second plaintiff. That solicitor was a Lee Ping who practises with WLAW LLC ("WLaw"). [note: 14] The second plaintiff's email read as follows: [note: 15]

> Please find attached documents duly signed by owner and holder of option to purchase. I have given my cheque for the 1pct option money to the holder of the option.

Kindly vet through the documents to ensure that they are in order.

The plaintiffs exercise the "option"

26 The "option" specified that it should be exercised at or before 4.00 pm on 7 October 2010 by signing and returning its acceptance copy to the defendant together with a cheque for 5% of the sale price less the option money. The plaintiffs were, however, eager to exercise the "option" and complete the purchase of 13A Jalan Berjaya early. On 23 September 2010, therefore, the plaintiffs went to WLaw and saw Lee Ping. There, they signed the acceptance copy of the "option". They also gave WLaw a cheque drawn in favour of the defendant for the sum due upon exercise. WLaw duly forwarded the acceptance copy and the cheque to the defendant on the same day. WLaw also protected the plaintiffs' interest as the ostensible purchasers of 13A Jalan Berjaya by lodging a caveat against that property.

The defendant's clockwork-like standard operating procedure

27 The defendant is a specialist conveyancing firm with a clockwork-like standard operating procedure for handling conveyancing matters. That procedure calls only for a title search to be undertaken when a new client informs the defendant that it has issued an option and would like the defendant to represent that client as the seller. So after Susan Chua did the title search on 20 September 2010 (see [20] above), nothing further was done.

28 But on 23 September 2010, when the defendant received WLaw's letter exercising the "option" and enclosing the plaintiffs' cheque, the defendant's clockwork-like standard procedure swung into full action. A conveyancing secretary took the decision to accept "Lum Whye Hee" as a client of the firm in the sale of 13A Jalan Berjaya. She informed the defendant's administrative staff, who opened a physical file. Under the defendant's standard operating procedure, all of this would have been done without the involvement of any of the defendant's solicitors. [note: 16] Before accepting "Lum Whye Hee" as a client, the defendant did none of the know-your-client identity checks mandated by Rule 11F of the Legal Profession (Professional Conduct) Rules. [note: 17] The defendant accepts that if it had done so, and had insisted on obtaining proof of its putative client's identity, it would have realised, at the very least, that Lum Whye Hee is a woman and not a man. [note: 18]

29 Another one of the defendant's conveyancing secretaries now took the physical file to the only lawyer in the defendant's conveyancing practice, Leong Li Lin, to inform her that the plaintiffs had exercised the option. [note: 19] This was the first time that any of the defendant's solicitors became aware that the defendant represented or intended to represent "Mr Lum" in selling 13A Jalan Berjaya. [note: 20] I deal with Leong Li Lin's evidence and her role in the defendant's practice in more detail at [74] below. The file presented to Leong Li Lin contained the original "option" faxed to Susan Chua, the initial title search which Susan Chua conducted on 20 September 2010 and WLaw's letter exercising the "option" together with enclosures. The file contained no warrant to act and no evidence of the identity of the defendant's client. [note: 21] Leong Li Lin looked over the documents and noticed nothing unusual. So she took the usual next steps: she issued the firm's standard form letter [note: 22] to "Mr Lum" informing him that the option had been exercised and ensured that the plaintiffs' cheque was deposited into the defendant's client account to be held as stakeholding money pending completion. The date fixed for completion was 15 December 2010.

30 Once they had exercised the "option" on 23 September 2010, the plaintiffs stopped their house hunting. As far as they were concerned, their purchase of 13A Jalan Berjaya was a concluded

transaction which was proceeding smoothly to completion. Indeed, that was also the defendant's view of the transaction.

The fraud is uncovered

31 The plaintiffs were not Victor Tan's only victims. Victor Tan perpetrated the same fraud on two other purchasers. The solicitors representing one of those other purchasers paid a visit to the property on 8 October 2010. At the property, they saw the defendant's now rain-soaked, standard-form letter of 23 September 2010 dangling in the post box. [note: 23] Noting that the letter was from a law firm, *ie* the defendant, their suspicions were aroused. They therefore contacted the defendant and spoke to Leong Li Lin to inform her of their suspicions.

32 Coincidentally, also on 8 October 2010, WLaw learned that two other parties claimed to have exercised an option to purchase 13A Jalan Berjaya. WLaw told the plaintiffs. The plaintiffs were understandably shocked. They tried to contact "Steven Sim" and "Lucas Ong" but could not do so. They contacted DTZ for assistance in tracing both men. DTZ later told them that nobody by either name was associated with DTZ.

33 WLaw conveyed the plaintiff's concerns to Leong Li Lin in a telephone call on 8 October 2010. At the same time yet another law firm informed the defendant that it acted for a purchaser of 13A Jalan Berjaya. Leong Li Lin tried contacting "Mr Lum" at the telephone number which Victor Tan had written on the "option". She could not get a response. Leong Li Lin asked for a fresh title search. It confirmed the worst: two other purchasers [note: 24] had lodged caveats against 13A Jalan Berjaya. Leong Li Lin became alarmed. She escalated the matter to the defendant's director, Eric Ng. Eric Ng sought the assistance of Rayney Wong in resolving the issue. [note: 25] Rayney Wong is a former partner of Eric Ng's who was then sharing premises with the defendant.

34 On 11 October 2010, the defendant told WLaw that it was no longer able to contact its client. WLaw responded by writing formally to the defendant on the same day asking specifically for: (i) confirmation that the option which the plaintiffs had exercised was the only option granted by the defendant's client; (ii) confirmation that all other options which the defendant's client appeared to have granted were invalid; (iii) confirmation of the "procedure(s) [the defendant] had taken to verify [its] client's identity to ensure that he is the registered proprietor" of 13A Jalan Berjaya; and (iv) the further steps that the defendant was or would be taking to contact its client.

35 On 11 October 2010, because it was unable to get instructions from its client "Mr Lum", the defendant took the decision that it should discharge itself from acting for the "owner" of 13A Jalan Berjaya with immediate effect. [note: 26] Eric Ng took this decision, in consultation with Rayney Wong. Leong Li Lin was directed to inform the Law Society of the defendant's decision. She did so by a letter dated 12 October 2010. [note: 27]

36 This letter was a curious letter for the defendant to have written. It did not seek permission, ask for guidance or indeed make any other request of the Law Society. [note: 28] It simply set out the circumstances in which the defendant found itself and set out what it proposed to do. Leong Li Lin conceded in cross-examination that she did not know the thinking behind sending this letter.

37 Leong Li Lin was instructed to inform WLaw that the defendant had decided to discharge itself. She did so in her letter [note: 29] sent on 12 October 2010 to WLaw in reply to its letter of 11 October 2010 (see [34] above). In that letter, Leong Li Lin told WLaw that the defendant was unable to

provide the first and second confirmations it sought in its letter of 11 October 2010 because the defendant was unable to contact "Mr Lum Whye Hee". She did not address the third and fourth confirmations that WLaw sought. She informed WLaw that the stakeholding money that the defendant had received would be kept on month-to-month interest-bearing deposit "pending resolution of the matter". She concluded by enclosing a copy of the defendant's curious letter to the Law Society.

The plaintiffs make a police report

38 On 13 October 2010, the second plaintiff reported Victor Tan's fraud to the police. The police investigated the matter. In the course of those investigations, they showed the second plaintiff a photograph of Victor Tan. [note: 30] She confirmed that she knew the man in the photograph as "Lucas Ong". The police informed the second plaintiff that Victor Tan had left the country and could not be traced. [note: 31]

The plaintiffs ask for the stakeholding money back

39 On 13 October 2010, WLaw asked the defendant to return the stakeholding money. On 15 October 2010, the defendant took the position that they would return the stakeholding money only if ordered by the court to do so.

The real Lum Whye Hee appears on the scene

40 In October 2010, members of the family of Lum Whye Hee, the true owner of 13A Jalan Berjaya, visited the property to collect her mail. They found various solicitors' letters (the defendant's among them) informing "Mr Lum" that three different options to purchase 13A Jalan Berjaya had been exercised. But the family knew that the property was not for sale and that Lum Whye Hee was in no position at all to issue an option to anyone to purchase it. They instructed solicitors, WongPartnership LLP ("WongP"), who wrote to WLaw [note: 32] to inform it that Lum Whye Hee was an 88 year old lady who had not been communicating for several years and that she had not granted any option to anyone to purchase 13A Jalan Berjaya.

41 The plaintiffs then discharged WLaw and engaged Drew & Napier LLC ("D&N") to act for them. In answer to follow-up questions in November 2010 [note: 33] from D&N, WongP informed the plaintiffs that neither Lum Whye Hee nor her family knew Victor Tan or "Lock Sau Lain", the ostensible witness named in the "option". D&N asked WongP whether Lum Whye Hee's family were nevertheless prepared to sell 13A Jalan Berjaya to the plaintiffs. WongP told the plaintiffs on 12 November 2010 that the property was not for sale. Their correspondence ended there.

The plaintiffs plan their next steps

42 While D&N was corresponding with WongP, it were also corresponding with the defendant. D&N wrote to the defendant on 27 October 2010 and again on 10 November 2010 seeking information in an attempt to piece together how the fraud had been perpetrated. The defendant failed to reply to either letter.

43 D&N next wrote to the defendant on 1 April 2011. [note: 34] D&N demanded repayment of the stakeholding monies *and* of the $105,200 the plaintiff had paid to Victor Tan. D&N asserted that the plaintiffs would not have paid that money to Victor Tan but for Susan Chua's representation to them that the defendant acted for the true owner of 13A Jalan Berjaya. This is a significant letter to which I return at [64] below. On 27 April 2011, the defendant replied. The defendant agreed to refund the

stakeholding money but rejected the plaintiffs' claim for payment of $105,200.

44 The defendant refunded the plaintiffs' stakeholding money on 15 June 2011 by cheque. The plaintiffs did not deposit the cheque for several months, lest they be taken to have waived their rights against the defendant. In October 2011, they finally deposited the cheque subject to an express reservation of their rights.

45 Shortly afterwards, on 18 October 2011, the plaintiffs commenced this suit.

The plaintiffs re-enter the property market

46 On 28 December 2011, the plaintiffs exercised an option to purchase an alternative property at a price of $8m, or $1,346 per square foot. By coincidence, this property is 13 Jalan Berjaya, right next door to Lum Whye Hee's house at 13A Jalan Berjaya. This property was the first one to come on the market after the plaintiffs resumed house hunting in January 2011. They had remained out of the housing market until then [note: 35] because, they say, they needed time to return to a fit state of mind to think about house hunting again. [note: 36] In the time that elapsed between being defrauded by Victor Tan in September 2010 and purchasing this alternative property in December 2011, property prices in their desired area leapt. The plaintiffs say that the defendant caused them to miss the opportunity to purchase either of the only two properties which came onto the market in that area during that period, in September and October 2010. Both these properties fit the plaintiffs' requirements and sold at prices substantially below the $8m they paid for 13 Jalan Berjaya.

The plaintiffs' claims

47 The plaintiffs now seek compensation from the defendant by way of damages for fraudulent or negligent misrepresentation or breach of warranty of authority comprising the following:

(a) The sum of $105,200 which they paid to Victor Tan, then posing as "Lucas Ong", to acquire his non-existent right to purchase 13A Jalan Berjaya under his "option"; and

(b) The sum of $2.046m [note: 37] being the difference in price between what the plaintiffs actually paid per square foot for 13 Jalan Berjaya in December 2011 and the average price per square foot of suitable properties in their desired area in September and October 2010.

48 The defendant's response, in brief, is to deny that Susan Chua made any actionable misrepresentation to the plaintiffs. Alternatively, insofar as Susan Chua may have confirmed that the defendant acted for Lum Whye Hee, the defendant submits that her representation cannot be attributed to it. Finally, the defendant submits that the plaintiffs' losses were not caused by the defendant or, alternatively, are too remote to be recovered.

The issues arising

49 It is common ground that the first plaintiff had a telephone conversation with Susan Chua on 20 September 2010 in which Susan Chua said certain things to him. With that in mind, the questions of fact and law which I have to determine are the following:

(a) What did Susan Chua represent to the first plaintiff on 20 September 2010?

(b) Did Susan Chua make those representations in the course of her employment with the defendant?

(c) Fraudulent misrepresentation:

(i) Were Susan Chua's representations false?

(ii) If so, was Susan Chua fraudulent in making those misrepresentations?

(iii) If so, what is the measure of the plaintiffs' damages?

(d) Negligent misrepresentation:

(i) Did the defendant owe the plaintiffs a duty of care?

(ii) If so, did the defendant breach that duty of care?

(iii) If so, what is the measure of the plaintiffs' damages?

(e) Breach of warranty of authority

(i) Did Susan Chua warrant that the defendant had Lum Whye Hee's authority to act for her in the sale of 13A Jalan Berjaya?

(ii) If so, did the defendant breach that warranty?

(iii) If so, what is the measure of the plaintiffs' damages?

What did Susan Chua say to the first plaintiff on 20 September 2010

50 As mentioned at [21] above, the plaintiffs' case is that Susan Chua made the following three representations to the first plaintiff on 20 September 2010:

(a) That the defendant acted for Lum Whye Hee (the 1st representation);

(b) That Lum Whye Hee had issued the "option" to Victor Tan (the 2nd representation); and

(c) That there were no problems with the plaintiffs purchasing the "option" from Victor Tan and paying him $35,200 for the "option" and $70,000 as goodwill money (the 3rd representation).

51 For the reasons given below, I find that Susan Chua most definitely made the first representation and most likely made the second representation. But I find that she did not make the third representation.

Susan Chua's account of the conversation

52 Susan Chua's recollection of her conversation with the first plaintiff on 20 September 2010 is not as clear as the first plaintiff's (see [21] above). Her poor recollection, she says, is partly because of the lapse of time, partly because she receives many calls in the course of her work as a conveyancing secretary, partly because she did not consider the matter to be an ongoing transaction at the time [note: 38] and partly because the caller was a third party and not the defendant's client. [note: 39] She does recall that she was not expecting the call [note: 40] and that it was a short call. [note: 41] She does not recall whether the caller was a man or a woman. The caller did not identify

himself but it is possible that he initiated the call by asking her whether she was Susan Chua. [note: 42] She would presumably have replied yes. The caller then asked whether the defendant was acting for Lum Whye Hee. She answered "Yes, [I] received a fax copy naming…Vision Law as…vendor's lawyers". [note: 43] Counsel for the plaintiffs suggested to her that the reason for the caller's query must have been because the inquirer was thinking of buying the option from the purchaser. Susan Chua disagreed with that suggestion. Her evidence was that the question could equally have been asked by the purchaser himself (or someone on his behalf) to ensure that the vendor had duly authorised the defendant to accept the exercise of the option. [note: 44] She could not remember the caller asking any follow-up questions. She was adamant that the caller did not tell her that he was thinking of buying the option and that the caller did not ask her whether there was any problem with doing so. [note: 45]

The first representation

53 Susan Chua's evidence effectively admits making the first representation. She accepts that her caller asked her whether the defendant acted for Lum Whye Hee. She is clear that she replied: "Yes, [I] received a fax copy…naming Vision Law as…vendor's lawyers". [note: 46] The opening "yes" of her answer, coming as it did in response to a direct and unambiguous question, obviously addressed that question. It confirmed to the caller that the defendant indeed acted for Lum Whye Hee.

54 It also makes perfect sense for Susan Chua to have said this to the first plaintiff. She was simply telling him what she genuinely believed at the time of the conversation. She had seen the name "Lum Whye Hee" on the copy of the option faxed to her. [note: 47] She had conducted a title search on the property which confirmed that the registered owner was "Lum Whye Hee". She had spoken to "Mr Lum" who had confirmed "his" handwritten instructions on the "option". She noticed nothing unusual in any of this. I accept Susan Chua's evidence that it never entered her mind that the "option" could be a forgery. [note: 48] All this led her genuinely to believe that "Mr Lum", as a new client in a new matter, had instructed the defendant to act for "him" in selling 13A Jalan Berjaya. This was her state of mind when the first plaintiff called. So when he asked whether the defendant acted for "Lum Whye Hee", it is perfectly consistent with these circumstances for Susan Chua to have answered "Yes" without qualification.

The second representation

55 Susan Chua did not in terms or in effect admit making the second representation. However, I find it probable that after Susan Chua made her first representation to the first plaintiff, the first plaintiff moved the conversation on from the *grantor* of the option to the *grantee* of the "option", Victor Tan. It seems wholly improbable to me that the first plaintiff ended his call to Susan Chua upon hearing her first representation. That would have been an unnaturally and improbably abrupt conversation. Further, that representation alone would not have addressed the first plaintiff's purpose in calling Susan Chua in the first place. His purpose was not simply to check on the identity of the grantor of the "option" or on the defendant's role as the grantor's solicitors but more importantly to inquire about the *grantee*, Victor Tan. It was Victor Tan, and not Lum Whye Hee, who was to be the counterparty to the transaction which the plaintiffs were contemplating at that time. I therefore find it likely that the first plaintiff continued his conversation with Susan Chua by asking her the follow up question which he testifies that he did.

56 In the course of that continued conversation, I find it likely that Susan Chua made the second representation. Just like the name of the grantor and the role of the defendant – the subject-matter

of the first representation – Victor Tan's name was also set out in the option. When asked about the grantee, it would have been entirely natural, and therefore probable, for Susan Chua to confirm to the first plaintiff that Victor Tan was the grantee, based on what she saw in her copy of the "option" and based on what I find she genuinely believed at that time.

The third representation

57 I find on the balance of probabilities that the first plaintiff did not ask the third and final question which he says he asked Susan Chua in this conversation; and, even if he did, I find that Susan Chua did not answer it by making the third representation. I make these findings for the following five reasons.

58 First, the final question is a very wide, open-ended question, posed at a very high level of generality. It can certainly be answered with a simple yes or no. But a moment's analysis shows that a simple yes or no answer is meaningless to the questioner. The final question does not explain what the first plaintiff means by the words "any problem". Is he asking whether there are any problems with Lum Whye Hee's title to 13A Jalan Berjaya? Or is he asking whether the "option" Lum Whye Hee granted to Victor Tan is assignable in law such that the plaintiffs can take the ultimate conveyance as Victor Tan's nominees? Or is he asking whether Lum Whye Hee or Victor Tan lack the capacity – for example by reason of mental incapacity or insolvency – to dispose of their proprietary or contractual rights? Or is he asking whether Lum Whye Hee and Victor Tan are persons who can be trusted? These questions – and many, many more – are all aspects of the single, broad, final question which the first plaintiff says he asked of Susan Chua. Nothing in the words of that question or in the context which the first plaintiff supplied when asking it – which on his own evidence was limited – indicates which aspect of the question the first plaintiff wanted answered. In the circumstances, I find it improbable that the first plaintiff would have asked such a broad question.

59 Second, the nature of the final question and the representation which the first plaintiff says it elicited is completely different from that of the earlier questions and the representations they elicited. Those earlier questions and representations relate to issues of pure fact: the identity of the vendor, the identity of the vendor's solicitors and the identity of the grantee of the "option". Further, these issues of pure fact are issues which an inquirer like the first plaintiff would be likely to expect to be within Susan Chua's knowledge and within her competence to answer. And they in fact were. That makes it likely that an inquirer would ask Susan Chua questions about these issues of fact. That also makes it likely that Susan Chua would have answered those questions and made the first and second representations. The third question and representation are completely different. The question is not one of fact but, in effect, seeks legal advice. [note: 49] Indeed what it seeks goes beyond legal advice. For the reasons set out at [58] above, the question is so open-ended that it is in fact seeking legal *and commercial* advice. The first plaintiff admits that Susan Chua did not identify herself to him as a lawyer. [note: 50] It appears to me highly improbable that the first plaintiff, whom I find to be a shrewd individual, would call up a law firm which he has never dealt with, speak to a person whom he does not know, and whom he does not know to be a lawyer, and ask that person for legal and commercial advice.

60 Third, even if the first plaintiff had put that wide, open-ended question to Susan Chua, I find it highly unlikely that she would have answered a question of that nature at all, let alone with a simple yes or no. I assessed Susan Chua's demeanour in the witness box. Susan Chua is a conveyancing secretary with an "O"-Level education. In court, she was a diffident and careful witness. That demeanour, in my view, reflected her true personality and was not the result of the artificial and inevitably intimidating environment of the courtroom. She did not speculate on matters outside her domain. And her domain, without intending any disrespect, is implementing the defendant's clockwork-

like standard operating procedure for routine conveyancing. For the reasons set out in [58] and [59] above, I have found it highly improbable that the first plaintiff asked the question which he says elicited the third representation. Those same reasons apply equally to make it highly improbable that a cautious person like Susan Chua – being a non-lawyer and speaking to a stranger whom I find was not identified to her as a client, as a prospective client or as a client's counterparty – would have answered that stranger's request for legal and commercial advice with an unequivocal yes or no.

61 I am of course aware of the risks of relying on demeanour alone to make critical findings of veracity or mendacity: *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] SGCA 27 a [42]-[56]. That is why I do not rely on my assessment of Susan Chua's demeanour alone to make my finding that she did not make the third representation as alleged. Instead, I rely on her demeanour to support the reasonable inferences which I draw and analyse in these paragraphs based on the undisputed and indisputable facts and the inherent probabilities.

62 Fourth, if the plaintiffs in fact wanted legal and commercial advice on 20 September 2010, they had throughout that day – and indeed, throughout the preceding weekend – the means to contact Lee Ping of WLaw, the lawyer whom they eventually instructed to act for them in purchasing 13A Jalan Berjaya (see [26] above). The second plaintiff had had direct dealings with Lee Ping from an earlier conveyancing transaction in which the second plaintiff had instructed Lee Ping on behalf of the second plaintiff's mother. [note: 51] The second plaintiff thus had Lee Ping's email address and mobile phone number in hand over the weekend. [note: 52] She could also have called Lee Ping through WLaw's switchboard on 20 September 2010. Indeed, one of the very first acts of the second plaintiff, immediately after the plaintiffs had handed their cheque for $105,200 over to Victor Tan posing as "Lucas Ong", was to instruct Lee Ping at 10.51 pm on 20 September 2010 to look over the documents (see [25] above). It is highly improbable that the plaintiffs, having Lee Ping's contact details in hand on 20 September 2010, and having been shrewd enough to seek her advice on that very day (albeit not before handing over $105,200 to Victor Tan) would have preferred to ask Susan Chua on 20 September 2010 for legal and commercial advice, knowing that the defendant acted for the counterparty (Lum Whye Hee) of their proposed counterparty (Victor Tan) and not even knowing whether she was professionally qualified to give that advice.

63 Finally, I find it very telling that the third representation made a very late entry indeed in the plaintiffs' case. The plaintiffs' positive case in this action, set out in their statement of claim filed on 1 8 October 2011, alleged only that the defendant, through Susan Chua, had made the first representation and no others. The plaintiffs made no reference whatsoever to the third representation in any correspondence, in any pleading or in any affidavit until it was introduced for the first time in the plaintiffs' Reply filed on 23 November 2011. That was a month after the plaintiffs had pleaded their positive case in their statement of claim and more than a year after the third representation was said to have been made. Indeed, the third representation did not become a part of the plaintiff's positive case (*ie* part of their statement of claim as opposed to appearing in their reply) only when they amended the statement of claim on the first day of trial.

64 Most importantly, D&N did not refer to the third representation in its letter before action dated 1 April 2011 (see above at [43]). The first plaintiff accepted that D&N was instructed at the latest by 27 October 2010 and that by 1 April 2011, the plaintiffs had given D&N the full story and the whole truth about the events of September 2010. [note: 53] D&N's letter of 1 April 2011 restates the facts leading up to the plaintiffs' handing over $105,200 to Victor Tan. In the course of that, the letter recounts the telephone call between Susan Chua and the first plaintiff as follows:

> 4. On 20 September 2010, our clients telephoned your office to verify whether you acted for

> Lum. Our clients spoke to your Ms Susan Chua who confirmed with our clients that your firm acted for Lum ("**the Representation**"). Upon receiving the Representation, our clients paid a sum of $105,200 to Tan…. [note: 54]

65 Paragraph 10 of the letter sets out what the plaintiffs say was the consequence of the Representation:

> 10. It is plain that the Representation which you made to our client was false. Relying on the Representation, our clients signed the … Option and suffered loss and damage as a result.

66 There are two significant points from these paragraphs. First, they allege that Susan Chua made only *one* representation (that the defendant acted for Lum Whye Hee). Second, it alleges that the plaintiffs relied *only* on that one representation when they paid the $105,200 to Victor Tan. The letter makes no allegation that Susan Chua made the third representation. The third representation is an afterthought.

67 It is true that this letter does not allege that Susan Chua made the second representation either: a representation which I have found that Susan Chua probably made. But from the context in which Susan Chua's conversation with the first plaintiff took place – with her speaking with the faxed option in hand, or at the very least in mind – that second representation is a natural consequence or extension of the first representation. But as I have explained, the third representation is of an entirely different nature. It amounts to the defendant's employee giving legal and commercial advice to the first plaintiff that she sees no problem in the plaintiffs adopting the very course which has now caused them loss. That representation is the very essence of the plaintiffs' negligent misrepresentation claim. That was the only cause of action the plaintiffs relied on until they reformulated their claim during trial to include by amendment a cause of action for breach of warranty of authority.

68 As the plaintiffs' case stands before me, the third representation is the most important of the three. Thus, the first plaintiff's evidence in chief gives pride of place to the third representation. After setting out his account of the three representations cited in [21] above in his affidavit of evidence in chief, the first plaintiff concludes as follows:

> 51 After hearing what Chua said, I felt reassured. I believed what Chua told me. Chua was a representative of a law firm. Since she had represented to me that Vision Law was acting for Lum, *and that there would be no problem with me purchasing the Option from Tan*, I felt confident that my wife and I could proceed to purchase the Property. Chua's representations dispelled any doubts I had about the veracity of the Option. [note: 55]
>
> [emphasis in italics added]

69 This passage shows that the first plaintiff was relying primarily not on the first representation, or even on the first and second representations taken together. It was the *third* representation which was the crucial assurance. Indeed, the first plaintiff seems to refer to the first and second representations merely to set the conversational context for the third representation.

70 The first plaintiff was cross-examined on this omission. His explanation was that he told D&N about the second and third representations but left it in D&N's discretion to abridge his account of the facts. [note: 56] Even if that explains the omission in the letter before action, it does not explain its absence in the correspondence with the defendant which followed 1 April 2011 or in the statement

of claim filed on 18 October 2011. It is one thing to omit an essential allegation on a single occasion, on the basis that it is not necessary to mention it on that occasion (*ie*, in a letter before action). It is quite another to omit that essential allegation from all subsequent correspondence and more importantly, from a statement of claim which was presumably drafted to put the plaintiffs' best case forward in litigation, unabridged. If Susan Chua had in fact made the third representation, I find it inexplicable that it did not feature anywhere in the plaintiff's case until 23 November 2011.

71 For the reasons given above, I accept the defendant's submission that the plaintiffs' evidence of the third representation is an afterthought which I should, and do, reject.

Susan Chua made her representations in the course of her employment

72 Having found that the first representation was made, that the second representation was likely to have been made and that the third representation was not made, the next question is whether the defendant can, in principle, be held liable for the consequences of Susan Chua's two representations. The plaintiffs argue: (a) that those representations are directly attributable to the defendant and were therefore in reality its representations; alternatively (b) that Susan Chua made her representations in the course of her employment such that the defendant can, in principle, be held vicariously liable for their consequences. [note: 57]

73 Both of the plaintiffs' submissions would fail in the usual case involving the usual law firm and the usual conveyancing (or other) secretary. A conveyancing secretary's acts are not ordinarily attributable to the law firm he works for. He is neither a partner nor a director of the firm and is not the firm's controlling mind and will. Further, the scope of a conveyancing secretary's employment does not ordinarily encompass dealing with members of the public on the firm's professional work. A conveyancing secretary does not have the legal education or training necessary to give legal advice. Indeed, because he is not an advocate and solicitor, he is prohibited by law from doing so. It is not part of his employment to act of his own accord even to disclose *information* about the firm's professional business, whether such disclosure is to a client, a client's transactional counterparty or, for even stronger reasons, to a member of the public. But, as I will show, the defendant is not the usual law firm and its conveyancing secretaries are not the usual conveyancing secretaries. I say this for four reasons: (a) the defendant's conveyancing secretaries develop business for the defendant; (b) they are – and are intended to be – the first point of contact for property brokers and potential clients; (c) they work without the supervision of solicitors; and (d) they communicate with members of the public on the defendant's professional work.

The defendant's conveyancing secretaries develop business

74 The defendant's Toa Payoh branch, where Susan Chua works, specialises in conveyancing. [note: 58] Leong Li Lin is a conveyancer and, as I have mentioned above (see [29]), was the sole solicitor in the defendant's conveyancing practice. The defendant employed her as a legal assistant from September 2009 to February 2011. [note: 59] Like Susan Chua, Leong Li Lin was merely an employee of the defendant. She had no role in the defendant's management and was never one of its directors. [note: 60] The role which the defendant's management assigned to Leong Li Lin was not the usual role of a solicitor. The usual role of a solicitor is to develop business, to execute the firm's professional work and to supervise others in the defendant (whether lawyers or otherwise) in executing the firm's professional work. As Leong Li Lin explained in evidence, the defendant's clockwork-like system assigns virtually all of that work to its conveyancing secretaries.

75 All of the defendant's conveyancing secretaries, including Susan Chua, are concurrently

designated as its business development managers. The defendant issues them business cards. [note: 61] Susan Chua's business card explicitly mentions her role in developing business for the defendant. [note: 62] In performing her business development role, Susan Chua attends property brokers' conferences and seminars and distributes her business cards to other attendees [note: 63] with a view to attracting business for the defendant.

The defendant's conveyancing secretaries are the first point of contact for brokers

76 The plaintiffs put in evidence a printed copy of the defendant's internet brochure (Exhibits P1 to P4) as it stood at the time of trial. The brochure is intended to attract business, or at the very least to attract inquiries with a view to attracting business. The brochure is hosted on the website of PropNex, a property broker. [note: 64] The brochure carries a banner heading which reads as follows:

VISION LAW LLC
LAWYERS
Advocates & Solicitors * Notary Public * Commissioner for Oaths * Agent for Trade Marks
490 Lorong 6 Toa Payoh #03-11 HDB Hub (Biz 3 Lobby 1), Singapore 310490
Tell: (65) 63580703 Fax: (65) 63580448 Email: admin_tp@visionlaw

77 Under that banner heading are three subheadings. Arranged under the subheadings are the photographs, names, mobile phone numbers and email addresses of twelve individuals. The first subheading reads "For Enquiries, please contact". Under that subheading appear two individuals: an Agnes Tan and a Lilian Tan. Agnes Tan is identified both as a "Paralegal" and as a "Business Development Manager". Lilian Tan is identified simply as a "Business Development Manager". Neither of them is a lawyer. The second of the three subheadings reads "Private Properties Department". Under that subheading appear the photographs of four individuals. The final subheading reads "HDB Properties Department". Susan Chua's photograph and details are the first to appear under this subheading.

78 None of the individuals who appear in this brochure – leaving aside Agnes Tan and Lilian Tan – carry any designation at all. This includes Susan Chua. It is true that the brochure does not *positively* designate any of the remaining ten individuals as a lawyer. But it equally gives no indication that any of these ten individuals is *not* a lawyer. In that sense, the brochure is ambiguous. Someone with the background knowledge that I have gained from the evidence before me will be able to resolve the ambiguity and draw the inference that the ten undesignated individuals are not solicitors. But an ordinary reader of the brochure, not knowing what I know, might well not be able to resolve the ambiguity.

79 The critical point about the brochure, though, is not how these individuals are or are not designated. The critical point is that it shows clearly that part of the defendant's business model is to invite the public – or at least a section of the public – who wish to refer conveyancing matters to the defendant to communicate directly and in the first instance with the defendant's conveyancing *secretaries* rather than with a conveyancing *solicitor*. And the defendant's conveyancing secretaries took on this role: Leong Li Lin confirmed in evidence that some of them were more successful at developing business for the defendant than others (see the quotation from the evidence at [82] below). [note: 65]

The defendant's conveyancing secretaries are the first point of contact for potential clients

80 One of the defendant's witnesses was Sega Param. He was a director of the defendant at the time of trial. He was not a director of the defendant when the critical events in this action took place

in 2010 and 2011. I have more to say about the significance of this point at [92] below. Sega Param gave evidence that the defendant's internet brochure was designed for and directed at property brokers. [note: 66] But it was not suggested that access to the brochure was restricted to PropNex brokers or even to property brokers generally. Indeed the plaintiffs had no difficulty gaining access to it at the time of trial in order to put it in evidence.

81 More importantly, Leong Li Lin confirmed in cross-examination that the defendant's business model contemplates not just brokers but also potential *clients* communicating directly with its conveyancing secretaries: [note: 67]

> Q Right. Now I have to ask you a little bit about the work flow in Vision Law in 2010 in the conveyancing department. Who would give instructions Susan Chua on her work?
>
> …
>
> A Management.
>
> Q Can you be more specific? Are you---are you referring to some individuals?
>
> A Okay, because the system at Vision Law is set in place such that the whole thing runs like a clockwork. Whenever files come in, there would be---they will contact a secretary, and… sometimes they'll contact a particular secretary like---
>
> Court: Sorry, Ms Leong …what do you mean when you say "when a file comes in"?
>
> Witness: Okay, when a new matter comes in, let's say there's an enquiry, be it by a potential client or agent, they would call one of the secretaries in the firm.
>
> …
>
> Court: …You said whenever a---when a new matter comes in, say, an enquiry by a potential client or an agent, ["]they["] will call. Who---who is "they"?
>
> Witness: The potential client…or the agent will call.
>
> Court: Yes. Will call [whom]?
>
> Witness: The---a secretary in the firm.
>
> …
>
> Q So the first point of contact for potential clients are these secretaries?
>
> A That is right.

The defendant's conveyancing secretaries work unsupervised by a solicitor

82 The defendant's conveyancing secretaries not only develop the defendant's professional business, it is they who initiate the file-opening procedure, thereby accepting a person as the client of the defendant, and who handle the file thereafter: [note: 68]

Q … And the system was such that clients and potential clients contacted these nine conveyancing secretaries. And then, those conveyancing secretaries would hand the matter over to you to handle. Did I describe it correctly?

A Okay. Usually, they would contact---certain secretaries are a little bit more active in receiving such calls while some secretaries don't get these calls at all. So the clients will call those secretaries or the agents would call them, giving---as---assigning the work to the firm; and with that, usually the secretary would first pass the file to the admin lady who does the file opening and then after that, if there are no matters---not---there's nothing involved at that point, thus, the secretary would take the file back. She may or may not give it to me right away.

83 Second, the defendant's conveyancing secretaries carry out the defendant's professional work, and do so without the supervision of a solicitor: [note: 69]

Q During that period, did Susan Chua report to you?

A No. Er, wait, sorry, what I'm trying to say is I was the solicitor in charge of conveyancing at Vision Law. She doesn't report to me as in when---when management issues are concerned, it's just like for the files if there are issues, yah.

Q How many solicitors were there in the conveyancing department of Vision Law in 2010?

A Just one, myself.

Q And Susan Chua---my understanding of your answer is that she does not report to you where management issues are concerned but she may come and see you if there are issues on her files?

A Yes.

Q And if there are no issues on her files, she would work independently?

A That's right.

Q In which case, not under the supervision of a solicitor?

A Okay, most experienced conveyancing secretaries actually can run the file on their own and whatever letters that they prepare is left on our desk for us to check and verify, and we will sign accordingly.

Q Is it the case that Susan Chua was not supervised in her work by a solicitor?

A You are saying for all areas or?

Q Yes, all areas.

A Yes.

The defendant's conveyancing secretaries communicate with members of the public on the defendant's professional work

84 Most importantly, Susan Chua confirmed that she is expected to and does receive calls not only from actual and potential clients in order to develop business for the defendant or to carry it out, but also from members of the public who are not actual or potential clients. That includes the counterparties of the defendant's clients, after conveyancing transactions are under way. Thus, Susan Chua acknowledged: [note: 70]

Q … So occasionally you receive such calls and they are from members of the public?

A Agents.

Q Is it only agents? Is that your answer or agents and other members of the public?

A Occasionally.

Q Okay. I know you said "occasionally". So I want you to give your answer, if you can, in a complete sentence so that we can write it down and we can move on. Is your answer that you occasionally receive such queries from agents and other members of the public?

A Yes.

Q Thank you. Now the reason people would make such enquiries is because they are interested in the properties concerned. Correct?

A Yes.

Q And they would ring you up because they are told that your firm is involved in the transaction in some way. True or false?

A Yes.

…

Q … But even though your name and business card is given out, the reason people call you is because they think you---your firm has some involvement with a particular property they are interested in. Correct?

A Yes.

85 Leong Li Lin confirmed this in her evidence: [note: 71]

Q … Do you agree that the public routinely rang up Vision Law to check if Vision Law acted for sellers of property?

A Not that I know of.

Q You're saying that the public never rings up Vision Law to check if Vision Law acts for sellers---

A No, that's not what I'm saying. I---what I'm trying to say is I don't know how often the public would ring Vision Law to check.

Q But to your knowledge, people do ring up Vision Law to check if Vision Law acts for sellers.

A I think people do ring any law firm to check if they act for the sellers. Not just Vision Law alone.

86 Sega Param admitted that it was foreseeable that members of the public would call Susan Chua, although he tried to draw the sting of that admission by denying that she had the defendant's authority to speak for it. [note: 72]

Q By putting Susan Chua's photograph and phone number---mobile phone number, in brochures, on the internet and in business cards, Vision Law must be expecting Susan Chua to speak to the public.

A Ah, no, Your Honour.

…

Q ---all right. When Susan Chua speaks to people who ring her up at her office, she speaks as a representative of Vision Law?

A Er, she, er, Susan Chua was an employee of Vision Law, Your Honour. Ah, not the agent or representative.

Q As an employee of Vision Law, when she spoke to the public, she had the authority of Vision Law.

A Ah, but, Your Honour, the, er, authority of Vision Law was only to do the work that the secretary would do, ah, not to give legal advice.

…

Q … Do you expect people like Susan Chua to talk to members of the public because you put Susan Chua's mobile phone number on brochures on the internet?

A Ah, no, Your Honour.

Q It is foreseeable that by doing so, Susan Chua will receive calls from members of the public?

A Maybe, Your Honour.

Q Yes. And it's foreseeable that the public will call Susan Chua to ask about matters which Vision Law is involved in?

A Yes, Your Honour. I thought it's possible, Your Honour.

Q And when Susan Chua takes these calls, she speaks as a representative of Vision Law.

A Er, Your Honour. Ah, I don't agree.

87 Sega Param's final point misses the point. The question at this stage of the analysis is not whether Susan Chua had the defendant's *authority* (as that term is used in the law of agency) to

make the representations she did to the first plaintiff on 20 September 2010. The question is whether Susan Chua was acting within the *scope of her employment* when she did so. Therefore, the concluding question and answer in the passage I have quoted above from Sega Param's cross-examination does not detract from the essential point he confirmed in the preceding questions and answers. It was foreseeable to the defendant – because it was intended by the defendant – that members of the public would communicate with the defendant's conveyancing secretaries on the defendant's professional work.

The defendant's business model

88 A law firm is undoubtedly a business. It must be run along commercial lines. Its management has an entirely legitimate interest in ensuring that the firm generates enough revenue not only to cover its overheads but also to make a profit for its proprietors. Running a conveyancing practice profitably, particularly a retail conveyancing practice, poses special difficulties. Conveyancing is now a commoditised, low-margin practice area. To be profitable, it must be run at high volume. That in turn requires management to devise and implement an efficient system which, on any particular matter, minimises the time spent by a solicitor on it by maximising the time spent by non-solicitors. So long as management observes the bounds of law and ethics, all of these responses to commercial pressures are normal and entirely compatible with the obligation to run a professional practice professionally. What is not compatible with that obligation is a law firm which responds to those pressures by adopting a business model which depends on its conveyancing secretaries both to develop its business and to carry out its business, all without the supervision of a solicitor. That appears to be what the defendant in this case has done.

89 On the unusual facts of this case, therefore, I am satisfied that the defendant intended Susan Chua in the course of her employment, like all of the defendant's conveyancing secretaries, to speak to members of the public, *ie* persons who were not the defendant's actual or potential clients or their representatives, about the defendant's clients' ongoing transactions. I therefore find that when Susan Chua made the first and second representations to the first plaintiff on 20 September 2010, she did so in the course of her employment by the defendant as a conveyancing secretary.

Defendant chose not to have the directors involved testify

90 I make this last finding based on the clear weight of the evidence of Sega Param, Leong Li Lin and Susan Chua herself. It is true, however, that Leong Li Lin and Susan Chua could not speak for the management of the defendant because neither of them was ever a director of the defendant.

91 Sega Param, as a director of the defendant at the time of trial, was the witness who came the closest to speaking for the defendant's management. But even he was not a director of the defendant in September 2010. [note: 73] His evidence of the defendant's business model and working practices as they stood in September 2010, or even of the actual events of September 2010, was inadmissible hearsay. By his own admission, it was "derived from records" [note: 74] and therefore not within his personal knowledge.

92 Sega Param's evidence on the defendant's business model and working practices *after* he joined it was direct evidence, within his personal knowledge, and therefore admissible. The directors of the defendant in September 2010 were Eric Ng Chin Boon, Ong Boon Leng and Stanley Ang. [note: 75] None of them came forward to explain away the unusual features of the defendant's business model which I have found on the evidence available to me and which are identified at [72] to [87] above. Neither did Rayney Wong, who it appears assisted the defendant in 2010 and 2011 in dealing with the

aftermath of Victor Tan's fraud and in overseeing how the defendant handled the plaintiffs' claim and lawsuit. [note: 76]

93 If the evidence of Leong Li Lin, Susan Chua and Sega Param left any misapprehension about the defendant's business model and working practices in September 2010, it was incumbent on the defendant to bring forward a director to dispel that misapprehension with direct evidence. The defendant did not do so.

94 There was therefore no evidence before me from a director who was in office in September 2010 to suggest that the defendant's business model and working practices in September 2010 were any different from the account given by Sega Param of the position at the time of trial. Likewise, there was no evidence to suggest that the evidence of Leong Li Lin and Susan Chua on the facts should be seen in a different light. All of this fortified me in drawing the conclusions which I did from the evidence of Leong Li Lin, Susan Chua and Sega Param about the position in September 2010.

Conclusion

95 For all of these reasons, therefore, I find that Susan Chua acted within the scope of her employment when she spoke to the first plaintiff on 20 September 2010 and when she made the two representations which I have found she did. Any liability for those representations is therefore properly attributable to the defendant.

96 This is a crucial threshold finding for the plaintiff's case. But this finding does not in itself fix the defendant with liability. The plaintiff must also establish one of the causes of action on which it relies: (a) fraudulent misrepresentation; (b) negligent misrepresentation; or (c) breach of warranty of authority. Before dealing with them in that order, it is useful to sketch a brief taxonomy of the law of torts so as to situate in context the three bodies of principles on which the plaintiff relies.

A top-down approach to the law of torts

97 The incremental tradition of the common law has meant that the law of torts has developed bottom-up over the centuries as specific cases have come up for determination before specific judges. (Note that I speak here of the law of torts and not (yet) of the law of negligence.) Although it developed and is now applied bottom-up – on a case by case basis – the law of torts can usefully be analysed top-down. That analytical approach offers valuable conceptual insights. It has been developed with great detail and intellectual rigour in the various works of Professor Peter Cane, in Professor Robert Stevens' *Torts and Rights* (Oxford University Press, 2009) ("*Torts and Rights*") and in Professor Allan Beever's *Rediscovering the Law of Negligence* (Hart Publishing, 2007).

98 Approached top-down, the law of torts emanates from a single moral precept. That moral precept is the ethic of reciprocity. This precept is universal. It is found in nearly every culture, religion and ethical system. In the English language, it is best known as the golden rule. That is the name which the Christian tradition gives it. The golden rule is a mandatory injunction to do good: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them": (Matthew 7:12, King James Version). But while a mandatory injunction to do good is a valid *moral* imperative, it is far too wide to be a valid *legal* imperative: *Stovin v Wise* [1996] AC 923 at 943F to 944C per Lord Hoffman. It covers much more than the minimum ground required to regulate our behaviour as we interact with each other in everyday life. It also conflicts with the importance which the common law attaches to personal autonomy. And its injunction to do good is impossible to enforce.

99 To arrive at a functional and practical *legal* imperative, the common law inverts the golden rule into a prohibitory injunction. You must do no harm to others that you would not want others to do to you: *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 ("*See Toh Siew Kee*") at [22]-[24]. As a moral precept, this is somewhat less aspirational than the golden rule. So Carl Sagan has dubbed it the silver rule.

100 Because it is the silver rule and not the golden rule which the common law enforces, the default position at common law is that you are not liable for failing to do good to another. It is not, therefore, a wrong to fail to confer a benefit on another or to protect another from harm: *Stovin v Wise*. But even the silver rule is far broader than necessary to regulate everyday life. It is a breach of the silver rule for you to hurt my feelings. It is a separate question entirely whether it should be a legal wrong, entailing legal liability, for you to do so. That then is the function of the law of torts: to identify those aspects of the silver rule which are sufficiently fundamental to everyday life as to constitute an exception to the common law's default rule *against* liability and to offer a remedy for a breach.

101 For each of these aspects, the law of torts establishes a legal duty not to breach the silver rule. But if you are under a duty to me, then I have a correlative right against you. That is a right in the truest sense of the word, because it is a correlative right, the direct reciprocal of a duty. The law of torts thereby vests implicitly in each of us a set of fundamental rights, each of which is an aspect of the silver rule and the infringement of any of which yields a remedy.

102 Although the law of torts vindicates each of these fundamental rights, it does not create all of them. Some of these fundamental rights arise outside the law of torts. For example, property rights are created by the law of property. The law of torts takes rights of property as a given and vindicates those rights by offering a remedy to their holder for an infringement. But some of the fundamental rights which the law of torts vests in us by implication are created in and by the law of torts itself. Thus, when the law of torts first awarded compensation for personal injuries, it thereby recognised a fundamental right of bodily safety. By that same process of implication, the law of torts has vested in us a right to be free of harm to reputation and to be free of psychiatric harm.

103 This body of fundamental rights develops differently in different societies, as the law responds to the particular circumstances of that society. Thus, for example, the English law of torts does not recognise a fundamental right to be free from economic harm which is inflicted negligently: *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27. Singapore law does: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [69].

104 This body of fundamental rights also develops over time, within the same society, as the law responds to changes within that society. Thus, for example, Lee Seiu Kin JC (as he then was) in 2001 granted a remedy to a plaintiff for deliberate harassment by a defendant: *Malcomson Nicholas Hugh Bertram and another v Mehta Naresh Kumar* [2001] 3 SLR(R) 379. That was the first time Singapore's law of torts had ever acknowledged such a remedy. By so doing, Lee Seiu Kin JC recognised – in the incremental tradition of the common law – that changes over time had resulted in new technologies and had turned Singapore into an urbanised society, all of which made it just that the law of torts should recognise a duty on each of us not deliberately to harass another. The scope of that duty and, in particular, whether a breach of that duty can be vindicated by anything other than injunctive relief, is left to be worked out on a case by case basis. But by this first step, Singapore's law of torts recognised a new fundamental right. The English common law of torts chose not to recognise the same right: *Hunter v Canary Wharf Ltd* [1997] AC 655.

105 All of this raises fundamental issues about the province of a common law judge in the 21st century. Can a judge legitimately add to the list of fundamental protected rights which the common law of torts has handed down to us, recognising that that list has been developed bottom-up, and therefore comes to us largely for historical rather than conceptual reasons? Or should a judge, acknowledging that he is unelected, confine himself merely to shaping the contours of the existing set of fundamental rights recognised by the law of torts and leave law reform to the elected legislature? Lee Seiu Kin JC felt that the answer to the former question was yes and to the latter no. Choo Han Teck J more recently expressed the opposite view: *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [8] and [10].

106 On a top-down analysis, the tort of negligence is a misnomer. When the law of torts recognises a new fundamental right, it also determines the quality of the conduct which will trigger liability for an infringement of that right: whether that right can be infringed without fault, negligently or only intentionally. Nominate torts are named after – or by reference to – the fundamental *right* which the tort vindicates, and not the quality of the conduct which triggers a remedy. The tort of false imprisonment vindicates a fundamental right to freedom of movement. The tort of trespass to the person vindicates a fundamental right to bodily safety. The tort of defamation vindicates a fundamental right of reputation. Some nominate torts are torts of strict liability and others require intention. But each of these torts is named after the fundamental right which it protects.

107 The tort of negligence is the only tort named for the *quality* of the defendant's conduct rather than the *right* which the tort protects. It could be said that this is not a misnomer. It could be said that it is indeed an aspect of the silver rule that you shall not cause harm to another through negligence because, by the ethic of reciprocity, you would not want to suffer harm through the negligence of another. The logical result of that view would be to make negligence in itself a wrong and thereby to elevate freedom from negligence into a correlative fundamental right. But that is not the law. There is no general duty to be careful: *Spandeck* at [29] per Chan CJ; *Hedley Byrne v Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") at 514 per Lord Devlin and 534 per Lord Pearce. There is at common law no fundamental right to be free of harm caused by negligence. Even within the tort of negligence, therefore, the common law's default rule is *against* liability.

108 The tort of negligence is so named because of the bottom-up way in which it has developed. That has inevitably led the inquiry in each particular case to focus on the quality of the defendant's conduct because it is that conduct which has caused the harm. But if it is accepted that the law of torts serves to vindicate a set of fundamental rights, the focus of the inquiry in each case, and particularly in a novel case, ought to be on whether the law recognises a fundamental right of the plaintiff which has been infringed.

109 That is a completely different inquiry from focusing on the nature or quality of the defendant's conduct or of the plaintiff's harm. All of the plaintiffs in the following example suffer economic loss as a result of the defendant's conduct. But in each case, the defendant has infringed a different fundamental right of the plaintiff: (a) a plaintiff drinks the defendant's negligently-contaminated ginger beer and becomes ill, incurring medical expenses and losing wages; (b) the defendant's negligent driving damages a plaintiff's car and the plaintiff incurs the cost of repair; (c) a plaintiff extends credit in reliance on the defendant's negligent and false representation about the debtor's creditworthiness and is unable to recover the debt; and (d) a negligently-prepared letter of reference falsely traduces an ex-employee and leaves him unemployable. Although each plaintiff suffers the same harm (economic loss) by the same conduct (negligence), each plaintiff has had a different fundamental right infringed. In sequence, these rights are: (a) the right to bodily safety; (b) rights of property; (c) the right to rely on a voluntarily assumed responsibility; and (d) rights of reputation. Losing sight of the fundamental right in play can lead us to group fundamentally different cases

together or, by the same token, prevent us from grouping like cases with like.

110 The analytical usefulness of keeping in sight not just the type of harm caused but also the fundamental right which the plaintiff relies on is illustrated by the case of *Man Mohan Singh s/o Jothirambal Singh and another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and another and another appeal* [2008] 3 SLR(R) 735. In that case, both of the plaintiffs' children were tragically killed in a car accident. The bereaved plaintiffs mounted a claim against the negligent driver which included damages for the cost of artificial reproductive techniques undergone in an attempt to have more children. The Court of Appeal denied their claim on the classical analytical approach (at [48]). But the Court of Appeal also relied on the rights-based analytical approach to reject the plaintiffs' claim. On that approach, the essence of the case depended neither on the quality of the defendant's conduct (negligence) nor on the harm suffered (economic loss). The essence of the plaintiffs' claim instead was the new duty which the plaintiffs were asking the Court of Appeal to recognise and the correlative right which would inevitably accompany it. Thus, Andrew Phang JA (delivering the judgment of the court) said at [51]:

> In essence, in challenging the Judge's decision to disallow their claim for the cost of fertility treatment, the appellants are asking this court to recognise that they have a right at common law to replace their deceased sons … who were all the children that they had. We do not believe that we can or should recognise such a right, as a matter of both law and policy, even though we are deeply sympathetic towards the appellants' plight.

111 With that background sketched, I first consider the plaintiffs' claim in fraudulent misrepresentation or the tort of deceit before going on to consider the claim in negligent misrepresentation and then the claim for breach of warranty of authority.

Fraudulent misrepresentation

The meaning of fraud

112 Fraud is the core concept in the tort of deceit. It is this concept which captures the fundamental right which the tort of deceit vindicates: the right not to be lied to. The core concept is captured as the last of the five essential elements for liability in the tort of deceit set out in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]:

> … First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff… acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

113 The standard exposition on fraud is Lord Herschell's speech in *Derry v Peek* (1889) 14 App Cas 337. Although that exposition is over 125 years old, the Court of Appeal has endorsed it on many occasions, some very recently: *Panatron* at [13]; *Wishing Star v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*") at [16]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [35].

114 According to Lord Herschell (at 374), a person making a representation is fraudulent if he makes a false representation with no honest belief in its truth. Lord Herschell posited three ways in which this can happen: (a) when that person knows that the misrepresentation is false; (b) when he

makes the misrepresentation without belief in its truth; and (c) when he makes the misrepresentation recklessly, not caring whether it is true or false. The first two limbs capture the core concept of fraud. The third limb is in fact an extension of the core concept, an extension which does not go as far as the plaintiffs suggest.

115 On the strength of Lord Herschell's analysis, the plaintiffs submit that whether Susan Chua had an honest belief in the truth of her statements is a question of fact to be determined applying an objective test. [note: 77] Applying that test, the plaintiffs rely on all three of Lord Herschell's limbs [note: 78] to argue that Susan Chua's misrepresentations to the first plaintiff were indeed fraudulent:

(a) First, the plaintiffs say that Susan Chua knew that her misrepresentations were false. [note: 79] At the time she made them, the defendant was not in fact in a solicitor/client relationship with "Lum Whye Hee". The basis for this submission is that both Leong Li Lin and Sega Param gave evidence in cross-examination that, when the defendant acts for a vendor of property, the defendant accepts the vendor as a client under their standard operating procedure only when the option is exercised. It is only then that the defendant runs a conflict check, gets evidence of the client's identity, gets the client's warrant to act and opens a file. None of that had happened at the time Susan Chua told the first plaintiff on 20 September 2010 that the defendant acted for Lum Whye Hee.

(b) Alternatively, the plaintiffs submit that Susan Chua made the misrepresentations without honest belief in their truth. The basis for this submission is that it is common ground that Susan Chua did not know and had never met Victor Tan, Lum Whye Hee, or Lock Sau Lain. [note: 80] Despite this, she did nothing to verify the identity of Lum Whye Hee before she misrepresented to the first plaintiff that the defendant was acting for "him" and that the defendant had received a copy of the "option" naming the defendant as the vendor's solicitors. [note: 81]

(c) Finally, the plaintiffs submit that Susan Chua was reckless in making these misrepresentations. [note: 82] The basis for making this submission is that even though Susan Chua was making material representations to the first plaintiff, she admitted paying little attention to her call with him and to what she said to him.

116 The plaintiffs therefore conclude: "Clearly, on 20 September 2010, Vision Law did not act for Lum. Vision Law also did not have any belief that it acted for Lum. The [m]isrepresentations were obviously made with the knowledge that they were false, or without any genuine belief that they were true. And neither Vision Law nor Chua had any reasonable grounds to believe that Vision Law acted for Lum." [note: 83]

117 I cannot accept the plaintiffs' submissions. The submissions conflate fraud with negligence. That conflation loses sight of the fundamental right which the tort of deceit protects: the right not to be *lied* to. Without a lie, the right is not infringed. Indeed, without a lie, the tort of deceit is not even engaged. A lie requires a specific, subjective state of mind. Fraud must therefore always be determined subjectively, not objectively: did *this* defendant in *this* case and in *these* circumstances have the state of mind determined by *Derry v Peek* to constitute fraud. It is of course true that, absent an admission, a court can only *infer* the defendant's state of mind, and can only do so from the objective facts. It is also true that the court can infer a defendant's subjective state of mind by comparing what the defendant asserts he knew, believed and said with what a hypothetical honest defendant in the same circumstances would have known, believed and said in the same circumstances and on the inherent probabilities. But a court cannot, as the plaintiffs submit, determine fraud by

applying an objective test. That would be impermissibly to equate fraud with negligence. "[N]egligence, however gross, is not fraud": *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR(R) 196 at [43] per Andrew Ang J, approved in *Wishing Star* at [17] and *Anna Wee* at [35].

The representations were not fraudulent under the first limb

118 Susan Chua's misrepresentations are not fraudulent within Lord Herschell's first limb. The plaintiffs' submission that they *were* fraudulent gives Susan Chua's first representation an unnatural and artificially literal meaning. The first plaintiff's first question to Susan Chua, understood properly in its natural meaning and in context, did not ask whether the defendant was then, on 20 September 2010, in a formal, technical solicitor/client relationship with "Lum Whye Hee" as a matter of law. Those legal technicalities were not the purpose of the first plaintiff's phone call and were ultimately of no interest to him. Instead, what he wanted to know was not just whether a solicitor/client relationship had in fact *already* arisen but also whether the defendant then had a basis to *expect* that relationship to arise in the near future in the natural course of events. This commonly-understood element of futurity is acknowledged by the statutory definition of "client" in s 2(1) of the Legal Profession Act (Cap 161, Rev Ed 2009). That provision defines "client" as including "any person who, as a principal … retains or employs or *is about to* retain or employ … a law corporation…." (emphasis added). Indeed, in that sense, if one focuses on the issue of whether the defendant had a client at all, Susan Chua's first representation was in fact true. It was false only in the sense that that client, in the extended sense which acknowledges futurity, was Victor Tan, not Lum Whye Hee.

119 That extended meaning of the first plaintiff's question is consistent with his purpose in asking the question. That purpose was to gather information to assist him in ascertaining whether Victor Tan's transaction with "Lum Whye Hee" was a genuine one so that he could assess the risk of his own *prospective* transaction with Victor Tan. I find that that is how he intended his question to be understood when he posed it. I am further satisfied that that is how Susan Chua understood his question when she answered it. I am also satisfied that Susan Chua genuinely believed at the time of her conversation with the first plaintiff that she had spoken to the real Lum Whye Hee and that "he" would in due course – upon exercise of the "option" – become a client of the defendant. The plaintiffs' reliance on Lord Herschell's first limb therefore fails.

The representations were not fraudulent under the second limb

120 Susan Chua's misrepresentations are also not fraudulent under Lord Herschell's second limb. The plaintiffs' case on the second limb rests on the qualifier "honest" (italicised below) which Lord Herschell inserts before "belief" twice in his exposition in *Derry v Peek* (at 374):

> To prevent a false statement being fraudulent, there must, I think, always be an *honest* belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such *honest* belief.
>
> [Emphasis added]

121 The qualifier "honest" when applied to a belief is tautologous. A dishonest belief is not a belief at all. Lord Herschell was aware of that. He makes clear in his exposition that he inserts this qualifier not as tautology but for a purpose. His intention is to capture the fraudster who argues that he is outside Lord Herschell's second limb because he has arrived at a struthious belief in the truth of his misrepresentation: by burying his head ostrich-like in the sand. Thus, Lord Herschell says (at 375):

> If I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

122 It is true that Susan Chua did not know any of the individuals named in the "option" and that she did not conduct any independent identity checks on "Lum Whye Hee" before making her representations to the first plaintiff. But there is absolutely no evidence that Susan Chua shut her eyes to the true identity of the "Mr Lum" to whom she spoke or that she purposely abstained from making inquiry into his identity. I am therefore satisfied that her belief in the truth of her misrepresentations was an honest belief, in the sense Lord Herschell intended that phrase. The plaintiffs' reliance on Lord Herschell's second limb also fails.

The representations were not fraudulent under the third limb

123 Susan Chua's misrepresentations are also not fraudulent under Lord Herschell's third limb. Although Lord Herschell says at 374 that the third limb is an instance of the second limb, it is in fact an extension of it. He expresses it separately to make clear that the fraudster who is *conscious* of a *risk* that his statement may be false, but who makes the statement anyway, does so "without belief in its truth" and is therefore also fraudulent: *Derry v Peek* at 371. "Recklessly" in the third limb therefore means "indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth" (per Bowen LJ in *Angus v Clifford* [1891] 2 Ch 449 at 471, cited with approval in *Wishing Star* at [18] and in *Anna Wee* at [34]). This requirement that the defendant be *conscious* of the risk of falsity is further evidence that the test for fraud is subjective. The word "careless" in the third limb does not import any aspect of objectivity or of negligence. It simply means "without caring". It does not mean "without taking care": *Anna Wee* at [34] and *Wishing Star* at [18].

124 Lord Herschell's coupling of "recklessly" with "careless" in the third limb is therefore intended to capture a defendant who makes a representation, conscious of a risk that it may be false, but who is indifferent to that risk. I am satisfied that Susan Chua on 20 September 2010 was not conscious of any risk that she had been duped into believing that the "option" had been genuinely issued by Lum Whye Hee to Victor Tan. I have accepted Susan Chua's evidence that it never entered her mind that the "option" could be a forgery [note: 84] and that she genuinely believed that "Mr Lum" had instructed the defendant to act for "him" in selling 13A Jalan Berjaya (see [54] above). Failing to take care before making a representation to that effect is not what Lord Herschell means by "careless". Paying little attention to her telephone call with the first plaintiff on 20 September 2010 is also not what Lord Herschell means by "reckless". Neither word is a warrant to introduce aspects of the law of negligence into the tort of deceit. The plaintiffs' reliance on Lord Herschell's third limb also fails.

Conclusion on fraud

125 The principle overarching Lord Herschell's three limbs is that fraud requires either outright dishonesty or recklessness amounting to dishonesty: *Anna Wee* at [35]. Recklessness here is subjective recklessness: indifference to a risk which the defendant is conscious of. It is not indifference to a risk which would have been obvious to a hypothetical reasonable person. That is consistent with the fundamental right protected by the tort of deceit: the right not to be lied to. Susan Chua did not lie to the plaintiffs either in the strict sense of the word or in Lord Herschell's extended sense of the word. The defendant was therefore not fraudulent in any sense of the word. Fraud ought not to have been alleged against it at all. The most the plaintiffs can fairly say on the evidence is that the defendant was negligent. It is that to which I now turn.

Negligent misrepresentation

The role of the duty of care

126 As I have pointed out above, it is the law that negligence does not in itself result in liability, even when coupled with harm (see [107] above). An analytical model which focuses on the negligent quality of the defendant's conduct therefore requires a control mechanism. On the classic model, that control mechanism is the duty of care. The purpose of the duty of care is to distinguish those cases in which a failure to take reasonable care plus harm results in liability from those cases in which it does not (or ought not).

127 If our analytical model for the tort of negligence were to focus on the right infringed there would be no need for any control mechanism at all. In that model, a defendant is liable to a plaintiff if he engages in conduct of the appropriate standard (faultless, negligent or intentional) which infringes a protected right of the plaintiff, thereby causing him harm. The scope of the exception to the law of negligence's default rule *against* liability is controlled by the scope of the protected right. The duty of care disappears from the analytical model because it is no longer needed to control liability. This alternative model gives rise not so much to pockets of negligence (see *Spandeck* at [42]) as to islands of rights. Policy is still a factor in this model but plays quite a different role. It is a factor in the value judgment made as to whether to elevate a particular right into protected status under the silver rule. (Whether it is the courts or the legislature who should make that value judgment is a separate question.) Policy ceases to play a role in validating or nullifying a duty of care, because that entire concept is no longer required.

128 But as I have acknowledged, the common law develops and applies the law of negligence bottom-up, not top-down. I therefore turn first to consider the basis of the plaintiff's claim that the defendant owed it a duty of care.

The universal test for a duty of care in the law of negligence

129 The plaintiffs rest their case against the defendant in negligence on the species of liability identified by the House of Lords in *Hedley Byrne*. On the traditional approach to the law of torts, the plaintiffs' case stands at the intersection of two problem areas. It involves words said to have been spoken carelessly causing loss which is purely economic. In the highly influential case *Hedley Byrne*, the House of Lords achieved two notable results. First, their Lordships abolished the distinction in the law of negligence between words and acts. Second, they recognised an exception to the general rule in English law which bars recovery in negligence for pure economic loss.

130 *Hedley Byrne* is not of course binding authority in Singapore. The first step to applying it in Singapore – as the plaintiffs invite me to do – requires integrating it with Singapore's universal test for determining when a duty of care arises in the law of negligence. The Court of Appeal laid down that test in its seminal decision in *Spandeck*. The test established by *Spandeck* is universal precisely because it applies to all harm caused by negligence, regardless of the type of harm which the defendant negligently causes to the plaintiff (on our current model) or the fundamental right of the plaintiff which has been negligently infringed (on the alternative top-down model).

131 The universal test thus determines whether a defendant owes a duty of care to a plaintiff to avoid inflicting personal injury, property damage, psychiatric harm or pure economic loss: *Spandeck* at [71]; *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 ("*Ngiam Kong Seng*") at [48] and [109]. It applies even to determine whether an occupier of land owes a duty of care to an entrant: *See Toh Siew Kee* at [76], [130] and [144]. Being universal, the same test applies regardless of whether the defendant's negligence consists of acts (negligent certification in *Spandeck*),

omissions (failure to give strategic investment advice in *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Deutsche Bank AG*")) or words (inaccurate borehole logs in *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485).

132 The universal test starts with the threshold question of factual foreseeability and follows that with a two-stage test comprising proximity and policy considerations. Each criterion of the universal test is to be applied incrementally, by analogical reference to decided cases. But where there are no analogous decided cases to assist the court, "recourse to general principle is not only valid but desirable": *Spandeck* at [43], [73] and [82].

133 I first summarise the principles comprising the universal test distilled from *Spandeck* and its progeny before analysing *Hedley Byrne* liability and seeing how it can be integrated into it.

The threshold question: reasonable foreseeability as a factual question

134 The threshold question in the universal test requires a court to consider as a factual matter whether the defendant ought reasonably to have foreseen that his negligence would cause harm to the plaintiff: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects* [2007] 1 SLR 853 ("*Sunny Metal*") at [46] and [55]. The threshold question casts a wide net and is easily satisfied in most negligence actions: *Sunny Metal* at [55]. That is why *Spandeck* characterises this issue as a threshold question rather than as a stage of the two-stage legal test for a duty of care: *Spandeck* at [115]. It is a preliminary filter and not a stage in itself. It serves more to filter out the obviously unsustainable case in which a duty of care cannot possibly arise rather than to identify the sustainable case in which it does: *Spandeck* at [76]; *Sunny Metal* at [55]. But this threshold question, even though it is not one of the two stages of the universal test, is nevertheless a necessary part of that test: *Ngiam Kong Seng* at [106].

135 To satisfy the threshold question in the typical case, there must be a finding that a defendant ought reasonably to have foreseen that the plaintiff could suffer harm, even if the specific *kinds* of harm which the plaintiff actually suffers could not have been foreseen: *Spandeck* at [89]. Exceptionally, where the harm is psychiatric harm, the threshold finding must be that the defendant ought reasonably to have foreseen that his negligence could cause the plaintiff *psychiatric* harm rather than any other kind of harm: *Ngiam Kong Seng* at [110]; *Man Mohan Singh* at [32].

136 Although *Spandeck* and its progeny make clear that the threshold question is a factual inquiry and not a normative inquiry (*cf* the concept of proximity at [142] below), the threshold question cannot be a *subjective* factual inquiry which is devoid of all *normative* content. In other words, the threshold question cannot be: "Did *this* defendant in the circumstances of *this* case *actually* foresee that *this* plaintiff could suffer harm?". If this were indeed the threshold question, the universal test would absolve at its threshold those who are oblivious to risk or incapable of foresight. So the threshold question must have at least *some* normative content. But that normative content cannot be infused by continuing to frame the threshold question in subjective terms: "*Ought* this defendant, in the circumstances of *this* case with *his* personal attitude to risk and *his* personal capacity for foresight, to have foreseen that *this* plaintiff could suffer harm?". This formulation too would absolve the defendant who is oblivious to risk or incapable of foresight. On either formulation, the law of negligence would fail to uphold minimum objective standards of conduct and to protect those who suffer harm when those standards are not met and their fundamental rights are infringed. The threshold question therefore must be: "Ought a *reasonable* person, in the circumstances of *this* case with a *reasonable* attitude to risk and a *reasonable* capacity for foresight, to have foreseen that *a* plaintiff could suffer harm?".

137 This approach to the threshold question is not only consistent with the underlying purposes of the law of negligence but also with the Court of Appeal's decision in *Spandeck*. The Court of Appeal sets out its exposition of the universal test at [73] to [86]. It commences this exposition by holding that "factual foreseeability" is inadequate as a legal control mechanism because "all that it means is that a defendant ought to have known that the claimant would suffer damage from his (the defendant's) carelessness": *Spandeck* at [75]. This question uses the modal verb "ought" and is therefore a normative question. It is this question framed in this way which the Court of Appeal then says at [76] is nevertheless "a necessary element in any claim in negligence" but as a "threshold question to be fulfilled, failing which the claim does not even take off." Further, when the Court of Appeal resolves the threshold question on the facts of *Spandeck* (at [89]), it frames its conclusion in normative terms and without inquiry into the defendant's subjective state of mind. Thus, the finding on this point is that the plaintiff's loss "*must have been* foreseeable" to the defendant (emphasis added) rather than a finding that it was in fact foreseen.

138 This normative and objective approach is also consistent with Court of Appeal decisions following *Spandeck*. These decisions interpret, apply and determine the threshold question divorced both from the defendant's actual foresight and his personal characteristics. Thus, in *Ngiam Kong Seng*, a case of psychiatric harm, the threshold question was not satisfied because the Court of Appeal held that it cannot be said that a person who communicates distressing information carelessly ought to foresee that that communication could in itself cause psychiatric harm (at [132]). Similarly, in *Man Mohan Singh*, a case of pure economic loss (albeit arising from a profoundly tragic double bereavement), the Court of Appeal held that it cannot be said that a motorist who drives negligently ought reasonably to foresee that his negligence could kill all the children of a particular family: *Man Mohan Singh* at [48].

139 *Deutsche Bank AG* is one case in which it could be said that the Court of Appeal determined the threshold question subjectively and descriptively, with no normative component. That is not, in my respectful view, the correct reading of that case. The alleged negligence in that case was a total *failure* to provide investment advice. The Court of Appeal was therefore considering liability for an *omission*: *Deutsche Bank AG* at [19]. It was in that context that the Court of Appeal considered the threshold question (at [31(d)]). The Court of Appeal's subjective and descriptive analysis of the threshold question in that case was therefore directed to the question whether the defendant had any duty to act at all. Having determined on the facts that it had no duty to act (at [31(c)], the Court of Appeal nevertheless assumed that the threshold question was satisfied (at [35]) and went on *obiter* to apply the universal test.

140 Finally, a normative and an objective approach to the threshold question is consistent with the Court of Appeal's decision in *See Toh Siew Kee*. VK Rajah JA, delivering the principal judgment of the Court of Appeal in that case, held that the law of negligence subsumes the body of common law rules in Singapore dealing with occupiers' liability. He then went on to map the *prima facie* duty of care arising under the universal test to the law of occupiers' liability: at [76]. The *prima facie* duty of care, of course, comprises both the threshold question of reasonable foreseeability and the first stage of proximity. Sundaresh Menon CJ and Chao Hick Tin JA delivered judgments concurring with VK Rajah JA in all material respects save for how the first stage of the universal test – proximity – should be mapped to the law of occupiers' liability. VK Rajah JA took the view that that mapping could be done *a priori* and *de jure*. Sundaresh Menon CJ's view was that it should be done on a case by case basis. Chao Hick Tin JA's view was that choosing between those two approaches should be left for future decision. What is important for present purposes is that neither Sundaresh Menon CJ nor Chao Hick Tin JA disagreed with VK Rajah JA's approach to the *threshold question*. He held that all occupiers are taken reasonably to foresee that if they do not take reasonable care to eliminate static or dynamic dangers on their premises, lawful entrants to those premises will suffer damage: at [77]. Fixing the

answer to the threshold question in this way shows clearly that the threshold question, although a factual question, is approached normatively and objectively.

The first stage: proximity

141 The first stage of the universal test is proximity. Proximity is a legal concept with normative force: *Sunny Metal* at [46] and [48]. Being a legal concept, proximity involves a value-judgment by the court about where the bounds of the law of negligence should be drawn: *Sunny Metal* at [58]; *Spandeck* at [79]. The central inquiry in this stage is whether the closeness and directness of the relationship between the parties ought to give rise to a duty of care: *Spandeck* at [77]. Proximity has many aspects including physical proximity, circumstantial proximity, causal proximity, a voluntary assumption of responsibility and reliance: *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 ("*Sutherland Shire*") at 55, approved in *Spandeck* at [79].

142 The legal concept of proximity equates to a legal or normative finding of reasonable foreseeability: *Ngiam Kong Seng* at [104]. There is no need to address reasonable foreseeability on the facts separately in the proximity stage of the universal test because it is captured in the threshold element of the universal test, which is "an integral part of the process of ascertaining whether there is sufficient (legal) proximity between the plaintiff and the defendant, albeit on a preliminary (and factual) level" (*Ngiam Kong Seng* at [106]).

The second stage: policy

143 The second and final stage of the universal test is policy. The universal test segregates the proximity inquiry from the policy inquiry to ensure transparency in duty of care decision-making rather than leaving the impression that the courts decide duty of care questions based on "unexpressed motives": *Spandeck* at [85]. The reference to policy in the second stage of the universal test is not the same conception of public policy which is captured in the maxim *ex turpi causa non oritur actio.* What is involved at this stage of the universal test is the "differential weighing and balancing of competing moral claims and broad social welfare goals": *Spandeck* at [85]. Thus, at this stage, the court looks at whether there are any broader community welfare or societal considerations which go beyond the imperative to do justice between the immediate parties and which militate against a duty of care which has, *ex hypothesi*, arisen at the first stage: *Spandeck* at [83]; *See Toh Siew Kee* at [87]-[88].

144 The primary purpose of the policy stage is *negative* in nature as it serves to negate a *prima facie* duty of care: *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [77]. It is nevertheless legitimate to consider at the second stage whether there are any reasons of policy to *support* a finding of a duty of care: *Animal Concerns* at [77]; *See Toh Siew Kee* at [86]; *Deutsche Bank AG* at [23]. But policy can never be a basis in itself for a duty of care to arise under the universal test. Policy is neither necessary nor sufficient for a duty of care to arise: it must be accompanied by proximity. Proximity is necessary but is not sufficient for a duty of care to arise: it must be accompanied by factual foreseeability.

Spandeck is ultimately a framework not a test

145 I have referred to *Spandeck* as having laid down a universal test for the existence of a duty of care in the law of negligence. In truth, though, the universal test operates at a sufficiently high level of abstraction to be more accurately characterised as a universal *framework* rather than as a universal *test*: *Spandeck* at [28]. As Sundaresh Menon CJ put it in *See Toh Siew Kee* at [130], "the genius of *Spandeck* is that it presents a flexible framework that allows the court to assess each case

according to the particular facts that arise, and yet to do so in a consistent manner". The flexibility of this framework and the level of abstraction at which it is pitched are features which enable the universal test to carry both explanatory force for established duty of care situations as well as normative force for novel ones. But these very features make it essential to populate both of its stages with factors operating at a lower level of abstraction before it can be applied to yield a result on the facts of a particular case.

Voluntary assumption of responsibility and reliance

146 *Spandeck* identified two factors that populate the proximity stage of the universal test: the defendant's voluntary assumption of responsibility towards the plaintiff and the plaintiff's reasonable reliance on the defendant. Thus, it is said, the twin concepts of a voluntary assumption of responsibility and its mirror image of reasonable reliance in many cases "constitute the best – and most practical – criteria for establishing whether or not there is proximity between the claimant and the defendant from a legal standpoint": *Sunny Metal* at [63]. This is particularly true in cases involving pure economic loss: *Ngiam Kong Seng* at [100]. But a voluntary assumption of responsibility is only one of the criteria which can lead to a finding of proximity: *Sunny Metal* at [70]. This is so even in a case involving negligent words or liability for economic loss: *Deutsche Bank AG* at [36(b)] and [38]. And a voluntary assumption of responsibility could, depending on the precise facts of the case at hand, be one of the criteria of proximity even in a case of psychiatric harm: *Ngiam Kong Seng* at [100]. It is the concept of proximity which is universal in our law of negligence, not the criteria by which proximity is established in any particular case or in any particular class of cases: *Ngiam Kong Seng* at [123].

147 The concept of a legal duty resting on a voluntary assumption of responsibility traces its history back to the courts of equity and the decision in *Nocton v Lord Ashburton* [1914] AC 932. But it was *Hedley Byrne* which transplanted this concept from equity into the common law and into the law of torts. Understanding what is meant by this concept therefore requires a closer analysis of *Hedley Byrne*.

Hedley Byrne

148 In *Hedley Byrne*, the House of Lords held that a defendant will be liable in damages to a plaintiff if the defendant carelessly makes a false statement to the plaintiff in circumstances where: (i) the defendant has voluntarily assumed a responsibility to the plaintiff to take reasonable care that the statement is true, (ii) the plaintiff relies reasonably on that statement; and (iii) the plaintiff thereby suffers loss.

149 A voluntary assumption of responsibility as conceptualised by *Hedley Byrne* is a term of art and not a turn of phrase. It means a contract minus only consideration. Thus, Lord Reid sees this species of liability as analogous to "an agreement or undertaking to be careful" which *Hedley Byrne* permits to yield a remedy in the English law of tort as it does in the Scots law of contract, where consideration is not an essential element (at 492). Lord Devlin too says that *Hedley Byrne* liability arises "where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract" (at 529; approved in *Animal Concerns* at [63]). Thus, Lord Devlin held, "a promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort" (at 526). That remedy in tort which *Hedley Byrne* makes available for the broken promise makes it "unnecessary and undesirable to construct an artificial consideration" to move the parties' relationship into the province of contract simply so as to make a contractual remedy available (at 528). "[T]he cause of action is better regarded as arising from default in the

performance of a voluntary undertaking independent of contract" (at 528).

150 This undertaking, analogous to contract, gives rise to the "special relationship" which *Hedley Byrne* saw as a necessary condition for liability. The similarities between *Hedley Byrne* liability and contract run deep. Four of them are significant.

151 First, just like a contract, the assumption of responsibility is voluntary in the sense that it springs from consent. "It is a responsibility that is voluntarily accepted or undertaken" (per Lord Devlin at 529). Thus the word "voluntary" is used not only in the sense which signifies the absence of consideration (as in the maxim that 'equity will not assist a volunteer') but also to indicate that the assumption of responsibility to take care is conscious and volitional: *Smith v Eric S Bush* [1990] 1 AC 831 ("*Smith v Bush*") at 870C, per Lord Jauncey.

152 Second, just like a contract, the assumption of responsibility need not be express but can be implied. Thus, Lord Devlin says that it is not "possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract" (at 530). A voluntary assumption of responsibility will readily be implied from certain categories of relationships between the parties, like a solicitor/client or customer/banker relationship. Where the parties are not in a relationship of that nature, "Responsibility can attach only to the single [negligent] act… and only if the doing of that act implied a voluntary undertaking to assume responsibility" (per Lord Devlin at 529; cited with approval in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [32]).

153 Third, just like a contract, the defendant's conscious and volitional assumption of responsibility to be careful can be inferred from the special circumstances of the case. Thus, Lord Reid finds it persuasive to contrast a response to "a 'mere inquiry' with a case where there are special circumstances from which an undertaking to be careful can be inferred" (at 492).

154 Fourth, just like a contract, where the assumption of responsibility is not express, the court applies an objective test to determine whether an assumption of responsibility is implied or can be inferred from the parties' outward manifestations of their intent rather than their subjective intent: *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*") at 637 per Lord Oliver; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181 per Lord Goff; *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 at 835 per Lord Steyn.

155 A voluntary assumption of responsibility as conceived in *Hedley Byrne* can thus be express or implied, or can be inferred from the special circumstances. But springing as it must from the defendant's volition, it *cannot* be imposed by the law or imputed by the court. As Lord Devlin says, it is not "a responsibility imposed by law upon certain types of persons or in certain sorts of situations". Lord Goff's remark to the contrary in *White v Jones* [1995] 2 AC 207 does not reflect the weight of authority.

156 The proto-contractual nature of *Hedley Byrne* liability is the only way to explain two of its features which are unique in the law of negligence and which are otherwise inexplicable. The most significant feature – and the one which was decisive in *Hedley Byrne* itself – is that a defendant is able to escape this type of liability altogether by making its performance of its promise to take care subject to a unilateral and suitably-worded disclaimer. That would be a startling result in any other branch of the law of negligence. It would be absurd to suggest that a motorist can escape liability for negligent driving by displaying a prominent notice on top of his car disclaiming all liability for damage suffered by those with whom he collides: *Harris v Wyre Forest District Council* [1988] QB 835 ("*Wyre Forest District Council*") at 853 per Kerr LJ. That is so even if the victim of the motorist's negligence

actually read and understood the disclaimer before the collision. Second, *Hedley Byrne* liability does not arise if the negligent misrepresentation is made in a casual or perfunctory conversation (*Hedley Byrne* at 495), on a social or informal occasion (at 482) or without deliberation (at 539). In other branches of the law of negligence, all of these factors would be *prima facie* evidence of a lack of care rather than factors negating liability.

157 Both of these features are easily explained by the rights-based approach to the law of torts. The true and lasting significance of *Hedley Byrne* is to recognise that breaking a promise to take care in doing an act is, if the act is actually performed and is reasonably relied upon, an aspect of the silver rule. That is so whether that promise is made by words or conduct and whether the promise is express or implied or can be inferred from the special circumstances. Through *Hedley Byrne* liability, the law of negligence vindicates the promisee's interest in that promise to take care by imposing legal liability on the promisor for breaking it, even if the promise is unsupported by consideration and therefore does not amount to a contract.

158 This result is derived by working backwards from the *Hedley Byrne* duty to see what correlative right vested in the plaintiff it necessarily implies. The key feature here is that the assumption of responsibility necessary for this species of liability has been framed from the outset in *Hedley Byrne* by analogy with contract. Once that is appreciated, it becomes clear that the right which *Hedley Byrne* liability protects is the same right that the law of contract protects: a plaintiff's interest in a promise to him being kept. The key difference is that *Hedley Byrne* liability protects the plaintiff's interest only in a promise by the defendant *to take care* in the doing of an act, not the promise to do the act in itself. That has at least two consequences. First, the defendant has no liability if the act is not done at all. The defendant is liable if, and only if, the act is performed and is performed without reasonable care (per Lord Devlin at 526). Second, the law offers a remedy only for the actual *loss* which is caused by the negligent performance of the promise. There is no remedy for expectations engendered by the promise which are defeated by its breach.

159 Once it is grasped that the promise to take care is the very root of this type of liability, the two unique features of *Hedley Byrne* liability resolve themselves quite easily. They can be explained readily on the basis that they go to the *promise* to take care and prevent any assumption of responsibility from arising in the first place (*Smith v Bush* at 848D per Lord Templeman; at 856H per Lord Griffiths; and at 873G per Lord Jauncey). Thus, the defendant's unilateral disclaimer is effective because it prevents a promise to take care from arising at all. It shows that the defendant never intended to assume a responsibility to take care. The disclaimer does not operate as a defence: by qualifying or nullifying a promise to take care after it has been made. So too, a casual response to a "mere inquiry" or a perfunctory response on a social occasion are all examples of circumstances which will typically operate to negate any express or implied promise to take care or which militate against inferring a promise to take care.

160 These fundamental differences between *Hedley Byrne* liability and other liability for negligence cannot be explained on any other basis. They cannot be explained on the basis that *Hedley Byrne* deals with careless words. The House of Lords supported its decision in *Hedley Byrne* by relying on cases where loss was caused by conduct as well as cases where it was caused by words. Indeed, one of the necessary results of *Hedley Byrne* was to eliminate the distinction between liability for careless words and liability for careless conduct. And *Hedley Byrne* liability extends to the negligent performance of a service, whether by careless words or conduct: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. Finally, both *Spandeck* and the English Court of Appeal case on which it relies heavily, *Pacific Associates Inc v Baxter* [1990] 1 QB 993, are cases applying *Hedley Byrne* principles to negligent conduct (certification) rather than to negligent words.

161 These fundamental differences cannot also be explained on the basis (as Kerr LJ attempted to do in *Wyre Forest District Council*) that a disclaimer is ineffective for a well-established duty of care, like a motorist's, whereas it is effective for a novel duty of care, such as the *Hedley Byrne* duty. The motorist's duty of care was a novel duty at one time. Yet it has never possessed these features. *Hedley Byrne* liability is over 50 years old and is by now well-established. Yet it continues to possess these features.

162 On this rights-based view of *Hedley Byrne* liability, the importance of reliance recedes from the liability question. It remains the case that reliance will often be present on the facts, simply because that is what a promisor's promise to take care naturally engenders in a promisee. And reliance remains essential for liability as the necessary causative link between the promise and the loss. But reliance is no longer essential to trigger *prima facie* liability. That trigger is the promise to take care. However, on a loss-based approach –reliance remains an essential requirement of the duty question. That is a particularly important requirement in English law because *Hedley Byrne* is the primary exception to the rule there which bars recovery for pure economic loss.

Integrating Hedley Byrne liability with the universal test

163 It is not easy to integrate the test for a *Hedley Byrne* duty of care with our universal test for a duty of care. I say this for four reasons. First, *Hedley Byrne* establishes a voluntary assumption of responsibility coupled with reliance as the sole indicia of a *Hedley Byrne* duty of care. What role then do the three components of the universal test – factual foreseeability, proximity and policy – play in establishing a duty of care in these cases? Second, if a voluntary assumption of responsibility is to be integrated into the universal test as a proximity factor of general application in the first stage, what is its content? Third, given that a voluntary assumption of responsibility coupled with reliance are sufficient *in themselves* to give rise to a *Hedley Byrne* duty of care, where does that leave other proximity factors which are universally recognised as being legitimate in other areas of the tort of negligence? Examples are those identified by Deane J in *Sutherland Shire* (see [141] above). Finally, given that the purpose of *Hedley Byrne* liability in English law is to define the principal exception to their general rule barring recovery in negligence for pure economic loss, and given that Singapore has no such general rule, in what class of cases in Singapore should a voluntary assumption of responsibility be a necessary (or even a relevant) proximity factor?

How does Hedley Byrne map to the universal test?

164 I can deal easily with the first question. *Hedley Byrne* preceded the more granular approach to duty of care taken in English law in both *Anns v Merton London Borough Council* [1978] AC 728 and *Caparo* and our synthesis in *Spandeck*. *Hedley Byrne* can now easily be mapped to the more granular universal test. The threshold question is satisfied because factual foreseeability is inevitable from the mere fact that the defendant has voluntarily assumed a responsibility to the plaintiff to take care. It is reasonably foreseeable from that fact alone that harm to the plaintiff will follow if the defendant fails to take care. Other aspects of reasonable foreseeability are resolved under the rules of causation and remoteness. At the first stage of proximity, the *Hedley Byrne* voluntary assumption of responsibility becomes a proximity factor. At the second stage, policy remains a relevant consideration. But the policy considerations in the paradigm *Hedley Byrne* case are *a priori* embedded in the *Hedley Byrne* duty rule. So, in cases at the core of *Hedley Byrne*, the policy analysis will be truncated or can be dispensed with entirely. But in cases which are at the fringes of *Hedley Byrne* liability, or which involve extending it, there may still need to be a detailed policy analysis at the second stage.

What is the content of a voluntary assumption of responsibility as a proximity factor?

165 The second question is more problematic. In integrating a voluntary assumption of responsibility into the universal test as a proximity factor to be considered at the first stage, it is important not to *impute* it. That would amount to framing the inquiry as one into whether a defendant ought to be *deemed* to have assumed a responsibility not to cause harm to others by his negligence, with others relying on him to fulfil that responsibility. That application of the concept makes it so general as to apply to every case of negligently-inflicted harm of whatever kind. And applying the concept as something imputed by law rather than as something which is the product of the defendant's conscious will makes the concept conclusory, equivalent to the entire proximity question and perhaps even the entire duty question. That in turn deprives the concept of meaning and of utility as an indicator of proximity. It also deprives the concept of its explanatory force for the unique features in the *Hedley Byrne* line of cases (see [156]-[161] above).

166 The question is not whether the defendant accepted (or ought to be held to accept) legal liability for a failure to take care but whether the defendant voluntarily (*ie* consciously and without consideration) assumed a responsibility to take care in performing a task: *White v Jones* at 274H per Lord Browne-Wilkinson. It is because Lord Griffiths interpreted this concept in the former sense that he rejected it as an unhelpful test for liability in *Smith v Bush* (at 862E; see also *Caparo* at 628F per Lord Roskill and at 637G per Lord Oliver) and fell back on the three-part test in English law which has since become known as the *Caparo* test (at 865A).

167 For the concept of a voluntary assumption of responsibility to have any analytical use as a proximity factor – whether in the three part test or in the universal test – it must therefore have a less abstract and more fact-specific meaning. It must ask: did this defendant, expressly or impliedly, actually assume responsibility to this plaintiff to take care in performing the task in question such that the defendant's undertaking to do so would have amounted to a contract if the plaintiff had given consideration for it? If not, are there circumstances from which the court can infer that the defendant did so? The distinction between implication and inference on the one hand and imputation on the other is a fine one. But that distinction must be observed if this concept is to have analytical utility for particular cases, explanatory utility for past cases and normative utility for novel cases. Worse still, blurring that distinction runs the risk of making the unique *Hedley Byrne* defences available to a defendant even though the basis for the defence no longer applies because the analytical inquiry has shifted from an actual *voluntary* assumption of responsibility to an *imputed* assumption of responsibility (see [173]-[177] below).

Do other proximity factors play a role in Hedley Byrne liability?

168 The third question is rather more difficult to answer. *Hedley Byrne* proceeded on the basis that a voluntary assumption of responsibility (as conceived in that case) coupled with the plaintiff's reasonable reliance on the defendant's undertaking to take care was sufficient to establish the *Hedley Byrne* duty of care. Mapped to the universal test, that seems to leave no room to consider at the same level of generality any other proximity factors which would ordinarily be taken into account in the first stage. That said, there can obviously be no objection to using proximity factors to ascertain if a voluntary assumption of responsibility can be implied or inferred, if it is not express. Further, once there is a finding that a defendant has voluntarily assumed responsibility, there can be no objection in principle to relying on other proximity factors at that the same level of generality as support for that finding.

169 *Hedley Byrne* proceeded on the basis that a voluntary assumption of responsibility coupled with reasonable reliance was not only sufficient but also *necessary* for *Hedley Byrne* duty of care to arise. But English law now recognises that a *Hedley Byrne* duty can arise so long as there is a finding that the parties' relationship remains akin to contract. In *Smith v Bush*, the House of Lords held that

a surveyor who valued a property for a mortgagor, knowing that the valuation would be passed on to the mortgagee, owed a duty of care to the mortgagee in preparing that valuation. The surveyor's express disclaimer of liability to the mortgagee was ineffective because it failed the test of reasonableness under the Unfair Contract Terms Act 1977. Though ineffective in law, the disclaimer made it impossible to find as a fact that the valuer had voluntarily assumed any responsibility to take care as against the mortgagee.

170 The House of Lords held that the surveyor nevertheless owed a duty of care to the mortgagee because the surveyor and the mortgagee were in a relationship akin to contract. The mortgagee paid or contributed to the surveyor's fees, thereby making the case "not far removed from that of a direct contract between the surveyor and the purchaser": at 859F per Lord Griffiths; see also at 843H, 846C and 847D per Lord Templeman. This is simply an application of Lord Devlin's observation in *Hedley Byrne* that "It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form." Thus, in English law, a *Hedley Byrne* duty may arise from the circumstances of the case even if a voluntary assumption of responsibility is absent or negatived, so long as the relationship remains akin to contract. So too, under our universal test, a voluntary assumption of responsibility is not necessary for a *Hedley Byrne* duty of care to arise.

What is the scope of the Hedley Byrne duty in Singapore law?

171 That brings me to the last and most difficult question. I have until now spoken of *Hedley Byrne* liability or a *Hedley Byrne* duty without considering precisely what that means. In English law, it is clear what that means. *Hedley Byrne* defines the principal exception to the general rule in English law which bars recovery for negligently-inflicted pure economic loss. That rule/exception relationship is sufficient to distinguish *Hedley Byrne* liability from all other liability in the English law of negligence.

172 That distinction is neither necessary nor available in Singapore law. We do not have a general rule which bars recovery for pure economic loss. So Singapore law cannot use the type of harm to distinguish *Hedley Byrne* liability from general liability in negligence. A plaintiff in Singapore seeking damages for negligently-inflicted pure economic loss does not have to fit his case through a *Hedley Byrne* exception to win. He can simply invite the court to apply the universal test. *Spandeck* could thus have side-stepped *Hedley Byrne* entirely and left it to the ordinary application of the universal test to control liability for pure economic loss. But that is not what *Spandeck* did. *Spandeck* accepts the twin criteria of voluntary assumption of responsibility and reasonable reliance as the indicia of proximity in pure economic loss cases, rather than as merely one set of indicia sufficient for a finding of proximity arising from applying the universal test in the usual way.

173 The risk which arises from the lack of a dividing line in Singapore law between *Hedley Byrne* liability and general liability in negligence is that that makes it easier for the concept of a voluntary assumption of responsibility to escape from pure economic loss cases, where it was developed, and become thought of as a necessary indicia of proximity of general application. The result would be to distort both liability for pure economic loss and liability for negligence generally.

174 The phrase "voluntary assumption of responsibility" can be used in two senses: (i) first, in the proto-contractual sense in *Hedley Byrne*, springing from an outward manifestation of agreement, whether express, implied or inferred; and (ii) second, in the sense of a legal imputation of responsibility.

175 A voluntary assumption of responsibility in the first sense cannot be either a necessary or a sufficient condition for a finding of proximity *generally*. If it were either, a unilateral disclaimer of

liability would suffice *generally* to prevent a duty from arising and negligence on a casual occasion would negate liability. That would mean, for example, that the driver in the example posited by Kerr LJ (see [156] above) would escape liability. It is significant that *Spandeck* and the subsequent Court of Appeal cases which have interpreted and applied its universal test are all cases of pure economic loss (with two exceptions). This is also true of *Sunny Metal*, a decision at first instance which, although it was reversed in its result on appeal, heavily influenced the Court of Appeal's reasoning in the later decision in *Spandeck*. It is for this reason that these cases use the twin criteria of a voluntary assumption of responsibility by the defendant and reliance on that assumption by the plaintiff when analysing the proximity stage of the universal test. None of these cases establish these twin criteria as necessary or even sufficient factors to establish proximity in all negligence cases. Notably, the two exceptions which do not rely on these proximity factors are both cases not involving pure economic loss: *Ngiam Kong Seng* (psychiatric harm) and *See Toh Siew Kee* (personal injuries).

176 The alternative sense of a voluntary assumption of responsibility is that it is an assumption imputed by the court. Using assumption of responsibility in that sense reduces it to a mere shorthand for a decision to impose liability. Distorting the concept of a voluntary assumption of responsibility to encompass an *imputed* assumption of responsibility may perhaps be understandable in those jurisdictions, like England, where recovery for pure economic loss is by and large barred unless a case can be made to fit through the *Hedley Byrne* exception. Singapore is not such a jurisdiction: we have no general rule barring recovery for pure economic loss. Distorting that concept in that way is unnecessary in Singapore and, worse, deprives it of its very strong explanatory force.

177 Thus, proximity in Singapore law is a much broader inquiry in the general case than merely a search for a voluntary assumption of responsibility and reliance. Those two concepts may be *sufficient* in Singapore law for a finding of proximity where loss is caused by a promise to take care which is broken (on the rights-based approach) or involving pure economic loss (on the loss-based approach). But because Singapore's law of torts has no general rule barring recovery in cases of pure economic loss, and because liability for all negligence in Singapore law is mediated by a single universal test, there is no reason in Singapore law why these two concepts from *Hedley Byrne* must be *necessary* for a finding of proximity in those cases. And the two *Hedley Byrne* concepts, if applied as their Lordships intended them in *Hedley Byrne* itself, are wholly unsuited for cases outside the field of economic loss (see [156] above).

178 The question then arises how the proximity stage of the universal test is to be populated with proximity factors so that the universal test carries both explanatory value for existing duty situations and has predictive or normative value in novel duty situations.

The Australian cases

179 Although the law of negligence in Australia has diverged from that in Singapore and England over the last decade, recent decisions from Australia nevertheless offer practical guidance on what these other proximity factors could be. The High Court of Australia (and notably Deane J) championed proximity as the determinant of a duty of care in the 1980s and 1990s. But that court has in the last decade moved away from proximity as a general determinant of a duty of care. The move away from proximity was signalled in *Perre v Apand* (1999) 198 CLR 180 and *Sullivan v Moody* (2001) 207 CLR 562 ("*Sullivan*"). That move took place because it was felt that the concept of proximity fails to address what more, beyond reasonable foreseeability, is required for a duty of care to arise. The Australian High Court has also rejected the *Caparo* three-part test on the grounds that it runs the risk of being elevated into dogma and also because the third stage (fair, just and reasonable) is "capable of being misunderstood as an invitation to formulate policy rather than to search for principle" (*Sullivan* at [49]). Instead, the High Court has advocated a new approach for Australia which takes into account

multiple factors or the salient features of a case. That approach is now adopted by all Australian courts, state and federal.

180 The Australian "multi-factoral" or "salient features" approach is best summarised by Allsop P in *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258 ("*Caltex*") at [100] to [106]:

> 100 … This approach recognises what has been said to be the use of foreseeability at a higher level of generality and the involvement of normative considerations of judgment and policy. This approach requires not only an assessment of foreseeability, but also attention to such considerations as control, vulnerability, assumption of responsibility and nearness or proximity.
>
> 101 The High Court has rejected its previously enunciated general determinant of proximity, the two stage approach in *Anns…* based on reasonably foreseeability, the expanded three stage approach in *Caparo…* and any reformulation of the latter two, such as in Canada in *Cooper v Hobart* (2001) 206 DLR (4^{th}) 193. …
>
> 102 This rejection of any particular formula or methodology or test the application of which will yield an answer to the question whether there exists in any given circumstance a duty of care, and if so, its scope or content, has been accompanied by the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.
>
> 103 These salient features include:
>
> (a) the foreseeability of harm;
>
> (b) the nature of the harm alleged;
>
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
>
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
>
> (e) the degree of reliance by the plaintiff upon the defendant;
>
> (f) any assumption of responsibility by the defendant;
>
> (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
>
> (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
>
> (i) the nature of the activity undertaken by the defendant;
>
> (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's

conduct or the activity or substance controlled by the defendant;

(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;

(l) any potential indeterminacy of liability;

(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;

(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

(o) the existence of conflicting duties arising from other principles of law or statute;

(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and

(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

104 There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content.

105 The task of imputation has been expressed as one not involving policy, but a search for principle: see especially *Sullivan v Moody* at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment.

106 I have described "foreseeability" as a salient feature; it is perhaps better expressed that the use of salient features operates as a control measure on foreseeability employed at the level of abstraction earlier discussed, for example by Glass JA in *Shirt* as the foundation for the imputation of duty of care. In a novel area, reasonable foreseeability of harm is inadequate alone to found a conclusion of duty. Close analysis of the facts and a consideration of these kinds of factors will assist in a reasoned evaluative decision whether to impute a duty. Whilst simple formulae such as "proximity" or "fairness" do not encapsulate the task, they fall within it as part of the evaluative judgment of the appropriateness of legal imputation of responsibility.

181 Although the Australian salient features approach is a fundamentally different approach to duty of care than that taken by our universal test, it remains the case that "what would now be described [in Australia] as relevant or salient features, have long been appreciated as elements within the broader notion of 'proximity'" (*Caltex* at [166] per Basten JA). The list of salient features can therefore be a useful rubric in a jurisdiction such as ours which continues to rely on proximity, not as a general determinant but as a stage in a multi-stage test. This is, of course, subject to Allsop P's express qualifications. The most important of these qualifications is that this list is neither mandatory nor exhaustive. Indeed no list of proximity factors can be exhaustive, not even those identified by Deane J himself: *See Toh Siew Kee* at [129].

182 To map Allsop P's list of salient features to the two stages of the universal test, I would add the following three further qualifications. The first is that although Allsop P lists foreseeability as the very first salient feature, our universal test articulates that as a threshold question. This difference between the two approaches is more apparent than real. Allsop J's qualification in *Caltex* at [106] (quoted at [180] above) makes clear that the approach to foreseeability under the salient features approach in fact closely approximates that under our universal test.

183 The second qualification is that, for the purposes of our universal test, it is necessary to segregate Allsop P's salient features into proximity factors and policy factors to ensure that they are considered at the appropriate stage of the universal test. Thus, features (l), (n), (o), (p) and (q) are in truth policy factors because they require a consideration beyond the facts of the particular case at hand.

184 My final qualification is that the right of the plaintiff which has been infringed ought to play a significant role in driving the selection of salient features from this list in a particular duty of care situation, even more than the type of harm caused or the type of conduct by which that harm was caused. Both the type of harm and the type of conduct are unsatisfactory bases for an attempt to group fundamentally like cases together for like treatment. As Lord Devlin said in *Hedley Byrne* (at 516):

> Originally it was thought that the tort of negligence must be confined entirely to deeds and could not extend to words. That was supposed to have been decided by *Derry v. Peek*. I cannot imagine that anyone would now dispute that if this were the law, the law would be gravely defective. …
>
> A simple distinction between negligence in word and negligence in deed might leave the law defective but at least it would be intelligible. This is not, however, the distinction that is drawn in [counsel for the defendant's] argument and it is one which would be unworkable. A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; and (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver drove the car and for which he could not recover. In this type of case, where if there were a contract there would undoubtedly be a duty of service, it is not practicable to distinguish between the inspection or examination, the acts done or omitted to be done, and the advice or information given. So neither in this case nor in *Candler v. Crane, Christmas & Co.* (Denning L.J. noted the point where he gave the example of the analyst who negligently certifies food to be harmless) has [counsel for the defendant] argued that, the distinction lies there.
>
> This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions

between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached.

185 Thus, for example, personal injuries and property damage can be caused by conduct, by omissions or by words. The choice of salient features should not vary with the type of conduct, or the harm caused but with the fundamental right being vindicated.

The threshold question: factual foreseeability

186 I now apply the universal test to the facts of the present case.

187 To answer the threshold question, I ask myself the following question: "Ought a *reasonable* person in Susan Chua's position, in the circumstances of *this* case with a *reasonable* attitude to risk and a *reasonable* capacity for foresight, have foreseen that persons in the position of the plaintiffs could call her with queries and could suffer harm if she were careless in responding to those queries?". I unhesitatingly answer that question in the affirmative.

188 I say this for two reasons. First, it was the foreseeable result of having Susan Chua's mobile phone number on the defendant's internet brochure that she would receive calls not just from clients or brokers but from members of the public inquiring about matters in which the defendant was acting. Sega Param, [note: 85] Leong Li Lin [note: 86] and Susan Chua herself [note: 87] all accepted this. Second, Sega Param also accepted that it was foreseeable that property brokers would call the defendant's conveyancing secretaries to ask general questions about exercising options and even about buying options. [note: 88] It is true that Susan Chua was assigned to deal with HDB properties and so it could be said that the defendant ought not reasonably to have foreseen a member of the public calling her about a private property option. But it is not suggested that the defendant had a system in place for her to *refrain* from dealing with transactions in private properties. Indeed, she took it upon herself to deal with Victor Tan's faxed "option" and to follow up by speaking to "Lum Whye Hee", rather than referring it to a colleague whom the defendant had assigned to deal with private property transactions. And there is every reason to believe, given how the defendant structured its practice, that even a colleague of Susan Chua's who dealt only with private property would have answered the first plaintiff's questions in the very same way.

189 I find also that it was reasonably foreseeable to the defendant that a member of the public who obtained information from Susan Chua about a conveyancing matter that the defendant was handling would rely on that information. Given the nature of Susan Chua's job (processing transactions), the nature of the defendant's practice (bulk conveyancing), and the nature of the likely inquiries that she would field (related to options and their exercise), it was foreseeable that inquirers would not be inquiring out of idle interest but with a purpose, and that carelessly-given information could cause loss to those inquirers. Leong Li Lin accepted this in cross-examination. [note: 89] Sega Param accepted that the defendant had a duty not to misrepresent facts even to members of the public. [note: 90] That cannot, of course, determine the question of whether there is a duty of care in law. That is a question of law and not one on which an admission can necessarily bind. But his admission suffices as an admission of factual foreseeability: as an admission on a factual level that it is reasonably foreseeable that those who seek information from the defendant intend to rely on that information.

190 It was thus reasonably foreseeable to Susan Chua, and therefore to the defendant, that

members of the public such as the plaintiffs would seek information from the defendant's conveyancing secretaries and could suffer loss if they received inaccurate information. I therefore find the threshold question satisfied. A reasonable person in Susan Chua's position, in the circumstances of this case with a reasonable attitude to risk and a reasonable capacity for foresight, ought to have foreseen that inquirers could suffer harm if she were careless in responding to their queries.

The first stage: proximity

191 With the threshold test answered in the affirmative, I now consider (i) whether there is sufficient proximity between the plaintiff and the defendant for a duty of care to arise; and (ii) whether, as a matter of policy, it is fair, just and reasonable for a defendant in the position of this defendant to owe a duty of care.

192 As I have mentioned above, the plaintiffs rest their claim in negligence against the defendant on – and only on – *Hedley Byrne*. The test of liability under *Hedley Byrne* requires a voluntary assumption of responsibility coupled with reasonable reliance. To succeed, therefore, the plaintiffs must establish a voluntary assumption of responsibility in the sense in which that phrase is used in *Hedley Byrne* and also that they reasonably relied on that assumption of responsibility.

No voluntary assumption of responsibility in the Hedley Byrne sense

193 The plaintiffs argue that in the present case, "there was an obvious assumption of responsibility" by the defendant because Susan Chua was under no compulsion and "could simply have refused to answer" the first plaintiff's question. [note: 91] The plaintiffs also submit that the defendant's unique business model – which depended on non-solicitors to develop legal business and communicate with the public – created an environment under which it assumed a responsibility to ensure that it did not mislead those to whom it chose to give information.

194 The plaintiffs' submissions on assumption of responsibility proceed on the wrong basis. As I have shown above, a voluntary assumption of responsibility in the sense it is used in *Hedley Byrne* is a relationship between the parties which is a contract in all but consideration. There are no facts before me which show the defendant expressly assumed a responsibility to the first plaintiff to take care in answering his questions. I must therefore consider whether a voluntary assumption of responsibility can properly be implied or inferred from the facts.

195 The first plaintiff's query arose in a random and informal call to the defendant. To Susan Chua, it was the most routine of calls. It was so routine, in fact, that Susan Chua does not even remember it distinctly. I accept her evidence on this. To the first plaintiff, it was no doubt a far from routine call. But neither he nor the circumstances of the call communicated to Susan Chua the special importance which he alone attached to the call. The first plaintiff's evidence is that all he said was "My name is Chu" and that he was "looking to buy property, 13A Jalan Berjaya." [note: 92] Crucially, he did not indicate that he intended to buy an option to buy 13A Jalan Berjaya. He asked Susan Chua whether the defendant acted for Lum Whye Hee and whether "he" had given an option to Victor Tan. I have found that the first plaintiff did not tell Susan Chua of his intended transaction with Victor Tan or ask Susan Chua the specific question whether there were any problems if he were to buy the option from Victor Tan. Susan Chua did not know that the plaintiffs had a copy of the "option". The first plaintiff admits that he never even gave Susan Chua his full name. On these facts, I find it impossible to imply a voluntary assumption of responsibility by the defendant to take care in its responses to the plaintiff in the sense I have used the concept above: as an implied contract to take care lacking only consideration.

196 I also do not find it possible on these facts to infer a voluntary assumption of responsibility to take care. All that Susan Chua did was to answer a routine, unsolicited telephone call received without forewarning from a member of the public. Her conversation with the first plaintiff was a casual or perfunctory conversation (in the words of Lord Morris (see [198] below)). Susan Chua answered the first plaintiff's questions without knowing his connection to the subject of his inquiry (13A Jalan Berjaya) or the overall purpose of his inquiry (purchase of the option). It would be quite different, if, for example, the first plaintiff had written formally to the defendant setting out the transactional background and asking the three questions he says he asked Susan Chua, or even the two questions I have found he asked Susan Chua. If Susan Chua or the defendant had then responded to that written query by a deliberate act, formally in writing and on the firm's letterhead, it would be easy to infer a voluntary assumption of responsibility on the defendant's part to take care in responding. Those circumstances in themselves would suggest that the defendant had deliberately applied its mind to the subject-matter of the plaintiff's formal inquiry in the course of the defendant's business. A voluntary assumption of responsibility would be found quite easily by inference from those circumstances.

197 Those were, essentially, the circumstances in *Hedley Byrne*. In *Hedley Byrne*, the House of Lords was able to find a voluntary assumption of responsibility on the circumstances of that case. The plaintiff asked its bank to secure a credit reference from the defendant on the plaintiff's intended counterparty. In response, the defendant communicated a carelessly-drawn reference to the plaintiff's bank by a formal letter, knowing that the letter would be passed on to the plaintiff. That letter had all the trappings of being a deliberate act in the course of the defendants' business and therefore an act for which it could reasonably be inferred that they assumed responsibility. It was further found as a fact that the defendant knew or ought reasonably to have known from the circumstances that the purpose of the reference was for the plaintiff to assess the creditworthiness of the subject of the reference before extending credit to it. Given these facts, it is not surprising that the House of Lords was able to infer a voluntary assumption of responsibility.

198 Lord Morris made clear the importance of the circumstances in which the allegedly careless statement was made (at 495):

> … If someone who was *not a customer of a bank* made a *formal approach* to the bank with a *definite request* that the bank would give him *deliberate advice as to certain financial matters* of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (*I exclude what I might call casual and perfunctory conversations*) they would be under a duty to exercise reasonable care in giving it. … [Emphasis added.]

199 The present case is also quite unlike *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 ("*Fong Maun Yee*"). In that case, a solicitor had a face to face meeting with the plaintiff at the solicitor's office. The plaintiff had been brought to the solicitor by a dishonest broker in connection with a specific (and unknown to the plaintiff and the solicitor, fraudulent) property transaction. The solicitor knew that it was likely that the plaintiff would act on the solicitor's advice or opinion in his dealings with that property. The Court of Appeal held the solicitor liable to the plaintiff for the loss he had suffered as a result of entering into the fraudulent transaction. The primary basis of the solicitor's liability arose because the Court of Appeal held that the plaintiff was the solicitor's client and therefore owed the plaintiff a contractual duty of care and skill (at [40]). But on the alternative cause of action in negligent misrepresentation, the Court of Appeal was undoubtedly right in these circumstances to draw the inference that the solicitor had voluntarily assumed responsibility towards the purchaser (at [50]).

200 The present case is also quite unlike the case of *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 on which the plaintiffs rely heavily. [note: 93] The plaintiffs in that case recovered compensation from their municipal council for serious building defects in a house which they had purchased at auction. The plaintiffs believed, wrongly as it turned out, that if the council issued a particular building certificate in respect of that house, it certified that the house had been built according to the plans and specifications approved by the council and was sound. In telephone conversations prior to completion, the plaintiffs sought and received assurances from an employee of the council that only a minor cosmetic issue was holding up the issuance of that certificate; and later, just before completion, that the council was about to issue that certificate. The plaintiffs proceeded to complete their purchase of the house in reliance on the council's assurances. There were in fact serious defects in the house arising from the builders' failure to follow the approved plans and poor workmanship. In those circumstances, the trial judge and the New South Wales Court of Appeal held that the council owed the plaintiffs a duty of care in giving those assurances. The council was held liable because of the trial judge's express findings of fact, upheld on appeal, that: (a) the plaintiffs unequivocally told the council's employee in their telephone conversations not only the nature of their transaction in relation to the house but also that they intended to rely on the council's assurances in proceeding to completion; and (b) that the plaintiffs' reliance on the information given to them by the council's employee was reasonable.

201 The facts of the present case are quite different from both of these cases. I have found that the first plaintiff did not tell Susan Chua either the nature of the plaintiffs' transaction with Victor Tan or the purpose of his inquiry on 20 September 2010. The plaintiffs submit that Susan Chua was under no obligation to answer the first plaintiff's query but because she chose to do so, she was obliged to take reasonable care in giving her answers. That is an oversimplification of the law. She undoubtedly had no obligation to answer the first plaintiff's queries. But having decided to answer them, she was bound to take reasonable care in doing so *only if*, on the facts, she expressly or impliedly voluntarily assumed responsibility to take care in making her statements, or if there were circumstances from which such an assumption can now be inferred. For the reasons I have given above, I find it impossible to make any of the necessary findings.

Plaintiffs did not reasonably rely on the defendant

202 Even if I am wrong and the defendant voluntarily assumed responsibility to the plaintiffs in the *Hedley Byrne* sense, I hold that it was not reasonable of the plaintiffs to rely on what Susan Chua told the first plaintiff in the telephone call on 20 September 2010.

203 During that call, the first plaintiff did not ask Susan Chua whether she was a lawyer. [note: 94] It is true that I have found, on the special features of the defendant's practice, that Susan Chua's statements to the first plaintiff are attributable to the defendant to the same extent as if she had been a lawyer rather than a conveyancing secretary. But the first plaintiff had no knowledge of the special features of the defendant's practice when he called and spoke to Susan Chua on 20 September 2010. As far as the first plaintiff was concerned, he could have been speaking to – and relying upon – the word of anyone in the defendant's practice, from the defendant's managing partner to the defendant's messenger. He did not know and had no reason to believe that he was speaking to a conveyancing secretary or that the scope of the defendant's conveyancing secretaries' employment was far wider than that of conveyancing secretaries in other law firms. In those circumstances, it was unreasonable for him to rely on what he was told by a stranger he spoke to (Susan Chua) at a law firm he had never dealt with (the defendant) both of whom he had been referred to by another stranger ("Steven Sim") whom he had spoken to for the first time just 2 days earlier and whom he had never met. The plaintiff was running a risk.

204 The first plaintiff sought to neutralise this point by testifying that he saw himself throughout his conversation as seeking advice from the *defendant* as a law firm, rather than from his interlocutor *Susan Chua* personally. I might be prepared to give the first plaintiff's evidence more weight if he had been speaking to a lawyer, or if he had *thought* that he was speaking to a lawyer, or if he knew of the defendant's unique practice structure and the role of conveyancing secretaries in it. I might, in those circumstances, accept that the first plaintiff thought Susan Chua was giving him legal advice on behalf of the defendant. But for all he knew, as I have said above, he could have been speaking to anyone in the defendant's organisation. It appears inherently unlikely to me that the plaintiff, whom I have found to be a shrewd individual (see [59] above), would have seen himself as seeking legal advice from the *defendant* when he was speaking to an unknown interlocutor of unknown status in the organisation of an unknown law firm.

205 The first plaintiff adds also that he did not see a need to seek this legal advice from his own lawyers because he saw no difference between seeking it from the defendant and seeking it from his own lawyers. [note: 95] I find this also difficult to accept. The first plaintiff, as I have already said, is a shrewd individual. He accepted that he knew he was seeking legal advice from his interlocutor. [note: 96] Legal advice, by its very nature, has a subjective element and often comes with a penumbra of uncertainty. It is tailored to the needs and circumstances of the person who seeks it. It is tailored to address the specific risks that the person who seeks it is concerned about or faces. I do not accept that the first plaintiff could have been unaware on 20 September 2010 of the difference between seeking legal advice from a law firm whose duty is to him and to him alone and seeking legal advice from the defendant, a law firm whose duty he believed was owed to Victor Tan's counterparty (Lum Whye Hee) in a conveyancing transaction to which the plaintiffs were not even a party.

Other proximity factors

206 In case I am wrong in taking a narrow view of the concept of a voluntary assumption of responsibility, or in case I am right that a duty of care not to cause pure economic loss by negligence in Singapore law (being an *application* of the universal test of a duty of care rather than an *exception* to it) enables a broader view to be taken of possible proximity factors than in English law (where *Hedley Byrne* defines the exception to a general rule), I examine also other proximity factors.

207 On the orthodox analysis, liability in negligent misrepresentation vindicates the plaintiffs' right not to be misled by the defendant's negligence. I therefore examine the following four proximity factors: (i) relational proximity; (ii) knowledge; (iii) vulnerability; and (iv) control.

(1) Relational proximity

208 There was no relational proximity between the plaintiffs and the defendant. The plaintiffs were not clients or potential clients of the defendant. The plaintiffs were not persons whom the defendant genuinely believed to be its clients. The plaintiffs were not even the transactional counterparty (Victor Tan) of the person whom the defendant believed to be its client (Lum Whye Hee). The plaintiffs were in fact two degrees removed from the defendant relationally. They were the counterparties (option purchasers) of a counterparty (Victor Tan) of a person the defendant believed to be a client (Lum Whye Hee). That is too tenuous a connection for there to be relational proximity on the facts of this case.

(2) Knowledge

209 The plaintiffs had far more material knowledge than the defendant. The plaintiffs knew precisely

the nature of their proposed transaction with Victor Tan. They also knew the precise risk associated with that transaction (that Lum Whye Hee's transaction with Victor Tan was defective). It was to address that very risk that they waited until 20 September 2010 to speak to the defendant before committing to the transaction. The defendant knew none of this and could not have known any of it. Other than knowing in an abstract sense that such an extended transactional chain is possible, the defendant knew nothing of the plaintiffs' transaction with Victor Tan or of the risk that the plaintiffs were seeking to eliminate.

(3) Vulnerability

210 The plaintiffs were not in a position of vulnerability as regards the defendant. The plaintiffs appreciated that the transaction they proposed to enter into carried a specific risk (a defective transaction between Lum Whye Hee and Victor Tan) and took steps which they thought were sufficient to address that risk. They were, throughout the weekend of 18 to 20 September 2010, in a position to enter into a direct contractual relationship with a lawyer who owed them, and only them, a duty to assess and advise them on the risks of the transaction and on the steps advisable to minimise that risk. The plaintiffs did so, but unfortunately *after* handing over their cheque to Victor Tan. The plaintiffs proceeded in this way because they believed that they had found a good bargain and because they believed they had taken adequate steps by speaking to the defendant to address a risk which they alone appreciated. None of that suffices to put the plaintiffs in a position of vulnerability as against the defendant.

(4) Control

211 The defendant was in no position to control the mechanism by which the plaintiffs suffered their loss. That mechanism was Victor Tan and his fraud. The defendant's only direct contact with Victor Tan, posing as Lum Whye Hee, was a single fax and a single telephone call. By contrast, in the context of the transaction by which they were defrauded, the plaintiffs' contact with Victor Tan, and with his array of identities, was direct and sustained over the period from 18 September 2010 to 20 September 2010. There is no doubt the defendant had an obligation to verify the identity of their putative client. But that obligation was first and foremost a professional obligation. That professional obligation could suffice a co-extensive obligation in tort, but only to a proximate party such as Lum Whye Hee herself. There is no basis to enlarge that professional obligation into a civil obligation owed to a counterparty of a counterparty of a putative client to ensure that that remote party suffers no loss in a proposed transaction of which the defendant knows nothing and the remote party knows everything. A law firm's professional obligation to know its client cannot be transformed into a civil obligation owed to all and sundry to prevent fraud. The mechanism of the plaintiffs' loss was Victor Tan's fraud, not the defendant's failure to verify Lum Whye Hee's identity. The defendant did not control the mechanism of harm.

212 For all these reasons, I find that there is no relationship of proximity between the defendant and the plaintiffs. That is, in itself, sufficient to hold that the defendant owed the plaintiffs no duty of care.

The second stage: policy

213 In case I am wrong, and there is in fact a relationship of proximity between the defendant and the plaintiffs, I now consider the second stage of the universal test. At this second stage, the court considers whether there are any broader community welfare or societal considerations which go beyond the imperative to do justice between the immediate parties and which negate the *prima facie* duty of care which would otherwise arise from the conjunction of factual foreseeability and proximity.

214 On the facts of this case, the key factor at the policy stage is that the plaintiffs were never the defendant's client. It is for that reason that the plaintiffs' claim is brought only as a claim in tort and not as a claim in contract, based on an express or even an implied retainer.

215 One of the salient features identified by Allsop J which finds its home in the second stage of our universal test is the existence of conflicting duties arising from other principles of law. It is this feature that the defendant relies upon to submit that even if proximity is established, policy considerations at the second stage of the universal test operate to negate a duty of care. I accept this submission. The possibility of conflicting duties is to my mind a powerful policy factor which operates to negate a duty of care here, even if I had found myself able to make a finding of proximity under the first stage in the present case.

216 The defendant is a firm of solicitors. As such, the defendant owes duties to its clients under the civil law, subject to and supplemented by the applicable ethical and professional rules that govern the legal profession. The general rule at common law is that a solicitor owes a duty of care in tort only to his client and not to any third parties. Thus, a solicitor acting for a seller of land does not generally owe a duty of care to the buyer of that land, even though the solicitor would know that any negligence on his part in conducting the sale could affect the buyer also: *Gran Gelato Ltd* v *Richcliff (Group) Ltd and Another* [1992] Ch 560. The policy factor identified by Allsop P at [103(o)] of *Caltex* (quoted at [180] above) is the very reason for this general rule. A solicitor owes onerous duties to his client, including a duty to advance his client's interests zealously. In the course of discharging that duty, a solicitor will often have to take positions which are foreseeably or even intentionally adverse to the economic interests of his client's transactional counterparties, and even of parties more remote such as counterparties of counterparties. In order to represent his client properly, he must be free to do all of that without fear of liability in tort to those third parties. As a matter of policy, therefore, the law does not impose a duty on the solicitor to a third party which has the potential to conflict with that solicitor's duty to his client.

217 The most notable apparent exception to this general rule is the anomalous cause of action available to a disappointed non-client beneficiary against a solicitor who has been negligent in drawing up a client's will. This liability was first recognised in English law in *Ross v Caunters* [1980] 1 Ch 297 and rationalised by the House of Lords in *White v Jones*. The latter decision was recently analysed with great erudition, albeit in *obiter dicta*, by the Court of Appeal in *Patrick Adnan Anwar v Ng Chong Hue LLC* [2014] SGCA 34 ("*Patrick Adnan Anwar*").

218 *White v Jones* is anomalous in English law because the duty of care arises neither under the general test in English law for a duty of care (because it is a claim for pure economic loss, barred in English law as a general rule) nor under the exceptional *Hedley Byrne* species of liability for pure economic loss (because it can arise without a voluntary assumption of responsibility and without reliance). That duty need not be anomalous under Singapore law because liability for pure economic loss is simply an application of our universal test rather than by way of exception. As a matter of English law, perhaps Professor Stevens is correct when he argues (*Torts and Rights* at 180-181) that the best explanation for *White v Jones* is that it is a *sui generis* cause of action in tort made available to a disappointed beneficiary once the testator has died because that is the only available way to vindicate the testator's expectation interest under his contract with the negligent solicitor. It is the only available vindication because any award of damages to the testator's estate will fall to be distributed under the testator's intestacy or under his provable will, and cannot be distributed as the testator intended and expected under his absent or ineffective will.

219 I refer to *White v Jones* as an apparent (and not an actual) exception to the general rule that a solicitor owes no duty of care to a non-client because in that class of case, the interests of the

solicitor's client and of the non-client are entirely aligned. It is in both their interests that the testator's will be drawn up without negligence so that it is able to give effect to his wishes after he dies, as he intends. No conflict can arise between the solicitors' duty to the client under his retainer and this exceptional duty of care to the non-client in tort. So too on the facts in *Patrick Adnan Anwar*, the interests of the law firm's client (a borrower) and of the plaintiffs (who unintentionally became guarantors of the borrower's indebtedness to the lender by reason of the firm's negligence) were aligned throughout. The policy factor which would otherwise operate to negate a *prima facie* duty of care is not engaged in these cases.

220 In the present case, as I have pointed above, the plaintiffs are on the opposite side of the transaction from the defendant's putative client. There is every possibility that the interests of a solicitors' client and the interests of the client's transactional counterparty will not be aligned. But the plaintiffs are not even the putative client's counterparty. They are a counterparty of a counterparty. The interests of Lum Whye Hee (the defendant's putative client) and of Victor Tan (Lum Whye Hee's putative counterparty) are not aligned with the interest of the plaintiffs. It makes no difference that the defendant was not in fact acting for the client (Lum Whye Hee) for whom they believed they were acting. Even if the defendant is taken as acting for Victor Tan, for that is the actual individual who engaged the defendant's services albeit under false pretences, the plaintiffs are on the other side of the transactional divide with the consequent presumptive non-alignment of interests. There is therefore every policy reason for negating any *prima facie* duty of care which may have arisen under the first stage of the universal test.

221 The plaintiffs argue that the policy considerations in this case point in favour of a duty of care. They rely on the fact that solicitors occupy a special and elevated position in society. Because of this, the plaintiffs submit that there is a policy imperative that a solicitors' word should be capable of being trusted and that information given by solicitors to members of the public should be accurate and reliable. [note: 97] This policy imperative, they say, supports at the second stage a duty of care arising from a finding of proximity at the first stage.

222 I am unable to accept this submission. It is of course true that solicitors occupy a special and elevated position in society. It is especially significant that solicitors continue to occupy this position despite unconscionable betrayals of trust by some errant solicitors in the recent past. Solicitors are given a monopoly in advising members of the public on the law and in representing members of the public when they seek justice. They are rightly held to high standards of conduct in their professional activities, and are rightly held to higher standards of conduct in their professional activities than the civil law of obligations requires. Those high standards are the *quid pro quo* for the monopoly that solicitors enjoy and for the privilege of being a self-regulating profession. But those higher standards are the province of the ethical and professional obligations of solicitors. Thus, a solicitor has a solemn professional obligation to honour an undertaking, no matter to whom the undertaking is given, and even if the undertaking involves matters outside the solicitor's control. Breach of a solicitors' undertaking is a serious matter, constituting a contempt of court, constituting a breach of the solicitor's professional obligations and carrying potential liability to compensate the party to whom it is given for loss arising from the breach: *Udall v Capri Lighting* [1988] 1 QB 907. But those consequences arise under the court's inherent supervisory and disciplinary jurisdiction over solicitors, not in the civil law of obligations. That is where the plaintiffs' case against the defendant resides. In the law of negligence, there are in my view strong policy considerations which militate against finding a duty of care owed by a solicitor to a non-client, even if proximity can otherwise be found.

223 There is in my view, therefore, no policy imperative that the special and elevated position of solicitors should put a solicitor at risk of civil liability to non-clients in the law of negligence. Indeed, the policy imperative is to my mind in quite the opposite direction. Imposing civil liability on the

defendant through the law of negligence in circumstances such as this makes the defendant effectively the insurer of a transaction which a non-client (the plaintiffs) proposes to enter into with another non-client (Victor Tan) or arguably with a client (Victor Tan fraudulently posing as Lum Whye Hee). The effect of that is to spread the risk which the plaintiffs took in transacting with Victor Tan across all clients of all solicitors through increased professional liability premiums which are ultimately passed on to those clients. There is no compelling policy reason why the special and elevated position of solicitors in society should mean that the transactional risk of two people who were, at the material time, not the clients of *any* solicitor should be spread in this way, through the law of negligence. The interest of the general public in solicitors upholding the standards of their special and elevated profession is vindicated by enforcement of the profession's ethical and professional obligations, not by recognising a duty of care to non-clients in the law of negligence. Even if I had found proximity, the positive policy argument relied on by the plaintiffs would not have outweighed the negative argument I have analysed above.

224 For these reasons, it is my view that even if I had found the plaintiffs to be in a relationship of proximity with the defendants, the *prima facie* duty of care which arose thereby would be negated on policy grounds. None of this, of course, deals with the very different policy analysis to be undertaken where the party claiming compensation from the solicitor is the solicitor's client or the person the solicitor believed to be his client (Lum Whye Hee in this case).

Breach of duty and damages

225 Given that I have found that the defendant owed the plaintiffs no duty of care, it is not necessary for me to consider whether the defendant breached that duty or to consider what recoverable loss and damage, if any, the plaintiffs suffered as a consequence. I therefore turn to consider the plaintiffs' alternative cause of action.

Breach of warranty of authority

226 The plaintiffs argue that they are entitled to succeed in their alternative action in breach of warranty of authority because:

(a) Susan Chua represented to the plaintiffs that the defendant had Lum Whye Hee's authority to act for her in the sale of 13A Jalan Berjaya;

(b) Susan Chua's representation is attributable to the defendant;

(c) Susan Chua's representation was untrue;

(d) Susan Chua's misrepresentation induced the plaintiffs to transact with Victor Tan;

(e) The plaintiffs suffered loss by reason of transacting with Victor Tan.

227 A breach of a warranty of authority requires an ostensible agent (A) who deals with a third party (T) with regard to the affairs of a putative principal (P). The principle which determines when A will be liable to T is set out in the following passage from *Bowstead & Reynolds on Agency* (Peter G Watts gen ed) (Sweet & Maxwell, 19th Edition, 2010) ("*Bowstead & Reynolds*") at para 9-060 (I have inserted my designations for the three parties in square brackets):

(1) Where a person [A], by words or conduct, *represents that he has actual authority to act on behalf of another* [P], and a third party [T] is *induced by such representation* to act in a

manner in which he would not have acted if that representation had not been made, the first-mentioned person [A] is *deemed to warrant that that the representation is true*, and is liable for any loss caused to such third party [T] by a breach of that implied warranty, even if he [A] acted in good faith, under a mistaken belief that he had such authority.

(2) Every person who purports to act as an agent [A] is deemed by his conduct to represent that he is in fact duly authorised so to act, except where the purported agent [A] expressly disclaims authority or where the nature and extent of his authority, or the material facts from which the nature and extent may be inferred, are known to the other contracting party [T].

[Emphasis added]

228 In *Fong Maun Yee* at [53], the Court of Appeal cited a predecessor of this passage, found in the then-current 16th edition of Bowstead & Reynolds, and accepted that it states Singapore law for this type of liability. The plaintiffs rely [note: 98] on this passage in their submissions. The defendant makes no submission to the contrary.

Anomalous features of this liability

229 Liability for breach of warranty of authority is, at its core, a species of liability for misrepresentation. That is apparent from the words in the passage from *Bowstead & Reynolds* which I have italicised at [227] above. The gist of the liability is A's misrepresentation to T which causes T to act in a certain way leading to T suffering loss. This is the unmistakable language of tort. But liability for breach of warranty of authority is, for historical reasons, classified instead as liability under an contract: *Fong Maun Yee at* [53]. As a result, liability for breach of warranty of authority has three contractual features which make it wholly distinct from liability in tort.

230 First, liability for breach of warranty of authority is strict, just as liability for all breach of contract is strict. Thus, A is liable to T even if A makes the representation as to his authority entirely without fault. This runs contrary to the general position at common law that liability for misrepresentation requires fault: either fraud (*Derry v Peek*), or at the very least negligence (since *Hedley Byrne*). Further, the fact that liability is strict has an important consequence. Because fault is not required for liability, A does not even have a liability in negligence, running parallel to his liability in contract, on which he can run a contributory negligence defence. In principle, therefore, T can recover the full extent of his loss in an action for breach of warranty of authority even if he ought to have taken reasonable care to protect himself but failed to do so (*cf Fong Maun Yee* at [55]).

231 Second, because A and T are counterparties to a contract, there is no need to find any other relationship between A and T in order to ground liability. A's liability to T arises simply because they have a contract and because the subject-matter of their contract is A's authority to act for P. So long as that is the case, A is liable to T even if A would owe T no duty of care if the parties' relationship were to be analysed in tort.

232 The final contractual aspect of liability for breach of warranty of authority is the measure of damages. If A is found liable to T for breach of a warranty of authority, A is obliged to put T in the position that he would have been in if A's warranty had been true and A in fact had had P's authority (the measure in contract), and not merely to put T in the position that he would have been in if A's misrepresentation as to authority had never been made (the measure in tort).

233 All of this is summarised in *Bowstead & Reynolds* at para 9-062:

> The nature of the liability arising under this rule has been much discussed. There are *dicta* in many of the cases which to modern eyes leave it doubtful whether the cause of action is to be classified as contractual or tortious. … The assumption in the later nineteenth century that all actions must be classifiable into one group or another eventually led to these actions being regarded as contractual, and contractual rules applied. The contract is normally unilateral, viz. the agent offers to warrant his authority in exchange for the third party entering into a contract with the principal or otherwise acting as requested; the offer is accepted by the third party acting accordingly. The result of the cause of action being classified as contractual is that strict liability is customarily placed on parties who make contractual promises; the agent is in effect a guarantor of his authority. There are repercussions as regards the damages obtainable, which are not limited to reliance loss.

The plaintiffs' case

234 The plaintiffs rely on these contractual features to submit that the defendant is liable to them for breach of warranty of authority even if it owed them no duty of care in tort and regardless of whether it was negligent in making the representation as to its authority. Further, the plaintiffs argue that the result of this liability is that the defendant is obliged to compensate them for their lost opportunity to purchase a property in their desired area between September 2010 (when they were defrauded) and December 2011 (when they purchased their current home).

235 I now consider whether the plaintiffs have made out each of the elements of their claim listed at [226] above.

The defendant is liable for breach of its warranty of authority

Susan Chua represented that the defendant had Lum Whye Hee's authority

236 I have already found as a fact (at [50]-[71] above) that Susan Chua, in her telephone conversation with the first plaintiff on 20 September 2010, represented to the first plaintiff that the defendant acted for Lum Whye Hee (the first representation) and did so in the sale of 13A Jalan Berjaya to Victor Tan as contemplated by the "option" (the second representation).

237 It is of course possible to construe Susan Chua's representations narrowly: as nothing more than a mere representation that the defendant had authority to act on behalf of a person going by the name of Lum Whye Hee and claiming to be the same individual as the person of that name who appeared to be the registered proprietor of 13A Jalan Berjaya in order to sell that property to a person going by the name of Victor Tan on the terms set out in what appeared to be an option granted by Lum Whye Hee to Victor Tan. But that would be an artificially narrow construction of what Susan Chua said to the first plaintiff given the unqualified nature of Susan Chua's answers to the first plaintiff's unambiguous two questions. Further, reading that clear representation of authority down in this artificially narrow way by hedging it internally with qualifications would eviscerate the doctrine of breach of warranty of authority (*cf Excel Securities plc v Masood* [2010] Lloyds Rep PN 165 ("*Excel Securities*") at 184). And, more importantly, that is not a point taken by the defendant. The defendant in fact accepts that Susan Chua's first representation amounts to a warranty of its authority to act for the real Lum Whye Hee. [note: 99]

Susan Chua's representation is attributable to the defendant

238 I have also found that Susan Chua made that representation in the course of her employment, and that that representation is therefore attributable to the defendant (at [72]-[96] above).

Susan Chua's representation was false

239 It is common ground that that representation was false. I need make no finding whether that is so because the defendant was at fault in making this representation. Liability for breach of warranty of authority is strict.

Susan Chua's representation induced the plaintiffs to transact

240 I find also that Susan Chua's misrepresentation induced the plaintiffs to transact with Victor Tan posing as "Lucas Ong" on the evening of 20 September 2010. That was the evidence of the first plaintiff in his affidavit of evidence in chief and in cross-examination. [note: 100] This evidence is consistent with the circumstances. As early as 18 September 2010, Victor Tan offered the plaintiffs the opportunity to snap up 13A Jalan Berjaya at a bargain price. The plaintiffs pursued that opportunity on Saturday, 18 September 2010 and Sunday, 19 September 2010. They were in communication with Victor Tan, in his many guises, on both days. If the plaintiffs' true motivation was to snap up the opportunity to acquire 13A Jalan Berjaya at a bargain price, as the defendant suggests, they would have done so on either of those two days. They did not do that. Instead, they deliberately waited to transact with Victor Tan until Monday, 20 September 2010, when the defendant's office was open for business, and until after the first plaintiff had obtained Susan Chua's representation as to the defendant's authority. The first plaintiff's evidence, which I accept, is that immediately after he received Susan Chua's confirmation, he telephoned "Steven Sim" and arranged to meet "Lucas Ong" that evening to enter into the transaction with Victor Tan and to hand over the plaintiffs' cheque drawn in his favour for $105,200. [note: 101] All of this satisfies me that the defendant's representations as to authority induced the plaintiffs to deal with Victor Tan. More than that, I am also satisfied that without the defendant's representations as to authority, the plaintiffs would not have transacted with Victor Tan.

241 It is to my mind immaterial that the plaintiffs prepared an acknowledgment letter on 19 September 2010 on the basis that they would transact with Victor Tan on 20 September 2010. I accept the first plaintiff's evidence that that he prepared that acknowledgment letter in anticipation of transacting with Victor Tan but not because the plaintiffs had already made up their mind to do so regardless of the outcome of the telephone conversation they intended to have with Susan Chua on 20 September 2010. I accept further the first plaintiff's evidence that he prepared this letter in advance on 19 September 2010 because that was a Sunday and the first plaintiff had the time to set aside to complete that task on that day. While this conduct may indicate a certain eagerness on the plaintiffs' part to transact with Victor Tan, that does not to my mind indicate that they would have done so without the defendant's representation as to its authority.

242 There is nothing inconsistent between this finding of the necessary inducement under this head of liability and my finding that the plaintiffs' reliance on Susan Chua's representation was not reasonable reliance for the purposes of *Hedley Byrne* liability (at [202]-[205] above). The two inquiries are very different. The fact that it was unreasonable for the plaintiffs to rely on Susan Chua's warranty of authority does not enter into the analysis on this cause of action. There is ordinarily no obligation on T in this situation to inquire about A's authority or its scope and extent: "[T] is entitled to assume that a person purporting to act as agent promises that he is so authorised" (*Bowstead & Reynolds* at para 9-070).

243 The defendant can escape liability for breach of warranty of authority only if the defendant expressly disclaimed the defendant's authority to act for Lum Whye Hee or if the plaintiffs at any time knew the nature and extent of the defendant's authority to act for Lum Whye Hee or knew any

material facts from which they might have inferred the nature and extent of that authority (see [227] above). There is no suggestion that the defendant ever expressly disclaimed authority to act for "Lum Whye Hee". And although the plaintiffs had contact with Victor Tan from 18 September 2010 to 20 September 2010 itself, there can be and is no suggestion that the plaintiffs knew or could have inferred that the defendant did not have authority to act for Lum Whye Hee.

The losses claimed by the plaintiffs

244 These findings are sufficient to hold the defendant liable for breach of warranty of authority. The next question, therefore, is to determine whether the plaintiffs are entitled to recover from the defendant the losses that they claim, namely:

(a) The sum of $105,200 which they paid to Victor Tan posing as "Lucas Ong"; and

(b) The opportunity they lost to purchase their new family home in their desired area at a date earlier than they eventually did (December 2011). The plaintiffs quantify this loss as $2.046m [note: 102] representing the rise in property values in their desired area between September 2010 (when they were defrauded) and December 2011 (when they purchased their current home).

245 I pause only to note that, although the plaintiffs submit that they are entitled to damages on the measure applicable in contract, both their claims are in fact sought on the measure applicable in tort. That is so even though the second claim refers to a lost opportunity. Both heads of damages seek to put the plaintiffs in the position they would have been if the defendant had never warranted its authority to act for Lum Whye Hee, rather than to put the plaintiffs in the position they would have been in if the warranty of authority had been true.

246 The reason for this is obvious. The contractual measure of damages is a complete non-starter on the facts of this case. Even if the defendant had had Lum Whye Hee's authority in September 2010 to act for her in selling 13A Jalan Berjaya to Victor Tan, the plaintiffs would still not have been able to purchase that property, for the simple reason that the option was an utter forgery. Even assuming counterfactually that the defendant actually had Lum Whye Hee's authority to 13A Jalan Berjaya, that does not in itself necessarily make the "option" genuine.

247 The plaintiffs cannot therefore say, on the facts of this case, that if A's warranty of authority had not been false, they would have succeeded in purchasing 13A Jalan Berjaya at S$3.864m. The defendant did not represent that Lum Whye Hee's signature on the "option" was a genuine signature. In any event, even if they did, the consequences of that representation would fall to be analysed in tort, not in the law on breach of warranty of authority. Thus, the contractual advantages of such a claim do not extend to a representation that Lum Whye Hee's signature on the forged "option" was genuine. While the approach of the Court of Appeal in *Fong Maun Yee* may appear to be inconsistent with this view, the *ratio* in that case rested on the victim of the fraud being a client of the law firm, and therefore entitled to recovery in contract, and not on liability in negligent misrepresentation in tort or for breach of warranty of authority.

Recoverability of loss arising from breach of warranty of authority

The test for causation

248 The principles as to the assessment of damages for breach of warranty of authority are common ground between the plaintiffs [note: 103] and the defendant. [note: 104] The plaintiffs are entitled to recover loss which (i) is caused by the defendant's breach of warranty of authority; and

(ii) satisfies the applicable test of remoteness of damage.

249 On causation, the plaintiffs invite me to adopt a loss of a chance analysis in preference to the traditional but-for test of causation. [note: 105] I decline to do so. The loss of a chance analysis is an exceptional one applicable where the: (i) the claimant has been injured but it is not clear who amongst a group of possible wrongdoers was the cause in fact of the loss; (ii) the defendant's wrongful conduct has injured a number of claimants but it is not clear whether the plaintiff is one of them; or (iii) where the defendant has engaged in wrongful conduct which has had an impact on the plaintiff, but it is not clear whether the defendant's wrongful conduct in fact caused harm to the plaintiff: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [69]. There is nothing difficult or exceptional about the facts of this case which warrants moving away from the traditional but-for test of causation.

The test for remoteness of damage

250 The parties are on common ground that the test for remoteness of damage in actions for breach of warranty of authority is the contractual test. As held in *Robertson Quay Investments Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [81]-[82], loss arising in contract will not be too remote to be recovered if that loss is fairly and reasonably considered to be within the reasonable contemplation of the parties either:

(a) Because that loss is ordinary loss, flowing naturally from the breach according to the usual course of things; or

(b) Because that loss is the probable result of the breach in special circumstances, where those special circumstances have been communicated between the parties beforehand and are therefore actually known to both of them at that time of contracting.

251 In order to apply the tests of causation and remoteness, I have to consider separately the plaintiffs' two heads of claim.

The $105,200 which the plaintiffs paid "Lucas Ong" is recoverable

(1) Causation

252 I have already found that the defendant's warranty of authority induced the plaintiff to transact with Victor Tan (see [240]-[241] above). For the same reasons, I find that the plaintiffs have established the necessary but-for causative link between the defendant's misrepresentation and the plaintiffs' decision to pay $105,200 to Victor Tan.

(2) Remoteness

253 I accept also that the loss which the plaintiffs suffered when they handed over their cheque for $105,200 to Victor Tan is not too remote to be recovered. Leong Li Lin accepted in cross-examination that members of the public who call law firms such as the defendant to seek information intend to act on the information received. [note: 106] She also confirmed that the defendant was aware that a sale by an option-holder of his rights under an option was a type of activity taking place in the property market. All of that was therefore in the reasonable contemplation of the defendant when the first plaintiff spoke to Susan Chua on 20 September 2010. Acting on information provided by a law firm by parting with money pursuant to a transaction which is not unusual (purchasing an option) which money turns out to be irrecoverable is in my view loss naturally flowing from a false

representation as to authority. That suffices to satisfy the contractual test of remoteness and to make the sum of $105,200 which the plaintiffs handed over to "Lucas Ong" on 20 September 2010 recoverable as damages for the defendant's breach of warranty of authority.

Damages for the plaintiffs' lost opportunity are not recoverable

254 Whether the plaintiffs are entitled to recover damages for their lost opportunity is a much more difficult question. I hold that they are not, because they have satisfied neither the test of causation nor the test of remoteness in respect of this head of damage.

(1) Causation

255 The plaintiffs submit that the test of causation is satisfied because, if the defendant had not warranted on 20 September 2010 that it had Lum Whye Hee's authority to sell 13A Jalan Berjaya to Victor Tan, the plaintiffs would have continued house hunting in September 2010 and October 2010 and would have purchased one of the next two suitable properties which came up for sale in their desired area in those months, but which were sold to others. [note: 107] Because the defendant warranted its authority on 20 September 2010, however, the plaintiffs were induced to transact with Victor Tan and became embroiled in his fraud. They were able to extricate themselves from that fraud only on 12 November 2010 when WongP on behalf of the real Lum Whye Hee told them conclusively that 13A Jalan Berjaya was not for sale (see [41] above). They resumed house hunting in January 2011, [note: 108] but no suitable property came on the market in their desired area until December 2011. They bought that property at $8m, about $3m more than they would have had to pay for either of the properties which had sold in September 2010 and October 2010.

256 I do not accept that the defendant's breach of warranty of authority is the but-for cause of the plaintiffs' lost opportunity to purchase the two properties which came onto the market in September 2010 and October 2010.

257 First, I do not accept that the plaintiffs' stated reason for staying out of the property market after they realised that they had been defrauded. The plaintiffs' initial position in their pleadings [note: 109] and in the first plaintiff's affidavit of evidence in chief [note: 110] was that the plaintiffs lost the opportunity to purchase one of those two alternative properties because their stakeholding money was withheld by the defendant from the time they accepted that they had been defrauded on 13 October 2010 until July 2011. However, the first plaintiff confirmed in oral evidence in chief that that was not the case: [note: 111] the plaintiffs had sufficient funding to commit to an alternative property even without the defendant releasing the stakeholding money. Instead, the reason now given for the plaintiffs' having lost the opportunity to go into the market is that the plaintiffs were not in the right state of mind to do so when they discovered that they had been defrauded. This reason is found nowhere in the plaintiffs' pleadings or affidavits of evidence in chief. To my mind, this is an afterthought.

258 Second, even if it is true that the plaintiffs were not in the right state of mind to resume househunting immediately, I find that that state of mind was not the result of the defendant's breach of their warranty of authority. I accept that a victim of a property fraud might require time to come to terms with having been defrauded and may not return immediately to the property market. I accept also that the defendant's conduct once it discovered Victor Tan's fraud was inexplicable and extraordinary (see [31]-[45] above). Particularly inexplicable is the defendant's decision on 15 October 2010 to insist on a court order as a condition for returning the plaintiffs' stakeholding money and their failure to agree to return that money unconditionally until 27 April 2011. As I have

mentioned, the first plaintiff candidly conceded that it was not the plaintiffs' inability to recover this stakeholding money which kept them out of the property market. [note: 112]

259 The first plaintiff in his evidence in chief said that their delay in returning to househunting was "more of a state of mind…when we were very disappointed with this…scam". [note: 113] I have found that the defendant was not fraudulent in its misrepresentation. It was therefore not a part of Victor Tan's scam. If the plaintiffs' state of mind arose from the scam, it arose from having been defrauded by Victor Tan. To the extent that the plaintiffs also blamed their state of mind on discovering the defendant's cavalier attitude both in making the misrepresentation on 20 September 2010 and to trying to ameliorate the very real consequences of that misrepresentation for the plaintiffs, I find that that too is an afterthought.

260 Finally, I find that by 13 October 2010 the plaintiffs knew that they had been defrauded and had no chance of purchasing 13A Jalan Berjaya through their transaction with Victor Tan. That was the day on which WLaw, on the plaintiffs' instructions, wrote to the defendant demanding the return of the stakeholding money. Yet the defendant attempted to pursue a purchase of 13A Jalan Berjaya – a property which they now knew had never been for sale – from the real Lum Whye Hee until 12 November 2010, when WongP made clear that Lum Whye Hee would not sell the property to them. The first plaintiff accepted in cross-examination that while he was focused on salvaging this non-existent deal, the other two suitable properties which were sold in the plaintiffs' desired area slipped by him. [note: 114]

(2) Remoteness

261 I also find that this head of damage is too remote. For the plaintiffs to succeed on the test of remoteness set out at [250] above, they would have to establish that it was in the reasonable contemplation of the parties that if the defendant misstated its authority to act for Lum Whye Hee in a sale of 13A Jalan Berjaya to Victor Tan, the result would be that the plaintiffs would cease all house hunting until 2011 in a rising property market, thereby suffering a lost opportunity to purchase their new family home at a price lower than the price which they eventually paid.

262 For that argument to succeed, the plaintiffs would have to show that each of the following special circumstances must have been known to the defendant at the time it gave its warranty of authority on 20 September 2010:

(a) That the plaintiffs were looking for a house in, and only in, their desired location in the Thomson/Bishan area;

(b) That if the plaintiffs' transaction with Victor Tan fell through, the plaintiffs would cease all house hunting for a period of time;

(c) That properties in the plaintiffs' desired area which were suitable for their requirements came on the market very rarely;

(d) That the next property which met the plaintiffs' requirements would not come onto the market until more than a year later, in December 2011;

(e) That property prices would rise during the intervening period.

263 There is no evidence from which I can draw even an *inference* that any of these special circumstances were actually known to the defendant. The first plaintiff and the defendant had only

one very brief telephone conversation on 20 September 2010. I have found that in that conversation, the defendant confirmed that it acted for Lum Whye Hee and that she had granted an option to Victor Tan. I have found, further, that the first plaintiff did not inform the defendant in that conversation of the plaintiffs' intention to purchase the option which both the plaintiffs and the defendant believed Lum Whye Hee had granted Victor Tan over 13A Jalan Berjaya.

264 In my view, it was neither reasonably foreseeable on 20 September 2010 nor within the parties' reasonable contemplation that the plaintiffs would be frozen out of a rapidly-rising property market for close to a year before the next property which met the plaintiffs' requirements came onto the market in their desired area and the plaintiffs committed to purchase that property to replace the bargain that they thought they had reached with Victor Tan on 20 September 2010.

265 Damages for that lost opportunity are therefore too remote for the plaintiffs to recover them against the defendant.

Some concluding comments on liability for breach of warranty of authority

The anomalous nature of liability for breach of warranty of authority

266 Because the law on liability for breach of warranty of authority is common ground between the parties, it has not been necessary for me to consider the applicable principles in any detail beyond that set out at [226]-[233] above. I conclude by noting just how anomalous this 19th century cause of action is in the 21st century, both in English law and in Singapore law, particularly in light of developments in the law of negligence for negligent misstatement.

267 Its anomalous nature can be demonstrated by an example. Assume that a hypothetical law firm is approached by a new client. It carries out reasonable identity checks on that client. In spite of all its efforts, it fails to detect that its client is a fraudulent impostor. If the law firm represents its authority to act for that impostor to T and if that representation induces T to do virtually anything, the state of the law appears to be that the law firm will find itself, without more, liable to T for all loss caused to T by the misrepresentation, and subject only to remoteness of damage.

268 This liability is anomalous on several levels. First, the law firm is liable to T for its misrepresentation even though it exercised reasonable care in verifying the fraudster's identity. Indeed, it is liable to T no matter how much care it exercised and no matter how clever and determined the fraudster was. Second, the law firm is liable for the misrepresentation even if it owed T no duty of care. Factual foreseeability is irrelevant. So too is proximity. So too is policy. Finally, holding the defendant liable here runs contrary to the general position that a firm of professionals is not ordinarily liable for loss caused in the course of its professional business without a showing of fault (*Excel Securities* at 184).

269 Liability arises despite all of these anomalies simply because of the *subject-matter* of the misrepresentation: A's authority to act for P. Looked at from the perspective of tort, and adopting the rights-based approach, the effect of the law is to endow each of us with a protected right not to be misled in any manner, however innocently, by an agent on the issue of his authority. There is no other type of information which the law considers so special that liability for a misrepresentation about that information arises without the need to establish proximity, regardless of policy considerations and without a showing of fault in order to ground recovery assessed on the contractual measure.

The paradigm case of breach of warranty of authority

270 This is the state of the law simply because liability for breach of warranty of authority is an anachronism. It developed in the 19th century in an understandable attempt to give a remedy to a third party who had been misled by a misrepresentation as to authority where the third party would otherwise have had no remedy. Successive case law has, however, allowed it to develop far beyond the narrow paradigm case which it initially sought to address. It now covers virtually the same field as liability in tort for misrepresentation, where that misrepresentation relates to an agent's authority. But it is capable of yielding different outcomes on the same facts, thereby bringing its principles into conflict with the law of tort.

271 The paradigm case of breach of warranty of authority is where A warrants to T that he has the authority of P to enter into a contract with T which will bind P, thereby inducing T to enter into that contract believing that P will be bound by it. It is easy to see why T ought to have a remedy against A in this paradigm case. The result of A's misrepresentation as to authority is that T has been wholly deprived of the bargain which he believed he had secured with P. The consequence of that loss ought not, in justice, to fall on T: he is blameless. But neither ought that consequence, in justice, fall on P: he too is blameless. A is the only one person left to hold liable. And it is in a sense just that the loss should fall on A as compared to T or to P. A is best placed to ensure that his representation as to authority is true before he makes it to a third party. And A is in a factual sense the cause of T's loss: it is his misstatement which misleads T and induces him to enter into the contract with P via A.

272 English law first recognised liability for breach of warranty of authority in 1857 in just such a paradigm case: *Collen v Wright* (1857) 8 El & Bl 647. Critically, though, the plaintiff in that case could not prove fraud. As the law then stood, that meant that T had no remedy against A for his misrepresentation. Only fraudulent misrepresentation was then actionable. And fraud at that time meant deliberate deceit. *Derry v Peek* had not yet brought within the doctrine of fraud Lord Herschell's third limb: a statement made when the maker is conscious of a risk that it might be false, but who is indifferent to that risk. Furthermore, *Donoghue v Stevenson* had not yet recognised that fault which caused loss could yield liability if, but only if, accompanied by a duty of care. Finally, *Hedley v Byrne's* recognition that there can be liability at common law for a negligent misstatement was more than a century away.

273 It was against this legal and factual backdrop that *Collen v Wright* recognised that T had a cause of action against A as an exception to the acknowledged rule which then barred recovery for all but fraudulent misrepresentation. Willes J described the scope and the basis of that exceptional liability as follows (at 657-658):

> … I am of the opinion that a person, *who induces another to contract with him as the agent of a third party* by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason for the assertion of authority being untrue. *This is not the case of a bare misstatement by a person not bound by any duty to give information.* The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that *a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist*. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract will be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter.

[Emphasis added]

The limited scope of liability for breach of warranty of authority as originally conceived

274 Willes J intended the new liability which *Collen v Wright* recognised to be limited in scope. It is clear from his speech that he did not intend to detract from the general rule at common law which still applied then that bare misstatements, and indeed non-fraudulent misstatements, were not actionable. *Collen v Wright* recognised an exception to that principle in the paradigm case because there was no other way for T to have a remedy. But there are four essential points about *Collen v Wright* which show just how limited the scope of this liability was intended to be.

275 First, the collateral contract on which *Collen v Wright* rests liability for breach of warranty of authority imposes three additional controls on that liability, over and above the very specific subject-matter of the misrepresentation. These additional controls are:

(a) T's act in response to the misstatement must be to enter into a putative *contract*, and even then only *with P*;

(b) A's misstatement must *induce* T to enter into the putative contract. That implies a tighter connection between the misstatement and T's consequent act than mere cause and effect. Inducement incorporates an element of direct communication between A and T and an element of express or implied persuasion of T by A. Those elements are not captured by the concept of reliance, which looks only at cause and effect and only from T's perspective. The present case offers an example. The defendant caused the plaintiffs to hand over $105,200 to Victor Tan, but it cannot be said plausibly that the defendant induced the plaintiffs to do so. On the principle in *Collen v Wright*, A must make the misstatement to T and must induce to T to act as he did by entering into the putative contract;

(c) Because A's liability arises from a collateral *contract*, A can be liable only to the counterparty of that contract, *ie* to T, and to nobody else.

276 These additional controls, together with the subject-matter of the misstatement, create a bright dividing line which distinguishes liability for breach of warranty of authority from liability at common law for misstatement.

277 Second, the collateral contract between A and T is a real, albeit implied, contract. It is not a legal fiction which the court imputes to the parties. It is a contract which the circumstances of the paradigm case allow the court reasonably to imply. Under this contract, A promises to T that he (A) has authority as P's agent to enter into a contract with T and explicitly or implicitly invites T to enter into that putative contract with P via A. That promise is A's consideration for the collateral contract. T's consideration is his act of entering into the putative contract with P via A, in response to A's invitation. That analysis reveals that the collateral contract is in fact a collateral *unilateral* contract. The important point, though, is that the contract is real, because both parties' consideration is real.

278 Third, so long as the collateral contract between A and T is a real contract supported by real consideration, there is nothing anomalous about compensating T on the contractual measure. T's assent to the bargain represented by his putative contract with P shows that T was willing to bear the burden of that bargain in exchange for the expectation of its benefit. T's expectation is defeated because of A's misstatement. That defeated expectation defines the scope of A's liability and the measure of T's recovery. The extent of both is determined by T's inability to hold P liable on the putative contract, contrary to A's representation. In those circumstances, it is right that A should be

required to put T in the position that T would have been in if A had actually had P's authority to contract on P's behalf and if T had thereby received the benefit of his expected bargain with P.

279 Fourth, requiring that A induce T to enter into a putative contract with P leaves no scope for an analysis of the same facts in tort to point to a different measure of compensation for the same misstatement. As far as T is concerned, he has contracted with P in reliance on A's misstatement as to his authority. But for that misstatement, T would have concluded that bargain directly with P. A cannot be heard to say that P would have refused that bargain with T because it is A who has purported to conclude that very same bargain with T for and on behalf of P. Because T entered into the putative contract to capture that bargain via A as a result of A's inducement, rather than directly with P (as T could have), T has lost the benefit of that bargain. In other words, if A had not misstated his authority, A must accept that T would have entered into an enforceable contract directly with P in the same terms as the ineffective contract via A. The benefit of that bargain, then, is the measure of T's loss both in tort and also in contract. Both analyses lead to the conclusion that A should be held liable to compensate T for T's lost bargain with P.

Liability for breach of warranty extended beyond its original limited scope

280 However, through a series of cases, English law has extended the liability for breach of warranty of authority to the point where it conflicts with liability in tort for misstatement and yields conflicting results on the same facts. This case is one such example. The plaintiffs has recovered $105,200 from the defendant even though the defendant owed the plaintiffs no duty of care simply because of the subject-matter of the misrepresentation.

281 The extension of liability in English law began with *Firbank's Executors v Humphreys* (1886) 18 QBD 54 ("*Firbank*"). That case dispensed with the requirement that T must be induced into entering into a putative contract with P. That case held that A is liable to T if the warranty of authority induces T to enter into *any* transaction with *anyone* and T thereby suffers loss.

282 The English courts extended the doctrine further in *Yonge v Toynbee* [1910] 1 KB 215 ("*Yonge*") by removing the requirement that A's conduct *induce* T to act as he did and allowing T to recover where there was on the facts only *reliance* by T. The result is indistinguishable from holding A strictly liable in tort for misrepresentation simply because the subject-matter of the misrepresentation is A's authority to act for P. That case has been treated as being of general application in claims for breach of warranty of authority, even though a close reading shows that an equally valid explanation for the result is that it springs from the court's supervisory jurisdiction over solicitors as officers of the court (at 234 and 235) and its inherent jurisdiction to determine by whom costs in civil litigation should be paid.

283 Finally, in *Penn v Bristol & West Building Society* [1997] 1 WLR 1356 ("*Penn*"), the English Court of Appeal extended *Collen v Wright* yet further. The result was to hold A liable even though it was never in A's contemplation that it was warranting its authority to a remote party, who was one step removed from T.

Liability for breach of warranty of authority now in conflict with the law of torts

284 There are five problems on the current state of English law.

285 First, the result of the successive extensions of the limited principle recognised in *Collen v Wright* is that the only remaining distinction between liability for breach of warranty of authority and liability in tort for misrepresentation is the subject-matter of the misrepresentation. The effect is to

single out and elevate A's misstatement as to his authority above all other misstatements as being so special that A will be liable notwithstanding the legal mechanisms put in place by the law of tort to control liability for all other types of misstatement, whether made by other persons or by A on other subjects. No other type of misstatement is actionable regardless of factual foreseeability. No other type of misstatement is actionable if made innocently. No other type of misstatement is actionable even if made negligently, unless there is a duty of care. No other type of misstatement is actionable even if strong considerations of policy point against it. No other type of non-fraudulent misstatement yields damages on the contractual measure at common law. Further, unlike the *Hedley Byrne* duty of care, A's duty does not rest on a *voluntary* assumption of responsibility by A to *take care* in making his representation of authority to T. That is because A's promise to T is deemed by the law to be an *absolute* promise: A is taken to have given T an unqualified *guarantee* of A's authority, regardless of however much care A may have taken before making the representation. It does not matter if T's act of reliance of the misstatement was wholly unreasonable or if T's carelessness contributed to his own loss. The only way A can escape liability is either by expressly disclaiming authority or by showing that T knew or could have inferred the nature and extent of his authority.

286 One of the reasons *Collen v Wright* was justified in creating such an exceptional liability for for A's misstatement as to authority was because it required, at the same time, a direct and tight connection between the subject-matter of the misstatement and the consequence of that misstatement: a putative contract with P via A. With that connection now broken, it is difficult to justify all of these exceptional consequences that follow for this class of misstatement.

287 Second, with this tight connection broken, it is no longer possible plausibly to imply an actual collateral contract in these cases. If A is liable to anyone who relies on his misstatement as to his authority, there is no longer a reasonable basis on which to find an implicit request, to find an act pursuant to that request and to find consideration to support a unilateral collateral contract. The basis of liability has shifted from an actual *implied* collateral contract to an *imputed* collateral contract.

288 Third, now that there need not be an actual contract but only an imputed contract, there is no longer a principled basis for awarding damages on the contractual measure in every case of breach of warranty of authority.

289 Fourth, if T is not induced into entering into a putative contract with P, the measure of damages for the misstatement as to authority assessed on the contractual measure diverges from the measure of damages in tort. The former measure, of course, continues to yield compensation to T for the loss of his bargain with P. But the latter measure can now yield something quite different, because it depends on what T would or would not have done if the misrepresentation as to authority had not been made. We can no longer say that if the misstatement had not been made, T would have contracted with P and secured the benefit of the bargain lost by reason of A's misstatement, simply because we no longer require T to do that. Awarding damages on the contractual basis where no actual collateral contract can be implied runs the risk of making T better off than he would otherwise have been, without any basis in contract for that result. This conflicts with the analysis in tort: A cannot be held liable in tort to make T better off than he would have been without the tort. Indeed, that was precisely the result in *Firbank*: the result in that case on the breach of warranty analysis put T in a better position in P's insolvency than he would have been in if A's representation as to authority had never been made at all.

290 Fifth, an overarching consideration in *Collen v Wright* was that without a remedy against A, T would have no remedy against anyone else. If we move outside the paradigm case, and accept that T need not enter into a putative contract with P via A, T may well now have a right of action against

someone else. The facts of the present case offer an illustration. The result of the defendant's warranty of authority was not to induce the plaintiffs to contract with Lum Whye Hee via the defendant. The result of the warranty was to cause the plaintiffs to have sufficient confidence to contract with Victor Tan. The plaintiffs undoubtedly have a cause of action against Victor Tan, whether in contract or in fraud. If they could trace him and if he had the means to pay, they would be able to recover from him in full all of their losses. The argument from justice which led *Collen v Wright* to impose liability on A is much diminished where an alternative is available, even if on the facts it is a worthless alternative.

291 *Fong Maun Yee*, although a case which considered the law on breach of warranty of authority, is a case which was decided on contractual principles because the plaintiff in that case became a client of the defendant law firm. What was said on breach of warranty of authority in that case, although of course entitled to the highest authority, was *obiter*. When the opportunity arises, therefore, it remains open for the Court of Appeal to develop the principles in this area coherently with the law of obligations as it stands in the 21st century.

Conclusion

292 The root cause of the plaintiffs' loss is Victor Tan. It is only because he is either unavailable to be sued or of insufficient means to be worth suing that the plaintiffs have sought to pursue the defendant in the tort of negligence and for breach of warranty of authority. Although their claim fails in tort, they are able to recover, anomalously, the $105,200 which they paid to Victor Tan arising from the defendant's breach of its warranty of authority. They cannot, however, rely on that cause of action to recover the lost opportunity to enter the property market in their desired area at the lower values prevailing in September 2010. That loss is too remote and permitting recovery would, on the facts of this case, be a step much too far.

293 For the reasons given above, I dismiss the plaintiffs' claim in fraudulent misrepresentation: there was no fraud in any sense of the word. I further hold that the defendant did not owe the plaintiffs a duty of care and therefore dismiss their claim in negligent misrepresentation.

294 I find, however, that the defendant is liable to the plaintiffs for breach of warranty of authority. The plaintiffs are therefore entitled to recover damages of $105,200, being the sum which the plaintiffs paid over to Victor Tan in reliance on Susan Chua's first and second misrepresentations. The plaintiffs cannot, however, recover damages for their lost opportunity in the property market.

295 I will hear the parties on costs.

[note: 1] First plaintiff's affidavit of evidence in chief, para 21.

[note: 2] First plaintiff's affidavit of evidence in chief, para 34.

[note: 3] Notes of Evidence, 15 January 2013, p 121 line 2-10.

[note: 4] Notes of Evidence, 15 January 2013, p 121 line 12-30.

[note: 5] Agreed bundle, p 3; Notes of Evidence, 15 January 2013, p 124 line 7-11.

[note: 6] Notes of Evidence, 15 January 2013, p 123 line 11-17.

[note: 7] Susan Chua's affidavit of evidence in chief, para 6; Notes of Evidence, 15 January 2013, p 124 line 31 to p125 line 1; p 129 line 29 to p 130 line 1.

[note: 8] Notes of Evidence, 15 January 2013, p 125 line 4-9.

[note: 9] Notes of Evidence, 15 January 2013, p 125 line 17 to p 126 line 7.

[note: 10] Notes of Evidence, 15 January 2013, p 126 line 10 to 12.

[note: 11] First plaintiff's affidavit of evidence in chief, para 53.

[note: 12] AB10.

[note: 13] AB5.

[note: 14] Notes of Evidence, 15 January 2013, p 60 line 32 to p 61 line 8.

[note: 15] AB6.

[note: 16] Notes of Evidence, 16 January 2013, p 101 line 31 to p 102 line 30.

[note: 17] Notes of Evidence, 16 January 2013, p 101 line 5-30.

[note: 18] Notes of Evidence, 16 January 2013, p 101 line 5-30.

[note: 19] Notes of Evidence, 16 January 2013, p 95 line1-8.

[note: 20] Notes of Evidence, 23 January 2013, p 4 line 27-32.

[note: 21] Notes of Evidence, 16 January 2013, p 100 line 12-14.

[note: 22] Notes of Evidence, 23 January 2013, p 2 line 32 to p 3 line 3.

[note: 23] AB138, para 9.

[note: 24] AB29, AB32.

[note: 25] Notes of Evidence, 16 January 2013, p 112 line 30 to p113 line 2; 23 January 2013, p 6 line 8-12.

[note: 26] Notes of Evidence, 23 January 2013, p 7 line 9-11; p 10 line 10-18.

[note: 27] AB71.

[note: 28] Notes of Evidence, 23 January 2013, p 11 line 28 to p 12 line 7.

[note: 29] AB70.

[note: 30] AB75.

[note: 31] First plaintiff's affidavit of evidence in chief, paragraph 96.

[note: 32] First plaintiff's affidavit of evidence in chief, page 127.

[note: 33] First plaintiff's affidavit of evidence in chief, page 134.

[note: 34] AB126

[note: 35] Plaintiffs' closing submissions, para 337.

[note: 36] First plaintiff's affidavit of evidence in chief, paragraph 132 to 137.

[note: 37] Plaintiffs' closing submissions, p 168.

[note: 38] Notes of Evidence, 16 January 2013, p 1 line 31 to page 2 line 2.

[note: 39] Notes of Evidence, 16 January 2013, p 2 line 22-28.

[note: 40] Notes of Evidence, 16 January 2013, p 2 line 8-9.

[note: 41] Notes of Evidence, 16 January 2013, p 2 line 29 to p4 line 1.

[note: 42] Notes of Evidence, 16 January 2013, p 1 line 17-18.

[note: 43] Notes of Evidence, 15 January 2013, p 132 line 13 to p133 line 17.

[note: 44] Notes of Evidence, 15 January 2013, p 138 line 31 to page 139 line 10.

[note: 45] Notes of Evidence, 16 January 2013, p 4 line 22-27.

[note: 46] Notes of Evidence, 15 January 2013, p 132 line 13 to p 133 line 17.

[note: 47] *Ibid.*, p 133 lines 13-19.

[note: 48] Notes of Evidence, 16 January 2013, p 6 line 12 to p 7 line 1.

[note: 49] Notes of Evidence, 14 January 2013, p 104 line 9-14.

[note: 50] Notes of Evidence, 14 January 2013, p 47 lines 7-9; p 104 lines 17-19.

[note: 51] Notes of Evidence, 15 January 2013, p 60 line 32 to p 61 line 8.

[note: 52] Notes of Evidence, 15 January 2013, p 61 line 14 to 15.

[note: 53] Notes of Evidence, 14 January 2013, p 65 line 15 to 24.

[note: 54] First plaintiff's affidavit of evidence in chief, p 146.

[note: 55] First plaintiff's affidavit of evidence in chief, pp 12-13.

[note: 56] Notes of Evidence, 14 January 2013, p 66 lines 21-30.

[note: 57] Plaintiffs' closing submissions dated 20 February 2013, para 179, page 90.

[note: 58] Notes of Evidence, 16 January 2013, p 34, line 26-28.

[note: 59] Notes of Evidence, 16 January 2013, p 100, line 4-5.

[note: 60] Notes of Evidence, 16 January 2013, p 42 line 15.

[note: 61] Notes of Evidence, 15 January 2013, p 120 line 10-21.

[note: 62] Notes of Evidence, 15 January 2013, p 120 lines 20-21.

[note: 63] *Ibid.*, p 135 lines 21-29.

[note: 64] Notes of Evidence, 16 January 2013, p 45 line 5-7.

[note: 65] Notes of Evidence, 16 January 2013, p 95 line 27 to p 96 line 6.

[note: 66] Notes of Evidence, 16 January 2013, p 45 line 21-27.

[note: 67] Notes of Evidence, 16 January 2013, p 93 line 32 to p 94 line 32.

[note: 68] Notes of Evidence, 16 January 2013, p 95 line 27 to p 96 line 6.

[note: 69] Notes of Evidence, 16 January 2013, p 92 line 14 to p 93 line 3.

[note: 70] Notes of Evidence, 15 January 2013, p 135 line 1 to p 136 line 1.

[note: 71] Notes of Evidence, 23 January 2013, p 27 line1-12.

[note: 72] Notes of Evidence, 16 January 2013, p 43 line 29 to p 44 line 30.

[note: 73] Notes of Evidence, 16 January 2013, p 34 line 3-19.

[note: 74] Affidavit of evidence in chief of Sega Param, para 1; Notes of Evidence, 16 January 2013, p 39, line 1.

[note: 75] Notes of Evidence, 16 January 2013, p 41 line 26.

[note: 76] Notes of Evidence, 16 January 2013, p 33 line13-17.

[note: 77] Plaintiffs' closing submissions, para 229.

[note: 78] Plaintiffs' closing submissions, para 248.

[note: 79] Plaintiffs' closing submissions, para 239.

[note: 80] Plaintiffs' closing submissions, para 230.

[note: 81] Plaintiffs' closing submissions, para 233.

[note: 82] Plaintiffs' closing submissions, para 235 and 238.

[note: 83] Plaintiffs' closing submissions, para 248.

[note: 84] Notes of Evidence, 16 January 2013, p 6 line 12 to p7 line 1.

[note: 85] Notes of Evidence, 16 January 2013, p 44, line 18-30; p 49 lines 9-23.

[note: 86] Notes of Evidence, 23 January 2013, p 27, line 1-30.

[note: 87] Notes of Evidence, 15 January 2013, p 135, line 1-14.

[note: 88] Notes of Evidence, 16 January 2013, p 46, line 3-6.

[note: 89] Notes of Evidence, 23 January 2013, p 27, line 21-22.

[note: 90] Notes of Evidence, 16 January 2013, p 49, line 17-22.

[note: 91] Plaintiffs' closing submissions at para 261 .

[note: 92] Notes of Evidence, 14 January 2013, p 102 lines 6-15.

[note: 93] Plaintiffs' closing submissions, paragraphs 116-123.

[note: 94] Notes of Evidence, 14 January 2013, p 47 lines 7-9.

[note: 95] *Ibid.*, p 46 lines 20-12.

[note: 96] Notes of Evidence, 14 January 2013, p 104 lines 9-14.

[note: 97] Plaintiffs' closing submissions, para 267 to 270.

[note: 98] Plaintiffs' closing submissions, at para 32.

[note: 99] Defendant's closing submissions at 269 – 270.

[note: 100] Defendant's affidavit of evidence in chief, para 128 to 131. Notes of Evidence, 15 January 2013, page 2 line 23 to page 3 line 12.

[note: 101] Notes of Evidence, Day 2, 15 January 2013, page 2 line 23 to page 3 line 12.

[note: 102] Plaintiffs' closing submissions at paragraph 332-333 and 338(b).

[note: 103] Plaintiffs' closing submissions at paragraph 295.

[note: 104] Defendant's closing submissions at paragraph 281 to 282.

[note: 105] Plaintiffs' reply submissions at paragraph 87.

[note: 106] Notes of Evidence, Day 4, 23 January 2013, page 27 line 9 to line 22.

[note: 107] Plaintiffs' closing submissions, para 314.

[note: 108] Plaintiffs' reply submissions, paragraph 98.

[note: 109] Statement of Claim (Amendment No. 1), paragraph 45(b).

[note: 110] First plaintiff's affidavit of evidence in chief, paragraph 112.

[note: 111] Notes of Evidence, 14 January 2013, page 7, line 9 to 25.

[note: 112] Notes of Evidence, 14 January 2013, page 9 line 19 to 24; page 16, line 18 to 20.

[note: 113] Notes of Evidence, 14 January 2013, page 7, line 9 to 25.

[note: 114] Notes of Evidence, 14 January 2013, page 64 line 31 to page 65 line 11.