**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 241**

Suit Nos 668 and 716 of 2017

Between

(1) Aljunied-Hougang Town Council
… *Plaintiff in S 668/2017*

(2) Pasir Ris-Punggol Town Council
… *Plaintiff in S 716/2017*

And

(1) Sylvia Lim Swee Lian
(2) Low Thia Khiang
(3) Pritam Singh
(4) Chua Zhi Hon
(5) Kenneth Foo Seck Guan
(6) How Weng Fan
(7) How Weng Fan
(personal representative of the estate of Danny Loh Chong Meng, deceased, in his personal capacity and trading as FM Solutions & Integrated Services)
(8) FM Solutions & Services Pte Ltd
… *Defendants*

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# JUDGMENT

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[Equity] — [Fiduciary relationships] — [When arising]

[Equity] — [Fiduciary relationships] — [Duties]

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# Aljunied-Hougang Town Council and another
# v
# Lim Swee Lian Sylvia and others and another suit

**[2019] SGHC 241**

High Court — Suit No 668 and 716 of 2017
Kannan Ramesh J
5, 8–12, 15–19, 22–25, 29–30 October 2018; 18 January, 1 March, 5, 9 April 2019

11 October 2019 Judgment reserved.

**Kannan Ramesh J:**

## Introduction

1 This is a case involving claims brought by Aljunied-Hougang Town Council ("AHTC") and Pasir Ris-Punggol Town Council ("PRPTC") against several current and former town councillors, as well as officers of the Town Councils and business entities controlled by them, on the basis that they had breached fiduciary duties, duties of skill and care, and/or statutory duties in their management of the Town Councils' affairs.

2 The trial of this case has been bifurcated. This means that I have only heard evidence on whether the defendants are liable for breach of their duties as alleged by the plaintiffs thus far. The present judgment deals with those issues. The issue of loss and damages, if any, that should be ordered against the

defendants for any breaches that they may be found liable for, will be considered in the next stage of this case. The issue of bifurcation is explained in full at [133] below.

3 A vast number of breaches and reliefs have been pleaded – in some instances with no clear link drawn between the two – giving rise to both factual and legal issues of significant complexity and adding in no small part to the length of this judgment. As will be evident to the reader, analysing these issues has been akin to battling the Lernaean hydra (as Edelman J aptly put it in *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 285 FLR 121 ("*Agricultural Land Management*") at [7]), with each step of the analysis on one issue spawning several related and inter-connected issues. As such, a table of contents would be helpful to the reader in navigating this judgment, which is set out here:

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***Dramatis personae***

*The plaintiffs in Suit Nos 668 and 716*

4 The plaintiff in Suit No 668 of 2017 ("S 668/2017"), AHTC, is a body corporate incorporated in Singapore pursuant to the Town Councils Act (Cap 329A, 2000 Rev Ed) ("TCA"). It should be noted that a number of amendments have been made to the TCA since the occurrence of the events in this case, and the version in force at the time of writing incorporates amendments made by way of Acts 17 and 34 of 2017. The version of the TCA relied upon by the parties is the version in force prior to these amendments, *ie*, the version in force from 15 August 2005 to 1 May 2017. In the context of this judgment, references to provisions of the TCA, unless otherwise specified, refer to provisions which are common between the TCA as it existed at the relevant time and the TCA at present. The same applies to references to the Town Council Financial Rules (Cap 329A, R 1, 1998 Rev Ed) ("TCFR").

5 Prior to the General Elections held on 7 May 2011 ("the 2011 GE"), Aljunied Town Council ("ATC") and Hougang Town Council ("HTC") were managed independently by town councillors from the People's Action Party ("PAP") and the Workers' Party ("WP") respectively. At the 2011 GE, a slate of candidates from the WP, which included Ms Sylvia Lim Swee Lian ("Ms Sylvia Lim"), Mr Low Thia Khiang and Mr Pritam Singh, was elected for the electoral division of the Aljunied Group Representation Constituency ("GRC"). Mr Yaw Shin Leong of the WP was also elected to the Hougang Single Member Constituency ("SMC") seat at the 2011 GE. Following the 2011 GE, and



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pursuant to the Town Councils (Declaration of Towns) Order 2011, ATC and HTC merged to form AHTC on 27 May 2011.

6 On 26 January 2013, Ms Lee Li Lian of the WP was elected to the Punggol-East SMC seat in a by-election. With effect from 22 February 2013, AHTC was reconstituted as Aljunied-Hougang-Punggol East Town Council ("AHPETC"). Following the successful contest of the Punggol-East SMC seat by Mr Charles Chong of the PAP at the General Election on 11 September 2015 (the "2015 GE"), AHPETC was reconstituted as AHTC on 1 October 2015. On the same day, pursuant to the Town Councils (Declaration of Towns) Order 2015 ("the 2015 Order"), Punggol-East SMC became part of PRPTC, the plaintiff in Suit No 716 of 2017 ("S 716/2017").

7 PRPTC's standing to bring S 716/2017 arises from the 2015 Order. Under this order, with effect from 1 December 2015, all property, rights and liabilities comprised in the undertaking of the former AHPETC to which AHPETC was entitled or subject immediately before 1 December 2015 and that related to or were connected with Punggol-East SMC, would become the property, rights and liabilities of PRPTC, and any proceedings or cause of action that related to the transferred undertaking that were pending or existing immediately before that date might be continued and enforced by or against PRPTC.

8 As a result of the foregoing, the Town Council that is the subject of the present suits was known by different names at different points of time:

| **Time** | **Name** |
|---|---|
| Before 27 May 2011 | ATC and HTC |
| 27 May 2011 – 21 February 2013 | AHTC |



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| | |
|---|---|
| 22 February 2013 – 30 September 2015 | AHPETC |
| 1 October 2015 – present | AHTC |

In this judgment, except where greater specificity is required, the Town Council shall be referred to consistently as AHTC for the sake of simplicity. For the purposes of identifying the plaintiffs when discussing the positions taken and submissions advanced by them in the present suits, I will refer to them as "the plaintiffs" collectively, or as "AHTC" and "PRPTC" respectively where there is a material difference in their respective positions. In the remainder of this judgment, I will use the term "Town Council" to refer generally to town councils constituted under the TCA.

*The defendants in Suit Nos 668 and 716*

9 The first defendant in both suits is Ms Sylvia Lim. From June 2011 to August 2015, she was Chairman of AHTC, and from October 2015 to present she was and continues to be Vice-Chairman of AHTC.

10 The second defendant is Mr Low Thia Khiang, who was the elected Member of Parliament ("MP") for the electoral division of Hougang SMC from 1991 to 2011, prior to the 2011 GE. He was Vice-Chairman of AHTC from 3 June 2011 to August 2012.

11 The third defendant is Mr Pritam Singh, who was also an elected MP of AHTC, as well as Vice-Chairman of AHTC from August 2012 to August 2015, and thereafter Chairman of AHTC from October 2015 to present.

12 Ms Sylvia Lim, Mr Low Thia Khiang and Mr Pritam Singh, along with Mr Chen Show Mao and Mr Muhamad Faisal bin Abdul Manap ("Mr Muhamad



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Faisal"), formed the slate of WP candidates elected as MPs for Aljunied GRC at the 2011 GE. Following the merger of ATC and HTC to form AHTC, Mr Yaw Shin Leong also formed part of the group of WP members elected to manage AHTC as town councillors. Mr Yaw Shin Leong was replaced by Mr Png Eng Huat of the WP following a by-election for Hougang SMC held on 26 May 2012. References to the elected MPs in the rest of this judgment thus refer to the MPs who were elected to manage AHTC at the relevant time, although of these elected MPs, only Ms Sylvia Lim, Mr Low Thia Khiang and Mr Pritam Singh are defendants to the present suits.

13 The fourth and fifth defendants are Mr Chua Zhi Hon ("Mr David Chua") and Mr Kenneth Foo Seck Guan ("Mr Kenneth Foo"), who were appointed as town councillors to manage AHTC.

14 Under the TCA, the elected MPs of a Town Council are known as its "elected members" (s 2(1) TCA). Thus, MPs automatically become members of the Town Council without the need for separate appointment. One of the elected MPs (if there is more than one) is appointed Chairman of the Town Council under s 9(1) TCA. The Chairman of the Town Council then appoints other, non-elected, members under s 8(1)(*b*) TCA. These members are known as its "appointed members" (s 2(1) TCA). The Town Council consists of the elected and appointed members (s 8(1) TCA). The members of the Town Council are commonly known as "town councillors", which is a term I will also use in this judgment to refer to both the elected and appointed members.

15 From June 2012, Ms Sylvia Lim, Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo were part of the Tenders and Contracts Committee ("the Tender Committee") following a Town Council meeting on 14 June 2012. Mr Pritam Singh was the Chairman of the Tender Committee. The Tender



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Committee was responsible for vetting specifications of tenders called by AHTC, evaluating tenders received and deciding on the award of tenders.

16 The sixth defendant is Ms How Weng Fan, who was married to Mr Danny Loh Chong Meng ("Mr Danny Loh"), and is a personal representative of Mr Danny Loh's estate, the seventh defendant. Mr Danny Loh was Secretary of AHTC from 1 August 2011 to 31 May 2015, whereas Ms How Weng Fan was Deputy Secretary from 9 June 2011 to 14 July 2015. Ms How Weng Fan was also the General Manager from 1 August 2011 to 14 July 2015. Ms How Weng Fan was also Estate Manager/General Manager/Secretary of HTC from 1991 to 2011, before the 2011 GE. Further, Mr Danny Loh was the sole proprietor of FM Solutions and Integrated Services ("FMSI"). Mr Danny Loh passed away on 27 June 2015. However, for the purposes of identification and attribution, my references to "Mr Danny Loh" include references to his estate when it comes to the positions taken in the present proceedings, as well as on the issue of liability.

17 The eighth defendant is FM Solutions and Services Pte Ltd ("FMSS"). FMSS was incorporated in Singapore on 15 May 2011 with Mr Danny Loh as the initial sole director and sole shareholder. Ms How Weng Fan was appointed a director of FMSS on 16 June 2011. The next day, on 17 June 2011, new shareholders of FMSS were introduced, namely Ms How Weng Fan, Mr Yeo Soon Fei, Mr Vincent Koh and Mr Chng Jong Ling. Under the new shareholding structure, Mr Danny Loh and Ms How Weng Fan held 50% and 20% of the shares in FMSS respectively, whereas the remaining three shareholders each held 10% of the shares in FMSS.

18 Between 15 July 2011 and 14 July 2015, FMSS provided managing agent ("MA") and project management services to AHTC. Further, between 1



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October 2011 and 30 June 2015, FMSS also provided emergency maintenance services under the Essential Maintenance Service Unit (commonly known as "EMSU services"). Thus, between 15 July 2011 and 30 June 2015, the following four contracts for these services, which are at the core of the claims in this case, were in place between FMSS and AHTC:

(a) a contract for the provision of MA and project management services for the period 15 July 2011 to 14 July 2012 ("the first MA contract");

(b) a contract for the provision of MA and project management services for the period 15 July 2012 to 14 July 2015 ("the second MA contract");

(c) a contract for the provision of EMSU services for the period 1 October 2011 to 30 June 2012 ("the first EMSU contract"); and

(d) a contract for the provision of EMSU services for the period 1 July 2012 to 30 June 2015 ("the second EMSU contract").

Apart from the four contracts above, Mr Danny Loh, through his sole proprietorship FMSI, also provided EMSU services to HTC, and later AHTC, from 15 October 2007 to 14 October 2012, pursuant to a separate EMSU contract ("the FMSI EMSU contract"). The FMSI EMSU contract was entered into by the former HTC prior to the 2011 GE, and later migrated to AHTC following the amalgamation of HTC and ATC. Following the migration, the services rendered pursuant to the FMSI EMSU contract were for the Hougang residents of AHTC.

19 Prior to the engagement of FMSS, MA services for ATC and subsequently AHTC were provided by CPG Facilities Management Pte Ltd



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("CPG") pursuant to a contract that was set to expire in July 2013 ("the CPG MA contract"), with an option to extend for a further three years. EMSU services for AHTC, excluding the estates covered by the FMSI EMSU contract, were provided by CPG, with the exception of the Kaki Bukit precinct. The EMSU services for that precinct were provided by EM Services Pte Ltd ("EM Services"). Both CPG and EM Services' contracts for EMSU services were to expire on 30 September 2011. CPG's key representative to AHTC was Mr Jeffrey Chua, who also served as General Manager of AHTC from May 2011 to August 2011 and Secretary of AHTC from June 2011 to July 2011.

***Circumstances leading to the present suits***

20 On 10 February 2014, AHTC submitted its audited financial statements for the financial year ending 31 March 2013. The auditor's report prepared by Foo Kon Tan Grant Thornton LLP contained a disclaimer of opinion based on 13 grounds of qualification.

21 On 19 February 2014, the Deputy Prime Minister, upon the request of the Minister for National Development, exercised his powers under s 4(4) of the Audit Act (Cap 17, 1999 Rev Ed) and directed the Auditor-General to undertake an audit of AHTC's financial statements. The Auditor-General in turn appointed PricewaterhouseCoopers LLP ("PwC") to undertake an audit of selected aspects of the financial statements on behalf of and acting under the authority of the Auditor-General. The Auditor-General's Office ("AGO") issued its final report incorporating the findings of PwC on 9 February 2015 ("the Auditor-General's Report"), following which the Ministry of National Development ("MND") commenced proceedings in Originating Summons No 250 of 2015 against AHTC for, *inter alia*, the appointment of independent accountants.



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22 The proceedings were eventually heard by the Court of Appeal. On 27 November 2015, the Court of Appeal in its judgment in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 ("*AHPETC (CA)*") ordered (at [119]), *inter alia*, that AHTC appoint independent accountants to assist in identifying the outstanding non-compliances with s 35(c) of the TCA, to advise on the steps needed to remedy such non-compliances, and to establish whether any past payments made by AHTC were improper and ought therefore to be recovered.

23 Pursuant to the order of the Court of Appeal, AHTC appointed KPMG LLP ("KPMG") as its independent accountants, whilst PRPTC appointed PwC. On 31 October 2016, KPMG issued a report on its review of the past payments made by AHTC ("the KPMG report"). PwC also issued a report dated 30 April 2017 on its review of past payments ("the PwC report"). The plaintiffs rely to a large extent on the findings in these two reports to support their claims.

24 Pursuant to a consent order of court dated 17 February 2017, AHTC appointed an Independent Panel to act as agents of AHTC under s 32(2) of the TCA. The Independent Panel thereafter commenced S 668/2017 in the name of AHTC. The Independent Panel is not instructing PRPTC in S 716/2017.

***Undisputed facts and key documents***

25 The principal allegation of breach of duties against the defendants relates to the appointment of FMSS under the first MA contract in July 2011 and the first EMSU contract in October 2011. The allegation is grounded on the circumstances surrounding the appointment of FMSS. The plaintiffs' allegation of breach of duties on the part of the defendants as regards the award of the second MA and EMSU contracts is also rooted in or related to the same circumstances. Thus, it is crucial to comprehensively set out the key events in



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the months following the 2011 GE as they set the stage for the analysis that is to follow. Finally, the plaintiffs make allegations of breach with regard to the award of various contracts to third parties, which are independent from the circumstances said to surround the award of the first and second MA and EMSU contracts. For the sake of completeness, I will also set out the key facts in relation to these allegations. There is a significant amount of documentary evidence in the form of letters, emails and minutes of Town Council meetings which are important in understanding and elucidating the material circumstances surrounding each of these allegations. In the interests of being comprehensive, I set them out in chronological order and *ad verbatim* in so far as it is relevant to do so.

*Correspondence after the 2011 GE up to 30 May 2011*

26 Shortly after the results of the 2011 GE, the MND notified all newly elected MPs of all constituencies by a letter dated 9 May 2011 that the TCA required the formation of Towns on the expiration of 14 days after the publication of the 2011 GE results. The recipients were also informed that after the relevant orders for the declaration and dissolution of Towns were gazetted, the reconstituted Town Councils would assume responsibility for the new areas under their charge with effect from 1 August 2011.

27 On the same day, Mr Low Thia Khiang sent the following email to the elected MPs ("the 9 May 2011 Email"), copying Ms How Weng Fan in the same email:

> Dear Team,
>
> The following are new developments after we have the discussion this morning:
>
> 1. I am asking Ms How, GM of [HTC] to attend the both meetings to meet Secretary of Aljunied TC and HDB Town Council



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> Secretariat. This is because feedback received by Hougang TC that CPG Facilities Management has started not to manage or go into inactive management of the contract for some projects and some areas are poorly maintain. We need to understand the situation in greater details and *may have to take over the management earlier* or risk residents suffering from poor service and rubbish piling up.
>
> 2. The name of the Town Council merged should be Hougang-Aljunied Town Council because majority of the HDB properties we managed will be in Hougang area and Singaporeans generally identify with Hougang TC for all kinds of feedback based on calls received […]
>
> 3. I have also communicated to Ms How our decision that a) Hougang TC will be merged with Aljunied TC b) *We will appoint managing agent to manage the town* instead of self management c) Party Chairman Sylvia Lim has been elected amongst us as elected members to be chairman of the Town Council.
>
> […]
>
> [emphasis added]

28 It would appear that sometime before 12 May 2011, Mr Low Thia Khiang had a discussion with Ms How Weng Fan concerning the setting up of a company to provide MA services. As a result, on 12 May 2011, Mr Danny Loh applied to ACRA for the company name "FMSS" to be registered.

29 On 13 May 2011, Mr Low Thia Khiang received an email from a WP supporter by the name of Mr TT Tan who said that according to his source, "it is quite apparent that [CPG] will be withdrawing from ATC". Mr TT Tan advised Mr Low Thia Khiang to procure the CPG MA contract and seek legal advice on the same, and also to "start employing or ask for tender now". This email was forwarded by Mr Low Thia Khiang to Ms How Weng Fan, and subsequently to the elected MPs.

30 Also on 13 May 2011, on Mr Low Thia Khiang's instructions, Ms How Weng Fan sent a letter to Mr Jeffrey Chua and Ms Png Chiew Hoon, Secretary of Marine Parade Town Council, with the title "Request for Transfer of



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Documents and Data" ("the 13 May 2011 Letter"). The letter was signed by Ms How Weng Fan as Secretary of HTC. The relevant portions of the 13 May 2011 Letter read as follows:

> We would like to inform that *we have been instructed by the Elected Members of Parliament for Aljunied GRC and Hougang SMC to arrange for the taking over of the management of Aljunied Town Council and Kaki Bukit Precinct.*
>
> Following the above, we would thus like to kick-off the taking over process and to facilitate the same, we would appreciate if you could arrange for the following documents and data/information of the Aljunied Town Council and Kaki Bukit precinct to be first transferred to us:-
>
> […]
>
> As time is of essence and so as to enable us to commence with setting-up at our end, we would appreciate if the above items requested […] could be transferred to us by 20 May 2011. For a better understanding of the details of the items required to be transferred to us and in particular that which are required for the setting up of the financial collection system, we too would like to arrange for a meeting between ourselves and our computer vendors either at 10.00 am on 18 May 2011 or at 3.30 pm on 19 May 2011 at the Aljunied Town Council office at Block 810 Hougang Central.
>
> Meantime, perhaps Mr Jeffrey Chua could also provide us with the particulars and contact numbers of the staff at Aljunied Town Council for us to liaise directly with them pursuant to Mr Low Thia Khiang's assurance to Ms Cynthia Phua over her concern as expressed in the press pertaining to employment status of Aljunied Town Council staff.
>
> [emphasis added]

Based on a list attached to the 13 May 2011 Letter, Ms How Weng Fan asked for, *inter alia,* the CPG MA contract.

31 On the very next day, on 14 May 2011, following a query from a Straits Times reporter on whether the elected MPs would "take on all the existing agreements" including the MA agreement with CPG, Mr Low Thia Khiang sent the following email to Ms Sylvia Lim, Mr Pritam Singh, Mr Muhamad Faisal



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and Mr Chen Show Mao, which was later forwarded to Ms How Weng Fan ("the 14 May 2011 Email"):

> Chairman,
>
> Please watch this. I do not quite understand what it means by all existing agreement and clarify to include managing agent agreement. *We will not extend the managing agent agreement.* I think is better to wait till we look at the agreement before saying anything.
>
> [emphasis added]

32 On 15 May 2011, following approval by ACRA of his application on 12 May 2011, Mr Danny Loh incorporated FMSS with an issued share capital of $500,000 and a paid-up capital of $450,000. He was the sole shareholder and director.

33 On 16 May 2011, Mr Jeffrey Chua replied to the 13 May 2011 Letter, informing Ms How Weng Fan that CPG was in the midst of compiling the list of existing term contracts requested, and would hand over the documents progressively. In the same email, Mr Jeffrey Chua drew attention to the fact that the existing EMSU contracts with CPG and EM Services were due to expire on 30 September 2011, and attached the EMSU contracts with the hope that this information would facilitate Ms How Weng Fan to "make advance preparation to call tenders for new term contracts accordingly". Mr Jeffrey Chua did not attach the CPG MA contract to the 16 May 2011 email, and it was not sent to the defendants until 13 June 2011 (see [43] below). In response to Ms How Weng Fan's request for the contact details of the ATC staff so that they could be considered for employment, Mr Jeffrey Chua informed her that CPG was "able to redeploy them to other alternative postings".

34 On 19 May 2011, following a short exchange on possible conflicts of interest that might arise from appointing a representative of a MA to the post of



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General Manager or Secretary of the Town Council, Mr Low Thia Khiang sent the following email to Ms How Weng Fan:

> Dear Ms How,
>
> I have a short discussion with Sylvia today, we agree it is cleaner and easier to work by *appointing Danny to be GM/Secretary of TC. This is on understanding that you will be actively involve with the company which will be appointed as MA for the transition period with a contract for one year.*
>
> Please prepare the necessary personnel/company credential and information and document for the *appointment by the council.*
>
> As for conflict of interest, we find that it is not a big issue as all transaction has to follow the Financial Rules and MA's company is subject to the Companies Act.
>
> […]
>
> [emphasis added]

35 On 26 May 2011, Mr Low Thia Khiang sent the following email to the elected MPs, copying Ms How Weng Fan. The subject of the email was "Meeting with [ATC] Managing Agent":

> Dear all,
>
> Meeting with [ATC] on Monday, 30 May 2011 at 10.00am […]
>
> This meeting is more an introductory meeting to acquaint ourselves with the Town Council, to have a look around the office and to set some understanding on how the current MA will work with the new administration until handover […]

36 On 28 May 2011, Mr Low Thia Khiang sent a short email to Ms How Weng Fan, stating that "AHTC MA should employ All the existing staff of [HTC], at least for a start". The next day, on 29 May 2011, Ms Sylvia Lim sent an email to the elected MPs to provide "an update of what has happened and will need to be done". She informed them that the "existing Managing Agent of [ATC], CPG, will report to us until we release them at such date not later than 1 Aug", and that "Jeffrey Chua of CPG will continue [as Secretary of TC] until



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we release him", and that "[we] will appoint our Secretary when our MA is ready to take over".

*Meeting with CPG on 30 May 2011*

37 On 30 May 2011, the meeting referred to at [35] above took place between the elected MPs, Ms How Weng Fan and representatives from CPG, comprising Mr Jeffrey Chua, his personal assistant Ms Pan Wanjing, and the Deputy General Manager of ATC Mr Seng Joo How. At this meeting, the CPG representatives, using presentation slides, gave an overview of the properties under AHTC's management, the organisational structure of AHTC, handing over preparations and interim management arrangements. These presentation slides indicated 27 May to 31 July 2011 as the "care taking period", and 1 August 2011 as the "appointed date for handover". Ms Sylvia Lim took handwritten notes during this meeting, the contents of which largely mirrored that of the presentation slides. Significantly, at the corner of the last page of these handwritten notes, she noted a reference to FMSS.

*Presentation by FMSS on 2 June 2011*

38 On 2 June 2011, Ms Sylvia Lim, Mr Low Thia Khiang and Mr Muhamad Faisal met with Mr Danny Loh. Mr Danny Loh made a presentation on behalf of FMSS in relation to the award of the MA contract and the EMSU contract for AHTC. In this presentation, the following was set out as the "Fee Proposal":

> - Due to time constraint and incomplete information, we propose the following :-
>  - We shall takeover all the existing staff of Hougang Town Council at their existing salary and terms of appointment. The total staff costs for financial year ended 31 March 2011 shall form the basis to compute the monthly Managing Agent's fee (Reimbursement basis with no profit element)



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> - We shall takeover the management of Aljunied Town Council at their prevailing Managing Agent's fee (2nd year fee structure)
> - Our scope of work shall follow closely to the specifications stipulated under the Managing Agent's contract of the Aljunied Town Council (Manpower deployment will differ slightly due to different mode of operation and specifications cannot be fully complied)
>
> […]

The presentation slides also set out the following "action plan":

> - FM Solutions to takeover [HTC] on 15 June 2011
> - Tentative Cut over Date for Aljunied – 1 August 2011
>  - Critical path is set by the Accounting System
> - MA ready to takeover on 15 July 2011 (Actual date of commencement of MA contract)
> - We will second staff (as necessary) to [HTC] till 15 July 2011. Such staff shall be reimbursed on a cost basis from AHTC.
>
> […]

The presentation slides also contained an "Additional Proposal on EMSU" in the following terms:

> - Essential to ultimately merge the EMSU with the MA contract for seamless provision of services to residents
> - Current contract expiring in September 2011
> - Upon expiry, MA takeover at prevailing contract sum

39 Also on 2 June 2011, Ms How Weng Fan sent an email to the elected MPs stating that "1 August 2011 handover has never been an issue as this handover refers to TC to TC handover and is mandated by MND". She further stated that "[with] CPG we have always maintained that there is the possibility that we may require them to continue their service until such time that we deem



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that all matters are properly handed over to the new MA. Indicative period is by a month ie up to 30 September 2011."

*The first Town Council meeting on 9 June 2011*

40 On 9 June 2011, the first Town Council meeting of the newly reconstituted AHTC was held, and it was attended by, *inter alios*, all the elected MPs, Ms How Weng Fan, Mr David Chua, Mr Kenneth Foo, Mr Jeffrey Chua, Mr Seng Joo How and Ms Pan Wanjing. The minutes of the meeting reflected that the following was discussed:

> 3.2.1 Chairman recommended that Mr Jeffrey Chua, Secretary of the then Aljunied TC should continue this role until such time the Council was ready to release him. The same should apply to the 2 Deputy Secretaries Mr Seng Joo How and Mr Clarence Tan […]
>
> 3.4 Delegation of Town Council Authority to Chairman to Act on behalf of Council
>
> 3.4.1 The Council approved the delegation of authority to Chairman under Section 32 of the [TCA] to exercise the powers, functions and duties of the Town Council in the name and on behalf of the Town Council during the interim to better facilitate the handover.
>
> […]
>
> 4.2 List of Term Contracts expiring on 30 September 2011
>
> […]
>
> b) EMSU
>
> 4.2.3 Secretary informed that M/s CPG Facilities Management Pte Ltd is the service provider for estates under 4 TCs including Aljunied-Hougang. [CPG] will provide the services up to the end of the extended contract on 30 Sept 2011. Deputy Secretary Mr Seng highlighted that in the case of Kaki Bukit estate, the EMSU contractor is M/s EM Services Pte Ltd. The Council decided that M/s EM Services Pte Ltd should continue to provide the services for Kaki Bukit estate up to 30 Sept 2011.
>
> […]
>
> 4.5 Managing Agent Contract



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> 4.5.1 Secretary reported that the MA contract would still run for another 2 years. He had a discussion with Chairman that the MA will facilitate the handover till 1 Aug 11 and will then sign a Deed of Mutual Release and Termination on 1 Aug 11.
>
> 4.5.2 The management understood from Ms How that the estate management staff would be in placed by 1 Aug 11 […]
>
> 4.5.3 Chairman and Vice Chairman Mr Low highlighted that the Council would not commit to 1 Aug 11 as the termination date until further notice and emphasized best effort be put in to achieve the targeted dates.
>
> 4.5.4 On a related note for project management contract, the Council will decide on a case by case basis whether to appoint [CPG] to continue with the project management until completion.
>
> […]

Notably, there was no discussion of any award of contracts for MA services EMSU services to FMSS, even though the presentation slides for the 2 June 2011 meeting contained a proposal for FMSS to take over the provision of both services.

*Correspondence with AIM regarding TCMS*

41 After the first Town Council meeting, several emails were exchanged regarding the status of the contract between ATC and NCS Pte Ltd ("NCS") which had been novated to Action Information Management Pte Ltd ("AIM"). The contract ("the AIM contract") licensed the use of a computer software, described as the Town Council Management System ("TCMS"), owned by AIM to ATC. TCMS was used to operate and manage ATC's financial system. Ms How Weng Fan sent an email to Ms Sylvia Lim on 9 June 2011, attaching the novation agreement between NCS, AIM and ATC, informing her that since the AIM contract expired in October 2011, "this talk by CPG that NCS will pull out by end July 2011 seems misplaced", and that AHTC "should therefore not be



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pressured into rushing into the completion of [its] computer system by 31 July 2011".

42 The next day, 10 June 2011, Ms How Weng Fan sent another email to Ms Sylvia Lim, informing her that she had spoken to one Mr Sasidharan of AIM to request use of TCMS until 31 August 2011. Ms How Weng Fan relayed that Mr Sasidharan, who "sounded very nice and helpful", informed her that AIM would give notice of termination of the AIM contract, but that AHTC could put in a request for extension of AIM's services before it was received. This request was duly sent to AIM by Mr Jeffrey Chua on the same day. On 24 June 2011, AIM accepted the request for extension until 31 August 2011. In the meantime, on 23 June 2011, Ms How Weng Fan obtained approval from Ms Sylvia Lim to waive the need for quotations before procuring computer services and equipment, on the basis that the "Secretary of [ATC] had advised that AIMs will terminate the provision of the computer systems to the newly established [AHTC] by 31 July 2011", and that such waiver of quotation was necessary "[i]n view of the urgency to set up the computer system".

*Events in between the first and second Town Council meetings*

43 On 13 June 2011, Mr Jeffrey Chua emailed Ms How Weng Fan a further response to the 13 May 2011 Letter, attaching this time a list of further agreements including the CPG MA contract, which he informed could be obtained from the AHTC office. This would appear to be the first time Ms How Weng Fan, or for that matter, any of the defendants was given the opportunity to view the CPG MA contract. There was no evidence before me of any further attempts to procure the CPG MA contract in the interim between the 13 May 2011 Letter and Mr Jeffrey Chua's response on 13 June 2011.



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44 On 15 June 2011, a letter of intent was sent by FMSS to Ms Sylvia Lim ("the FMSS LOI"), stating as follows:

> We are pleased to offer our services as the *Managing Agent for Aljunied-Hougang Town Council* and enclose herewith our proposal as follows: -
>
> 1. Former Aljunied Town Council
>
> a) *We shall take-over the management of the former Aljunied Town Council Town Council on 15 July 2011 at the prevailing Managing Agent's fees and fees structure as per the existing Managing Agent contract between Aljunied Town Council and M/s CPG Facilities Management Pte Ltd made on 8 June 2010.* A copy of the applicable contract sum and breakdown is attached as Annex 1.
>
> b) In view of the boundary change, we will adjust the Managing Agent fees based on the revised quantum of residential dwelling units, commercial units, market/hawker stalls and motorcar/motorcycle/lorry parking lots.
>
> 2. Former Hougang Town Council
>
> a) *We shall take-over all the existing staff of the former Hougang Town Council at their existing salary and terms of appointment on 15 June 2011 for preparation of takeover. Our Managing Agent fees shall be based on the annual staff cost as per the accounts as at 31 March 2011*[…]
>
> 3. Reimbursement of New Staff
>
> a) We shall engage new staff as necessary for the preparation of the handing and taking over and shall claim such staff costs on a full reimbursement basis.
>
> 4. Scope of Work
>
> a) Our scope of work for Aljunied-Hougang Town Council shall follow the specifications stipulated under the Managing Agent's contract of the former Aljunied Town Council.
>
> *The above appointment shall be for a period of one year with effect from 15 July 2011 to enable the Town Council to call for a tender of the Managing Agent contract.*
>
> […]
>
> [emphasis added]



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Notably, the terms in the FMSS LOI broadly tracked the proposed terms set out in the presentation made by Mr Danny Loh on 2 June 2011, save that there was no reference to the "Additional Proposal on EMSU" services.

45 As stated at [17] above, Ms How Weng Fan, Mr Vincent Koh and Mr Yeo Soon Fei became shareholders of FMSS two days after the FMSS LOI was sent, *ie*, on 17 June 2011.

46 Before the FMSS LOI was signed, Ms Sylvia Lim emailed a copy of the same to the elected MPs on 6 July 2011, informing them that "the rates quoted are similar to the ones CPG is using for [ATC] for its [second year] of service", and that she intended to sign the FMSS LOI by 8 July 2011 after seeking a clarification on the project management rates.

47 Ms Sylvia Lim emailed the request for clarification to Ms How Weng Fan on the same day, followed by the further email below a short while later:

> Also one more query – by going via the letter of intent, can we defer the formal appointment till after 1 Aug? *Or do we need to get Council to waive tender now….which needlessly involves CPG?* [emphasis added]

Ms How Weng Fan replied to this email on the same day, saying that as there was the FMSS LOI, "the formal appointment can be made any time after 1 August 2011".

48 The FMSS LOI was signed on behalf of AHTC by Ms Sylvia Lim on 8 July 2011 and Mr Yaw Shin Leong on 18 July 2011, appointing FMSS as the MA of AHTC for a period of one year. This was the basis of the first MA contract.



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49 On 13 and 14 July 2011, a series of emails were exchanged between Ms Sylvia Lim, Mr Low Thia Khiang, Mr Yaw Shin Leong and Ms How Weng Fan on the subject of postponement of the date for the second Town Council meeting, originally scheduled for 21 July 2011. This began with the following email from Ms Sylvia Lim on 13 July 2011:

> I'm wondering if we should proceed with the AHTC meeting on 21 July, or we should defer the meeting till after 1 Aug.
>
> The original reason we chose to meet on 21 July was to take stock of the handover process, to see that everybody was on track for the handover.
>
> *I'm re-considering whether it is better to wait till CPG is out of the picture and Jeffrey is released as Secretary. But there is, to me, one big issue.*
>
> *One key item is the appointment of the new MA to replace CPG, and the appointment of Danny as Secretary. Clearly this must be done before 1 Aug. We have decided not to tender out the MA job for now, and will do so in one year's time.*
>
> *As we have chosen to commit to appointing [FMSS] via letter of intent for now, we may not need to let CPG know the details.* At the same time, we need to explain to the residents our plan, otherwise there will be a gap when they receive the Notification dated 15 July. So at least Councillors should know (tho we can go via circulation? but that must involve Jeffrey as Secretary, right?).
>
> *According to the [TCFR] para 74(17), TC or Chairman can waive tenders in accordance with the authorisation limits. Even though TC delegated to me powers of TC, we can't contravene [TCFR]. I suspect my authority as Chairman does not entitle me to waive tender for such an amount as the MA contract value. So we need TC to endorse.*
>
> *We also need to document the reasons for waiver fully, as [TCFR] says.* (I think there is no issue here – that to ensure smooth transition and residents do not suffer, we decided to work with those familiar with running Hougang SMC, at the same rates charged by CPG, and will tender out after one year).
>
> Your views, pls, on whether we should go ahead with the meeting on 21 July and confirm the new MA. My mind tells me it is safer somehow.
>
> [emphasis added]



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50 Mr Yaw Shin Leong replied to this email on the same day, expressing his view that "we should be rather transparent" and that "[s]ince we have nothing to hide, Jeffrey's presence should not be a hindrance for the council to deliberate + to decide the appointment of FM Solutions & Services". Mr Yaw Shin Leong added that based on his interactions with Mr Jeffrey Chua thus far, he "has found him to be a reasonable and responsible person". However, Mr Low Thia Khiang took a different view, and sent out the following email on 13 July 2011:

> My view is that we do not need to meet to do so but I think Ms How should advise on this.
>
> 1. *If we meet to appoint MA, it has to show at the meeting and on record that we have done our due diligent before decision is made. Although we have done so at separate meeting, I do not think we want the information to be revealed to them.*
>
> *2. I am also not comfortable to go through the process in the presence of Jeffrey Chua and Co although they appear to be friendly and cooperative thus far.*
>
> […]
>
> 4. *I am of the view that based on the resolution passed, you do have the authority to waive tender requirement based on urgency of the matter and the circumstances.* (Our confident level of the tenderer will be a prime factor in our consideration anyway even if we have gone for tender now)
>
> […]
>
> [emphasis added]

51 Ms Sylvia Lim then replied to everyone in the email chain on 14 July 2011, agreeing to "release Jeffrey as secretary and appoint Danny on 1 Aug" and to "have AHTC meeting ASAP after 1 Aug i.e. on 4 Aug, to appoint the MA". There was also a query as to who should write up a report on the assessment of and the decision to appoint FMSS, to which Mr Low Thia Khiang replied that "Danny can provide the draft report and assessment under your instruction".



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52 Further to this correspondence, Ms Sylvia Lim then prepared a draft report to be tabled at the second Town Council meeting in her name, which was sent by her to Mr Low Thia Khiang and Mr Yaw Shin Leong via email on 3 August 2011 ("the Report on MA appointment"). This report was a revised version of a draft report prepared by Mr Danny Loh. This email was also copied to Mr Danny Loh and Ms How Weng Fan, with the message "cc Danny and Ms How Weng Fan – fyi and any comments on whether *it will pass the auditors' eyes – esp re waiver of tender*" [emphasis added]. The material portions of the Report on MA appointment read as follows:

> 1. The incumbent MA, CPG Facilities Management Pte Ltd, though appointed MA for Aljunied Town Council from Aug 2010 to July 2013, had requested to be released as MA following the change in political leadership.
>
> 2. It was mandated by the [MND] (vide letter dated 9 May 2011) that the reconstituted Town Councils would assume responsibility for the new areas under their charge with effect from 1 August 2011.
>
> 3. The service provider for the accounting system in Aljunied Town Council gave written notice that the service would be totally withdrawn within one month[…]
>
> 4. The short timeframe, the critical nature and magnitude of the works, and the overriding concern that the welfare of the residents should not be disrupted, precluded the possibility of conducting a tender exercise for the appointment of Managing Agent. It was also imperative that the Managing Agent should be appointed as early as possible to enable recruitment and preparation.
>
> 5. FM Solutions & Services Pte Ltd (FMSS), incorporated in May 2011, was identified as a suitable MA for appointment. Its key management and staff were qualified and experienced in estate management, some of whom had worked with Hougang Town Council with proven track records.
>
> […]
>
> Consensus was obtained among the elected Members to proceed with FMSS on the [terms in the FMSS LOI].
>
> […]
>
> Council's approval is sought to:



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> a) waive the calling of a tender for MA services from 15 July 2011 to 14 July 2012 in view of the urgency of the services and the manifest necessity in the public interest;
>
> b) appoint FM Solutions and Services Pte Ltd as the Managing Agent for Aljunied-Hougang Town Council from 15 July 2011 to 14 July 2012.

53 Subsequently, Mr Yaw Shin Leong raised a query on whether there was "a need to disclose to fellow town councilors [*sic*] regarding the husband & wife relationship of Danny & Ms How", to which Mr Low Thia Khiang replied that most councillors "know both of them but no harm to mention it at the meeting". Mr Yaw Shin Leong followed up with a further query on whether there was "a need to reveal the exact *stakeholdership(s) [*sic*] of [FMSS] in the TC minutes/report", to which Ms Sylvia Lim replied that "we can / should enclose the ACRA search....let me arrange".

*The second Town Council meeting on 4 August 2011*

54 The second Town Council meeting took place on 4 August 2011, and was attended by the elected MPs with the exception of Mr Muhamad Faisal. Mr Kenneth Foo was present at this meeting, but not Mr David Chua. No representatives from CPG were present, but Mr Danny Loh and Ms How Weng Fan were in attendance and were noted to be representing FMSS. The minutes of meeting recorded that Mr Danny Loh presented FMSS's MA proposal to all present, after which Mr Danny Loh and Ms How Weng Fan were excused from the meeting to facilitate the discussion by the town councillors. Following the discussion, Mr Danny Loh and Ms How Weng Fan were invited back into the meeting, and "informed of AHTC's decisions" awarding the first MA contract to FMSS, in response to which "Mr Danny Loh accorded his appreciation for the award". The minutes also recorded Mr Danny Loh's declaration that he was the Managing Director and Ms How Weng Fan a director and the General



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Manager of FMSS. The minutes of the discussion which took place in the absence of Mr Danny Loh and Ms How Weng Fan largely mirrored the contents of the Report on MA appointment, and also recorded the fact that AHTC unanimously agreed to waive the calling of a tender for MA services for one year and to appoint FMSS as MA for the same period. There was no record of any discussion on the contract for the provision of EMSU services.

*Events following the second Town Council meeting*

55 The next day, on 5 August 2011, AHTC released a media statement on the appointment of FMSS. The decision not to call a tender for MA services was justified on the basis of the "urgency of the timelines […], and the overriding concern that Town Council services should not be disrupted to the detriment" of the residents, and that there was "insufficient time" to do so. It was also said that "[no] Workers' Party member has any interest in FMSS", and that "AHTC does not incur additional MA fees from appointing FMSS, as FMSS has agreed to assume the scope of works and pricing of the former MA [for ATC]".

56 On 11 August 2011, AHTC and CPG entered into a deed of mutual release with effect from 1 August 2011, stating that "both parties are desirous to be released and discharged from the further performance" of the CPG MA contract and that "they have mutually agreed to release and discharge each other" from further performance of the same. Also on 11 August 2011, AHTC and CPG entered into a project management contract for CPG to provide three staff members for a one-month parallel run of computer services at AHTC, and to provide project management services for three improvement works and repainting projects which were in progress.



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*Correspondence leading to the award of the first EMSU contract to FMSS*

57 As noted above at [33], Mr Jeffrey Chua notified Ms How Weng Fan on 16 May 2011 that the existing contracts with CPG and EM Services for EMSU services were set to expire on 30 September 2011. The same point was noted in the presentation slides used at the presentation on 2 June 2011 (see above at [38]), and was also made by Mr Jeffrey Chua at the first Town Council meeting on 9 June 2011.

58 On 26 August 2011, Ms How Weng Fan sent a letter to Mr Jeffrey Chua as the Managing Director of CPG, concerning the "extension of term contract for [EMSU services] from 1 October 2011 to 31 March 2012":

> We are pleased to inform you that our Town Council would like to extend the contract for another 6 months for the period 1 October 2011 to 31 March 2012 on the same terms and conditions.
>
> Your confirmation on the extension would be appreciated.

A similar letter was sent to EM Services.

59 On 7 September 2011, EM Services replied, stating that they were declining the request for extension. Thus, the provision of EMSU services by EM Services would terminate on 30 September 2011.

60 The third Town Council meeting was held on 8 September 2011. At this meeting, the following discussion pertaining to EMSU contracts with CPG and EM Services was recorded in the minutes:

> The Managing Agent reported that the incumbent EMSU service providers were M/s CPG Facilities Management Pte Ltd and M/s EM Services Pte Ltd whose extended contracts would be expiring on 30 September 2011. *Whilst M/s CPG had indicated interest to renew for a further period of 6 months, M/s EM*



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> *Services was not agreeable to the proposed extension.* However, the Meeting noted that M/s CPG FM had not confirmed officially in writing on the proposed extension despite several reminders.
>
> The Meeting noted the lack of EMSU service providers in the market that would be willing to provide their services to Aljunied-Hougang Town Council. In view of the short time frame, the Meeting decided to appoint a Committee required under Rule 76(4) of the Town Councils Financial Rules in order that the Council could consider *proposal from the current Managing Agent to provide the EMSU services in case M/s CPG FM decided not to extend.* The Committee shall comprise Ms Sylvia Lim, Mr Chen Show Mao, Mr Muhamad Faisal and Mr Anthony Teo.
>
> [emphasis added]

61 On 14 September 2011, Mr Jeffrey Chua sent an email to Ms How Weng Fan on behalf of CPG, apparently to follow up from a telephone conversation the same morning, stating that "[a]s explained, it will not be appropriate for us to continue providing the EMSU services to your Town Council when the current extended contract ends on 30 Sept 2011".

62 Two days later, on 16 September 2011, Ms Sylvia Lim emailed the town councillors to apprise them of the "important news re EMSU services":

> At the AHTC meeting on 8 Sep, you were briefed that with the EMSU (emergency services) contracts expiring on 30 Sep, [CPG] had verbally agreed to extend their services for EU, BRP, PL and SG Divs for 6 months until 31 Mar 2012. EM Services for [Kaki Bukit] Div had indicated they did not want to extend but would confirm by Monday 12 Sep.
>
> Council had agreed that it was prudent to extend CPG for 6 months and call a tender thereafter for the EMSU services for the whole [Aljunied-Hougang] town.
>
> As for [Kaki Bukit] Div, it was likely that our Managing Agent FM Solutions and Services would have to take over EMSU services for 6 months until Mar 2012 when the tender for [Aljunied-Hougang] town would be called […]
>
> This week, EM Services has stood firm that they will not extend beyond 30 Sep. However, [CPG] informed us on 14 Sep(in writing and orally) that they too are not extending – it seems



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> that they have been 'spoken to' about not helping us and have made a business decision.
>
> This means that we must make immediate provision to have continuity of EMSU services beyond 30 Sep for all Divs in Aljunied GRC. *We are likely to award the contract for 6 months (Oct 2011 to Mar 2012) and call a tender for the period of Apr 2012 onwards.*
>
> [emphasis added]

63 This email was followed by a meeting on 18 September 2011 of the committee mentioned in the minutes of meeting at [60] above ("the EMSU Committee"), which comprised Mr Chen Show Mao, Mr Muhamad Faisal, Mr Anthony Teo and Ms Sylvia Lim. The EMSU Committee compared the EMSU contracts of the existing providers in the market, CPG, EM Services and Integrated Solutions, and made decisions as to the scope of EMSU services to be awarded. The EMSU Committee also noted that there were "advantages of awarding the MA contract and the EMSU contract at the same time", and recommended to award the EMSU contract for the interim period from 1 October 2011 to 30 June 2012 "given the urgency", so that the tenders for the subsequent MA and EMSU contracts could be called at about the same time.

64 On 18 September 2011, Ms Sylvia Lim emailed the town councillors, reiterating that CPG has confirmed its unwillingness to extend its EMSU services beyond 30 September 2011. She stated that this "came as a surprise on 14 Sep and was contrary to the verbal agreement that they were willing to extend for 6 months". She further stated that as EMSU was a critical service, a waiver of tender for EMSU services was required due to the "urgency of the requirement and the public interest necessity". She concluded by stating that FMSS had offered to supply the EMSU services in accordance with the scope of works approved by the EMSU Committee, and for the period October 2011 to June 2012, following which an open tender would be called. AHTC's



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approval was sought to waive the tender for EMSU services and to award the contract to FMSS. Approval was unanimously provided via email circulation.

*Events leading up to the award of the second MA contract and second EMSU contract to FMSS*

65 At the ninth Town Council meeting on 8 March 2012, it was discussed that FMSS's provision of MA and EMSU services under the first MA and EMSU contracts would be expiring in July 2012, and that tenders would need to be called soon. The meeting then decided to appoint a committee to consider the MA and EMSU tenders. This committee is the Tender Committee referred to at [15] above.

66 At the tenth Town Council meeting on 12 April 2012, it was noted that the Tender Committee had met twice to review and make amendments to the tender documents and specifications used by ATC for MA and EMSU services, which would be used for the calling of tenders the next day. Representatives from FMSS, which included Mr Danny Loh and Ms How Weng Fan, were then excused from the meeting. After they re-joined the meeting, they were informed that AHTC would call for quotations to appoint a firm to audit the process of appointment of the MA.

67 A tender notice for the provision of MA and EMSU services, each for a term of three years, was published in the Straits Times on 13 April 2012, with the tender closing on 4 May 2012. On 16 April 2012, tender documents were collected by CBM Pte Ltd and EM Services. FMSS subsequently collected tender documents on 26 April 2012. FMSS submitted the sole bid for the second EMSU contract and second MA contract on 4 May 2012.



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68 The minutes of the Town Council meeting of 10 May 2012 recorded that the Tender Committee had "appointed M/s RSM Ethos at $6,000 as the firm to audit the process of the appointment of the Managing Agent".

69 On 19 June 2012, Ms Sylvia Lim sent Ms How Weng Fan and Mr Danny Loh the following email which gave them a heads up as to what the Tender Committee would seek explanation on:

> Dear Danny and Ms How,
>
> To give you a heads up, the tender interview comm is likely to ask for some explanation as to the pricing difference from current to the proposed.
>
> I have done a preliminary analysis, pls correct me if I'm wrong – as attached.
>
> According to info I have from one of the PAP TC Chairmen, the going rate for MA tenders is currently $6+ to $7. Since FMSS' tender is at the higher end, some explanation would be most useful. […]
>
> [emphasis added]

Mr Danny Loh replied to this email on the same day with revised calculations on FMSS's rates. The revised calculations show FMSS's proposed rates for 2012 to have increased from $5.96 per equivalent dwelling unit ("EDU") in 2010 to $7.00 per EDU, representing a 17.28% increase in MA fees. Mr Danny Loh also said that he "[a]ppreciate[d] the heads up".

70 On 21 June 2012, the Tender Committee, now comprising Ms Sylvia Lim, Mr Pritam Singh, Mr Muhamad Faisal, Mr David Chua and Mr Anthony Teo, met to evaluate FMSS's tender for the second MA and EMSU contracts. The committee expressed concern about the marked increase in the MA rates tendered, representing "an increase of 17.3% when averaged out over the respective 3-year contract periods", and asked FMSS for justification. In response, Mr Danny Loh showed presentation slides explaining FMSS's pricing



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strategy, and pointing to other costs that FMSS had to bear. Ms How Weng Fan also added that provision of IT maintenance services was done by FMSS in-house at no extra cost, which was a saving of more than $30,000 per month. Concerned about the impact of the proposed prices on AHTC's bottom line and whether it would necessitate raising service and conservancy charges levied on residents, the Tender Committee asked for a possible 3-year projection. Ms How Weng Fan was recorded as having responded that the budget for FY2012 showed a surplus of over $100,000, and that it was "not possible to accurate [*sic*] project for the next 3 years due to the unpredictable external environment, changing manpower polices and rising costs". The minutes of meeting also reflected that whereas FMSS's tender for the second MA contract specified project management fees at a rate of 3.5% for the first two years and 4% for the third year, Mr Danny Loh indicated that FMSS was willing to hold the rates at 3.5% for all three years.

71 The Tender Committee reconvened one month later on 21 July 2012 to evaluate the MA tender submitted by FMSS, and this time queried why FMSS's project management rates did not price in any rate reduction for larger projects. Mr Danny Loh responded that since FMSS focused on managing only one town, it did not enjoy the economies of scale in project management enjoyed by other companies.

72 On 26 July 2012, Ms Sylvia Lim received an email from Kelly Services in response to a prior request to review the salaries of FMSS staff. The representative from Kelly Services stated that the salaries reviewed were "generally acceptable and within range of market norms".

73 At the 13th Town Council meeting held on 2 August 2012, the council considered the tender evaluation reports submitted by the Tender Committee,



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and adopted its recommendations to award the second MA and EMSU contracts to FMSS at the agreed upon prices. Representatives from FMSS were absent at that meeting. An ACRA search showing the shareholding of Mr Danny Loh, Ms How Weng Fan and other FMSS representatives was part of the documents put before the Tender Committee during the preparation of their tender evaluation report, but this was not put before the Town Council at this meeting.

74 The day after the Town Council meeting, a letter of acceptance of FMSS's tender for the second MA contract, for the contract period from 15 July 2012 to 14 July 2015, was sent by Ms Sylvia Lim to FMSS. On 7 August 2012, FMSS's tender for the second EMSU contract was accepted similarly for a period of three years.

*Circumstances leading to the award of miscellaneous contracts to third party contractors*

75 The plaintiffs' claims also include various contracts which they say were improperly awarded to third party contractors. None of these contractors has any connection to Mr Danny Loh, Ms How Weng Fan or FMSS. The circumstances leading up to these appointments, as gleaned from undisputed documentary evidence, will be briefly summarised here.

(1) LST Architects

76 On 31 August 2012, AHTC invited tenders for the appointment of architectural consultants to a panel for a period of three years, for the provision of consultancy services at pre-agreed rates based on the value of the awarded project. Tenders were received from LST Architects and Design Metabolists, and it was recorded in the tender evaluation report that for projects between the values of $0.5m and $3.66m, LST Architect's prices were lower, whereas



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Design Metabolists' prices were lower for projects under $0.5m or above $3.66m.

77 LST Architects and Design Metabolists were given a performance assessment score of 42 and 41 respectively by AHTC's Property Officer on 20 September 2012, suggesting that they were broadly even in terms of performance. On 7 November 2012, the Tender Committee decided that both tenderers ought to be appointed to the panel of consultants. LST Architects and Design Metabolists subsequently entered into appointment agreements with AHTC for the contract period 1 December 2012 to 30 November 2015.

78 Based on the review by KPMG of ten projects which were subsequently awarded to LST Architects, LST Architects was actually higher-priced than Design Metabolists for seven of those projects.

(2) Red-Power

79 In April 2012, AHTC called for a tender for the maintenance of transfer and booster pumps, automatic refuse chute flushing system and roller shutters. At the material time, AHTC had contracts with Digo Corporation Pte Ltd ("Digo") and Terminal 9 Pte Ltd ("Terminal 9") for the same services, which could have been extended at AHTC's option for a maximum of two years at the same rates. On 11 June 2012, Red-Power Electrical Engineering Pte Ltd ("Red-Power"), the sole tenderer, was awarded a term contract for the maintenance of transfer and booster pumps, automatic refuse chute flushing system and roller shutters for AHTC for a period of three years.

80 Punggol-East had a separate contract with EM Services for the same services, which contract could not have been further extended after its expiry on 31 March 2015. At the time of the expiry of the said contract, AHTC had in



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place the contract with Red-Power mentioned in the preceding paragraph, as well as a separate contract with Tong Lee Engineering Works Pte Ltd ("Tong Lee") which covered different precincts of AHTC. It would appear that Tong Lee was not obliged to extend their coverage to include Punggol-East. On 12 December 2014, a letter was sent to Red-Power to confirm that Punggol-East would be added to AHTC's existing term contract with Red-Power at the same rates, terms and conditions, with effect from 1 April 2015.

(3) Rentokil

81 On 12 July 2013, AHTC called a tender for pest control services. Tenders were received from Rentokil Initial Singapore Pte Ltd ("Rentokil") and Pest-Pro Management Pte Ltd ("Pest-Pro"), with Pest-Pro's bid being the lowest. On 17 August 2013, interviews were conducted with both Rentokil and Pest-Pro by the Tender Committee. On 26 August 2013, Rentokil was awarded a term contract for the inspection, extermination and eradication of pests for AHTC for a period of three years.

82 Punggol-East had a contract for pest control services with Clean Solutions Pte Ltd ("Clean Solutions") which expired on 31 March 2015. On 12 December 2014, a letter was sent to Rentokil to confirm the addition of Punggol-East into the existing contract at the same rates, terms and conditions, with effect from 1 April 2015.

(4) Titan and J Keart

83 PRPTC had contracts for conservancy and cleaning works, and servicing and maintenance of fire protection systems with Titan Facilities Management Pte Ltd ("Titan") and J Keart Alliances Pte Ltd ("J Keart") respectively. Both contracts expired on 31 March 2015, and contained an option to extend for a



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further 12 months on the same terms and rates. This option was not exercised. Instead, AHTC called for fresh tenders.

84 Three bids were received for the provision of conservancy and cleaning works, and a new contract for these works was awarded to the lowest bidder, Titan, for the period 1 April 2015 to 31 March 2018. Similarly, three bids were received for the maintenance of fire protection systems, and a new contract was awarded to the lowest bidder, J Keart, for a period of three years. In other words, new contracts for the same services were awarded to the existing contractors when the existing contracts could have been extended. It is not disputed that the new contracts with Titan and J Keart were at a higher rate than the existing contracts with the same contractors.

**Parties' cases**

85 The parties' cases will be briefly summarised here, and will be dealt with in greater detail when I set out my decision beginning at [160] below. Even though the arguments made by the parties do not always entirely overlap, a distinction will only be made here between the arguments made by AHTC as opposed to those by PRPTC, and the arguments made by the first to fifth defendants as opposed to those by the sixth to eighth defendants, when it is relevant and appropriate to do so. The parties' arguments will be analysed with greater specificity in the latter portions of this judgment.

***The plaintiffs' case***

86 The focus of the plaintiffs' complaint against the defendants relates to the appointment of FMSS as MA and provider of EMSU services under the first MA and EMSU contracts and subsequently the second MA and EMSU contracts (collectively, "the first and second MA and EMSU contracts") and the payments



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made thereunder, as well as the payments made to FMSI pursuant to the FMSI EMSU contract following the merger of HTC and ATC. I will thus canvas the arguments relating to this complaint before moving on to the other claims concerning the appointment of third party contractors and the payments that were made to them.

87 As the plaintiffs' cases were largely conducted on a joint basis, their positions as pleaded and argued will be treated here as applying to them both, except where they are expressly stated to apply to only one of them.

*The defendants owe fiduciary duties to the plaintiffs and/or were trustees*

88 The first issue is a preliminary one, and pertains to the nature of the legal relationship between the defendants and AHTC, which has implications on the duties owed by the defendants to AHTC and the remedies that can be sought for the breach of those duties. The plaintiffs argue that the defendants, with the exception of FMSS and FMSI, were fiduciaries of AHTC in their respective capacities as town councillors and appointment holders. It is argued that Ms Sylvia Lim, Mr Low Thia Khiang, Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo therefore were custodians of the residents' monies and public monies in their capacity as town councillors, whereas Ms How Weng Fan and Mr Danny Loh similarly owed fiduciary duties as Deputy Secretary/General Manager and Secretary respectively. It is pointed out that the defendants had possession or control of assets and property of AHTC, and AHTC reposed trust and confidence and relied on them to discharge their functions, which is consistent with them being custodians and fiduciaries.

89 The plaintiffs therefore argue that the first to seventh defendants owed to AHTC fiduciary duties which included duties of loyalty and fidelity, good



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faith, not to put oneself in a position of conflict and not to make a profit other than through their legal entitlements, and by extension a duty to inquire into facts that would have awakened the suspicion of a prudent person, and a continuing duty to disclose and rectify breaches of the aforementioned duties.

90 PRPTC further claims in the alternative that the first to seventh defendants were trustees of AHTC's assets and property. In their opening statements, the plaintiffs take the further position that the first to seventh defendants were *custodial* fiduciaries of AHTC's assets.

*The defendants breached their duties in the award of the first and second MA and EMSU contracts*

91 As noted earlier, the plaintiffs' claim centres on four crucial contracts (see above at [18]) – the first MA and EMSU contracts awarded in 2011 and the second MA and EMSU contracts awarded in 2012 – under which the substantial portion of the allegedly improper payments were made to FMSS. The plaintiffs argue that the award of the first MA and EMSU contracts to FMSS without the calling of a tender was a breach of the defendants' duties to AHTC, as the circumstances did not justify the waiver of a tender. The discussion that follows presents the plaintiffs' case jointly to the extent that the narrative is common between AHTC and PRPTC. As I discuss below at [303], PRPTC's claim is broader as it alleges breaches of fiduciary duties against the first to seventh defendants, rather than just Ms Sylvia Lim and Mr Low Thia Khiang. Nonetheless, the focus in the ensuing discussion is on the essence of the case run by the plaintiffs rather than the particular defendants against whom the claims are made.



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(1) The first MA contract

92 The plaintiffs' case is essentially that immediately after the 2011 GE, Ms Sylvia Lim and Mr Low Thia Khiang took steps to secure the appointment of FMSS as MA of AHTC without a tender being called, motivated by a desire to benefit the supporters of the WP and/or to advance the interests of opposition parties generally. Specifically, appointing FMSS in place of CPG allowed the defendants to protect the former staff of HTC, enrich Ms How Weng Fan and Mr Danny Loh by offering FMSS a profit incentive, and provide an alternative to service providers typically engaged by PAP-run Town Councils so as to benefit future opposition Town Councils. That Ms Sylvia Lim and Mr Low Thia Khiang had the intention of enriching Ms How Weng Fan and Mr Danny Loh is clear from the choice of the MA model which, while ensuring a profit for FMSS, offered no distinct operational advantage to AHTC and imposed considerable financial costs on it.

93 According to the plaintiffs, the evidence shows that the defendants made a calculated decision to not hold CPG to the CPG MA contract and to instead appoint Ms How Weng Fan and Mr Danny Loh to provide services to AHTC without calling a tender. This is evident from the emails exchanged between the defendants shortly after the 2011 GE, as well as the manner in which FMSS was appointed via a delegation of authority to Ms Sylvia Lim. Further, there was no discussion about preparing for a tender and no steps taken to invite a tender, which shows that there was never an intention to do so. This was even though the elected MPs were aware of the requirement to call a tender.

94 The plaintiffs say that even if CPG was unwilling to continue as MA, this was irrelevant since CPG was obliged to perform the CPG MA contract until at least July 2013 and possibly until July 2016. This was because the CPG



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MA contract was set to run until July 2013, with an option to extend for a further period until July 2016 (albeit on terms to be agreed). The CPG MA contract also allowed AHTC to require CPG to extend its MA services to HTC following its amalgamation with ATC. The defendants' case that it would be difficult to work with an unwilling MA was also undermined by the fact that CPG continued to provide EMSU services until October 2011 – that the defendants trusted CPG to continue to provide such critical services to AHTC showed that the defendants did not find it difficult to work with CPG.

95 The plaintiffs also argue that there was a lack of full and proper disclosure at the second Town Council meeting on 4 August 2011 on two bases. First, that Ms Sylvia Lim and Mr Low Thia Khiang had procured the town councillors' ratification and/or approval of the first MA contract at this meeting without disclosing the shareholding and ownership of FMSS, despite knowing that this was material information. Second, the alleged urgency which was offered as justification for the waiver of the tender was false, because CPG was contractually obliged to provide MA services until 31 July 2013 under the CPG MA contract, which meant that sufficient time to call a tender could have been secured.

(2) The first EMSU contract

96 The plaintiffs contend that the award of the first EMSU contract to FMSS without a tender in 2011 was similarly a breach of the defendants' fiduciary duties. The plaintiffs assert that there is no evidence that bears out Ms Sylvia Lim and Mr Low Thia Khiang's attempt to justify the waiver of tender on the basis of a verbal agreement between AHTC and CPG for the latter to carry on providing EMSU services beyond 30 September 2011. Rather, the



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evidence shows that the plan all along was for FMSS to take over both MA and EMSU services for AHTC, and that the calling of a tender would have foiled it.

97 Further, the plaintiffs say that r 81 TCFR was breached as there was no written contract entered into for the first EMSU contract. The plaintiffs point out that the breach was conceded by Ms Sylvia Lim. PRPTC also argues that there was a breach of r 76(4) TCFR, which precludes a MA from participating in the evaluation and recommendation for a waiver of tender pursuant to r 74(17). In this case, FMSS had recommended itself as the supplier of EMSU services, which PRPTC says amounts to participation in the evaluation and recommendation process.

(3) The second MA contract and second EMSU contract

98 On the plaintiffs' case, the reasons and motives which drove the defendants to waive tenders and appoint FMSS under the *first* MA and EMSU contracts rendered the subsequent award of the *second* MA and EMSU contracts in 2012 a *fait accompli* notwithstanding that a tender was called. This was because the defendants' actions in ousting CPG and installing their own supporters in 2011 made it a foregone conclusion that industry players would not have wanted to participate in the tenders for the second MA and EMSU contracts in 2012. In other words, the plaintiffs argue that the defendants' breaches of duties in waiving tender and awarding the first MA and EMSU contracts to FMSS in 2011 continued to persist and tainted the award of the second MA and EMSU contracts in 2012.

99 According to the plaintiffs, the defendants continued to show partiality towards FMSS throughout the tender process, in that Ms Sylvia Lim quietly fed Ms How Weng Fan and Mr Danny Loh inside information on what the Tender Committee's likely questions would be. This "heads-up" enabled Mr Danny



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Loh to come armed with slides addressing the questions that were likely to be raised by the Tender Committee at the presentation on 21 June 2012. Further, the plaintiffs argue that Ms How Weng Fan's assertion at this presentation that it would not be possible to project AHTC's cashflow for the next three years was a deliberate misrepresentation because she knew that AHTC's budget surplus would be wiped out by FMSS's proposed rate increases. This was evident from the fact that whilst FMSS's profit rose 300% over the next two financial years, AHTC became financially imperilled over the same period. In this regard, reference was made to the KPMG report and the unchallenged evidence of Mr Owen Hawkes that such projections could have been prepared.

100 The plaintiffs further argue that the award of the second MA and EMSU contracts were also highly irregular in several aspects. Whereas the first MA contract expired on 14 July 2012, AHTC's decision to award the second MA contract on 2 August 2012 to take effect from 15 July 2012, meant that FMSS provided MA services in the intervening period – 15 July 2012 to 2 August 2012 – despite a tender not being called or waived. This was also the case for the second EMSU contract. Further, since the contracts were issued more than two weeks after FMSS started providing MA and EMSU services, PRPTC also alleges that this is a breach of r 81(6) of the TCFR. The appointment of RSM Ethos to audit the tender process did not improve the integrity of the process as they did not have access to material facts and also did not review substantive aspects of the tender process.

101 Lastly, the plaintiffs also argue that Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh once again failed to disclose that the latter two were shareholders of FMSS, which tainted the award of the second MA and EMSU contracts.



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*The defendants breached their duties in failing to ensure meaningful oversight over payments to FMSS and FMSI*

102 The plaintiffs make various other allegations which extend beyond the award of the first and second MA and EMSU contracts. It is alleged that the defendants set up a system where payments made to FMSS pursuant to these four contracts were authorised or made by conflicted persons, namely, persons who had an interest in FMSS but concurrently held positions in AHTC. This allowed the conflicted persons to certify that works were done or that payments were owing to FMSS without proper verification by independent persons. In other words, the entire payment approval process was facilitated by the very people to whom the payments were made. This exposed AHTC to the risk of improper use and misappropriation of public funds.

103 The plaintiffs submit that the standing instruction put in place at the third Town Council meeting on 8 September 2011 that required these payments to FMSS to be ultimately co-signed by the Chairman and Vice-Chairman of AHTC, was not a sufficient safeguard. The defendants rely on the standing instruction in their defence. The plaintiffs' contention here is that it was unlikely that the Chairman or Vice-Chairman would have been informed by independent parties as to whether the payments were justified, or be in a position to personally verify the adequacy of the works. Instead, Ms Sylvia Lim, Mr Low Thia Khiang and Mr Pritam Singh, in co-signing the cheques for payment, relied on supporting documents prepared by FMSS and approved by conflicted persons. This represented a significant shortcoming in the payment process. This lack of oversight was compounded by the fact that the Property Officer who certified the works as complete would often simply confirm that the sums in the supporting documents tallied with the amounts stated in the cheques



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before payment was made, rather than verify that the works had in fact been satisfactorily completed.

104 Thus, the plaintiffs contend that the payments made to FMSS under the first and second MA and EMSU contracts constituted improper payments which ought to be recovered.

105 AHTC, but not PRPTC, further argues that payments to FMSI under the FMSI EMSU contract were similarly made in breach of Ms Sylvia Lim's and Mr Low Thia Khiang's fiduciaries duties, as conflicted persons were also involved in the payment approval process without meaningful oversight.

106 Several specific categories of improper payments to FMSS were identified by the plaintiffs, which I describe below.

(1) Project management fees paid to FMSS

107 One category identified was payments which were made to FMSS for project management fees. This is a claim that only AHTC makes. These are fees paid to FMSS for project management services charged at 3.5% of the progress payments made to third party contractors engaged to undertake certain works, and were in addition to FMSS's fees for MA services. On AHTC's case, some $1,220,697 in project management fees were wrongly paid to FMSS as a result of incorrect classification of those services as project management services. The argument is that invoices totalling $611,786 were in reality for a combination of project management services and MA services, and further invoices totalling $608,911 were in fact for MA services. In short, AHTC alleges that FMSS was not entitled to receive additional payment for those services as they ought to have been performed by FMSS under the first and second MA contracts at no extra charge.



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(2) Invoice of $106,559 paid to FMSS on 30 June 2011 and invoice of $166,591 paid to FMSS on 31 July 2011

108 Another instance of improper payment to FMSS related to invoice FMSS/0601 dated 30 June 2011 for the sum of $106,559, which included the sum of $92,000 for the provision of MA services to Hougang SMC for the month of June 2011, and reimbursement for the salary of HTC staff. On PRPTC's case, since FMSS's appointment was with effect from 15 July 2011, there was no contractual basis for FMSS to issue the invoice for services allegedly provided before the effective date of appointment. It is unclear what AHTC's case on invoice FMSS/0601 is, although this invoice does form a head of claim by AHTC.

109 Additionally, PRPTC amended its statement of claim to include a claim for the sum of $166,591 paid to FMSS under invoice no. FMSS/0701 issued on 31 July 2011. PRPTC argues that FMSS was not entitled to issue this invoice because it was for services rendered before 15 July 2011, which was the date on which FMSS's appointment took effect.

(3) Miscellaneous improper payments to FMSS and FMSI

110 The KPMG report identifies several other instances of "detectable improper payments" to FMSS and FMSI, which pertain to payments for electrical parts, overtime and so on. While these payments do not appear to form specific heads of claim by AHTC or PRPTC as they are encompassed within the broader pleaded claim for improper payments to FMSS and FMSI, I shall nonetheless deal with them separately at [382] below since parties focused some attention on them during the trial.



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*The defendants improperly awarded contracts to various third parties*

111 The plaintiffs additionally claim that the defendants who were members of the Tender Committee, *ie*, Mr Pritam Singh, Ms Sylvia Lim, Mr David Chua and Mr Kenneth Foo, improperly awarded contracts at prices which were significantly higher than those offered by existing contractors or by other contractors who submitted lower bids. This, they say, is contrary to the requirements in rr 74(13), 74(15) and 74(16) TCFR which constrain Town Councils to accept the lowest tender meeting specifications unless reasons for not doing so are justified and recorded. Whereas the bulk of these claims are pursued only by PRPTC, the claim in relation to LST Architects is common to both PRPTC and AHTC. PRPTC's claims are also broader in that they are against not just the members of the Tender Committee, but each of the first to seventh defendants.

(1) LST Architects

112 The plaintiffs argue that the award of seven projects to LST Architects despite the fact that Design Metabolists would have cost significantly less for the same, contravened rr 74(15) and 74(16) TCFR. The plaintiffs also argue that the award of projects to a panel without calling for a tender in each instance was also in contravention of the requirement to call a tender under r 74. In other words, the plaintiffs challenges both the practice of appointing consultants to a panel, as well as the fact that seven contracts were subsequently awarded to the more expensive of the two panel consultants.

(2) Red-Power

113 PRPTC claims that the defendants ought not to have caused AHTC to enter into a contract with Red-Power for a period of three years for the provision



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of maintenance services for the estate's transfer booster pumps, refuse chute flushing system and roller shutters. Since the rates for the same services under the contracts with AHTC's existing contractors, Digo and Terminal 9, were much lower, AHTC would have enjoyed considerable cost savings had it exercised the option to extend. Thus, PRPTC claims that the award of the contract to Red-Power instead of extending the existing contracts with Digo and Terminal 9 was improper.

(3) Rentokil

114 PRPTC challenges the award of the contract to Rentokil for pest control services for a three-year period. PRPTC contends that as Pest-Pro had submitted a lower bid and had also achieved a higher Price Quality Method ("PQM") score, the tender ought to have been awarded to them. For similar reasons as above, this was, on PRPTC's case, in breach of rr 74(13), 74(15) and 75(16) TCFR.

(4) Breaches following the expiry of contracts for services in Punggol-East

115 PRPTC had contracts with EM Services, Clean Solutions, Titan and J Keart for various services in Punggol-East. The contracts expired on 31 March 2015.

116 Following the expiry of the contract with EM Services, the defendants caused AHTC to include Punggol-East under the Red-Power contract, instead of extending the services provided by Tong Lee for the period from 1 July 2012 to 30 June 2015 to cover the Punggol-East area. This resulted in additional costs of $25,920 being incurred. PRPTC argues that there was no credible written evidence that Tong Lee had declined to extend its services, or that Tong Lee's services were in any way unsatisfactory.



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117 Upon the expiry of the contract with Clean Solutions, AHTC included Punggol-East in the contract with Rentokil (see above at [114]) instead of inviting a new tender for pest control services for Punggol-East. PRPTC argues that as the award of the pest control contract to the Rentokil was improper, by the same token, the inclusion of Punggol-East in the Rentokil contract was similarly improper.

118 AHTC had the option to extend the contract with Titan for an additional period of 12 months. Instead of doing so, it invited a new tender for the provision of conservancy and cleaning works for Punggol-East, and awarded the contract to the same contractor, *ie*, Titan, but at much higher rates. The same thing happened upon the expiry of the contract with J Keart – instead of exercising the option to extend the original contract, a fresh contract was awarded to J Keart at a higher rate. The defendants rely on an email from Mr Philip Lim informing them that there was no option to extend the Titan and J Keart contracts. PRPTC argues that this does not allow the defendants to disclaim liability as they should have reviewed the contracts themselves to ascertain if there were options to extend. PRPTC thus claims that awarding fresh contracts to J Keart and Titan at higher rates was improper and a breach of the duties owed by the defendants.

*The first to fifth defendants failed to ensure that payments made to third parties were substantiated by supporting documents or subject to properly authorised and certified invoices*

119 Apart from the award of contracts to third parties, PRPTC also claims that two particular categories of payments to third parties were irregular.



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(1) 12 invoices totalling $171,112.62

120 PRPTC alleges that in November 2015, AHTC made payments to third parties on 12 invoices for expenses of Punggol-East which were not accompanied by required supporting documents that showed that the work had been carried out. Six of these invoices did not have monthly service reports, whereas there was no verification of work done for the remaining six.

(2) 56 invoices totalling $674,388.70

121 In November 2015, AHTC made payments to third parties on 56 invoices which ought to have been certified by the Head of Department under r 56(4) TCFR. Instead, these invoices were signed by the Property Officer or finance and admin executive. PRPTC alleges that this is a breach of r 56(4) TCFR and the defendants' fiduciary duties.

122 It was clarified during trial that these 56 invoices include the 12 invoices mentioned at [120] above.

*The defendants are not entitled to rely on s 52 of the TCA*

123 The plaintiffs submit that the defendants are not entitled to rely on s 52 of the TCA on the basis that the defence therein does not apply where town councillors and officers breach their duties to the Town Council. Rather, s 52 only applies where the claim is by a third party against them. In any case, s 52 does not apply since the defendants did not act in good faith.

*Remedies sought*

124 The nature of the remedies sought by AHTC and PRPTC in S 668/2017 and S 716/2017 respectively is slightly different, and the permissibility of the



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remedies sought will be discussed in greater detail from [527] below. The remedies are briefly set out here.

(1) AHTC

125 AHTC claims, as against Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh, the total sum of $33,717,535, being the amounts paid pursuant to the first and second MA and EMSU contracts as well as the FMSI EMSU contract, subject to the defendants "showing otherwise in a proper account and inquiry".

126 In the alternative, AHTC claims against Ms Sylvia Lim and Mr Low Thia Khiang:

(a) payment of $515,773 and $746,000, being the higher MA fees paid to FMSS as MA in the first and second years respectively, compared to if CPG was held to the CPG MA contract; or

(b) damages for breaches of their duty of care, including in relation to the first and second MA contracts.

127 AHTC also seeks an account of any profits against Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh, or a declaration that such profits (or their traceable proceeds) are held on constructive trust (or subject to an equitable lien) in favour of AHTC.

128 AHTC claims that FMSS holds on constructive trust and is liable to account for the payments made to it (or the traceable proceeds thereof) in breach of fiduciary duties by the defendants, by virtue of its knowing receipt and/or dishonest assistance of the same. AHTC also claims equitable compensation in respect of the same wrongful payments, subject to FMSS "showing otherwise



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in a proper account and inquiry". In the alternative, AHTC wishes to rescind the first and second MA and EMSU contracts and obtain restitution of all payments made to FMSS thereunder. AHTC makes the same claims against FMSI.

129 AHTC claims, as against the members of the Tender Committee, damages or equitable compensation to be assessed, or the amount of $2,794,560, which represents the additional cost of appointing LST Architects over Design Metabolists for the seven projects despite the higher rates quoted by the former.

(2) Additional claims by PRPTC

130 Apart from some differences in the nature of the reliefs sought, PRPTC's claims against the first to seventh defendants broadly mirror AHTC's as outlined above. PRPTC also claims additionally that the first to seventh defendants breached their duties to AHTC in causing AHTC to:

(a) pay the sum of $106,559 in relation to the invoice FMSS/0601 dated 30 June 2011;

(b) pay the sum of $166,591 in relation to the invoice FMSS/0701 dated 31 July 2011;

(c) award the contract to Red-Power instead of Digo/Terminal 9;

(d) award the contract to Rentokil instead of Pest-Pro;

(e) include Punggol-East under the contract with Red-Power instead of Tong Lee, which would have saved $25,920;

(f) include Punggol-East under the contract with Rentokil instead of under the contract which ought to have been awarded to Pest-Pro, which would have saved $2,700.21;



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(g) award a fresh contract to Titan instead of extending its existing contract, which would have saved $423,147;

(h) award a fresh contract to J Keart instead of extending its existing contract, which would have saved $27,249.20.

131 PRPTC also claims that the first to fifth defendants breached their duties to AHTC in causing AHTC to:

(a) make payments under the 12 invoices without supporting documents and/or evidence of work, amounting to $171,112.62;

(b) make payments under the 56 invoices that were not properly authorised and/or certified by the Head of Department, amounting to $674,338.70.

132 Finally, PRPTC claims that in respect of all the improper payments alleged above, the particular defendants responsible for approval or certification of the same are also liable to repay the amounts disbursed under rr 56(1) or 56(2) TCFR.

(3) Bifurcation

133 PRPTC applied for, and was granted, a bifurcation of the action in S 716/2017 under O 33 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). AHTC also applied to bifurcate S 668/2017. However, at the hearing of its application, counsel for AHTC accepted that since the primary remedy AHTC sought was an account and inquiry, the court's order for an account would necessarily amount to a bifurcation of the action. AHTC withdrew its application consequently. As such, the present trial proceeds in two stages: the first stage, which is the subject of this judgment, concerns the determination of



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liability; at the second stage, the plaintiffs will address the quantification of the reliefs ordered if the defendants are found liable. I will discuss the issue of bifurcation further at [642] below, after I have dealt with the issues of liability and remedies.

***The defendants' case***

*The defendants do not owe fiduciary duties to AHTC*

134 The defendants deny that they owe fiduciary duties to AHTC or that they were custodial fiduciaries or trustees. Their position is that town councillors only owe statutory duties under the TCA and TCFR, and that the entire relationship between the town councillors and their Town Council arises out of and is circumscribed by the TCA, such that there can be no additional common law rights and remedies. The defendants argue that the plaintiffs have failed to show that there is any basis for the imposition of fiduciary duties over and above the statutory duties in the TCA and TCFR. They argue that even though the electorate has reposed trust and confidence in the elected MPs by voting for them in part to manage the Town Council, any fiduciary relationship that arises in this regard is limited to one between the *elected* MPs and the constituents who actually voted for them. Further, as far as Mr David Chua and Mr Kenneth Foo are concerned, it would be unduly onerous and contrary to the policy objectives of Town Councils to saddle them with fiduciary duties, as they are laymen volunteering their services for an honorarium of a mere $300 per month. Mr Danny Loh's and Ms How Weng Fan's appointments as Secretary and Deputy Secretary were for administrative purposes and did not carry fiduciary duties.



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*The waiver of tender and appointment of FMSS in relation to the first and second MA and EMSU contracts was proper*

135 I turn now to the defendants' case regarding the propriety of the first and second MA and EMSU contracts, before setting out their case on the payments to FMSS/FMSI and the third party contracts. Due to the nature of the plaintiffs' claims, the focus in the following discussion is on the arguments run by the first to fifth defendants.

(1) The first MA contract

136 The defendants assert that there was no intention to oust CPG and replace it with FMSS. Rather, their intention was to have as a contingency plan an alternative MA in waiting in case CPG and other incumbent contractors were to pull out. This contingency kicked in on 30 May 2011, when Mr Jeffrey Chua informed the elected MPs that CPG did not wish to continue as MA of AHTC after 31 July 2011, and asked to be released from the CPG MA contract.

137 The defendants argue that the town councillors became aware of the need for prompt action to facilitate the transition from CPG to the incoming MA at the Town Council meeting on 9 June 2011, and therefore delegated authority to Ms Sylvia Lim under s 32 of the TCA to ensure a smooth handover in a timely manner. Ms Sylvia Lim exercised the delegated authority and entered into an agreement for FMSS to act as MA of AHTC. This agreement was recorded in the FMSS LOI. Pursuant to the FMSS LOI, FMSS took over the existing staff of the former HTC at existing salaries, and since the work was carried out for AHTC, AHTC reimbursed FMSS for this payment. Also, there was no deliberate effort to keep CPG in the dark about FMSS's appointment. The decision to waive the tender was made given the special circumstances of CPG's unwillingness to work with a WP Town Council, and the withdrawal of TCMS



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by AIM. The town councillors thus made a judgment call not to compel CPG to continue as MA under the CPG MA contract, and decided that holding a tender would have been unwise in the circumstances since it would be at the expense of other critical works being carried out. The reasons for this waiver were recorded in the Report on MA appointment circulated at the second Town Council meeting on 4 August 2011, and the town councillors accordingly approved the waiver and appointment of FMSS.

138 The defendants argue that there was no withholding of information at the second Town Council meeting on 4 August 2011, as the town councillors were aware that FMSS was owned by Mr Danny Loh and Ms How Weng Fan. The town councillors were equally aware that FMSS had already been appointed pursuant to the FMSS LOI, as this was made known in the Report on MA appointment circulated before the meeting.

139 Likewise, they argue that there was no conflict of interest in having senior employees of FMSS appointed as the General Manager and Secretary of AHTC as it was industry practice to have senior employees of the MA hold key appointments in the Town Council. This was not prohibited by the TCA.

(2) The first EMSU contract

140 The defendants contend that the award of the first EMSU contract to FMSS without a tender was justified by the urgency of the circumstances, as CPG and EM Services had declined to extend their provision of EMSU services in September 2011. The EMSU Committee therefore met on 18 September 2011 to discuss the EMSU contract specifications – FMSS's presence at this meeting did not amount to a contravention of r 76(4) TCFR since that provision only prohibited the MA's participation in the evaluation and recommendation of the *waiver* of the tender. AHTC's discussions on waiver took place over email



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correspondence to which FMSS was not privy. Moreover, the allegation that the defendants had breached their duties by not putting the first EMSU contract in writing is an unpleaded allegation, and in any case it was clear to all involved what the specifications under the first EMSU contract were.

(3) The second MA and EMSU contracts

141 On the defendants' case, there was no breach of duty in the defendants causing AHTC to award the second MA and EMSU contracts to FMSS, since FMSS was the sole tenderer in an open tender called by AHTC. The allegation that FMSS gained an incumbency advantage in 2012 by virtue of having been awarded the first MA and EMSU contracts in 2011 was without evidential basis. Further, a special committee had been appointed to evaluate the second MA and EMSU contracts, and the defendants took various due diligence measures which included the appointment of RSM Ethos to review the tender evaluation process and award, and the appointment of Kelly Services to review the salaries of FMSS staff. There was also no unfair advantage or insider information given to FMSS by Ms Sylvia Lim – her email to Mr Danny Loh was not improper, as she merely wanted FMSS to come prepared for the interviews with the relevant information so that the meeting would be productive.

142 The defendants also assert that the allegation that FMSS was not properly appointed between the expiry of the first MA and EMSU contracts and the date of FMSS's official appointment under the second MA and EMSU contracts is unpleaded.

*The payments to FMSS were proper*

143 The defendants submit that there was sufficient oversight over the payment process to FMSS, as there was a standing instruction for the Chairman



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or Vice-Chairman to authorise all payments to FMSS. To require the Chairman or Vice-Chairman to personally verify on the ground that every item of work had been completed before authorising payment was clearly untenable. Instead, AHTC had a system in place for the supervision of the MA, such as centralised computer systems, regular interactions with staff, estate visits, and resident feedback mechanisms.

144 The defendants deny that AHTC had paid some $1.2m to FMSS for services wrongly classified as project management services. They challenge KPMG's assertion that the services ought to have been properly classified as MA services or a mix of project management and MA services. They argue that KPMG's view was formed based on legal advice obtained from a review of the contracts, with no on-site investigation to evaluate the nature and scope of the actual works that were carried out. Further, two of the projects for which project management fees of $611,786 were paid were entered into by the former ATC prior to the 2011 GE, and later taken over by AHTC. There is thus no basis for alleging that the classification of services was incorrect, at least with regard to these contracts.

145 As for the invoices of $106,559 and $166,591 paid to FMSS on 30 June 2011 and 31 July 2011 respectively, the defendants say that these were legitimately issued. Since FMSS took over the running of HTC from 15 June 2011, it was entitled to issue invoice FMSS/0601 on 30 June 2011. For the same reason, FMSS was entitled to issue FMSS/0701 on 31 July 2011.

*The appointment of and payments to third party contractors were proper*

146 I now set out the defendants' case on the award of contracts to third party contractors and the payments that were made to them.



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(1) LST Architects

147 The defendants raise a preliminary objection that PRPTC has no basis to claim for the payments made to LST Architects since the payments came from AHTC's sinking funds and not PRPTC's funds.

148 As regards the award of the seven projects to LST Architects, the defendants submit that, having appointed LST Architects and Design Metabolists to a panel of consultants after an open tender, there was no further requirement under the TCFR for a fresh tender to be called in respect of every future project to be awarded to either of the consultants on the panel. Rather, AHTC's practice of awarding the ten projects to either LST Architects or Design Metabolists was in compliance with the TCFR, and also consistent with the practice of CPG.

149 Further, the defendants say that the decision to award seven out of the ten projects to LST Architects over Design Metabolists was justified, because (a) Design Metabolists had previously re-quoted a higher fee instead of carrying out the project at the rate it quoted in its tender when it was on a panel for ATC, and (b) LST Architects was the better consultant given Design Metabolists' shortcomings in other projects.

(2) Red-Power

150 The defendants argue that PRPTC has no *locus standi* in relation to this claim. This was because even if the contracts with Terminal 9 and Digo had been extended, they would nonetheless have expired in June 2013 and 2014 respectively. At that time, Punggol-East had a contract with EM Services which expired on 31 March 2015. Thus, the option to extend the terms of the Terminal 9 and Digo contracts did not accrue to Punggol-East and by extension PRPTC,



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since the contract with EM Services was still alive when the said option fell due for exercise. In short, any benefit from extending these contracts would not have been enjoyed by PRPTC.

151 The defendants further argue that even if the contracts with Terminal 9 and Digo had been extended, such extension would only be for a further year. As such, AHTC would still need to call a tender after that and might not have obtained lower bids.

(3) Rentokil

152 The defendants argue that the appointment of Rentokil over Pest-Pro was justified as it was the more qualified and well-established company. In particular, reliance is placed on Rentokil's familiarity with obtaining subsidies from the National Environment Agency ("NEA") under its Rat-Attack programme. These reasons were recorded in the Tender Committee minutes of meeting on 17 August 2013. The decision was therefore proper.

(4) Inclusion of Punggol-East under contracts with Red-Power and Rentokil

153 The defendants contend that the inclusion of Punggol-East under the Red-Power contract was because Tong Lee had declined to extend its coverage to Punggol-East, and was also to achieve better cost efficiencies. Similarly, Punggol-East was brought under the contract with Rentokil for cost efficiencies and to allow AHTC to call a fresh tender on a consolidated basis.

(5) Appointment of Titan and J Keart under new contracts

154 The defendants argue that the Tender Committee was informed by AHTC's contract department that there was no option to extend the existing



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contracts with Titan and J Keart. Also, there were advantages in calling tenders instead of renewing existing contracts, such as to negotiate for a longer term contract for a lower rate at an earlier time. In any case, PRPTC's computation that $423,147 could have been saved if the contract with Titan had been extended was erroneous.

(6) Payments of 12 invoices in November 2015

155 On the defendants' case, the supporting evidence for the 12 invoices does exist, and is in PRPTC's possession. Further, according to the evidence of Mr Vincent Koh, monthly service reports were not necessary for payments of routine works. In relation to the setting up of polling stations for the 2015 GE on the directions of the Housing and Development Board ("HDB"), the HDB had confirmed that the work had been done and had made reimbursements for the expenses incurred by AHTC. As such, there was no need for supporting documents for this item of work.

(7) Payment of 56 invoices in November 2015

156 The defendants argue that r 56(4) TCFR had been complied with because the voucher journal reports for each of the 56 invoices had been properly certified by the relevant Head of Department, who was either the Property Manager or the Assistant Finance Manager. There is no requirement in the TCFR for the signature to be found on the invoices themselves.

*The defendants acted in good faith and are protected by s 52 TCA*

157 The defendants argue that they are protected from personal liability by s 52 TCA as they acted in good faith in the execution of the TCA. Acting in good faith in this regard means acting honestly and reasonably. Further, s 52



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TCA is not restricted in its application to claims by third parties, and this is evident from the plain text of the provision.

*The claims are time-barred*

158 Lastly, the defendants argue that some of the plaintiffs' causes of action accrued more than six years before the commencement of S 668/2017 (AHTC's claim) on 21 July 2017 and S 716/2017 (PRPTC's claim) on 3 August 2017, and are thus time-barred (*ie*, claims accruing before 21 July 2011 and 3 August 2011 for AHTC and PRPTC respectively). This notably includes the appointment of FMSS on 8 July 2011 pursuant to the first MA contract. Similarly, AHTC's claim in relation to the provision of EMSU services by FMSI to AHTC up to the start of the relevant 6-year limitation period is also time-barred. Finally, the defendants argue that PRPTC's claim in relation to invoice FMSS/0601 dated 30 June 2011 is likewise time-barred.

**Issues to be determined**

159 In the light of the cases advanced by the parties, the issues to be determined are as follows:

(a) What is the nature of the duties owed by the defendants to AHTC?

(b) Was the waiver of tender and the appointment of FMSS pursuant to the first MA contract in 2011 a breach of any of the defendants' duties to AHTC?

(c) Was the appointment of FMSS pursuant to the first EMSU contract in 2011 a breach of any of the defendants' duties to AHTC?



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(d) Was the award of the second MA and EMSU contracts in 2012 to FMSS a breach of any of the defendants' duties to AHTC?

(e) Were there control failures in the payment approval process for payments to FMSS and FMSI, and if so did this represent a breach of any of the defendants' duties to AHTC?

(f) Were any of the payments to FMSS made in breach of the defendants' duties to AHTC?

(g) Were any of the contracts to third parties awarded in breach of the defendants' duties to AHTC?

(h) Were payments made to third parties based on invoices which were not compliant with the TCFR?

(i) Are the sixth to eighth defendants liable for dishonest assistance and/or knowing receipt in respect of any of the above breaches?

(j) Are the claims or any of them time-barred?

(k) Are the defendants entitled to the defence under s 52 TCA?

(l) What are the remedies available for the breaches above (to the extent that they are established)?

Given the length of this judgment, I have, for ease of reference, provided a summary of my decision in relation to the main claims – issues (b) to (h) – at [440]–[447] below, and a summary of the reliefs which the plaintiffs are ultimately entitled to pursue at [643] below.



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**My decision on liability**

***Duties owed by the defendants to AHTC***

160 Before I turn to the facts at [245] below, I shall first address the issue of whether the first to seventh defendants owed AHTC fiduciary duties as a matter of law. This is a critical issue in these proceedings, as it is the foundation of the cause of action. For the reasons that will follow, I find that they do. As will be seen in the subsequent sections of this judgment, my conclusion that the first to seventh defendants owe fiduciary duties to AHTC makes an important difference in the standards by which their actions are judged, and the remedies available to the plaintiffs for any breach by the defendants of their duties.

161 The plaintiffs contend that beyond being fiduciaries *simpliciter*, the first to seventh defendants also owe fiduciary duties by virtue of being trustees or custodial fiduciaries. These further contentions on the precise status of the defendants make no difference to liability; the plaintiffs rely on those contentions mainly in their arguments on the remedies that are available for breach. I will therefore address these points later in the judgment (see [533] below).

*Did the first to fifth defendants owe AHTC fiduciary duties?*

162 It is undisputed that Ms Sylvia Lim, Mr Low Thia Khiang, Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo were town councillors of AHTC at the material time. The pith of the issue is whether town councillors in Singapore owe fiduciary duties to their Town Council by virtue of that position.



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(1) The nature of fiduciary duties

163 The hallmark of the fiduciary obligation is set out in the seminal judgment of Millett LJ (as he then was) in *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") at 18A–C, which was cited with approval by the Court of Appeal in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") (at [192]):

> … A fiduciary is someone who has *undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.* This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary … [emphasis added]

164 In *Tan Yok Koon*, the Court of Appeal set out two further basic principles of fiduciary duties, which may be understood as corollaries of the principle above. First, fiduciary duties are *voluntarily undertaken*, in the sense that they arise as a consequence of the fiduciary's conduct (at [194]). This refers to the objective intentions of the fiduciary which may be imputed by the law, as opposed to the subjective willingness of the fiduciary to undertake those duties. Second, the court emphasised that as a result, "the label 'fiduciary' is a *conclusion* which is reached only once it is determined that particular duties are owed" [emphasis in original] (at [193], citing James Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 316).

165 Therefore, while the first to fifth defendants have unsurprisingly admitted in their testimony that they must act in accordance with duties of good



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faith and loyalty, ultimately these concessions made on their basis of their subjective beliefs do not assist in deciding whether they are fiduciaries.

166 Besides these first principles, the law also recognises that there are certain relationships in which one party will be presumed to owe fiduciary duties to another because they fall within what may be called an "established fiduciary relationship" (see *Tan Yok Koon* at [210]). It is uncontroversial that such established fiduciary relationships include those between express trustee and beneficiary, agent and principal, solicitor and client, and partners of a firm: see, *eg*, *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 7-004. Nevertheless, as should be evident from the principles canvassed above, the categories of fiduciary relationships are not closed: see, *eg*, *Guerin v The Queen* [1984] 2 SCR 335 ("*Guerin*") at [103]. Thus, the analysis would normally proceed in the following manner (Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 3rd Ed, 2018) ("*Virgo, Principles of Equity*") at 420):

> … In determining whether a person is a fiduciary, it is first necessary to consider whether that person is in a relationship with another that falls within one of the recognized categories of fiduciary relationships. If it does not, it is then necessary to examine the factual circumstances of the relationship to determine whether there are sufficient hallmarks of a fiduciary relationship to enable the court to conclude that the relationship is indeed fiduciary.

(2) The fiduciary duties of municipal councillors: the case law

167 AHTC's primary submission is that the relationship between town councillors and their Town Council *is* an established fiduciary relationship. This submission rests on the basis of case law in England and Canada that has found those occupying comparable positions in those jurisdictions to be fiduciaries. AHTC contends that town councillors should be treated no differently. For the



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purposes of this analysis, I will refer to positions in England and Canada comparable to that of town councillors as "municipal councillors", and entities comparable to that of Town Councils as "municipal councils". In the alternative, AHTC submits that Ms Sylvia Lim and Mr Low Thia Khiang acted as agents of the Town Council on some occasions, and agency is an established fiduciary relationship. Notably, PRPTC does not make these submissions; I address the arguments that PRPTC relies upon starting at [206] below.

168 According to AHTC, it is well-established that municipal councillors in Canada are fiduciaries. For this proposition it cites cases such as *Toronto Party for a Better City v The City of Toronto et al* (2013) 115 OR (3d) 694 ("*Toronto Party*"). AHTC argues that it is also well-established that municipal councillors of municipal authorities in England are fiduciaries, citing the well-known decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357 ("*Porter v Magill*").

169 On the other hand, the first to fifth defendants submit that town councillors should not be regarded as fiduciaries because there is an important distinction between public law and private law. Where powers are conferred and duties imposed by public law, it is generally inappropriate to find that these powers and duties are subject to the control of private law concepts, such as fiduciary duties. According to the first to fifth defendants, the relationship between town councillors and their Town Council is governed exclusively by public law, and they therefore cannot be fiduciaries. The first to fifth defendants argue that *AHPETC (CA)* provides support for this argument. They also rely on the decisions of the House of Lords in *Swain v The Law Society* [1983] 1 AC 598 ("*Swain*") and the English High Court in *Tito and others v Waddell and others (No. 2)* [1977] 1 Ch 106 ("*Tito v Waddell*").



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170 I must say at the outset that I do not find the authorities cited by the first to fifth defendants to make the point that they seek to advance. They do not in my view set out a general or even presumptive proscription against the finding of private law relationships such as fiduciary duties in *any* context governed by public law. Instead, these cases rightly counsel against an impulse to think of all legal relationships as being subject to the control of private law concepts, when some relationships may *in certain circumstances* be governed exclusively by public law. This is also a point that is evident in the analysis of the Court of Appeal in *AHPETC (CA).* Thus, *AHPETC (CA)* does not in any way suggest that a private law relationship cannot exist in a public law context. In fact, properly understood, the decision does suggest that such a relationship may be found in the appropriate circumstances. I elaborate on this at [174]–[185] below.

171 As for the cases cited by AHTC, I will make two observations. First, the Canadian cases concern the relationship between the municipal councillors and *their constituents* and not the relationship between municipal councillors and *the municipal council*, which is the relationship that is before me. The important point is that a fiduciary duty arises from an undertaking by one person to another (see [163]–[164] above). It would therefore not be helpful to look at the relationship between the Town Council or the town councillors and their constituents, if what is actually in issue is *the relationship between the Town Council and its town councillors*. In order for the Canadian cases to have relevance, the argument must be that the relationship between town councillors and their Town Council is either analogous to, or some extension of, the relationship between the town councillors and their constituents. AHTC has not, however, cited any case that has drawn such a link. I do not think such a link can in fact be drawn. Caution ought to be exercised in transposing the analysis of fiduciary duties between different kinds of relationships in this manner. In the present context, I find that there is some force in the first to fifth defendants'



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argument that the Canadian position may be incongruent with the Court of Appeal's reasoning in *AHPETC (CA)* in so far as the Canadian authorities are relied upon to draw an analogy between fiduciary duties owed by town councillors to their constituents and the duties which they owe to their Town Council. The Canadian authorities are therefore of limited applicability in the context of the TCA. I elaborate on these cases at [186]–[195] below.

172 Second, and on the other hand, the English authorities do address claims by municipal councils against municipal councillors. They therefore address the relationship which is relevant to the present discussion. Having said that, these cases do not make clear the legal basis for the duty that gives rise to such claims. This may be explained on the basis of the long-standing independent statutory basis for such claims in England, such that the common law has mostly taken a backseat. Therefore, while the English cases do stand for the proposition that municipal councillors owe duties to their municipal councils, I hesitate to fully accept them as persuasive authority for concluding that town councillors owe fiduciary duties to their Town Council. I elaborate on the English cases at [196]–[205] below.

173 In the final analysis, I arrive at the conclusion that town councillors do indeed owe fiduciary duties to their Town Council on the basis of the nature of the relationship between town councillors and the Town Council, drawing support for my conclusion from the English jurisprudence only in so far as it recognises that such duties are owed by municipal councillors to municipal councils. This analysis is set out finally at [206]–[219] below.

### (A) THE DISTINCTION BETWEEN PUBLIC LAW AND PRIVATE LAW

174 The only authority that deals with the position of town councillors under the TCA is the Court of Appeal's decision in *AHPETC (CA)*. However, the



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Court of Appeal did not consider the specific issue of whether duties are owed by town councillors to their Town Council. Instead, the issue before the Court of Appeal was whether a private law relationship exists between the MND and AHTC such that the MND could compel performance by AHTC of its duties under the TCA as a matter of private law. The MND argued that the requisite relationship existed by virtue of a contractual mandate or a beneficial interest under a *Quistclose* trust given that it provided AHTC with grants-in-aid pursuant to the TCA. The Court of Appeal held that these private law relationships could not arise *as between AHTC and the MND* (at [123]):

> … *The entire relationship between the MND and AHPETC arises out of the TCA*, and can only be analysed by reference to the TCA. There may be recourse available to the MND as provided in the statute, such as pursuant to s 50 of the TCA. The MND may also be able to apply for judicial review, subject to the usual legal prerequisites that apply in the context of such applications. But we do not think that it can fundamentally alter the very basis of the relationship from one founded in and regulated by statute to one in trust, agency or any other private law concept. It is *not appropriate*, ***on the facts of the present case***, *to add such private law overlays to the statutory relationship* ***between the Minister and the Town Councils***. Indeed, there is nothing at all in the TCA to suggest otherwise. … [emphasis added in italics and bold italics]

175 The first to fifth defendants contend that similarly, the entire relationship between town councillors and their Town Councils arises out of the TCA, and the application of common law rights and remedies is therefore precluded. The first to fifth defendants' reliance on *AHPETC (CA)* for this proposition misses the mark. Properly understood, the Court of Appeal in *AHPETC (CA)* was concerned solely with the relationship between AHTC and a third party, namely, the MND, and the analysis set out above was on that issue. It is incorrect to transpose the remarks of the Court of Appeal on the relationship between AHTC and an *external* party to the present context, which is the relationship between AHTC and an *internal* party, namely its town councillors. The Court of Appeal



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was not seeking to, and did not establish a blanket rule that every relationship between a Town Council and any other party it is envisaged to have dealings with under the TCA – and in particular an internal party – should be governed purely by public law. That was not the issue before the Court of Appeal. Indeed, it is implicit in the passage cited in the preceding paragraph that the question of whether a private law overlay ought to be added to other relationships under the TCA has to be considered on a case-by-case basis. This is consistent with the position taken in *Swain* and *Tito v Waddell*, which I discuss at [178]–[185] below. I also return to this point at [189] below when I consider whether the related proposition that town councillors owe their *constituents* fiduciary duties is consistent with *AHPETC (CA)*.

176 The first to fifth defendants also rely on the Court of Appeal's conclusion in *AHPETC (CA)*, based on the Parliamentary debates, that the TCA contemplated a degree of independence for the Town Councils such that neither the Town Councils nor their residents could expect any external assistance in the case of mismanagement or financial difficulties. The Court of Appeal said:

> 50 … [I]t is evident from the debates that the Town Council was seen as a political measure that would deepen the connection between Members of Parliament (especially in their capacity as town councillors … ) and the residents they were elected to serve in their constituency. What was unquestionably clear from the debates was that *neither the Town Councils nor the residents could expect that either the Government or the HDB would bail them out with financial assistance of any sort* in the event a given Town Council sustained financial or other losses due to mismanagement. To this extent, *it was contemplated that the residents would have to bear the consequences*, even the adverse ones, of electing, as their representatives in Parliament and as those who would oversee the operations of their Town Council, persons who discharged their duties in such a way that it caused financial and other losses to their Town Council.
>
> …
>
> 52 … [H]aving accorded this *degree of independence and latitude* on the Town Council, the residents would have to bear



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> the consequences of this. What this means in particular, as we have already noted, is that they would not be entitled to expect the Government to bail them out in the event of mismanagement.
>
> [emphasis added]

177 The first to fifth defendants argue that this "degree of independence and latitude" enjoyed by the Town Council limits the possible liability of the town councillors to the Town Council. This argument is misconceived. It is apparent from the passage above that the Court of Appeal was not saying that the Town Council has no recourse against its town councillors. Read in context, the passage set out above merely summarised Parliament's policy intention that the government would not bail out Town Councils for mismanagement by their elected representatives. It explains why the government is limited in its recourse against the Town Council, but it does not speak to whether any recourse is available to the Town Council against its town councillors, or address the relationship between them at all.

178 In setting out the reasoning quoted at [174] above, the Court of Appeal in *AHPETC (CA)* cited *Swain* ([169] *supra*), which it summarised and applied as follows:

> 125 The importance of recognising the distinction between public law and private law was also emphasised by the House of Lords in [*Swain*], where the Law Society, acting on behalf of all solicitors required to be insured, took out insurance to provide indemnity against loss arising from claims made against solicitors in respect of liability for professional negligence. The plaintiffs, who were solicitors, argued that the Law Society was accountable for the share of the commission it secured from the brokers. The argument turned on whether the Law Society was a trustee for the solicitors in respect of their share of the commission. The House of Lords said it was not, holding that the Law Society was performing a public duty in exercising the power conferred on it by the statute, for which there was no remedy in breach of trust or equitable account, and on that basis, the Law Society was not liable.



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> 126 Lord Diplock emphasised the importance of bearing in mind that the Law Society has both private and public capacities. When the Law Society is acting in its private capacity, it is subject to private law alone. But when the Law Society is acting in its public capacity, the principal purpose of which is to protect the public, it is governed by public law. This fundamental distinction, according to Lord Brightman, had important consequences because (at 618):
>
>> … the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached. If a public duty is breached, there is the remedy of judicial review. There is no remedy in breach of trust or equitable account. The latter remedies are available, and available only, when a private trust has been created … The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense.
>
> 127 Lord Diplock agreed with the reasoning of Lord Brightman, but added the pertinent observation on the "initial error" of failing to distinguish between public law and private law (at 609):
>
>> … I will limit my own comments to what I regard as the initial error, resulting from the way in which the cases of both parties had been presented in the courts below and uncorrected until the hearing in this House, of *failing to distinguish between public law and private law* and because of that failure seeking to discover the legal relationships between the Society, the insurers, the brokers and the individual premium-paying solicitors *by applying to these relationships concepts of private law alone*. [emphasis added]
>
> 128 The same error, with respect, was made by the MND in its submissions here and below. The MND may well be correct in its contention that the grants-in-aid were advanced for the purposes of the TCA. But any remedy for any failure to apply any such money in accordance with the TCA must rest in the TCA as a matter of public law and be based upon it.
>
> [emphasis in original]

179 The first to fifth defendants similarly rely on *Swain* and suggest that the Court of Appeal's conclusion in the last paragraph quoted above, that "any



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remedy for any failure to apply any such money in accordance with the TCA must rest in the TCA as a matter of public law", applies to the plaintiffs' claims against them. This again is a submission that misses the mark. It reads the last paragraph quoted above out of context. A proper reading shows that the Court of Appeal's holding is narrower than the first to fifth defendants suggest. Bearing in mind the specific issue that was before the Court of Appeal, it is clearly intended to apply only in relation to the monies disbursed to the Town Councils by the MND as grants-in-aid under the TCA. The Court of Appeal merely decided that the disbursement of these grants-in-aid did not feature a private law dimension, and the MND's recourse in relation to them lay within the confines of the TCA.

180 A close reading of *Swain* shows that like the Court of Appeal in *AHPETC (CA)*, the House of Lords did not intend to draw a strict dichotomy between private law and public law powers. On the contrary, it also recognised that the exercise of public law powers *could* be overlaid with private law characteristics and consequences. This is implicit in its analysis as to whether the Law Society's transactions in *Swain* could properly fall within the private law concepts of agency and trusts, as the plaintiff there had claimed. The House of Lords held that the nature of those transactions was incompatible with such private law concepts (*per* Lord Diplock at 612B–613A; *per* Lord Brightman at 619A–621E). *Swain* concluded that there was no private law dimension to such transactions not because there was *no* private law concept which fit the contours of the specific legal relationship in question. It was not simply because the Law Society was exercising public law powers in that context. *Swain* therefore does not carry the first to fifth defendants very far.

181 The first to fifth defendants also rely on *Tito v Waddell* ([169] *supra*) for two similar propositions: first, that the imposition of statutory duties does not



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give rise to fiduciary duties unless Parliament clearly intended otherwise; and second, that even where the language of a statutory provision can be read to impose a trust upon a governmental body, the court must still examine whether this results in a "true trust" in the private law sense, or whether it is a "trust in the higher sense", which is a governmental obligation that the courts cannot enforce: see *Tito v Waddell* at 216F. They argue that any trust-like obligations owed by town councillors by virtue of holding public office must be understood as a "trust in the higher sense", not a "true trust".

182 *Tito v Waddell* concerned the plight of the Banabans, who were the native inhabitants of Ocean Island, a British settlement in the Pacific. Under British ordinances, the resident commissioner, who administered the island on behalf of the Crown, had the power to take possession of land belonging to the Banabans and to lease it to companies for phosphate mining. In one example, under a 1928 Ordinance, the resident commissioner was to collect royalties from the mining companies and hold them "in trust on behalf of the former … owners" subject to the directions of the Secretary of State (at 226B). In 1971, various groups of Banabans sued the Crown, arguing, *inter alia*, that in negotiating the royalties to be paid under the various transactions involving the leasing of Banaban land for mining, the Crown was subject to a trust or fiduciary duty for the benefit of the Banabans, and had breached this duty by failing to obtain the proper rate of royalties.

183 As mentioned at [181] above, in *Tito v Waddell* Sir Robert Megarry V-C drew a distinction between "true trusts" and "trusts in a higher sense". Megarry V-C explained the basis on which the court was to decide between the two as follows (at 216G):

> … [T]he determination whether an instrument has created a true trust or a trust in the higher sense is *a matter of*



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> *construction, looking at the whole of the instrument in question, its nature and effect, and, I think, its context.* … [emphasis added]

Thus, when Megarry V-C came to consider the direction in the 1928 Ordinance for the resident commissioner to hold the royalties "in trust", he looked at the nature and context of the relationship thereby prescribed. It was in so doing that Megarry V-C came to the conclusion that those provisions were consonant with a governmental obligation amounting only to a "trust in the higher sense", but not with a true trust or fiduciary duty (at 227D–228E). For example, Megarry V-C pointed out that the power conferred by the same provision upon the Secretary of State, to give directions to the resident commissioner in relation to the royalties, would be out of place in a private law trust (at 227F).

184 Indeed, Megarry V-C did recognise the possibility of private law obligations arising in a relationship governed by public law. This is made clear by his comments at 230B–D:

> … I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. *Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations.* But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes a duty relating to property, the person on whom the duty is imposed were thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed. [*Reading v The King* [1949] 2 KB 232] was a case in which the Crown servant was held to be accountable to the Crown. *Here the contention is not that the resident commissioner is accountable to the Crown, but that the Crown is accountable to a third party* by reason of the statutory duty imposed on the resident commissioner; and *that involves very different considerations.* [emphasis added]

185 The principle to take away from *Tito v Waddell* is not that statutory powers and duties *cannot* co-exist with private law obligations. Instead, whether



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they *should* is a matter to be decided in the context and circumstances of the statutory power or duty (see *Tito v Waddell* at 235C). As I pointed out at [175] above, this point is also implicit in *AHPTEC (CA).* What *Swain*, *Tito v Waddell* and *AHPTEC (CA)* all rightly counsel against is the shoehorning of private law concepts into public law relationships even where the analysis does not fit the circumstances. The first to fifth defendants' error is in assuming that a statutory duty governed by public law cannot have a private law dimension under any circumstances.

(B) MUNICIPAL COUNCILLORS AND THEIR CONSTITUENTS

186 I now turn to consider the Canadian and English cases cited by AHTC involving claims for breach of fiduciary duties by municipal councillors. I first consider the Canadian cases, starting with *Toronto Party* ([168] *supra*). In this case, city councillors of the City of Toronto had voted in favour of a by-law which entitled them to reimbursement by the City for various expenses, including election-related expenses. The by-law was subsequently found to be *ultra vires* the City Council. The plaintiff, a non-profit corporation, sued the city councillors who had voted for the by-law and who then received reimbursements under it on the basis that they owed fiduciary duties *to taxpayers*. This was therefore not a claim by a municipal council against its municipal councillors. The Ontario Court of Appeal agreed with the judge at first instance that while the city councillors owed taxpayers a fiduciary duty of loyalty, that duty was only breached if there was an absence of good faith, which was not found on the facts: *Toronto Party* at [19]–[20], [50]–[52] and [60].

187 The first to fifth defendants sought to downplay the relevance of *Toronto Party* by pointing out that the councillors in that case did not contest that they owed such fiduciary duties (see *Toronto Party* at [19]), and that there was



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therefore no discussion on this specific point. While that is correct, it ignores why the concession was made. The reason is apparent from the first instance judgment of the Ontario Superior Court in that case (*Toronto Party for a Better City v Toronto (City)* [2011] ONSC 3233). There, G.A. Hainey J said:

> 12 The Respondents concede that the City Councillors stand in a fiduciary relationship to the taxpayers of the City of Toronto. They rely upon the decision of the Supreme Court of Canada in [*Guerin* ([166] *supra*)] in which Dickson J. (as he then was) held:
>
> > … where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.
>
> 13 They also cite the decision of Poupore J. in *Simms v. Fratazie*, [1996] O.J. No. 4488 at para. 80 in which he held:
>
> > It is argued, and this Court does agree, an elected official stands in a fiduciary relationship with the electorate.
>
> 14 The Applicants rely on the Privy Council's decision in *Bowes v. City of Toronto* (1858), 14 E.R. 770 in which the Privy Council held:
>
> > We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly.
>
> 15 On the strength of these judicial authorities, I agree with the parties and I find that the City Councillors owe a fiduciary duty to the electorate of the City of Toronto … .

188 It is clear from the foregoing that the city councillors' concession in *Toronto Party* that they owed fiduciary duties to taxpayers was made because of the strong jurisprudence in Canada which recognised the existence of such duties. AHTC cites another such Canadian authority, *Sumas Indian Band v Ned* [2002] BCSC 944, although that case concerned Indian Band councils, a *sui generis* form of local government in Canada. It is worth noting that this



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Canadian position also appears to have been the traditional position of the law in England, as detailed in John Barratt, "Public Trusts" (2006) 69 MLR 514 ("'Public Trusts"') at pp 528 *et seq*, and affirmed relatively recently in *Bromley London Borough Council v Greater London Council and another* [1983] 1 AC 768 (*per* Lord Wilberforce at 815B; *per* Lord Diplock at 829H; *per* Lord Scarman at 838G).

189 Intuitively, it might be thought that if municipal councillors owe their constituents fiduciary duties, *a fortiori* it must be even more obvious that they owe the municipal council itself fiduciary duties. For this to be correct in the present case, it must first be correct to conclude that fiduciary duties are owed by town councillors to their constituents. However, it is not clear that such a conclusion is consistent with the reasoning in *AHPETC (CA)*. In *AHPETC (CA)*, the Court of Appeal held, citing *Swain*, that "[t]he entire relationship between the MND and AHPETC arises out of the TCA, and can only be analysed by reference to the TCA" (at [123]; see [174] above). Likewise, it seems correct to conclude that the entire legal relationship between town councillors and *their constituents* arises out of, and can only be analysed by reference to, the TCA. In particular, considerations of the political nature of Town Councils may assume a heightened significance here, with the constituents having to live with the consequences of their choice of elected representatives and secure any "relief" at the ballot box (see [176] above). In my view, it is difficult to see how a principled distinction can be drawn between the position of the MND and that of the constituents as regards their rights against the Town Council or the town councillors. Both must be analysed in terms of options that have been provided under the TCA rather than on the basis of rights in private law. Indeed, it is difficult to understand the basis upon which a private law relationship, whether of a fiduciary character or otherwise, can be said to exist between town councillors and their constituents (see [194]–[195] below). It would thus be



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incorrect to apply the Canadian cases, which proceed on a different basis in a different context. But that does not mean that *the Town Council* itself is without recourse against its town councillors. As I have pointed out at [175] above, the fact that a Town Council is a creature of statute (*ie*, the TCA) which sets out its powers and responsibilities, does not mean that the TCA is a complete code for *all* the legal relationships involving a Town Council. What, then, is the appropriate approach to ascertaining whether there are any private rights that reside in the context of a statutory relationship?

190 Some guidance may be gleaned from the decision of the Supreme Court of Canada in *Guerin* ([166] *supra*). *Guerin* concerned the lease of the lands of an Indian Band by the Crown to a golf club. Under the Indian Act, RSC 1952, c 149 (Can), the lands of Indian Bands were to be held by the Crown for the use of the Indian Band in question, unless the lands were surrendered to the Crown by the Band either conditionally or unconditionally. The Supreme Court of Canada unanimously held that the Crown had breached its fiduciary duties to the Indian Band in entering into the lease on terms less favourable than those agreed upon when the surrender was arranged. Dickson J, delivering the leading judgment of the Court, said:

> 89 … [*Tito v Waddell*] and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. *In each case the party claiming to be beneficiary under a trust depended entirely* [*on*] *statute, ordinance or treaty as the basis for its claim to an interest in the funds in question.* The situation of the Indians is entirely different. *Their interest in their lands is a pre-existing legal right not created by … any … executive order or legislative provision.*
>
> …
>
> 104 It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary



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> relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, *the Indians' interest in land is an independent legal interest.* It is not a creation of either the legislative or executive branches of government. *The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.* Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.
>
> [emphasis added]

191 The analysis in *Guerin* illustrates the correct approach to take. To put it simply, when the relationship in question has no legal character independent of the applicable public law powers and duties, it falls within the province of public law as explained in *Swain* and *Tito v Waddell*. This would be a situation of a "trust in the higher sense", or "political trust" as *Guerin* describes it. Conversely, where the relationship has an independent legal character, that relationship retains its ordinary legal consequences, even if the relationship is created by statute and involves the exercise of powers prescribed by statute in the public interest. In the present case, this means that any relationship which is shaped entirely by the statutory framework of the TCA will not give rise to private law obligations. This approach explains the analysis and conclusion in *AHPETC (CA).* The MND's relationship with the Town Council was defined and shaped by statute only. The grants were made pursuant to statutory obligations under the TCA and their supervision was likewise statutorily spelt out. There was no independent basis, as a matter of private law, to assess the use to which the grants were put.

192 The relationship between town councillors and their constituents and that between town councillors and their Town Council fall on opposite sides of



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this distinction. In Singapore, the position of town councillor is a creature of statute and the relationship between town councillors and their constituents is a *sui generis* creation of the TCA – as with the relationship between the MND and the Town Council addressed in *AHPETC (CA)*. Such a relationship would ordinarily be governed *exclusively* by public law. On the other hand, although the Town Council itself is also a creation of the TCA, the TCA does not exhaustively define its legal character. Section 5 of the TCA is critical. It provides that a Town Council is a body corporate, which is a free-standing legal concept. The nature of a body corporate is not defined by the TCA, but established by general principles of private law. The private law in relation to corporations therefore informs the nature and character of those of the Town Council's relationships which have a ready analogue in the law of corporations.

193 A body corporate is a legal and not an actual person, and must therefore ultimately be directed and controlled by actual persons. Under s 8(1) of the TCA, a Town Council consists solely of its elected and appointed members, who are its town councillors. The role of the town councillors in directing the Town Council thus falls into the template of a body corporate and its officers. Therefore, although on one hand both town councillors and the Town Council are creations of the TCA, on the other hand the relationship between the Town Council and its town councillors has an independent character that is well-known to private law – that of a body corporate and its officers. Seen in this light, any conclusion that town councillors owe their Town Council fiduciary duties is entirely consistent with *AHPETC (CA)*, *Swain*, *Tito v Waddell* and *Guerin*. This is a point which I will expand on at [212] below.

194 Since I have doubted that town councillors owe a fiduciary duty to their constituents in Singapore, how should the Canadian cases that recognise such a duty be understood? In Canada (and in England), it appears that historically



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municipal councillors have always owed some form of fiduciary duty at common law to their residents (see [187]–[188] above). The councillors in *Toronto Party* evidently considered themselves the successors to this fiduciary relationship. The application of this line of authorities to town councillors in Singapore would be more strongly justified if the position of town councillors in Singapore could be traced to a common heritage with the municipal councillors in the Canadian cases (such as those cited at [187] above). However, town councillors in Singapore do not share those roots. In Singapore, the very idea of a town councillor was created by the TCA when it was enacted in 1989. Prior to 1989, the predecessor of both the town councillor and the Town Council itself was a single entity, the HDB. Therefore, prior to the TCA, there was no comparable relationship to speak of. In this sense, town councillors and Town Councils are both a "somewhat unique feature" of the Singapore system of local government (*AHPETC (CA)* at [1]). Indeed, during the Parliamentary debates at the second reading of the Town Councils Bill, no reference was made to municipal councils in any other country (*Singapore Parliamentary Debates, Official Report* (28–29 June 1988) vol 51 at cols 373–398, 403–445). I am therefore not inclined to consider the Canadian authorities to be applicable in Singapore. Indeed, as noted at [189] above, such a conclusion would not be consistent with *AHPETC (CA)*.

195 This conclusion also has the benefit of making the law more workable. If town councillors were to owe fiduciary duties to their constituents, it would presumably follow that individual constituents could bring claims for breach of fiduciary duty against town councillors. If they succeed in those claims, the question then would be whether they could individually recover their share of the monies wrongfully disbursed by the town councillors. The reality is that taxpayers have no legal entitlement, not even a residual one, to taxes properly



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paid to public authorities. Recovery of wrongfully disbursed public monies is rightfully limited to public bodies themselves.

(C) MUNICIPAL COUNCILLORS AND MUNICIPAL COUNCILS

196 I next turn to the English authorities. In England, the leading case concerning the liability of municipal councillors is *Porter v Magill*, upon which AHTC places much emphasis. In *Porter v Magill*, the defendants, the leader and deputy leader of Westminster City Council, had devised and procured the implementation of a plan to sell large quantities of council housing to its residents. The evidence was that the sole purpose of this plan was to increase the electoral prospects of the Conservative Party in local elections on the basis that homeowners were more likely to vote for the party. Following complaints, an independent auditor was appointed under the Local Government Finance Act 1982 ("LGFA 1982") to audit the Council's accounts and make findings as to the liability of the municipal councillors for any misconduct. The auditor found, *inter alia*, that the defendants' exercise of their powers for improper political purposes amounted to wilful misconduct under s 20 of the LGFA 1982. By virtue of s 20, the loss caused by the municipal councillors' wilful misconduct, which the auditor certified to be some £31.7m, was recoverable personally from the municipal councillors. On appeal, the Divisional Court of the High Court upheld the auditor's findings against these two defendants, but reduced the loss to £26.5m. The House of Lords unanimously upheld the decision of the Divisional Court.

197 Although the defendants' liability was expressly provided for under s 20 of the LGFA 1982, Lord Bingham of Cornhill nevertheless outlined the general legal principles behind the liability of municipal councillors, which were founded upon common law principles (at [19(4)]):



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> (4) If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council. This is the rule now laid down in section 20(1) of the [LGFA 1982]. But it is not a new rule. A similar provision was expressed in section 247(7) of the Public Health Act 1875 (38 & 39 Vict, c 55), section 228(1)(d) of the Local Government Act 1933 and in section 161(4) of the Local Government Act 1972 … . *Even before these statutory provisions the law had been declared in clear terms*. One such statement may be found in [*Attorney General v Wilson* (1840) Cr & Ph 1 ("*A-G v Wilson*")], 23–27 where Lord Cottenham LC said:
>
>> "*The true way of viewing this is to consider the members of the governing body of the corporation as its agents*, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was ostensibly an act of the corporation? … As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead … they take measures for alienating that property, with the avowed design of depriving the corporation of it … . *This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate*; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be recovered in specie? But if … I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then *the two cases are identical*. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of … ."
>
> [emphasis added]

198 In discussing the principle that the exercise of public powers by municipal councillors for improper purposes amounted to misconduct, Lord



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Bingham made further reference to "an old and very important principle" set out in *Attorney General v Belfast Corpn* (1855) 4 Ir Ch R 119 at 160–161 (quoted in *Porter v Magill* at [19(2)]):

> "*Municipal corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals* who constitute its executive, and by whom the injury has been committed, *cannot be made responsible*. They are a collection of persons doing acts that, when done, are the acts of the corporation, but which are induced by the individuals who recommend and support them … As the trustees of the corporate estate, nominated by the legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed." [emphasis added]

Thus, while the decision in *Porter v Magill*, strictly speaking, stands only on the basis of s 20 of the LGFA 1982, Lord Bingham's speech made it clear that he considered this statutory basis to reflect a pre-existing liability at common law for misconduct by the elected leaders of local authorities. This is all the more notable bearing in mind that by the time the House of Lords gave its decision in *Porter v Magill*, the recovery provisions under the LGFA 1982 had been repealed, thus bringing common law remedies back into relevance for future cases (see [140] *per* Lord Scott of Foscote).

199 In *Westminster City Council v Porter and another* [2003] Ch 436 ("*Westminster CC v Porter*"), Westminster City Council commenced an action against Dame Shirley Porter ("Dame Shirley"), the first defendant in *Porter v Magill*, for recovery of the judgment sum. Although there was no question that Dame Shirley was liable under s 20 of the LGFA 1982, the Council also sought to recover the same sum from her on the grounds of breach of trust. This was because the statutory liability only commenced 14 days after the final resolution of the appeal in *Porter v Magill*, whereas the Council asserted that under a claim for breach of trust, liability and therefore interest would accrue much earlier,



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from the date of the auditor's certificate (see *Westminster CC v Porter* at [10]–[12]). Hart J granted the Council's application for summary judgment.

200 Discussing the Council's claim for breach of trust, Hart J thought that there was a "wider jurisdiction, which undoubtedly existed in the early nineteenth century, whereby *a corporate local authority could sue its own members* for abuse of their powers" [emphasis added] (at [14]). The only question was whether in enacting the modern statutory code, upon which the defendants were found liable in *Porter v Magill*, Parliament nevertheless intended the older common law jurisdiction to remain. To answer this question, Hart J considered the older authorities on which this jurisdiction was founded. He cited the passage from the judgment of Lord Cottenham LC in *A-G v Wilson* which was set out in Lord Bingham's speech in *Porter v Magill* (quoted at [197] above). Hart J emphasised Lord Cottenham LC's view that even if the members of a local authority were constituted trustees of its property by virtue of an Act of Parliament, there nevertheless existed a trust in common law, such that even before the passage of the Act, a claim for breach of trust could be maintained against the members by the corporate local authority itself (*Westminster CC v Porter* at [23], quoting *A-G v Wilson* at 23):

> "But it was said that such relief cannot be given in a suit in which the corporation are plaintiffs, because the acts complained of were acts of the corporation, and a cestui que trust cannot complain of a breach of trust to which he was a party. This objection was ingeniously argued, but it has no foundation to support it. What the present plaintiffs, the corporation, complain of, is, that certain persons, members of the corporation at a former time, fraudulently and illegally used the power and authority of the corporation for the purpose of depriving it of property to which it was by law entitled. Is it to be said that the corporation is therefore without remedy? It is true that, in future, all such property being in trust for the benefit of the public, the Attorney General may assert the right of the public in an information; but if, before the Act passed, a corporation might, in a proper case, institute a suit for the purpose of setting aside transactions fraudulent against it,



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> though carried into effect in the name of the corporation, that right cannot be affected by the Attorney General having also a power to complain of a transaction. … ”

Hart J accordingly concluded that the common law remedy for a councillor's misconduct in relation to the council's funds was not overtaken by the statutory remedy, and entered summary judgment in favour of Westminster City Council.

201 Hart J's conclusion that Dame Shirley was liable in private law to Westminster City Council for breach of her duties as a municipal councillor is notable in that it is the first case in the analysis thus far of a claim by a municipal council against a municipal councillor. However, Hart J did not specify the precise nature of this liability. All he said at [27] was that "the language of the particulars of claim is in my judgment *inaccurate* in describing the first defendant as a *trustee* of the assets of the claimant" [emphasis added], without going on to explain in what way the description of "trustee" was inaccurate. It has been suggested, however, that Hart J must have been contemplating Lord Cottenham LC's holding in *A-G v Wilson* (set out in the quotation from *Porter v Magill* at [197] above) that the municipal councillors were acting as agents: see "Public Trusts" ([188] *supra*) at p 538.

202 Thus, both in *Porter v Magill* and in *Westminster CC v Porter*, the court left undecided the precise nature of the non-statutory remedy for the councillors' misconduct, although there are echoes in the analysis of the relationship between a body corporate and its officers. On the other hand, both Lord Bingham and Hart J in these respective cases cited with approval the reasoning of Lord Cottenham LC in *A-G v Wilson*. Lord Cottenham LC made it clear that in his view, municipal councillors were agents of the corporate municipal council. At the time of that judgment, municipal councillors had also become trustees by virtue of statute (*A-G v Wilson* at 22). For this reason, Lord



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Cottenham LC referred to municipal councillors as "agents and trustees" of the corporate municipal council at various points in *A-G v Wilson* (including in the passage set out at [197] above).

203 However, it is by now common ground between the parties in the present case that town councillors do not act as agents for the Town Council in the ordinary performance of their duties. In my view, this is correct. When town councillors vote at a meeting of the Town Council under s 28(1) TCA, their decision *is* the decision of the Town Council. In this regard, their position is the same as when company directors pass a resolution at a board meeting: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [25]. In either case, no question of agency arises. I therefore do not follow the position taken in *A-G v Wilson*.

204 The upshot of this analysis is that I am unable to discern from the English authorities a clear basis for the existence of fiduciary duties owed by municipal councillors to municipal councils. Indeed, in *Porter v Magill*, the language of fiduciary duty was conspicuously absent from the analysis of the House of Lords. Instead, Lord Bingham said that public powers are "conferred *as if upon trust*" [emphasis added] (at [19(2)]). Nevertheless, these words were said in the context of a discussion of the legal principles underlying the liability of municipal councillors to their municipal council. As such, *Porter v Magill*, *Westminster CC v Porter* and *A-G v Wilson* are all authorities of relevance to the extent that they support the *existence* of duties of an equitable character owed by municipal councillors to their municipal council, even though the precise character of such duties was not made clear.

205 In the final analysis, the English and Canadian authorities are important primarily in showing that the common law has unflinchingly accepted that



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municipal councillors can be held to account for their actions in private law, even though their conduct takes place in a public law context and with a political overlay. These cases serve to amplify the injustice that would result if the law were to conclude that the remedy for misconduct by town councillors which causes financial loss to public funds held by the Town Council lies solely in the realm of public law. The real question, however, is discerning the exact nature of the duty owed by the town councillors to the Town Council. For that, I return to the analytical framework set out at [166] above. I prefer to decide this issue not on the basis of the existence of an established fiduciary relationship, but rather on an examination of the actual relationship in question. In my view, it is the latter examination which is conclusive in the present case, and it is to that which I now turn.

(3) Whether the relationship between town councillors and Town Councils gives rise to fiduciary duties

206 In essence, the plaintiffs contend that the responsibilities under the TCA which town councillors assume upon taking office give rise to fiduciary duties, and that the trust and confidence reposed in town councillors likewise gives rise to fiduciary duties. In my view, it is the nature and character of the relationship between town councillors and Town Councils as a whole, and not any specific obligation imposed upon town councillors under the TCA, that gives rise to fiduciary obligations on their part.

207 A definition of fiduciary duties in outline was laid down in the judgment of Millett LJ in *Mothew* and approved by the Court of Appeal in *Tan Yok Koon*, as set out at [163] above. Indeed, it may well be the case that given the fact-sensitivity of the fiduciary relationship and the perceived need for flexibility, no more precise formulation is possible: see *Snell's Equity* ([166] *supra*) at para 7-



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005. Thus, for example, in *Guerin* ([166] *supra*) Dickson J said, consistently with Millett LJ's subsequent formulation in *Mothew*:

> 101 … Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> 102 I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that *where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary*. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> [emphasis added]

208 As Dickson J held, an undertaking giving rise to fiduciary duties can occur by virtue of statute. I agree with the first to fifth defendants that the mere existence of a statutory duty cannot, without further analysis, give rise to a private law right of action. In fact, bearing in mind that a statutory obligation does not necessarily need to be explained with reference to any private law concept, greater care ought to be taken in the analysis (see *Tito v Waddell* at 211G–H). However, the fact that there is a statutory context to the relationship does not negate the finding a relationship of a fiduciary character if that is the result of a further and careful analysis (a point likewise made in *Tito v Waddell*: see [184] above).



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209 Once again, I must preface my analysis with the observation that the alleged fiduciary duties in the present case are said to be owed by town councillors to Town Councils, and not to any external parties. With this in mind, the only potentially relevant statutory provisions which the plaintiffs are able to point to are the obligation of the Town Council to keep proper accounts (s 35 TCA), and the imposition of personal liability on officers for incorrect or unauthorised payments (r 56 TCFR).

210 In my view, nothing turns on the obligation to keep accounts under s 35 TCA, as it is not suggested that *any* person who has to keep proper accounts owes fiduciary duties (see *Tito v Waddell* at 219G–H). Furthermore, the person to whom this duty is directed is the Town Council itself (and, by virtue of r 51 TCFR, the Secretary), and not the town councillors. Likewise, I do not think that anything can be made of the personal liability imposed under r 56 TCFR. This is because r 56 is framed such that it would apply as long as the officer had no proper authority (r 56(1)) or caused a wrongful payment by making an incorrect certification (r 56(2)). Since such conduct would not, without more, amount to a breach of fiduciary duties, r 56 does not point to the existence of fiduciary duties. Therefore, the most that can be said is that the provisions in the TCA and TCFR are consistent with, and not contradictory to, the existence of fiduciary duties.

211 I therefore turn to what I consider to be the core of the analysis on the current issue. Have town councillors "undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence", such that the Town Council can expect their "single-minded loyalty" (*Mothew* at [163] above)? Much of the discussion in the preceding sections (see, in particular, [190]–[193] above) provides the foundation upon which this analysis can be built.



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212 As articulated earlier, the starting point remains the nature of the relationship. To answer the question, one must look at the basis and nature of the relationship between Town Councils and their town councillors. I considered this at [192] above. A Town Council is a body corporate (s 5 TCA) which is made up of its town councillors (s 8(1) TCA) as its directing mind, and through whom it acts. As noted earlier, this brings the role of town councillors in directing the Town Council within the template of a body corporate and its officers. The town councillors collectively act on the Town Council's behalf in the discharge of all its functions, except where those functions are delegated to specific officers, who are nevertheless accountable to the Town Council (s 20(1) TCA). Since town councillors act on behalf of the Town Council, the question then is on what terms they must act. The answer must surely be that they must act in accordance with the duties that the law imposes on officers of bodies corporate.

213 Here, it is useful to compare the position of Town Councils with other bodies corporate governed in similar ways. In *AHPETC (CA)*, the Court of Appeal pointed out (at [68]) that the genealogy of the duties and functions imposed upon the Town Council under s 21 TCA can be traced back to the Conveyancing (Strata Titles) Act (No 17 of 1961) (NSW) ("the 1961 Act"):

> … The scheme of the legislation regulating these developments entailed the creation of a body corporate (commonly referred to as a management corporation or strata corporation) impressed with various duties and functions, one of which would be to control, manage and administer the common property for the benefit of the residents. It is in such legislation that we first find provisions using language similar to that which we see in s 21 of the TCA.

As the Court of Appeal suggested in the passage cited above, the fact that the 1961 Act provided for a body corporate as a managing body creates significant



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parallels between the members of the council of such a body corporate, and town councillors under the TCA.

214 In *Re Steel and The Conveyancing (Strata Titles) Act 1961* (1968) 88 WN (Pt 1) NSW 467 ("*Re Steel*"), the Supreme Court of New South Wales found council members of a body corporate formed under the 1961 Act to be in breach of their fiduciary duties. Else-Mitchell J held (at 470, as quoted in *Fu Loong Lithographer Pte Ltd and others v Mok Wing Chong (Tan Keng Lin and others, third parties)* [2018] 4 SLR 645 ("*Fu Loong Lithographer (HC)*") at [222]):

> [M]embers of the council of a body corporate under the Conveyancing (Strata Titles) Act … *are at least in a position analogous to company directors*; … it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct, and that the onus lies on them to prove affirmatively that they have not acted in their own interests or for their own benefit.
>
> [emphasis added]

215 In Singapore, an entity comparable to the body corporate under the 1961 Act is the management corporation constituted under the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed). Unsurprisingly, a similar legal position applies. The Court of Appeal has cited *Re Steel* for the proposition (albeit *obiter*) that council members of the management corporation of a strata development owe fiduciary duties at common law: *Fu Loong Lithographer Pte Ltd and others v Mok Wai Hoe and another and another matter* [2014] 3 SLR 456 at [27], applied in *Fu Loong Lithographer (HC)* at [222].

216 Seen from this perspective, my analysis in relation to town councillors is thus not dissimilar to the duties owed by the directors of a company to the company. Although I would not say that town councillors are entirely analogous



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in their legal status to directors, or council members of a management corporation, there is nevertheless a very close analogy between their respective relationships with the entities that they serve. Indeed, the importance of the duties in question is amplified by the fact that the town councillors are responsible and accountable for the use of public monies paid to their Town Council. Thus, there is no reason that militates against the conclusion that town councillors have undertaken to act on behalf of their Town Council in a relationship of trust and confidence that gives rise to fiduciary duties. In short, town councillors must manage the estate and serve the interests of their Town Council with a single-minded loyalty, and for proper purposes. These are matters which are no doubt based in statute and governed by public law. Nevertheless, the nature of town councillors' relationship with their Town Council puts it beyond argument that they must also act with single-minded loyalty to their Town Council. As such, when discharging their duties town councillors are subject both to the standards of conduct imposed by public law, and to fiduciary duties imposed by private law.

217 The defendants' contentions against such a conclusion, as I understand them, are twofold: namely, that Town Councils are political institutions, and that the TCA prescribes certain statutory duties which should be exhaustive of the duties owed by the town councillors. First of all, to the extent that these arguments are based on the Parliamentary debates on the Town Councils Bill and the Court of Appeal's analysis of those debates in *AHPETC (CA)*, I have already shown such reliance to be misguided (see [174]–[177] above). Furthermore, I have noted that there is no blanket rule against overlaying private law concepts in the context of public law obligations (see [190]–[191] above; and the discussion of *Swain* at [180] and of *Tito v Waddell* at [185] above).



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218 As for the question of the extent, if any, to which the political context of Town Councils militates against imposing fiduciary obligations on town councillors, it is hard to do better than to cite the words of Lord Bingham in *Porter v Magill*:

> 21 … Elected politicians of course wish to act in a manner which will commend them and their party … to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. *But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. …*
>
> 22 … [The] cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate their responsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage.
>
> [emphasis added]

219 It must be correct as a matter of law and principle that notwithstanding the political dimension of Town Councils and the fact that town councillors are held politically accountable to the residents via the ballot box, the town councillors remain bound by a duty of loyalty to the Town Council, which entails acting honestly, without conflicts of interest, and for proper purposes. So far as the existence of a fiduciary relationship is concerned, I can see no principled distinction between a company and its directors, a management corporation and its council members, and a Town Council and its town councillors. In fact, the analysis which I have adopted means that the fiduciary relationship between town councillors and their Town Council is entirely distinct from the political relationship between town councillors and their



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constituents. Unlike the Canadian cases, my analysis does not hinge upon the duties owed by town councillors to those whom they represent in a political capacity. Instead, I find an even stronger source for the town councillors' fiduciary duties in their direct relationship with their Town Council as officers of a body corporate. I therefore hold that the first to fifth defendants owe fiduciary duties to AHTC.

220 In view of my conclusion that town councillors owe their Town Council fiduciary duties by virtue of their relationship, there is no need for me to consider AHTC's alternative and more narrow submission that Ms Sylvia Lim and Mr Low Thia Khiang owed AHTC fiduciary duties by acting as its agent specifically in negotiating the first MA contract with FMSS.

(4) Whether the volunteer status of appointed members changes their position

221 The first to fifth defendants submit that because Mr David Chua and Mr Kenneth Foo, as appointed members of AHTC, were merely volunteers being paid an honorarium of $300 per month, it would be unduly onerous to impose fiduciary duties upon them (see [134] above).

222 In support of this argument, the first to fifth defendants cite the High Court's decision in *Koh Keow Neo and others v Chee Johnny and others* [2004] 3 SLR(R) 385 ("*Koh Keow Neo*"). *Koh Keow Neo* concerned the actions of the members of a committee formed for the purposes of privatising Bedok Reservoir HUDC Estate under the Land Titles (Strata) Act. The members of the committee were residents who volunteered without receiving any compensation in return. Lai Siu Chiu J held that as the committee members were volunteers, "it would be unduly onerous and unfair to saddle them with fiduciary duties *of the standard* imposed on … accountants" [emphasis added] (at [93]), citing an



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Australian case concerning duties owed by a firm of accountants to their clients. This passage therefore appears to discuss the *standard* of the duties to be imposed on the committee members, and not their existence. If one further examines Lai J's conclusions, it is clear that she dealt with the allegations of breach of fiduciary duty on the assumption that fiduciary duties were in fact owed: Lai J held, on the one hand, that on many occasions, the committee members did not exercise their own discretion at all but were constrained by the actions of third parties or were guided by the views of the other flat-owners (at [94]–[95]). On the other hand, she also held that where the committee members did exercise discretion, they had done so properly and with due care (at [92] and [96]). *Koh Keow Neo* therefore does not stand for the proposition that volunteers are unlikely to owe fiduciary duties.

223 The Court of Appeal's decision in the subsequent case of *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*"), which PRPTC cites, is in fact contrary to the point advanced by the first to fifth defendants. That case concerned the duties owed by the members of a collective sale committee of a private housing estate. The Court of Appeal made it clear at [111]–[112] of its judgment that even gratuitous agents owed their principals fiduciary duties. In the same vein, it is also clear that a trust relationship can arise even if the trustee is not remunerated. Likewise, it must be correct as a matter of principle that a fiduciary relationship is not predicated upon any reward being paid to the fiduciary.

224 I am also not convinced by the related argument that fiduciary duties do not arise because appointed members like Mr David Chua and Mr Kenneth Foo are likely to be lay persons inexperienced in estate management. There is no prerequisite for fiduciaries to have a particular level of skill or expertise, or to



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profess to do so, although they may be held to a higher standard of skill and care if they do. In the context of trustees, for example, this principle is enshrined in s 3A of the Trustees Act (Cap 337, 2005 Rev Ed). If at all, this is relevant to the issue of the standard of care that is expected of the fiduciary in the discharge of his duties.

225 I am therefore of the view that the analysis above in relation to the existence of fiduciary duties (at [211]–[219]) applies to all town councillors by virtue of the nature of their roles and responsibilities, and regardless of whether they were elected (as in the case of Ms Sylvia Lim, Mr Low Thia Khiang and Mr Pritam Singh) or appointed (as in the case of Mr David Chua and Mr Kenneth Foo).

*Did Ms How Weng Fan and Mr Danny Loh owe AHTC fiduciary duties?*

226 The plaintiffs submit that Ms How Weng Fan and Mr Danny Loh owed fiduciary duties to AHTC by virtue of their appointment as officers of AHTC (see [88] above). Ms How Weng Fan and Mr Danny Loh argue otherwise. In the case of Ms How Weng Fan, it is alleged that she owed fiduciary duties to AHTC during her appointment as Deputy Secretary from 9 June 2011 until 14 July 2015, including the period of her appointment as General Manager from 1 August 2011 until 14 July 2015. In the case of Mr Danny Loh, it is alleged that he owed fiduciary duties to AHTC during his appointment as Secretary from 1 August 2011 to 31 May 2015. All the parties (the plaintiffs, as well as Ms How Weng Fan and Mr Danny Loh) broadly characterise the nature of Ms How Weng Fan and Mr Danny Loh's relationship with AHTC as that of employees. In addition, AHTC suggests that they should also be seen as agents of AHTC.



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227 Although all employees owe duties of loyalty and care to their employer, this must be distinguished from fiduciary duties, which are of a different nature: see *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 ("*Nagase*") at [25]–[26]. Nevertheless, "the employer/employee relationship is one of the well-established categories of legal relationships which is *capable* of giving rise to a fiduciary relationship" [emphasis in original]: *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 ("*QAM*") at [25]. At its core, the test for determining whether an employee owes his or her employer fiduciary duties is fundamentally the same as that for the existence of fiduciary duties in general (see *Mothew* at [163] above), as Elias J held in *Nottingham University v Fishel and another* [2000] IRLR 471 at [97] (cited in *Nagase* at [26]):

> … [I]n determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the *particular duties undertaken by the employee*, and to ask whether in all the circumstances he has *placed himself in a position where he must act solely in the interests of his employer*. … [emphasis added]

228 At the same time, it is common to suggest by way of shorthand that "senior employees" or "top management" have undertaken such duties to their employers and therefore owe fiduciary obligations: see Malcolm Cope, *Equitable Obligations: Duties, Defences and Remedies* (Lawbook Co, 2007) ("Cope, *Equitable Obligations*") at para 3.150; and *Nagase* at [27], [29]. Thus, in *Nagase*, Judith Prakash J (as she then was) referred (at [30]) to the case of *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, in which a president and executive vice-president of a subsidiary company were found to owe fiduciary duties, notwithstanding their being subject to the supervision of the controlling company. In contrast, in *Nagase*, Prakash J held that one of the defendants, despite being a director of a division of the company with the authority to negotiate contracts and authorise payments on behalf of the



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company, did not owe it fiduciary duties as he was in reality a middle manager who had to get his immediate supervisor's sanction for many of his decisions (at [29]).

229 I therefore do not agree with Ms How Weng Fan and Mr Danny Loh that the conclusion on the facts in *Nagase* applies to them. *Nagase* draws a distinction between those who exercise some degree of autonomy but are ultimately in the middle of the corporate hierarchy, and those who may be subject to supervision or accountability but are nevertheless at the top of that hierarchy. Nowhere in *Nagase* is it suggested that an employee who is accountable to another person or entity should not be considered a fiduciary. This accords with commercial reality, since it is not uncommon in the organisational structure of a company that even employees who can be considered "top management" would be under the supervision of and accountable to the chief executive officer or managing director, and the top management as a whole would be under the supervision of and accountable to the board.

230 It cannot seriously be disputed that the Secretary of the Town Council is a member of the "top management" of a Town Council. The TCA envisages the Secretary being "responsible to the Town Council for the proper administration and management of the functions and affairs of the Town Council…" (s 20(1) TCA). To this end, other officers and staff members are appointed to "assist" the Secretary (s 20(2) TCA).

231 While the position of Deputy Secretary has no statutory basis, Ms How Weng Fan's appointment as Deputy Secretary was intended as part of a continuity and handover plan once Mr Jeffrey Chua's departure as Secretary and General Manager had been arranged. Indeed, Ms Sylvia Lim's evidence



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was that Ms How Weng Fan was appointed Deputy Secretary alongside Mr Jeffrey Chua as Secretary so that CPG and FMSS could perform their duties "concurrently" in respect of Aljunied (for CPG) and Hougang (for FMSS). As a result, on 16 June 2011 Mr Jeffrey Chua and Ms How Weng Fan were both delegated the same authority under the TCFR to do such things as approve spending, sell assets, make investments, and write off debt. In other words, despite the difference in the name of the positions, it was envisioned that Mr Jeffrey Chua and Ms How Weng Fan would act as co-equals in running Aljunied and Hougang respectively for the time being. Furthermore, the continuity plan also meant that Ms How Weng Fan's role as Deputy Secretary could also be said to be akin to a Secretary-designate (or General Manager–designate). Ms How Weng Fan's appointment as Deputy Secretary therefore placed her within the top management of AHTC.

232 While it could be said that Ms How Weng Fan's role as Deputy Secretary would have changed in nature once Mr Danny Loh assumed his appointment as Secretary, it should be noted that Ms How Weng Fan was appointed General Manager on the same day. The position of General Manager likewise has no statutory basis. However, the evidence is that General Managers of Town Councils are typically responsible for their day-to-day administrative functions. It has not been suggested that Ms How Weng Fan's role as General Manager was any different from this norm. The evidence further is that the General Manager is the MA's representative in the Town Council. In fact, this was why Ms How Weng Fan was appointed the General Manager (see [234] below). It is therefore clear that she remained in a top managerial role in AHTC when she was appointed General Manager in addition to her existing role as Deputy Secretary. Indeed, it has not been suggested that there are any employees of AHTC more senior than the Secretary and General Manager.



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233 It is therefore clear to me that Ms How Weng Fan and Mr Danny Loh were senior executives and members of the top management of AHTC, and performed roles in which they were vested with a high degree of trust and confidence, and indeed autonomy. There is, however, one important consideration which remains – the significance, if any, of Ms How Weng Fan and Mr Danny Loh being the directing minds and top management of FMSS, and its substantial shareholders.

234 Ms How Weng Fan and Mr Danny Loh were not simultaneously the directing minds of FMSS and officers of AHTC by happenstance – they were appointed officers of AHTC *because* they were also running its MA's operations. The uncontroverted evidence is that Ms How Weng Fan and Mr Danny Loh were chosen to be AHTC's General Manager and Secretary respectively because Ms Sylvia Lim and Mr Low Thia Khiang thought that it was more conducive for these roles to be filled by the MA's representatives; this was in part based on the common practice of Town Councils in Singapore, including the fact that Mr Jeffrey Chua was also the managing director of CPG while he was Secretary *and* General Manager of AHTC. In fact, the MA contract that CPG had with AHTC, which FMSS followed, provided expressly that the MA was to provide AHTC with a General Manager. Likewise, as Ms How Weng Fan explained, the first and second MA contracts also required the appointment of a "Managing Agent's Representative", whose responsibilities were identical to those of the Secretary as set out in s 20(1) TCA, suggesting that it was intended for those two roles to be fulfilled by the same person. It is evident that the dual roles Ms How Weng Fan and Mr Danny Loh each played in respect of AHTC and FMSS were an inherent and deliberate part of the arrangement all the parties had in mind for the running of AHTC. This is underscored by the fact that AHTC did not pay any salaries for the positions of



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General Manager and Secretary, even though they were full-time positions. That was the MA's obligation.

235 The question that arises is whether Ms How Weng Fan and Mr Danny Loh ought to be regarded as fiduciaries given their potentially conflicting loyalties to AHTC (as its officers) and FMSS (as its directors and shareholders). This is because, as I explained at [227] above, employees are fiduciaries if their duties require them to act with a "single-minded loyalty" (*Mothew* at [163] above). Setting aside the fact that Ms How Weng Fan and Mr Danny Loh were shareholders of FMSS (which, it is alleged, was not disclosed to the town councillors), the baseline under the first and second MA contracts and the common understanding of all parties involved, as we have seen, was for the General Manager and Secretary to be amongst the senior management of the MA. As senior management of the MA, the General Manager and Secretary of AHTC would also owe duties to the MA. Could Ms How Weng Fan and Mr Danny Loh then still be said to owe a "single-minded loyalty" to AHTC?

236 I believe that the answer is yes. As I have explained, the starting point is that the General Manager and Secretary would ordinarily be considered fiduciaries, given the nature of their roles and responsibilities in the Town Council. Was that altered by the fact that they would in all likelihood also be fiduciaries of the MA? I would be slow to conclude that it did. If this proposition is correct, it must mean that Ms How Weng Fan and Mr Danny Loh would be fiduciaries of neither AHTC nor FMSS because of their conflicting loyalties, despite holding positions which would ordinarily attract fiduciary duties. The obvious difficulty with this conclusion speaks to the unsustainability of the argument. In this regard, it is important not to conflate two distinct issues – *whether* a fiduciary duty exists, and the *management of* any conflict that may interfere with the discharge of the duty. The mere existence of conflicts of



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interest or conflicting duties is not inimical to finding a fiduciary duty. A well-known and common example of a fiduciary who serves two masters is a nominee director of a company who is also a director or senior officer of the nominating shareholder whom he represents: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.55. Inevitably, such directors will find that their fiduciary duties owed to one company will conflict from time to time with those owed to the other company. However, the individual, when wearing the hat of the nominee director, must act in the sole interests of that company, notwithstanding his connections and obligations to the nominating shareholder. To this end, the law makes some provision for the declaration and management of such conflicts of interest: see ss 156(4)(*b*) and 156(5) of the Companies Act (Cap 50, 2006 Rev Ed). Nevertheless, depending on the circumstances, it may be necessary for such a director to abstain from voting or even resign, depending on the severity of the competing loyalties in the particular context: see *Walter Woon on Company Law* at para 8.57.

237 The present situation is analogous. It seems incorrect as a matter of principle for a person who would ordinarily owe fiduciary duties to cease to have such responsibilities because of a potential or inherent conflict of interest, when if anything the need for a fiduciary standard of conduct would thereby be heightened. Furthermore, in the case of Ms How Weng Fan and Mr Danny Loh, these potential conflicts of interest were likely to arise only in some circumstances: in many aspects of their work as General Manager and Secretary, the interests of the AHTC and FMSS would not conflict – *eg*, when they dealt with third parties (see also *Mothew* at 20E–G). Since the conflicts of interest were not intractable, the better answer would be to recognise the fiduciary nature of the relationship and to require the conflicts to be managed as and when they did arise. For example, when AHTC made payments to FMSS,



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the General Manager and Secretary should not play a key approving role (an issue which I consider at [347]–[354] below). I therefore conclude that Ms How Weng Fan and Mr Danny Loh owed fiduciary duties to AHTC while they occupied the positions of Deputy Secretary and General Manager, and Secretary respectively.

238 I would add that although Act 17 of 2017 amended the TCA to add s 15A, imposing a specific requirement for, *inter alia*, the Secretary of a Town Council to disclose conflicts of interest, this does not change the analysis. That s 15A is not intended to change the position at common law is confirmed by s 15A(4), which provides that s 15A is "in addition to" any rule of law regarding conflicts of interest.

239 AHTC also made two alternative submissions: first, that the Secretary's statutory duties in the TCA – such as the responsibility for making and collecting payments to and from the Town Council under s 33(8) TCA – had the effect of imposing fiduciary duties; and second, that Ms How Weng Fan and Mr Danny Loh were fiduciaries by virtue of being agents of AHTC. I do not find these submissions very persuasive, but in light of my conclusion above, I do not need to consider them further.

*The duties owed by the defendants to AHTC*

240 For the sake of clarity, I will summarise my findings on the fiduciary duties which the defendants owed to AHTC, and then outline the specific duties that are owed. I find that the first to fifth defendants owe fiduciary duties to AHTC because of the nature of the relationship between the Town Council and its town councillors. This relationship is one between a body corporate and its officers, which has close parallels with that between a company and its directors, and that between a management corporation and its council members.



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This is a relationship which is governed by private law, even though town councillors, along with their powers and responsibilities, are creatures of statute and the conduct of town councillors is also subject to the control of principles of public law. This finding is consistent with the position on the liability of municipal councillors in England, although I have not directly relied on the English cases to discern the specific nature of the duty. Such duties are not precluded by the principle that private law obligations are distinct in nature from public law obligations; nor are they precluded by the political nature of Town Councils. Finally, the fact that some town councillors are volunteers does not preclude the finding that they owe fiduciary duties.

241 I find that Ms How Weng Fan and Mr Danny Loh owed fiduciary duties to AHTC because their positions as Deputy Secretary/General Manager and Secretary respectively of AHTC constituted them as senior management of AHTC. Employees who play such pivotal roles will normally be found to be fiduciaries. The fact that Ms How Weng Fan and Mr Danny Loh owed potentially conflicting duties to FMSS was something to be managed as part of their fiduciary duties to AHTC, and did not preclude the existence of such duties.

242 Fortunately, the nature and content of the defendants' fiduciary duties is much more settled than whether they in fact owed such duties in the first place. It is sufficient for present purposes to say that minimally, the core fiduciary duties as described in *Mothew* (and cited in *Tan Yok Koon* at [192] – see [163] above) would apply to the first to seventh defendants. These duties, which are encapsulated in the notion of a single-minded loyalty to the principal, are:

(a) A duty to act in good faith and for proper purposes;

(b) A duty not to make a profit out of the fiduciary relationship;



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(c) A duty not to be in a position of conflict between one's duty and interests; and

(d) A duty not to act for the benefit of oneself or a third party without the informed consent of the principal.

243 Attendant with the existence of fiduciary duties is an equitable duty of skill and care. However, although the equitable duty of skill and care comes in tandem with a fiduciary relationship, it is not a fiduciary duty *per se*. In substance, the duty of skill and care is equivalent to the duty of care in the tort of negligence: see *Mothew* ([163] *supra*) at 16G–17B. The remedies for breach of this duty of skill and care are also measured on the same basis as those in tort, although they may be called "equitable compensation" in name: see *Mothew* at 17C–H. Thus, there is no need for me to consider separately any alleged breaches of the duty of care in tort, since in the present case such duties would mirror the defendants' equitable duty of skill and care. To be clear, when I refer to "breach of fiduciary duties" in this judgment, I refer only to breaches of the core fiduciary duties, and *not* breaches of the equitable duty of skill and care.

244 Having concluded that the first to seventh defendants owed fiduciary duties to AHTC and established the nature of those duties, I now turn to the facts of this case to examine whether any of those duties has been breached in the defendants' conduct of AHTC's affairs.

***The waiver of tender and appointment of FMSS pursuant to the first MA contract in 2011***

245 The conduct of the defendants, or at least some of them, leading up to the waiver of tender for the first MA contract and appointment of FMSS as the MA of AHTC in 2011 assumed centre stage at the trial, and formed the main point of contention between the parties. This is understandable as these



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circumstances set the stage for, and are inextricably tied to, the events that followed, which include the award of the first EMSU contract and the second MA and EMSU contracts, and the allegedly improper payments made thereunder. As such, it is appropriate to first address this issue in some detail before going on to consider the issues surrounding the first EMSU contract, the second MA and EMSU contracts and the alleged improper payments that were made under all the contracts with FMSS.

246 In approaching the issue of waiver of tender and the motivations of the relevant persons, the statutory framework is of critical importance. Rule 74(1) of the TCFR makes clear that tenders must be called for the execution of works or for any single item of stores or services estimated to cost more than $70,000, unless such tender is waived under r 74(17) on the basis of special circumstances that are fully justified. The pertinent provisions are rr 74(17) and 74(18) TCFR:

> (17) Tenders may be waived by the Town Council or the chairman as authorised within the limits of his financial authority to incur expenditure where —
>
> > (*a*) the supply of goods or services is known to be only within the capacity of a sole agent or a specialist contractor;
> >
> > (*b*) the urgency of the requirement makes it necessary; or
> >
> > (*c*) it is manifestly necessary in the public interest to do so.
>
> (18) Waiver of tenders under paragraph (17)(*b*) or (*c*) shall only be used under very special circumstances and must be fully justified.

247 Each side has painted a very different narrative of the facts in the months following the 2011 GE up to the appointment of FMSS under the first MA contract. This has been set out in the outline of the respective parties' case above



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at [92]–[95] and [136]–[139], which I summarise here for convenience. On the one hand, the defendants assert that the waiver of tender for the first MA contract was neither premeditated nor desired, but was necessitated by and in response to a string of unfortunate events outside their control, involving various parties such as CPG and AIM. On their narrative, the elected MPs and Ms How Weng Fan took preparatory steps to replace CPG as a *contingency plan* due to fears that CPG and AIM would pull out of AHTC in response to the change in political leadership. These fears materialised at the 30 May 2011 meeting when CPG confirmed their intended departure, forcing the defendants to scramble to bring the contingency plan to fruition, so that there was minimal disruption of estate management services to the residents of AHTC. In view of the short timelines and the importance of the services provided by a MA, this could only be achieved by waiving the tender, and awarding the first MA contract to FMSS. Waiver of tender was therefore fully warranted. Thus, everything that was done was not only with the interests of the residents in mind, but also in accordance with proper procedure, since a waiver of tender was possible if warranted by special circumstances.

248 On the other hand, the plaintiffs paint a starkly different picture, one which involves the appointment of FMSS under surreptitious circumstances and in a clandestine manner. The barb in the allegation is that the appointment was driven by the desire to remove "PAP-affiliated" CPG from the picture so that the elected MPs could install in CPG's place a team of trusted and loyal WP supporters, thereby ensuring that money, in the form of MA fees, was placed in the pockets of those supporters. On the plaintiffs' account, the defendants took immediate steps following the 2011 GE to commence the takeover by FMSS, with no intention of continuing to work with CPG or to call a tender, such that the installation of FMSS was already a *fait accompli* by the time of the 30 May 2011 meeting with CPG. This was accompanied by a series of



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misrepresentations on the part of the defendants to keep CPG out of the loop, so as to reduce the risk of raising suspicion as to why a tender was not called. In doing so, the first to seventh defendants were clearly acting in the interests of third parties such as loyal WP supporters, or for collateral political purposes, rather than in the interests of AHTC, and by extension, its constituents, and were hence in breach of their fiduciary duties.

249 As noted earlier, it is fortunate that in this case, I am aided in my analysis of the facts by rather voluminous contemporaneous documents in the crucial period between May and August 2011 which I have described in detail above at [26]–[56]. It is important that the authenticity of these documents has not been challenged. In piecing together the true narrative, I have therefore placed considerable weight on the contents of these documents, particularly as there is an absence of any factual witnesses for the plaintiffs' case. Further, I have tested the defendants' oral and written testimonies against these documents in order to assess their veracity.

*Was the replacement of CPG with FMSS a contingency plan or a* fait accompli*?*

250 It is clear that steps were taken by the defendants to replace CPG shortly following the 2011 GE. Such steps involved taking over documents and data from CPG and incorporating FMSS. The point of discord is whether these were merely preparatory steps taken as part of a contingency plan which was subsequently triggered by CPG's announcement of its intention to leave at the meeting on 30 May 2011, or whether they were concrete steps taken with the intention of emplacing FMSS as the MA of AHTC regardless of CPG's intentions or AHTC's rights under the CPG MA contract.



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251 In my assessment, the contemporaneous documentary evidence speaks unequivocally to one conclusion – that there was a clear plan for FMSS to replace CPG for the provision of MA services regardless of the intentions of CPG. In other words, this was no contingency plan. The assertion that FMSS was a contingency is nothing more than an attempt to varnish the plan with a veneer of credibility in order to camouflage its true motive. However, as one carefully evaluates and unpacks the evidence, the veneer peels away, and the truth is revealed in its place. It is significant that in a series of correspondence that transpired in quick succession immediately following the results of the 2011 GE on 7 May 2011, there is not a single mention that the intended course of action involving FMSS was a contingency plan. To the contrary, the correspondence speaks to the unwavering intention to emplace FMSS in place of CPG. I turn now to examine the correspondence.

252 As early as two days after the 2011 GE, in the 9 May 2011 Email, Mr Low Thia Khiang communicated the unequivocal decision that "we will appoint managing agent" (see above at [27]). The emphatic tone of the email suggests that a decision had been made on or before that date to replace CPG with a different MA. In cross-examination, Mr Low Thia Khiang said that this did not necessarily refer to a different MA than CPG, and that he was merely communicating the decision for AHTC to be managed by a MA instead of managing AHTC in-house. I do not find this to be credible. It is difficult to believe that that was the intended meaning of the quoted phrase. CPG was the *incumbent* MA and was tied to a contract, the CPG MA contract. That contract still had some legs to run, at least until July 2013 and with an option to extend for a further period of three years. There was thus no need to talk about *appointing* CPG as the MA when they were already the MA. Mr Low Thia Khiang must therefore have had in mind some other party. Further, his evidence does not square with his view that CPG would seek to exit the management of



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AHTC. If that was his thinking at that time, the MA he had in mind when penning the 9 May 2011 Email must surely have been a replacement for CPG. Indeed, it is clear from the entirety of the 9 May 2011 Email that Mr Low Thia Khiang was communicating the decision to replace CPG with a different MA. The first part of the email talks about CPG having gone into "inactive management" and that it had "poorly" maintained some areas in the estate. It is clear that Mr Low Thia Khiang was expressing misgivings and dissatisfaction with CPG's service levels as MA. It is therefore inconceivable that he was thinking of continuing with CPG when he wrote the phrase "we will appoint managing agent". He clearly had in mind a replacement. Further, it is likely that he had in mind a new player since it is the defendants' evidence that the MA industry was dominated by a few players whom they perceived to be "PAP-affiliated" and who would have no desire to work with a WP-led AHTC. Given this sentiment, a tender would not have crossed his mind as it would not serve any purpose. This was exactly his evidence. The question then is who was to be the new MA.

253 It is significant that in the 9 May 2011 Email, Mr Low Thia Khiang stated that the decision to appoint a new MA had been communicated to Ms How Weng Fan. Notably, he had copied this email to her. Ms How Weng Fan had also been asked to attend a meeting with Mr Jeffrey Chua and the HDB Secretariat to discuss CPG's alleged shortfall in performance since the 2011 GE. This makes it evident that her direct involvement in the management of AHTC was contemplated. It is difficult to see why she would have otherwise been asked to attend the meeting. I do not accept Ms Sylvia Lim's evidence that Ms How Weng Fan's inclusion in this email was simply because she was at that time the General Manager of HTC, and thus it was relevant to her that the elected MPs had decided that AHTC should be managed by a MA rather than in-house. Apart from this not explaining why Ms How Weng Fan was asked to



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attend the meeting, it seems strange to notify her of the decision to have AHTC managed by a MA if she was not going to be involved in the new MA, since the email would have had the import of informing her that she would soon be unemployed. That could not have been the intention of Mr Low Thia Khiang given his high regard for Ms How Weng Fan. This point was made to Ms Sylvia Lim during cross-examination, but she struggled to offer a satisfactory response. As is evident from the events as they unfolded, the intention all along was to retain the entire HTC management team which included Ms How Weng Fan (see below at [285]). This in part explains why she was asked to attend the meeting with the HDB.

254 The 13 May 2011 Letter that was sent by Ms How Weng Fan to Mr Jeffrey Chua and Ms Png Chiew Hoon on Mr Low Thia Khiang's instructions (see above at [30]) shortly after the 9 May 2011 Email fortifies the conclusions above. The first portion of the letter refers to the instructions by the elected MPs of AHTC "to arrange for the taking over of the management of Aljunied Town Council and Kaki Bukit Precinct". This clearly means that by 13 May 2011, it had been decided that CPG would no longer continue management of AHTC. Mr Low Thia Khiang maintained in cross-examination that the reference to "taking over of the management" did not refer to a new MA taking over management of AHTC from CPG, but rather the WP taking over management of AHTC from the PAP. I again found this not credible. The results of the 2011 GE made it an obvious fact that the WP would take over the management of AHTC from the PAP. CPG surely knew this. There would have been absolutely no need for Ms How Weng Fan to inform CPG of this fact, much less to say that she had been instructed to arrange to take over the management of ATC and Kaki Bukit.



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255 Further, the last portion of the 13 May 2011 Letter asked for the contact information of the ATC staff so that they could be considered for potential re-employment. This must refer to re-employment with the new management of AHTC. If CPG were to continue as the MA of AHTC, it would presumably do so with the existing staff at ATC, and hence there would be no reason to consider them for *re*-employment or provide their contact details to Ms How Weng Fan. In fact, Mr Low Thia Khiang's evidence on this point contradicts his evidence on the 9 May 2011 Email. If the decision was to have a MA manage AHTC, as he testified, and that MA was to be CPG, there would have been no reason for Ms How Weng Fan to write to arrange the takeover of management, including requesting documents and data as part of a handover. This would not have been necessary for CPG to continue in its role. The only credible explanation is that there was a plan shortly after the 2011 GE to replace CPG with a new MA prompting the need for takeover by Ms How Weng Fan.

256 It is important to see the 13 May 2011 Letter in the context of the email that Mr Low Thia Khiang received on the same day from Mr TT Tan relaying the information that CPG would be withdrawing from ATC (see above at [29]). Based on Mr TT Tan's email, Mr Low Thia Khiang must have formed the view that CPG wanted to exit and as such, instructed Ms How Weng Fan to send the 13 May 2011 Letter to commence the takeover of management of AHTC from CPG. It conveyed the decision, at least of Mr Low Thia Khiang, that he intended to replace CPG as the MA of AHTC. The fact that Ms How Weng Fan was organising the takeover suggests that she was very much part of the incoming management team.

257 The conclusions drawn above from the 9 May 2011 Email and the 13 May 2011 Letter are further buttressed by the email sent by Mr Low Thia Khiang on 14 May 2011 in response to a query from the Straits Times. In this



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email, he took the unequivocal stance that "We will not extend the managing agent agreement" (see above at [31]). Seen in context and bearing in mind Mr TT Tan's warning just the day before that CPG was looking to exit, Mr Low Thia Khiang must be stating that he wanted to replace CPG. In cross-examination, he attempted to downplay this email by saying that he merely meant that AHTC would not extend CPG's contract beyond its expiry, but this is once again difficult to accept for two reasons. First, Mr Low Thia Khiang's own evidence is that he did not ask to review the CPG MA contract or to be briefed on AHTC's rights thereunder. It appears from Ms How Weng Fan and Ms Sylvia Lim's evidence that the first time they had sight of the CPG MA contract was sometime in the first two weeks of June, which is consistent with the evidence that the CPG MA contract was only sent to the defendants by Mr Jeffrey Chua on 13 June 2011 (see above at [43]). The 14 May 2011 Email in fact indicated that the elected MPs had not yet seen the agreement, since Mr Low Thia Khiang also said that it would be better to wait till they had sight of the agreement before "saying anything". Thus, if Mr Low Thia Khiang did not review the CPG MA contract, it is difficult to believe that he would have known about the duration of the CPG MA contract, let alone that there was an option to extend it. Second and more importantly, the Straits Times's query clearly concerned whether the elected MPs intended for AHTC to *take on* the existing agreements entered into by ATC, including the CPG MA contract. That this was the import of the reporter's query was also Ms Sylvia Lim's evidence. The 14 May 2011 Email, which was in response to this, must have thus meant that the elected MPs *did not* intend to take on the CPG MA contract.

258 Two critical and related events that took place in the same period (*ie*, between 9 and 14 May 2011) show up the true motivations of the defendants. The emails earlier must be viewed in this context. As stated above at [28] and [32], Mr Danny Loh applied to ACRA for use of the name "FMSS" on 12 May



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2011, and this was followed shortly by the incorporation of FMSS on 15 May 2011. It is relevant that Mr Danny Loh made the application on 12 May 2011, very shortly after the 9 May 2011 Email, and shortly before the 13 May 2011 Letter and the 14 May 2011 Email. It is also relevant that FMSS was incorporated with a paid-up capital of $450,000 the day after the 14 May 2011 Email. By all indications, this was a significant sum to Mr Danny Loh. It is not a coincidence that Mr Danny Loh (as FMSI) was providing services at that time to HTC, which was to merge with ATC to form AHTC shortly thereafter. It was also not a coincidence that Ms How Weng Fan was his wife and the General Manager of HTC. Viewed in the round, it is clear that the incorporation of FMSS was undertaken after serious deliberation and pursuant to a firm plan to have it installed as the new MA. This was therefore not merely a contingency. Appointing FMSS as MA would, amongst other things, ensure that it had a sustainable business, thus justifying the significant capital outlay that Mr Danny Loh had made.

259 Any lingering doubt as to the intention of Mr Low Thia Khiang as revealed by the 9 May 2011 Email, the 13 May 2011 Letter and the 14 May 2011 Email must be put to rest in the light of the further correspondence, summarised at [34]–[36] above that was exchanged prior to the 30 May 2011 meeting with CPG. The email on 19 May 2011, sent by Mr Low Thia Khiang to Ms How Weng Fan just four days after the incorporation of FMSS, stated that Mr Danny Loh would be "GM/Secretary" of AHTC on the understanding that Ms How Weng Fan would be actively involved in the company that would be appointed as MA. This only serves to fortify the conclusion I arrived at in the preceding paragraph. This must have been a reference to FMSS. The subsequent email on 26 May 2011, sent by Mr Low Thia Khiang to Ms How Weng Fan just four days before the 30 May 2011 meeting with CPG, made it clear that the purpose of the meeting was to discuss how CPG would work with



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"the new administration *until handover*" [emphasis added]. The 28 May 2011 email sent by Mr Low Thia Khiang to Ms How Weng Fan stated that AHTC's MA would take over all the existing staff of HTC. On the very next day, Ms Sylvia Lim sent an email to the elected MPs on the next steps, and stated that the new Secretary would be appointed when "our MA" was ready to take over. These must again all be references to FMSS. There was absolutely no mention of the possibility of retaining CPG as the MA or of calling a tender. These steps were taken without any regard for AHTC's rights under the CPG MA contract even though the meeting with CPG was imminent. No heed was paid to the advice of Mr TT Tan to review the contracts and prepare for a tender (see [29] above), because the die had been cast before the meeting with CPG.

260 Thus, by the time of the 30 May 2011 meeting with CPG, both sides came to the table with the understanding that CPG would not continue as MA. The meeting was called solely to discuss the modalities for disengagement as is evident from the CPG presentation slides which indicated 1 August 2011 as the "appointed date for handover" (see above at [37]). Notably, this coincides with the date stated in Ms Sylvia Lim's email on 29 May 2011 where she said that CPG "will report to us until we release them at such date not later than 1 Aug".

261 The picture that emerges from the foregoing discussion is crystal clear. Shortly after the 2011 GE, a decision was made, certainly at least by Mr Low Thia Khiang and Ms Sylvia Lim, that AHTC would not work with CPG as the MA. A plan was formulated to replace CPG with another MA involving Ms How Weng Fan and Mr Danny Loh. Steps were put in motion to effect the plan. The other events that took place around this time support this conclusion, namely, the request for transfer of documents and data for the purposes of upscaling HTC's existing computer software system, the application to ACRA for use of the name "FMSS" on 12 May 2011 and the incorporation of FMSS



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with a substantial paid-up capital on 15 May 2011. The failure to examine the CPG MA contract at any time before the 30 May 2011 meeting with CPG underscores the conclusion.

262 The inevitable conclusion of this analysis is that the decision to remove CPG as MA of AHTC was arrived at shortly after the 2011 GE at the very latest. The defendants, or at least some of them, wanted CPG out. This means that the waiver of tender and the appointment of FMSS was not a contingency at all, but a *fait accompli* by the time of the 30 May 2011 meeting with CPG.

263 Ms Sylvia Lim said on the stand that the elected MPs were fairly certain even before 30 May 2011 that CPG did not wish to continue as MA, due to information that had been in the public domain. She cited, as an example, an interview by Ms Cynthia Phua reported on 10 May 2011 that ATC staff were concerned about losing their jobs, which would have only been the case if CPG was going to exit the scene. Taking the defendants' case at its highest, it might be said that since CPG gave the first signal of their intended departure on 10 May 2011, this triggered the subsequent events which were mere contingencies preparing for such departure. I do not think that this analysis of "who dealt the first blow" is at all persuasive. Even if CPG had made the first move, the fact remains that CPG was bound by contract to continue to provide MA services. In any event, I do not accept the point that any of this had anything to do with CPG's intention. The sequence of events starting with the 9 May 2011 Email and ending with the 14 May 2011 Email which Mr Low Thia Khiang sent following the query from the Straits Times intimates an independent and simple-minded course of action. Clearly these were interlinked events which were not related to the interview by Ms Cynthia Phua. I make four further observations. First, Ms Sylvia Lim's argument does not explain the 9 May 2011 Email which precedes the report on 10 May 2011, which suggests that Ms Cynthia Phua's



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interview was not the trigger. Second, the subsequent correspondence makes no mention of the plan as being a contingency which had been triggered by Ms Cynthia Phua's interview. Instead, the correspondence speaks unequivocally of the intention to replace CPG. Third, if Mr Low Thia Khiang and Ms Sylvia Lim feared that CPG would withdraw their services and had good reason to fear this due to sources such as the news report on 10 May 2011, then the logical thing to do would have been to approach CPG and clarify whether CPG indeed had such an intention, before setting in motion the process that would lead to its replacement. Yet this was not done at any time before the 30 May 2011 meeting. Fourth, if there was indeed a fear of CPG pulling out and FMSS was only a contingency, surely the defendants would have assiduously reviewed the CPG MA contract to determine what courses of action or remedies AHTC had if this fear materialised. I now elaborate on this last observation.

264 The defendants' assertion that the plan to replace CPG with FMSS was a mere contingency is undermined by the fact that they did not appear to have called for the CPG MA contract before the 9 May 2011 Email. At the very least, the contract ought to have been carefully scrutinised after the news report on 10 May 2011 came out and before the 30 May 2011 meeting with CPG. Instead, the evidence suggests that the defendants called for the CPG MA contract on 13 May 2011, and they only obtained and reviewed the contract in the first half of June 2011. There was no effort made to procure the CPG MA contract in the interim. If they were truly concerned that CPG was planning to exit the scene, the natural response would surely have been for Mr Low Thia Khiang or Ms Sylvia Lim to call for the CPG MA contract as soon as possible, so that they could satisfy themselves as to whether CPG was entitled to terminate the contract, and to defer any decision making until after this has been ascertained. Instead, plans were being made to replace CPG without any reference to AHTC's contractual rights under the CPG MA contract.



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265 Indeed, this was the very course of action advised by Mr TT Tan in his email of 13 May 2011 (see above at [29]). I pause to note that although it is not clear who Mr TT Tan is, the elected MPs clearly did not ignore his email. Instead, Mr Low Thia Khiang forwarded the email to the elected MPs as well as Ms How Weng Fan, and both Ms How Weng Fan and Ms Sylvia Lim acknowledged its contents.

266 If the defendants had reviewed the CPG MA contract earlier, they would have realised that CPG had no entitlement to unilaterally terminate the CPG MA contract. That would have assuaged their concerns about having to find a replacement MA as CPG could have been held to the contract. Any concern about "inactive management" could also have been dealt with contractually. There would have been no necessity for any contingency.

267 I find it difficult to understand why the defendants had not taken more active measures to procure and examine the CPG MA contract at an earlier date, given the importance of AHTC's rights thereunder to any decision that it might make concerning its MA. Several of the elected MPs were after all legally trained. No explanation has been offered for the defendants' apparent nonchalance at not obtaining the CPG MA contract until one month after it was first requested from Mr Jeffrey Chua. This leads me to conclude that the defendants were simply unconcerned with AHTC's rights under the CPG MA contract because they wanted FMSS to replace CPG regardless.

268 In my view, the totality of the evidence points to the conclusion that FMSS was not a contingency plan at all. The plan was always to replace CPG, and the defendants made their intentions plain in the 13 May 2011 Letter. CPG understood this clearly as seen from Mr Jeffrey Chua's reply dated 16 May 2011



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(see above at [33]). In fact, any suggestion to the contrary seems contrived in light of the documentary evidence.

*Was the waiver of the tender justified in the circumstances?*

269 If the plan to replace CPG was not merely a contingency, as I have found, it must follow that the picture painted in the defence and in the AEICs that the town councillors became aware of the "need for prompt action to be taken" following the 30 May 2011 meeting was not a truthful one. The clock did not start ticking after and as a result of CPG's announcement of its intention to terminate the CPG MA contract at the meeting on 30 May 2011, as the defendants allege. Rather, the clock started ticking shortly after the announcement of the 2011 GE results at the very least, because the decision had been made to jettison CPG by then. It would follow that steps ought to have been taken to call a tender to appoint a new MA. But there was no intention to call a tender, as the plan to jettison CPG was the flipside of the same plan to appoint FMSS in CPG's place. This would inevitably lead to the conclusion that the waiver of tender was not justified. This means that the narrative presented by the defendants in the Report on MA appointment (see above at [52]), that CPG's departure was the root cause of the defendants' plight, was misleading and not honest. I now turn to consider the issue of waiver of tender in greater detail.

270 Key to the whole foundation of the defendants' case on waiver is the compression of time caused by CPG's announcement at the 30 May 2011 meeting of its decision to exit. This argument assumes two things. First, that CPG's announcement was a surprise to the defendants. The analysis earlier suggests this not to be the case. Second, that CPG's announcement did not leave the defendants with any room for negotiation, to request or require CPG to stay



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on for a sufficient time to enable tender to be called. This of course must mean that CPG was entitled to unilaterally terminate the CPG MA contract. But the defendants did not review the CPG MA contract before mid-June 2011 and therefore did not seek to understand AHTC's rights under that contract. This is despite Mr TT Tan's advice and Ms Sylvia Lim's testimony that the issue of waiver was already on her mind on 9 May 2011.

271 If time was indeed what the defendants needed to call a tender, they could and should have bought themselves exactly that by compelling CPG to continue as MA for such a period as it would have been necessary for a tender to be called. Had they reviewed the CPG MA contract or at least asked Mr Jeffrey Chua when the CPG MA contract was set to expire, they would have realised that AHTC had the right to compel CPG to continue providing MA services until at least July 2013, which was the expiry date for the initial term of the contract. According to the letter of acceptance, the CPG MA contract was for the period 1 August 2010 to 31 July 2013. That AHTC had the right to hold CPG to the CPG MA contract at the very least until 31 July 2013 is also evident from the contract itself. The CPG MA contract specifically states that CPG "shall continue for an Initial Period of three (3) years … and thereafter at the sole discretion of the Town Council to exercise the option to renew for a further period of three (3) years on terms and conditions to be agreed upon."

272 The defendants suggest that the analysis is not as simple as that. They contend that the CPG MA contract does not require CPG to extend its services to HTC upon its merger with ATC. This made it unfeasible to stick with CPG. Quite apart from this not having been a factor at all in the defendants' calibrations based on the documentary evidence discussed earlier (being really offered as an afterthought), I agree with the plaintiffs that AHTC arguably had the right to require CPG to provide MA services to HTC as well. Clause 1.1 of



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the specifications to the CPG MA contract states that the MA's services covers the whole Town under the Town Council, and the Town Council is deemed to include "other properties in any part of Singapore taken over from other town councils or other Government bodies for management by the Town Council on an agency basis. The Town Council reserves the right to direct the Managing Agent to perform the Services to such properties". In my view, at the very least, CPG was arguably not only contractually bound to provide MA services for ATC until July 2013, but also to provide MA services for the expanded AHTC (including HTC) until such date. The totality of the circumstances points to the conclusion that CPG was legally bound to continue performing the CPG MA contract at least until July 2013, if not until July 2016 if the contractual option was exercised. Thus, time for calling a tender could have been procured. The handover date of 1 August 2011 was not an immutable one. In fact, the elected MPs and Ms How Weng Fan had made it clear to CPG that they might need more time for the transition (see above at [39], and para 4.5.3 of first Town Council meeting minutes, quoted at [40] above). So the defendants knew very well that they could push CPG for time if they needed it. Yet, no effort was made to compel CPG to keep to the terms of the CPG MA contract, or at least to keep to it long enough to allow for a tender to be called.

273 I accept that the elected MPs might have felt that it would not be practicable for them, as WP MPs, to work with CPG in the long term because they viewed CPG as "PAP-affiliated". I also accept that the elected MPs might have perceived that "forcibly [retaining] CPG against its own will would not have been sensible because an unwilling MA would not have performed its functions effectively". But these do not offer any answer to why no effort was made to secure time to call a tender for a new MA. After all, on the defendants' own case, they only required two months to call the tender. The defendants certainly did not suggest that CPG was so unreasonable that it would be



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impracticable for them to work with CPG for a few more months – indeed it is undisputed that they did continue to work with CPG for the software parallel runs and for project management services for existing projects. Further, CPG was also set to provide EMSU services until 30 September 2011, which Ms Sylvia Lim agreed was a critical service that ought to be provided by trustworthy and reliable persons. It would have been entirely conceivable for the elected MPs to ask that CPG continue to provide MA services at least until then as well, which would have given them sufficient time to call a tender.

274 In her AEIC, Ms Sylvia Lim sought to explain that it was "pointless" for AHTC to try to hold CPG to the CPG MA contract, because having AHTC "embroiled in a dispute with CPG to compel CPG to perform the MA contract" would risk the residents "facing disruptions to vital services". This is a convenient overstatement of CPG's reactions to any request for time – in truth, it is an afterthought as it could only have been a live consideration at the material time if the CPG MA contract had been reviewed. In any event, it does not meet the argument in the preceding paragraph, which was *not* about the impracticability of holding CPG to the MA contract for the *entirety* of its term. The fact is that CPG was not the party with the leverage. The cards were held by AHTC. Indeed, requiring CPG to stay on for as long as was required to call a tender would ensure the least disruption possible to estate management services, since it would ensure that the transition was not unnecessarily rushed.

275 The defendants also sought to blame AIM. They point to the termination of AHTC's use of TCMS by AIM to support their case that the urgency of the circumstances justified the waiver of tender. They say that they were first made aware of the situation with AIM shortly after the 30 May 2011 meeting with CPG. According to Ms Sylvia Lim, as AIM was entitled to withdraw TCMS by providing one month's notice, this information led the elected MPs to start



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making "urgent preparations for the withdrawal of TCMS by upscaling the Hougang SMC computer software". I do not find this credible for three reasons.

276 First, the events before the 30 May 2011 meeting with CPG show that the plan was already in place to replace CPG. The defendants assessed that this would have resulted in AIM pulling out. Hence, steps were taken to considerably upscale HTC's computer software as is evident from the 13 May 2011 Letter. This was well before the defendants were allegedly made aware of AIM's intention to withdraw TCMS. Ms Sylvia Lim has attempted to downplay the effect of the 13 May 2011 Letter by saying that it does not state that the documents were required "for the purpose of upscaling", even though she accepts that "it is a natural consequence". In my view, this was an attempt at splitting hairs. In any case, Ms Sylvia Lim later agreed that it had been decided on or before 13 May 2011 that the HTC computer vendor would be asked to upscale the existing HTC computer system, and that steps were taken in subsequent weeks to arrange a meeting between the two computer vendors for the purposes of upscaling HTC software. Thus, AIM's withdrawal in no way precipitated the defendants' course of conduct leading to the waiver of the tender. It was anticipated that AIM's withdrawal of TCMS would be triggered by the defendants' intention to replace CPG, as indicated by the 13 May 2011 Letter.

277 Secondly, if the defendants were concerned that AIM would pull out, one would have expected them to call for the contract with AIM rather than take steps as they did to upscale the HTC software in the expectation that AIM might withdraw TCMS. This is common sense. In fact, Ms Sylvia Lim agreed under cross-examination that it would be reasonable and relevant for somebody who is concerned about whether the contract would be terminated to check the contract. Yet this was not done.



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278 Thirdly, it is undisputed that after AIM had given notice of termination on 22 June 2011, it nonetheless agreed on 24 June 2011 to extend AHTC's use of TCMS until 31 August 2011, and upon AHTC's further request until 9 September 2011. In the circumstances, it would appear that the defendants had sufficient time to call for a tender notwithstanding AIM's withdrawal of TCMS, and could possibly have requested AIM to extend the use of TCMS for an even longer time if this was necessary for the calling of a tender. In fact, Ms How Weng Fan's evidence, as revealed by the transcript of a conversation between Ms How Weng Fan and a KPMG representative, was that Ms Sylvia Lim was the one who did not want to extend the AIM contract. In such circumstances, it does not behove the defendants to use AIM as an excuse.

279 In the circumstances, I find that there was no urgency or public interest that warranted the waiver of tender. It was neither CPG's announcement on 30 May 2011 nor AIM's withdrawal of TCMS that resulted in tender being waived. The elected MPs could and should have at the very least sought to hold CPG to the CPG MA contract until such time as necessary for the calling of a tender. The requirement for the calling of a tender in the TCFR is an important one, devised with the intention to keep the substantial financial outlays of Town Councils in check by ensuring transparency. Such an important requirement cannot be waived unless the circumstances genuinely justified it (see r 74(18) TCFR), and all other practicable avenues of recourse have been exhausted. It is clear that this was not done in the present circumstances. In fact, Mr Low Thia Khiang admitted that as far as he was aware, none of the town councillors explored the possibility of asking CPG to stay on for a longer period so that a tender could be called, even though there was nothing stopping them from doing so. The failure of the elected MPs to do so is, to my mind, inexcusable. It begs the question: was there really an intention to call a tender? I do not believe Mr Low Thia Khiang's evidence that they did not do so because the thought never



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crossed his mind. Rule 74(17) clearly states that a tender was required, and Mr Low Thia Khiang was an experienced town councillor (see [282] below). Rather, as mentioned earlier, it is inexorably clear that there was never an intention to call for a tender as the plan all along was to appoint FMSS as MA in place of CPG. I consider the reasons behind this plan and the motivations that underpinned it in the next portion of the judgment.

280 For completeness, it should be noted that Mr Low Thia Khiang alluded to his belief that the MA industry was dominated by a few key players with PAP affiliations who would have no interest in managing AHTC, an opposition ward. To the extent that this has been used to justify the waiver of the tender by suggesting that it would be futile to call for a tender in 2011 as there would have been no bids, it has not been pleaded. It is also irrelevant as a basis for waiver of tender for the purpose of r 74(17) of the TCFR. Further, the defendants' purported intention to call a tender for the second MA contract in 2012 would seem to be premised on the belief that bids would come in when this tender was called. If so, it did not therefore make sense for them to think that no bids would come in at all merely one year earlier. In any case, even if the defendants feared that no bids would materialise in the calling of a tender in 2011, the prudent and correct thing to do would have been to call for a tender to test this hypothesis, rather than to waive tender altogether. FMSS could have put in a bid and might very well have secured it if Mr Low Thia Khiang's hypothesis was correct. In any case, this is nothing but an attempt at *ex post facto* justification as there was never any intention to call a tender in the first place. I now turn to consider this in the next portion of this judgment.



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*What were the actual reasons for the waiver of tender?*

281 The foregoing analysis and the conclusion that the waiver of the tender for the first MA contract was not justified in the circumstances is sufficient basis to conclude that the first to seventh defendants breached their duties to AHTC in failing to call a tender in view of the requirements in the TCFR. The circumstances clearly did not justify a waiver. But the question remains – if there was no real urgency that justified the waiver of the tender, why was a tender not called? The plaintiffs have made various allegations of bad faith and acts of concealment against the defendants, which are relevant to this question and go to the issue of whether the defendants have breached their *fiduciary* duties to AHTC in that they failed to act with single-minded loyalty and in AHTC's best interests. It would therefore be necessary to ascertain the real motivation and reasons behind the waiver of tender, and the plan to replace CPG with FMSS as MA. This analysis determines my conclusion on the precise nature of each of the defendants' breach of duties (which conclusion I set out at [312] below).

282 I should first say that I do not find it credible for Mr Low Thia Khiang to say that the issue of a tender did not cross his mind or did not occur to him. He states in his AEIC that he had informed Ms How Weng Fan shortly after the 2011 GE that the appointment of FMSS as MA (purportedly as a contingency) would be a temporary appointment, as a public tender would need to be called subsequently. This demonstrates that the calling of a tender did cross his mind. It is also clear from the email of 13 May 2011 from Mr TT Tan that the elected MPs' attention was specifically drawn to the need to call a tender for the appointment of a MA. Furthermore, as a town councillor for HTC for many years prior to the 2011 GE, Mr Low Thia Khiang must have been fully aware of r 74 of the TCFR. In any case, Ms Sylvia Lim testified that the issue of a



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tender was on her mind, and in fact she had gone one step further to contemplate the issue of waiver as early as 9 May 2011. It seems probable that she would have shared this with Mr Low Thia Khiang.

283 The true narrative emerges if one were to take a step back and consider Mr Low Thia Khiang's evidence. By Mr Low Thia Khiang's account, he faced tremendous difficulties as a newly-elected WP MP of HTC after the 1991 GE, which included the termination of critical services and tenancy agreements. Given the difficulties faced in running HTC, Mr Low Thia Khiang testified that he anticipated similar problems would arise should the WP win Aljunied GRC in the 2011 GE. In fact, he "fully expected the critical service providers to the town such as the MA, EMSU and computer system service providers of [ATC] to not want to continue with their contracts". It is Mr Low Thia Khiang's own evidence that the plan to set up FMSS was partly motivated by political considerations, in that he believed having a new entrant in the MA industry dominated by "PAP-affiliated" entities would "serve as an attractive alternative option for any other opposition candidate who may be elected in future". This was on his mind at the time shortly after the 2011 GE.

284 The fear that the elected MPs would face these challenges posed by what they considered "PAP-affiliated" entities would have been further compounded by their self-professed "inherent distrust" towards these entities. This distrust is clearly manifested in the email correspondence between the elected MPs regarding the rescheduling of the second Town Council meeting, and specifically the discussion to move the meeting from 21 July to after 1 August so that CPG would be kept out of the loop on the appointment of FMSS (see above at [49]–[50]). Under cross-examination, Mr Low Thia Khiang also revealed that he did not trust Mr Seng Joo How, who was then Deputy Secretary



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of ATC and a representative from CPG, due to previous unpleasant experiences with him back in 1991. This is an issue to which I will return at [294] below.

285 Distrust of "PAP-affiliated" entities aside, another crucial factor was Mr Low Thia Khiang's strong affiliation towards the staff of HTC and everyone he worked with there. This included Ms How Weng Fan and Mr Danny Loh. Mr Low Thia Khiang had, by the time of the 2011 GE, worked closely with the staff of HTC for 20 years, and had, on his own evidence, "invested substantial time and attention in micro-managing [his] staff personally and cultivating inter-personal relationships with them to enhance productivity levels by keeping their morale and spirits high". It is clear that Mr Low Thia Khiang held these staff members, in particular Ms How Weng Fan and Mr Danny Loh, in high regard, as he had "personally witnessed their commitment" and their ability to "work with limited resources under adverse conditions". It is also clear that for Mr Low Thia Khiang, Hougang SMC and the people who had worked with him there had a particular "emotional pull". He felt a tremendous sense of loyalty towards them, which would perhaps explain his desire for the reconstituted Town Council to be called *Hougang-Aljunied* Town Council instead of Aljunied-Hougang Town Council (see the 9 May 2011 Email at [27] above).

286 In these circumstances, following the WP's victory in Aljunied GRC in the 2011 GE, two factors must have weighed on and influenced Mr Low Thia Khiang's thinking. First, his distrust of entities which he perceived to be "PAP-affiliated" and the need to have them removed from the equation. Second, his desire to ensure the continued employment of the HTC staff who had served the WP loyally for the past two decades. Clearly, both these concerns would not be addressed if CPG remained as MA for the reconstituted AHTC. As regards the second concern, as an established business with its own pool of employees, CPG would have had no room for the HTC staff, and it is hard to see how the elected



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MPs could "negotiate" for CPG to take on the HTC staff. Mr Low Thia Khiang conceded that there was a risk that if CPG carried on, the employment of the HTC staff would be terminated. It was also Ms Sylvia Lim's testimony that it was certain that CPG would not have agreed to take over HTC. This must have presented a deeply unpalatable outcome for Mr Low Thia Khiang. The inevitable conclusion is that in order to protect the HTC staff, CPG needed to be removed from the picture, and a new and compliant MA appointed so that the HTC staff could continue to be employed. This would allow the HTC staff to be rewarded for their loyalty over the years, and at the same time ensure that AHTC moving forward was managed by a team that the elected MPs found "dependable" and "trustworthy". The natural option was Ms How Weng Fan and Mr Danny Loh, who were both trusted and compliant.

287 The desire to protect the HTC staff is first revealed in Mr Low Thia Khiang's email to Ms How Weng Fan of 28 May 2011, that "AHTC MA should employ All the existing staff of [HTC], at least for a start" (see above at [36]). It is clear that this email was not a request but a direction, a point which Mr Low Thia Khiang appeared to concede in cross-examination. Mr Low Thia Khiang also agreed that at least one of the reasons why he asked for FMSS to employ the HTC staff was because these were people who had been loyal to him for the last 20 years. Mr Low Thia Khiang even testified that in order to prevent the retrenchment of the HTC staff, he would have made it a condition of the tender for the new MA to employ all the HTC staff. It is not clear how this would have been feasible, since any existing MA would clearly have its own pool of employees or at least its own employment preferences. Mr Low Thia Khiang nonetheless maintained that this would have been an *immutable* condition. He was not prepared to accept the tender of a company that was cheaper and more experienced with more qualified staff, because of the "overriding importance"



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of retaining the HTC staff. This speaks volumes about his commitment to the HTC staff.

288 A clear picture emerges from the foregoing analysis. At the very least shortly after the 2011 GE, the elected MPs, or at least Mr Low Thia Khiang and Ms Sylvia Lim, were clear that they did not want to work with CPG as MA or any other existing MA in the industry. There was a perception that all the existing players in the MA industry including CPG were "PAP-affiliated". Working with them would have meant working with people they did not trust, and also that the HTC staff would be retrenched. Both of these were unpalatable outcomes and had to be avoided at all costs. Thus, a plan was devised to appoint a MA which would address both these concerns. The sub-text to the plan was the emergence of a new player in the MA market who would be a viable alternative option to the "PAP-affiliated" entities, which future opposition wards could work with. The identified candidates to set up this new MA were Ms How Weng Fan and Mr Danny Loh, who were ideal because of their involvement in HTC and because they were seen as trusted and loyal. Thus, the application to register FMSS was made and FMSS was incorporated shortly after the results of the 2011 GE with a substantial paid-up capital. Mr Danny Loh could confidently put up the capital as the MA contract was assured. However, to ensure that FMSS was appointed, CPG had to be removed from the picture and tender waived, as there would otherwise be no guarantee that FMSS would be appointed. This conclusion is supported by the following exchange during the cross-examination of Mr Low Thia Khiang:

> Q. The reason, it would appear from your evidence, that it didn't occur to you to call a tender, is that you were proceeding with FMSS; correct? It comes down to that?
>
> A. That was the best option – best possible option we can have.
>
> Q. The answer is "yes"; right?



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> A. Yes.
>
> Q. Thank you. Therefore, it was not a question of there being no time to do a tender. It was not a question of you being put in a situation where it would be a rush to call a tender. On your own case --
>
> A. No, but it is --
>
> Q. Let me finish, let me finish.
>
> A. Okay.
>
> Q. Your own fall-back plan would be inconsistent with calling a tender; correct?
>
> A. Yes, you can say that, but it has never been in my -- on my mind to call a tender in the first place.

289 Thus, steps had to be taken to ensure that this did happen without the true motivations being uncovered. In particular, CPG had to be kept in the dark. I now turn to consider what these steps were, and how and why CPG was kept in the dark lest they blew the whistle.

*The manner in which the waiver was effected without the involvement of CPG/Mr Jeffrey Chua*

290 I believe it is safe to conclude from the evidence that Mr Low Thia Khiang and Ms Sylvia Lim were certainly fully aware that their conduct was of questionable legality in so far as compliance with the TCA and TCFR was concerned. This awareness is evident from the manner in which the waiver was effected, and in particular the efforts taken to keep CPG and Mr Jeffrey Chua in the dark.

291 It is undisputed that CPG's departure was more or less confirmed by 2 June 2011, and that by this point FMSS had been set up and preparations were underway to manage the transition period. Indeed, by 2 June 2011, FMSS had made a presentation to certain elected MPs on MA and EMSU services and the terms of appointment (see [38] above). If it was felt that the conduct was above



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board and there was a legitimate sense of urgency or public interest that would justify the appointment of FMSS by waiving tender, then the natural thing to do would be to present this plan at the first Town Council meeting on 9 June 2011, so that the decision could be adopted by the council. Yet, it is evident from the minutes of the first Town Council meeting on 9 June 2011 that there was no mention of FMSS or a new MA that was being contemplated in replacement. The only reference to any sort of succession plan was that Ms How Weng Fan and the estate management staff would be in place by 1 August 2011 (see above at [40]). The plaintiffs argue that this reference to Ms How Weng Fan and the estate management staff gave the false impression that the succession plan was for AHTC to go into in-house management as opposed to appointing a new MA. On balance, I find that this was indeed the case. If the intention was to be candid that CPG would be replaced by another MA, then there would have been some mention at the very least of steps to either commence or waive the tender process to appoint a new MA. The absence of this coupled with the assertion that "Ms How Weng Fan and the estate management staff would be in place", conveyed, in my view, the impression that the plan was for AHTC to go into in-house management after the exit of CPG. This impression would have been fortified by the fact that "Ms How Weng Fan and the estate management staff" referred to the staff who had at that point of time been managing HTC in-house.

292 In any case, the omission of any mention of FMSS or any new MA at the first Town Council meeting is conspicuous. It ought to have been the most important topic for discussion since most relevant matters relating to the appointment of FMSS had already been decided at the 2 June presentation, where Mr Danny Loh made a detailed presentation to several elected MPs on the terms of FMSS's appointment (see above at [38]). Yet, instead of discussing the waiver of tender at the first Town Council meeting, the meeting delegated the authority of the Town Council to Ms Sylvia Lim as Chairman under s 32 of



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the TCA to facilitate the handover. This was misleading as the real reason for the delegation was to enable Ms Sylvia Lim to sign the FMSS LOI, which she then did on 8 July 2011. Yet, there was no mention at the first Town Council meeting that Ms Sylvia Lim would be executing the FMSS LOI in due course.

293 In other words, the important decision of whether to appoint FMSS appears to have been deliberately kept away from its natural forum, *ie*, the Town Council meeting, and instead placed in the hands of Ms Sylvia Lim. Ms Sylvia Lim disagreed that the delegation of authority was done to hide anything from anyone, as it was "up to [the council] to decide whether to [delegate its authority]". But it is difficult to see it any other way. There was a palpable economy of truth in the way things were disclosed at this meeting. Since the council was not given any information about FMSS, it cannot be said that the delegation of authority was procured with full disclosure of the facts. Indeed, the mistaken impression was that AHTC was to be managed in-house starting from 1 August 2011. There was, it would seem, a reason behind this counterintuitive and indirect way of appointing FMSS. The elected MPs did not want CPG to know that FMSS was being appointed and that tender was being waived. This is hinted at in an email sent by Ms Sylvia Lim to Ms How Weng Fan (see above at [47]). It was believed that by circumventing the Town Council meeting and delaying the formal appointment of FMSS until after 1 August, this avoided CPG's needless involvement. In short, the decision to delegate authority to Ms Sylvia Lim was to keep CPG and the Town Council in the dark about the plan to appoint FMSS under the FMSS LOI without tender being called. This was a deliberate and calculated move.

294 The discussion on the date for the second Town Council meeting further demonstrates the desire at least on the part of Mr Low Thia Khiang and Ms Sylvia Lim to keep CPG in the dark. It is clear from the correspondence at [49]–



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[50] that Mr Low Thia Khiang believed that CPG should not be involved in the discussion surrounding the waiver of tender and the appointment of FMSS. As such, the second Town Council meeting needed to be postponed till after CPG's departure. The efforts in this regard were explored in detail at trial. Ms Sylvia Lim's evidence was essentially that CPG did not need to be bothered with the details of the waiver or the appointment of FMSS as it did not concern them. I do not find this to be believable for reasons which I shall elaborate on in the following paragraphs. It is also pertinent that the correspondence was not about *when* the second Town Council meeting should be scheduled. Rather, it was all about keeping the appointment of FMSS from the eyes of CPG. Mr Low Thia Khiang conceded as much in cross-examination. He said that he did not want CPG at the second Town Council meeting as his previous experience dealing with Mr Seng Joo How gave him cause for discomfort. It is difficult to see why there would be any discomfort if the appointment and process by which it was done was *bona fide*.

295 In the circumstances, it seems evident that Mr Low Thia Khiang and Ms Sylvia Lim did not want CPG to be apprised of the details surrounding the waiver of the tender or the appointment of FMSS, out of fear that CPG would play the whistle-blower and sound the alarm should the reasons for the waiver be revealed to them. If the waiver of tender was documented as being due to insufficient time caused by CPG's desire to exit early, CPG could very well have offered to stay on for as long as it was needed to enable the calling of the tender. This would have certainly scuppered the plans to appoint FMSS and install a team of trusted WP supporters to replace CPG. If Mr Low Thia Khiang and Ms Sylvia Lim believed the waiver to be entirely above board and objectively justified, there would have been no harm in having an open discussion in front of CPG representatives at the originally scheduled date of 21 July 2011 for the second Town Council meeting. There was a consistent and



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concerted effort to keep the true facts away from CPG's eyes so that the effort to appoint FMSS without tender being called would be successful.

296 Furthermore, Ms Sylvia Lim's purported reason for not wanting to discuss the waiver in front of CPG must be assessed bearing in mind that Mr Jeffrey Chua was, up till 1 August 2011, the Secretary of AHTC. This meant that pursuant to s 20 TCA, he was responsible for the proper administration and management of the functions and affairs of AHTC. In other words, there was a positive obligation for Mr Jeffrey Chua to stay informed of key matters relating to the management of AHTC, which must include the appointment of a new MA. If that were to happen by a waiver of tender, he would surely need to know the reasons that justified the decision. Ms Sylvia Lim agreed under cross-examination that Mr Jeffrey Chua would have needed to know whether a tender would be called and whether there were grounds on which this could be waived in order for him to discharge his duties as Secretary of AHTC. Yet this did not seem to matter one jot to the defendants. In such circumstances, the argument that CPG did not need to know the details of the waiver and the appointment of FMSS is flawed, and makes the conscious decision to exclude CPG and Mr Jeffrey Chua from the discussion inexcusable and egregious.

297 The lack of transparency and candour is also apparent from the 3 August 2011 email from Ms Sylvia Lim and the preparation of the draft Report on MA appointment. Ms Sylvia Lim's email attached the draft Report on MA appointment, and asked Ms How Weng Fan and Mr Danny Loh to examine if it would "pass the auditors' eyes" (see above at [52]). I find this to be quite extraordinary and casts serious doubt on the integrity of Ms Sylvia Lim. It seems to me to be wholly unsatisfactory and inappropriate for Ms Sylvia Lim to ask Ms How Weng Fan and Mr Danny Loh to comment on a report concerning the appointment of FMSS without tender being called. They were after all the



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officers and shareholders of the very MA whose appointment was approved without tender. They should have been the last persons involved in any step in the process by which FMSS was appointed. Their conflict of interest is crystal clear. Ms Sylvia Lim must have been well aware of this. Mr Low Thia Khiang was equally complicit in this endeavour, since it was his suggestion that Mr Danny Loh should prepare the first draft of the Report on MA appointment under the instruction of Ms Sylvia Lim (see above at [51]). My observations on the integrity of Ms Sylvia Lim's conduct would also apply to him. That Ms Sylvia Lim subsequently asked Mr Danny Loh and Ms How Weng Fan to sanitise the report so that it would pass the scrutiny of the auditors and be tabled at the second Town Council meeting, made the acts all the more egregious. In this respect, it must be remembered that the Report on MA appointment was not truthful and painted a wholly inaccurate picture. There was a concerted attempt to cloak the appointment of FMSS with a veneer of propriety. It was an attempt to mislead, and a clinical demonstration of the disregard Ms Sylvia Lim and Mr Low Thia Khiang had for the requirements in the TCFR. The inevitable conclusion is that those involved in the scheme – Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh – were keenly aware that the waiver of tender and appointment of FMSS was not consonant with the TCFR, and papered over the cracks.

298 Lastly, the portrayal of the misleading picture continued with the press release that was made on 5 August 2011 concerning the appointment of FMSS. The press release incorrectly asserted that because of the urgency of the timelines, there was insufficient time to call a tender. That was not the true picture and it camouflaged the real reasons why tender was waived. It is particularly unsatisfactory that this misleading narrative was conveyed to the public, and specifically the very constituents that the elected MPs were elected to serve.



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299 In the round, the conduct of Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh lacked candour.

*Conclusion on the waiver of tender for the first MA contract*

300 It is clear from r 74(18) TCFR that the calling of tender may only be waived on grounds of urgency or manifest necessity in the public interest, in "very special circumstances", and must be "fully justified" (see above at [246]). The language of the provision makes it clear that these are particularly stringent requirements, and that the threshold for justifying such waiver is a high one. Based on the evidence before me, I am convinced that this threshold was not met in the circumstances. Not only was there no real urgency or necessity in the public interest to waive tender, it would appear that the waiver was really motivated by extraneous considerations, including politics and a misguided sense of loyalty. I am not suggesting that Mr Low Thia Khiang and Ms Sylvia Lim were expected to have no regard to any political considerations in making their decisions, which would surely be unrealistic. However, they were expected to not subordinate the interests of AHTC, not to mention their statutory and fiduciary duties, to their own political interests (see the apt words of Lord Bingham in *Porter v Magill* at [218] above). It is clear that the TCFR imposes strict requirements on tender which Mr Low Thia Khiang and Ms Sylvia Lim did not comply with when they waived, not negligently but intentionally and for irrelevant reasons, the tender for the appointment of MA. It cannot be gainsaid that this was not in the best interests of AHTC and was a breach of the TCFR.

301 It is important to now differentiate the position of the various defendants in terms of liability even though I have not done so in detail in the foregoing analysis purely as a matter of convenience. In the final analysis, Mr Low Thia Khiang and Ms Sylvia Lim, who were most involved in the events surrounding



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the appointment of FMSS under the first MA contract, engineered a plan with Mr Danny Loh and Ms How Weng Fan to ensure that FMSS was appointed as MA under the first MA contract without calling tender. They did this by deliberately delaying the calling of tender so that time for doing so would be compressed. This in turn served, as intended, as a convenient excuse and purported justification for the waiver of tender on the ground of exceptional circumstances, thereby facilitating the appointment of FMSS as MA under the first MA contract. Their motivations for doing so had nothing to do with the best interests of AHTC.

302 In the circumstances, I am satisfied that Mr Low Thia Khiang and Ms Sylvia Lim had acted in breach of their fiduciary duties to act in AHTC's best interests.

303 PRPTC's claim (as distinct from AHTC's claim) is broader in that it alleges breaches of fiduciary duties against the *first to seventh defendants* in relation to the waiver of tender issue. Thus, I shall briefly discuss whether any of the remaining defendants have breached their fiduciary duties to AHTC in this regard.

304 The fact that Mr Pritam Singh was sent the key emails of 9 and 14 May 2011 might perhaps suggest that he had some involvement in the events leading to the appointment of FMSS pursuant to the first MA contract, and raises questions as to any role he might have played. However, exactly what his involvement was, if any, has not been made clear or explored fully at trial. It should be noted that the other elected MPs were also sent the 9 May 2011 Email, and (with the exception of Mr Yaw Shin Leong) the 14 May 2011 Email. However, there is no allegation that they were involved in any way. I note that Mr Pritam Singh was present at the 30 May 2011 meeting with CPG, but so



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were the other elected MPs. He was absent from the 2 June 2011 meeting with FMSS where apart from Mr Low Thia Khiang and Ms Sylvia Lim, another elected MP, Mr Muhamad Faisal, was also present. I also note that Mr Pritam Singh together with the other elected MPs received the 6 July 2011 email from Ms Sylvia Lim concerning the signing of the FMSS LOI, although he was not involved in the subsequent signing of the same. That was done by Ms Sylvia Lim and Mr Yaw Shin Leong on 8 July 2011 and 18 July 2011 respectively (see above at [48]). No allegations have been made against the other elected MPs despite their receipt of the relevant emails and their involvement in these events. I am therefore unable to conclude based merely on Mr Pritam Singh's involvement in these email threads and events that he was involved in the plan to procure the appointment of FMSS as MA by a waiver of tender.

305 It is not entirely clear to me the exact role, if any, Mr Pritam Singh might have played. The documents that show his specific involvement in the plan to have FMSS appointed as MA are non-existent or at the very least thin. In my view, four factors are crucial. First, he was not involved in the email chain concerning the drafting of the Report on MA appointment and the need to sanitise it to "pass the auditors' eyes" (see above at [52]) which Mr Yaw Shin Leong was copied on.

306 Second, he was not involved in the email exchange concerning the rescheduling of the second Town Council meeting (see [49] and [50] above).

307 Third, AHTC itself does not make any allegation against Mr Pritam Singh in this regard. This is significant since any complaint against Mr Pritam Singh as far as the first MA contract is concerned cannot be unique to PRPTC.



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308 Fourth, there was no cross-examination of Mr Pritam Singh on his involvement in the appointment of FMSS. If PRPTC's case is that Mr Pritam Singh was involved with Ms Sylvia Lim and Mr Low Thia Khiang in the formulation of the plan to replace CPG with FMSS without tender being called, surely this needed to be explored in cross-examination with Mr Pritam Singh and put to him. The cross-examination of Mr Pritam Singh, however, appeared to focus mostly on his knowledge of the events in early May 2011, and why he had failed to enquire as to the reason for the waiver of tender when he became aware of the engagement of FMSS during the signing of the FMSS LOI on 8 July 2011. In fact, Mr Pritam Singh was not contradicted on his claim that he was unaware of the incorporation of FMSS on 15 May 2011, and that he had only become aware of FMSS's engagement on 6 July 2011 when he received a copy of the FMSS LOI. The lack of any substantive cross-examination on the involvement of Mr Pritam Singh coupled with the thinness of the documentary evidence showing his specific involvement in the plan to appoint FMSS means that there is insufficient basis to conclude that Mr Pritam Singh was sufficiently involved. In this regard, I am mindful that the allegation against Mr Pritam Singh is a serious one and the burden in terms of the cogency of the evidence that must be adduced to prove it is therefore correspondingly higher (*Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14]). It seems to me that the real focus of PRPTC's claim in this regard is against Mr Low Thia Khiang and Ms Sylvia Lim, which is fortified by the fact that much of the cross-examination was trained on the two of them. That AHTC (as opposed to PRPTC) does not bring any claim against Mr Pritam Singh in this respect only buttresses this conclusion. Thus, I do not find that Mr Pritam Singh has breached his *fiduciary* duties to AHTC in relation to the appointment of FMSS as MA in 2011.



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309 There was no evidence before me of the involvement of Mr David Chua and Mr Kenneth Foo in the early discussions to replace CPG. Thus, likewise I am unable to conclude that they were sufficiently involved such that they can be said to have breached their fiduciary duties.

310 However, the third to fifth defendants (*ie*, Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo), were privy to information that ought to have raised red flags in their minds as to the propriety of FMSS's appointment in view of the requirements of the TCFR. The third to fifth defendants were no doubt aware or ought to have been aware that a tender had to be called and that such a tender could only be waived under special circumstances. They should have at the very least inquired or ought to have been put on inquiry as to why CPG had been released from its contractual obligations under the CPG MA contract when there was a considerable period left in the contract, and why therefore there was an urgent need to appoint another MA. Even if they had believed the narrative painted by Ms Sylvia Lim and Mr Low Thia Khiang that the exigencies of the circumstances put AHTC in a difficult position, it would or ought to have been apparent at the very least that there was no effort to hold CPG to the CPG MA contract to enable a tender to be called, and the third to fifth defendants ought to have questioned whether this was proper. I thus find that they were in breach of their equitable duties of skill and care.

311 Ms How Weng Fan and Mr Danny Loh's fiduciary duties to AHTC arise out of their positions as senior management of AHTC. Such fiduciary duties could only be said to have arisen from the date of their appointment to these positions. Thus, Ms How Weng Fan would have owed fiduciary duties to AHTC from 9 June 2011, when she was appointed Deputy Secretary, whereas Mr Danny Loh would have owed fiduciary duties to AHTC from 1 August 2011, when he was appointed Secretary. Since the award of the first MA contract to



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FMSS preceded 1 August 2011, Mr Danny Loh did not owe any fiduciary duties to AHTC then and thus could not be said to be in breach of those duties. Ms How Weng Fan on the other hand already owed fiduciary duties to AHTC prior to the appointment of FMSS as MA of AHTC. Even though Ms How Weng Fan's fiduciary duties only began from 9 June 2011, her involvement in the matters after the 2011 GE and up to that date are nonetheless relevant in assessing whether she has breached her fiduciary duties. It is pertinent to note that Ms How Weng Fan was heavily involved in the early May 2011 communications, in the setting up of FMSS and in the efforts to keep CPG in the dark. Ms How Weng Fan was also involved in the preparation of the FMSS LOI and the drafting of the Report on MA appointment where her input was sought as to how it might be sanitised. Ms How Weng Fan as a shareholder of FMSS from 16 June 2011 also clearly stood to gain from the award of the first MA contract to FMSS. In the circumstances, there was sufficient evidence before me to find that she acted in breach of her fiduciary duties to AHTC.

312 In summary, I find that Ms Sylvia Lim, Mr Low Thia Khiang and Ms How Weng Fan acted in breach of their fiduciary duties to AHTC in the waiver of tender and appointment of FMSS pursuant to the first MA contract. I also find that Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo acted in breach of their equitable duties of skill and care in relation to the same issue.

313 Before turning to address the remaining contracts that the plaintiffs seek to impugn, I briefly consider the other issues pertaining to the appointment of FMSS as MA in 2011.



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*Was there a failure to disclose a conflict of interest in the appointment of FMSS?*

314 An issue that has arisen concerns the alleged failure to make full disclosure of the conflict of interest resulting from Ms How Weng Fan and Mr Danny Loh's concurrent positions as Deputy Secretary/General Manager and Secretary respectively of AHTC, and shareholders and officer holders of FMSS.

315 The first question is whether full disclosure was in fact made. I am of the view that it was not, although I do not believe that this was deliberate. It is quite clear that full disclosure was not made at the second Town Council meeting on 4 August 2011. It is not in dispute that there was no mention of FMSS's shareholding in the Report on MA appointment tabled at the meeting. Ms Sylvia Lim's evidence is that there was no such disclosure at the meeting itself even though she had intended to make available the ACRA searches, because it had slipped her mind. Mr Low Thia Khiang also testified that the disclosure of the shareholding was not done. Mr Kenneth Foo in his AEIC testifies that there was such disclosure, but upon cross-examination he appeared to take the position that he had assumed that Ms How Weng Fan and Mr Danny Loh were shareholders as they had conducted the presentation and were thereafter asked to leave the room for the deliberations. Ms How Weng Fan was the only one who maintained unequivocally that there was actual disclosure at the second Town Council meeting. However, I find her evidence on this point to be not credible for two reasons. First, her position that there was disclosure of the shareholding is contradicted by the evidence of all the other defendants. Secondly, such disclosure is not reflected in the minutes of meeting. The minutes record the disclosure of Mr Danny Loh and Ms How Weng Fan as directors of FMSS. The minutes were prepared by Mr Danny Loh himself. If the necessary disclosure had been made, Mr Danny Loh, being one of the



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conflicted persons, would have meticulously documented it. Thus, I find that there was no disclosure of the conflict of interest issue at the second Town Council meeting.

316 I should make it clear that I do not believe that Mr Low Thia Khiang and Ms Sylvia Lim deliberately suppressed information of the shareholding of Ms How Weng Fan and Mr Danny Loh in FMSS. The contents of the 3 August 2011 correspondence suggest that there was an intention to disclose.

317 Further, I do not consider that the failure to make a full disclosure on FMSS's shareholding would constitute any independent breach on the part of the defendants. It is undisputed that the town councillors were aware that FMSS was helmed by Mr Danny Loh and Ms How Weng Fan. All the town councillors must have been equally aware that FMSS was a newly incorporated entrant in the MA market: after all, until recently, Mr Danny Loh and Ms How Weng Fan had been part of the in-house management team employed directly by HTC, and could not have been involved in any MA business. Thus, even though there was certainly a lack of proper disclosure about FMSS's shareholding at the second Town Council meeting, in reality the town councillors should be taken to have known at least that Mr Danny Loh and Ms How Weng Fan were major shareholders of FMSS. When a principal appoints a fiduciary knowing of the fiduciary's conflicts of interest, the principal cannot complain of the fiduciary's failure to disclose them: see *Mothew* ([163] *supra*) at 19A–B. There is therefore no independent breach of duties arising from the failure to disclose.

*Other matters pertaining to the appointment of FMSS*

318 It is fair to conclude that when Mr Low Thia Khiang asked FMSS to employ the HTC staff (see above at [36] and [287]), it was contemplated that FMSS would be reimbursed by AHTC for the cost. This explains why the slides



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for the presentation on 2 June 2011 and the FMSS LOI provided for reimbursement of the said costs with effect from 15 June 2011 (see [38] and [44] above). Mr Low Thia Khiang maintained under cross-examination that in his mind, FMSS would fund this expense by itself, but this cannot be true. This was not what the FMSS LOI provided for, and FMSS was at that point of time a newly incorporated business with no source of revenue. It is simply not credible that Mr Low Thia Khiang had assumed that FMSS could "raise the capital needed" to take over the HTC staff with no concern for whether this could be done, especially since he was the one giving the direction for the HTC staff to be employed by FMSS. The reasonable inference is that the plan was to have FMSS reimbursed by AHTC for the salary costs of the HTC staff that it was taking over.

319 The next question is whether allowing FMSS to be reimbursed was improper and a breach of fiduciary duties. Mr Low Thia Khiang argues that the cost of HTC staff was a cost that would have been incurred anyway, but I am not convinced that this is correct. As already discussed above at [286], the HTC staff would likely have been retrenched if CPG had been required to continue performing the CPG MA contract for the expanded AHTC. Alternatively, if a tender had been called and a new MA appointed, it seems contrived to suggest that the HTC staff would have been ported over wholesale to the new MA. Presumably, the new MA would have its own pool of employees to run its projects. In this regard, notwithstanding Mr Low Thia Khiang's view (see above at [287]), I do not see how he could have insisted on this as an immutable condition of the award of the tender as it would result in an unjustifiable increase in costs to AHTC. After all, the whole purpose of the tender process under the TCFR is to secure the best possible commercial outcome for the Town Council though a process which is transparent and fair. Further, Ms Sylvia Lim testified that she gave Mr Danny Loh the go-ahead to proceed with FMSS taking over



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the HTC staff with effect from 15 June 2011, and that this conversation took place before 15 June 2011. Since this was a cost subsequently to be borne by AHTC, the TCFR was applicable, and a tender should have been called. Ms Sylvia Lim did not dispute this, and instead asserted that she had waived the tender given the urgency of the circumstances, which I have found not to exist.

320 Another issue pertains to FMSS's adoption of CPG's prevailing rates as the rates that it would charge for its MA services. The defendants have presented this as something which made it all the more reasonable to appoint FMSS in the circumstances, in that there would be no additional cost to AHTC compared to if CPG had continued as MA. However, it should be kept in mind that as of June 2011, FMSS had neither the experience nor the employees to run a town of the size of AHTC. Porting over the rates of CPG, which was an established company experienced in the area of estate management of Town Councils, to a hitherto untested and inexperienced company such as FMSS, without ascertaining FMSS's cost structure, was at the very least questionable. Mr Low Thia Khiang testified that this was the best option at that point of time, and that they had no other choice, but as would have been evident from my analysis pertaining to the waiver of the tender, there was in fact a choice. The better and correct option would have been to call a tender.

321 In the circumstances, I find that these peripheral issues – full disclosure of the conflicts of interest, the imposition of the HTC staff costs on AHTC and FMSS's rates – support the overall analysis that the first MA contract ought not to have been awarded without a tender being called. These matters reinforce my findings that Mr Low Thia Khiang, Ms Sylvia Lim and Ms How Weng Fan have breached their fiduciary duties. They also support the conclusion that Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo have breached their equitable duties of skill and care in relation to the award of the first MA contract.



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***The waiver of tender and appointment of FMSS pursuant to the first EMSU contract in 2011***

322 I turn next to the award of the first EMSU contract to FMSS in 2011, again without a tender being called.

323 Two key facts are pertinent to this analysis. First, on 16 May 2011, Mr Jeffrey Chua had, in response to the 13 May 2011 Letter, emailed Ms How Weng Fan the CPG EMSU contract. He specifically drew attention to the fact that it was set to expire on 30 September 2011 (see above at [33]). This contradicts Ms Sylvia Lim's account that the issue of the expiry of the EMSU contracts was "first mentioned by CPG" at the first Town Council meeting on 9 June 2011. Thus, the town councillors and Ms How Weng Fan were or ought to have been aware that the CPG EMSU contract would expire on 30 September 2011. Second, at the 2 June 2011 presentation by Mr Danny Loh, it was specifically stated that the existing EMSU contracts were expiring in September 2011 and the plan was to ultimately merge the EMSU and the MA contracts into a composite contract (see above at [38]). Presumably, this proposal was with regard to both the CPG and EM Services EMSU contracts as both collectively covered ATC and would expire in September 2011. It was therefore clearly contemplated by at least some of the defendants that the first EMSU contract would be awarded to FMSS, without a tender being called, and that from October 2011, the EMSU contract for AHTC would be folded into the MA contract to form a composite contract with FMSS.

324 Two questions therefore arise. First, why was the plan to merge the EMSU services into the FMSS MA contract not discussed at the first Town Council meeting on 9 June 2011 given that it had been proposed at the 2 June 2011 presentation? Second, why were steps not taken to call for a tender for EMSU services after the email from Mr Jeffrey Chua on 16 May 2011 despite



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the defendants being alerted that the expiry of the existing EMSU contracts was looming? There was certainly enough time to call for a tender. The defendants offer no real answers save for relying on an alleged "verbal agreement" with CPG that it would extend its EMSU contract until March 2012.

325 I believe the two questions lead to the same answer. Raising the issue of the expiry of the existing EMSU contracts at an early stage would have meant that a tender exercise would have been needed for the provision of EMSU services for all of AHTC. Steps would then have to be taken to this end. This would not have been desirable to the defendants from two perspectives. First, it could have resulted in FMSS not being awarded the contract for EMSU services for all of AHTC. Second and more significantly, it would have prompted questions as to why a similar exercise was not being undertaken for the MA services. Collectively, the plan, as manifested in the 2 June 2011 presentation slides, to appoint FMSS as MA initially and thereafter consolidate the contract for EMSU services into a composite contract with FMSS could potentially have been derailed.

326 What then of the allegation of a verbal agreement with CPG? I am inclined to believe that CPG did give a verbal indication that it would be willing to extend its services beyond 30 September 2011, although this might not have carried the quality of an agreement *per se*. There is first the email sent by Ms Sylvia Lim to the elected MPs on 18 September 2011 which refers to CPG's surprising confirmation that it was not willing to extend the EMSU contract until March 2012 "contrary to the verbal agreement" – this would appear to be evidence that, at least from the defendants' point of view, there was indeed a verbal agreement. Further, the letter for extension of EMSU services sent by Ms How Weng Fan to Mr Jeffrey Chua on 26 August 2011 (see above at [58]), and



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specifically the language referring to "confirmation for the extension", does seem to suggest that the defendants believed that there was a verbal agreement.

327 However, even if CPG might have verbally indicated that it was willing to extend the EMSU contract until March 2012, this does not assist the defendants. The question remains why a tender was not called.

328 It is also important to note that the EMSU contract with EM Services for the Kaki Bukit division was also expiring on 30 September 2011. There was no basis for the defendants to believe that EM Services would extend that contract, and this was subsequently confirmed by EM Services' email of 7 September 2011 (see above at [59]). The Kaki Bukit division, in the scheme of things, was a small area of AHTC. As EM Services was unwilling to extend its services for Kaki Bukit beyond 30 September 2011, it would have been appropriate to call a tender to replace EM Services. However, that would have raised questions as to why a tender for EMSU services for all of AHTC was not being called. It would have been more reasonable for EMSU services for the whole of AHTC to be provided by one service provider. This would have rendered any verbal agreement with CPG irrelevant. However, calling a tender for EMSU services for all of AHTC would have posed two significant issues for the defendants. First, a consolidated tender would run the risk of FMSS not securing the contract for the EMSU services, which would in turn jeopardise the plan set out in the 2 June 2011 presentation slides. The second issue was perhaps more significant. There is a direct correlation between the calling of a tender for EMSU services for all of AHTC and the award of the contract for MA services to FMSS under the first MA contract. Calling a tender for EMSU services for all of AHTC would have naturally prompted the question why a similar exercise had not been undertaken for MA services when FMSS was awarded the first MA contract. This could result in the unravelling of the defendants' well laid-out plan to have



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FMSS appointed for both services. At the very least, searching questions would have been asked.

329 On the stand, Ms How Weng Fan attempted to explain away the foregoing. She asserted that after the expiry of the EMSU contract with EM Services, the Kaki Bukit division could have come under the EMSU contract with CPG. As such, there would have been no need to call a tender in 2011 if CPG had agreed to extend its EMSU contract. However, this position is neither pleaded nor found in the AEICs. I am also not sure how this can be correct as I have not been shown any basis upon which CPG could have been compelled to take on the precincts that were under EM Services. There were separate contracts for different areas of AHTC. If it was felt that this was a feasible option, one would have expected a request to have been made to CPG, but there is no evidence of any such request. In any event, it is pertinent that Ms How Weng Fan's evidence is contradicted by Ms Sylvia Lim's email of 16 September 2011 (see above at [62]) which states that it was likely that FMSS would have to take over EMSU services for Kaki Bukit until March 2012. This is consistent with the proposal that was made at the 2 June 2011 presentation.

330 It was thus important for the tender for the EMSU services to be deferred in order to ensure that FMSS was appointed as MA and the provider of EMSU services for all of AHTC. Extending the CPG EMSU contract for a short period of time would in fact enable the defendants to achieve their objective to "ultimately merg[e] the EMSU with the MA contract for seamless provision of services to residents" A short extension of six months would avoid the need for tender to be called for EMSU services for all of AHTC, thereby avoiding problematic questions on the award of the first MA contract as mentioned at [325] above. At the same time, it would permit a consolidated tender exercise for both the MA and EMSU services to be carried out prior to the expiry of the



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first MA contract. At the same time, given that there was no possibility that EM Services would extend their EMSU contract, letting it lapse would allow FMSS to be appointed for the Kaki Bukit division on the grounds of urgency. The pith of the plan for EMSU services as reflected in the slides for the 2 June 2011 presentation would have remained unchanged.

331 Accordingly, CPG's subsequent refusal to extend its EMSU services presented an issue which had to be resolved. Calling a tender for EMSU services for all of AHTC was not tenable for reasons outlined above and given the self-inflicted shortage of time. The problem could only be and was resolved by awarding the first EMSU contract to FMSS without tender on the ground of urgency. Seen in the round, the plan all along was for FMSS to take over EMSU services for AHTC. This would explain why the defendants did not take steps to prepare for the calling of a tender during the months of May, June and July, and only sent a letter requesting for extension on 26 August 2011 *after the award of the first MA contract*. This was just slightly over a month from the expiry date of the existing EMSU contract. It would also explain why the issue was not raised at the first Town Council meeting on 9 June 2011. All of this leads to the conclusion that the waiver of tender for the first EMSU contract was not justified. There was no legitimate urgency or public interest that necessitated a waiver, and any shortness of time was entirely of the defendants' own making. The waiver of tender and award of the EMSU contract to FMSS was only necessitated by the defendants' plan to have FMSS take over the provision of MA and EMSU services for the whole of AHTC.

332 Apart from the unjustifiable waiver of tender for the first EMSU contract, there is also PRPTC's argument concerning r 81(6) of the TCFR. The rule stipulates that there must be a written agreement before works or supply of services began. It is undisputed that the first EMSU contract with FMSS was



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not reduced into writing, and Ms Sylvia Lim agreed that this was a breach of the TCFR. This, however, is an allegation that was not specifically pleaded, and as such I make no findings on this point.

333 PRPTC has gone further to argue that there was a breach of r 76(4)(*b*) TCFR. The rule provides that where there is an intention to waive quotations or tenders as a result of which the MA will be the sole supplier of the services in question, such waiver shall be permissible only if the MA does not participate in the evaluation and recommendation of the waiver. PRPTC argues that in the present case, FMSS recommended itself as the provider of EMSU services and that this amounted to a breach of r 76(4)(*b*). I do not accept that this was the case. Just because FMSS recommended that it be appointed as the provider of EMSU services did not mean that it *participated* in the evaluation and recommendation process. It is certainly natural and reasonable for a desiring vendor to recommend its own services as part of the sales pitch. This does not amount to participation in the process which r 76(4)(*b*) prohibits. In any event, given the analysis above on the award of the first EMSU contract, this issue is immaterial.

334 In these circumstances, given the award of the first EMSU contract is very much linked to the award of the first MA contract to FMSS, I similarly find that Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh breached their fiduciary duties in this regard, whereas Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo breached their equitable duties of skill and care. The reasons for finding that Ms Sylvia Lim, Mr Low Thia Khiang and Ms How Weng Fan have breached their fiduciary duties in relation to the award of the first MA contract apply with equal force here, as it has become clear from the foregoing analysis that it was the plan of these three defendants, and Mr Danny Loh, that FMSS be appointed the sole provider of both MA and



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EMSU services for the entire AHTC, replacing CPG and EM Services in the process. Their awareness that the circumstances did not justify the waiver of a tender, and their conduct in creating a state of affairs that resulted in the award of the first EMSU contract, shows that they did not act with single-minded loyalty towards AHTC and in AHTC's best interests. To be clear, Mr Danny Loh is liable for breach of fiduciary duties in respect of the first EMSU contract even though he is not so liable for the first MA contract because his fiduciary duties arose upon his appointment as Secretary, which occurred after the award of the first MA contract but before the award of the first EMSU contract.

***The appointment of FMSS pursuant to the second MA and EMSU contracts in 2012***

335 It is not disputed that in 2012, a tender was called with regard to the second MA and EMSU contracts and the contracts were awarded to FMSS, the sole bidder for both the tenders. As I understand it, the plaintiffs' complaint in this regard is primarily twofold: first that the defendants did not rectify the failure to fully disclose the conflicts of interest; and secondly that the absence of bids in 2012 was a state of affairs that was deliberately engineered by the defendants when the appointment of FMSS under the first MA contract was made in 2011. This, it is alleged, was a continuing breach of the defendants' duties. This second argument is a point more directly made by PRPTC instead of AHTC, but for ease of convenience I shall refer to both arguments as the plaintiffs' arguments. In brief, I am not with the plaintiffs' analysis on both points. Nonetheless, I find that the award of the second MA and EMSU contracts were consequential on the breaches that resulted from the award of the first MA and EMSU contracts. As such, any loss that might have been incurred from the award of the second MA and EMSU contracts (if proven) would be consequential losses flowing from the defendants' breaches in relation to the



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appointment of FMSS under the first MA and EMSU contracts. This is not the same as saying that such loss is a result of an independent or continuing breach.

336 In so far as the disclosure of Ms How Weng Fan and Mr Danny Loh's shareholding in FMSS is concerned, I do not think that there can be any legitimate complaint that the effect of the failure to make the necessary disclosures in this regard persisted for almost a year following FMSS's appointment. While it is true that the defendants have not put forward any documentary evidence to show that there was express disclosure to rectify the failure to make disclosure at the second Town Council meeting on 4 August 2011, it was never seriously contested that it was common knowledge by the time the second MA and EMSU contracts were awarded in 2012 that Ms How Weng Fan and Mr Danny Loh were officers and shareholders of FMSS. As I have observed at [317] above, the town councillors must have known prior to the award of the first MA contract that Mr Danny Loh and Ms How Weng Fan had some shareholding interest in FMSS. Thus, the conflict of interest resulting from the shareholding of FMSS would have been a non-issue in terms of the award of the salient contracts in 2012. I therefore reject the contention that the award of the second MA and EMSU contracts were *independent* breaches, taken by themselves.

337 I now come to the plaintiffs' second argument, that these awards were *continuing* breaches. I do not think this analysis is correct. The case here is that the defendants had appointed FMSS in 2011 knowing that FMSS would then enjoy the advantage of incumbency in 2012. As the argument goes, the waiver of tender for both the MA and EMSU contracts in 2011 also sent a strong signal to the other players in the market that AHTC was not willing to work with anyone other than FMSS. Potential bidders were thereby discouraged. Thus, on the plaintiffs' case, the appointment of FMSS as the sole bidder in 2012



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represented a continuation of the breach of the defendants' fiduciary duties in awarding the first MA and EMSU contracts to FMSS in 2011. As I have found at [281]–[288] above, the appointment of FMSS and the waiver of tender in relation to the first MA contract was executed with the objective of installing a team of trusted WP supporters, including the retention of existing HTC staff, in place of CPG. It would follow that this was not merely an interim plan, as it would have been of little comfort to the defendants or the former HTC staff to know that after one year, AHTC might once again be managed by "PAP-affiliated" entities who could possibly retrench the HTC staff. The setting up and appointment of FMSS must have been a mid- to long-term plan, especially given Mr Low Thia Khiang's hope that it might in the future provide MA services to other opposition-run Town Councils.

338 In short, the plaintiffs' entire argument on continuing breach is premised on the notion that the defendants' wrongful conduct in appointing FMSS under the first MA and EMSU contracts in 2011 made FMSS's re-appointment under the second MA and EMSU contracts in 2012 an inevitability. I do not disagree that all this might have been in the defendants' contemplation in 2011. However, while the defendants must have hoped and indeed might have assessed that FMSS would remain the MA in the long run, this does not mean that they intended to make sure of this by engaging in a continuing breach of their duties to AHTC. In fact, I have not found any independent wrongdoing on the defendants' part in relation to the second MA and EMSU contracts. The fact that FMSS's re-appointment in 2012 was purely the natural consequence of its 2011 appointment and consequent incumbency, and not the product of some further wrongdoing, means that no continuing breach is discernible in so far as the second MA and EMSU contracts are concerned. Rather, to the extent that the re-appointment of FMSS under the second MA and EMSU contracts resulted in any loss to AHTC, this would be recoverable simply as a



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consequential loss flowing from the breaches in relation to the first MA and EMSU contracts. In other words, the breaches in 2011 were causative of the loss (if any) that resulted in 2012 by reason of the second MA and EMSU contracts.

339 To understand the analysis on assessing consequential loss, it would be useful to think about the possible counterfactual scenarios. In order to be compliant with the requirements of the TCFR and to act in the best interests of AHTC, the defendants ought to and would have taken one of two alternative courses of action *in 2011*. In the first scenario, they would have held CPG to the CPG MA contract until its expiry at the end of July 2013. In the second scenario, they would have called a tender for a new MA in 2011, compelling CPG to stay as MA for as long as it was necessary for this to be done, and awarded a new MA contract to the lowest bidder. In the first scenario, CPG would have continued as MA until end July 2013, at which time the CPG MA contract would either have been extended (as that option existed in the contract – see above at [271]) or a fresh tender would be called. In the second scenario, a new MA contract (whether to FMSS or another entity that had a lower or more effective bid) would have been awarded sometime in the second half of 2011, presumably for a term of three years as was the industry practice. In either scenario, what is clear is that there would not have been a MA contract expiring in 2012 and there would have been no need to call for a tender in 2012 or to award a fresh MA contract to FMSS in 2012. In other words, *but for* the breach in awarding the first MA contract to FMSS in 2011, the issue of appointing FMSS pursuant to the second MA contract would never have arisen. Therefore, the only viable approach to analysing AHTC's loss (if any) due to the second MA contract also requires accepting that it represents the outcome and consequence of the original breach in 2011, and not a breach of its own, "continuing" or otherwise. This is true whether one considers the first or second scenario of what would have occurred in 2011, although it would be for the



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plaintiffs to elect which scenario they wish to adopt for the purposes of assessing any loss suffered.

340 The same analysis can be applied to the issue of the second EMSU contract. If the tender for the first EMSU contract had not been waived in 2011, a fresh tender would have been called and presumably awarded to the lowest or most effective bidder for a period of three years, starting from 1 October 2011. If CPG had been retained as MA until July 2013, then they might also have agreed to continue providing EMSU services for all of AHTC until that time, perhaps as part of the negotiation for AHTC not to exercise its option to extend the CPG MA contract beyond its initial term. In any case, there would have been no need to call a fresh tender for EMSU services in 2012, and there would therefore not be the second EMSU contract in 2012 to speak of.

341 I agree with the plaintiffs that there would have been a smaller chance of bids from other MA entities in 2012. Whereas the playing field would have been more level in 2011, the cards were very much stacked in favour of FMSS come 2012, for the reasons advanced by the plaintiffs. If managing AHTC was an unattractive proposition to "PAP-affiliated" entities in 2011 because AHTC was an opposition ward, that could only have been more so in 2012, due to the defendants' actions in appointing FMSS without a tender being called. That being said, once the appointment of FMSS in 2012 is seen as a consequence flowing from the breach of waiving tender without proper justification in 2011, it becomes unnecessary to consider the issue of incumbency.

342 In view of the above analysis, it is also unnecessary to explore the defendants' assessment of FMSS's bid during the 2012 tender process in detail, or for that matter the audit conducted by RSM Ethos and the review of salaries undertaken by Kelly Services. The defendants have relied on the audit



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conducted by RSM Ethos on the tender process for the second MA contract as well as the email from Kelly Services to show that they had done their due diligence in examining FMSS's bid. Since FMSS's was the only bid, the only potential relevance of these issues is whether AHTC ought to have secured a better price from FMSS. This is irrelevant once the award of the second MA contract is seen as a consequential loss rather than a continuing breach, because the relevant counterfactual for assessing consequential loss does not involve looking at a hypothetical 2012 bid and contract, but rather at one in 2011.

343 The plaintiffs have dwelled on the allegation that Ms Sylvia Lim gave FMSS a heads-up on the price increase in their bid as an incident of breach. She is alleged to have alerted them to the fact that this was of some concern to the town councillors and that they (FMSS) should come prepared with the necessary information, even going to the lengths of doing the preliminary calculations on FMSS's rates in 2011 and 2012 (see above at [69]). I do not accept the plaintiffs' point. I would not go as far as the plaintiffs as to say that there was passing on of insider information or that there was an attempt to stack the cards in FMSS's favour. Given that FMSS was the sole bidder, there was no preferential treatment to speak of when Ms Sylvia Lim sent the email at [69]. It does not seem unreasonable to have alerted FMSS to the issues to be discussed at an upcoming meeting in order for the conversation to be more productive, although I accept that Ms Sylvia Lim ought to have copied the other members of the Tender Committee in the same email, as a matter of good governance. The key question must be whether FMSS was unfairly advantaged by the email of Ms Sylvia Lim. I am not able to say that was the case.

344 Lastly, PRPTC alleges that there was a breach of r 81(6) TCFR as the first EMSU contract was unwritten, and the second MA and EMSU contracts were only reduced into a written agreement some two weeks after the



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commencement of the respective services. In my view, these claims have not been sufficiently pleaded, and as such I make no findings on them.

345 Thus, I find that the award of the second MA and EMSU contracts is *not* a fresh or continuing breach on the part of any of the defendants. I, however, find that they represent consequential losses, if any, flowing from the breaches of duties that occurred in 2011 in relation to the award of the first MA and EMSU contracts. As mentioned above, it will be for the plaintiffs to elect the basis upon which they wish to prove what losses they have suffered as a result at the stage of assessment of damages.

***Improper payments made to FMSS/FMSI***

346 I turn now to the issue of the payments made to FMSS and FMSI pursuant to the first and second MA and EMSU contracts, and the FMSI EMSU contract. While my finding that the first and second MA and EMSU contracts flowed from breaches of fiduciary duties means that the payments made thereunder constituted improper disbursements of AHTC's funds, the plaintiffs also argue that the manner in which these payments were approved and disbursed also suffered from what they called "control failures". This they allege represents yet another set of breaches on the part of those of the defendants who approved the payments. The same point is made with regard to payments under the FMSI EMSU contract which was migrated over from HTC upon its integration with ATC to form AHTC. The plaintiffs have also made various further allegations to impugn the propriety of particular categories of these payments. As such, I shall discuss both the system under which payments were made to FMSS and FMSI (the "control failures" issue), and then the propriety of specified categories of payments.



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*The control failures*

347 It is not in dispute that conflicted persons, *ie*, persons with a shareholding interest in FMSS, were involved in the approval process for payments to FMSS and FMSI. These conflicted persons held direct ownership interests, and key management and operational positions in FMSS and FMSI, and concurrently held key management and operational positions in AHTC. This created a conflict between their obligations to act in the interest of AHTC on the one hand, and their obligations to FMSS and their profit motive arising from their interests in FMSS and FMSI on the other hand. In KPMG's report, this was described as an area of pervasive control failure with serious conflicts of interest, involving an unacceptably high degree of abdication of control to the conflicted persons. This exposed public funds to the risk of improper use. I agree that *in the absence of safeguards*, this created an inherent risk of overpayment or payment for work that was not adequately or satisfactorily completed.

348 The crux of the dispute turns on whether there were such safeguards. On the defendants' case, the standing instruction instituted at the third Town Council meeting on 8 September 2011 for co-signature by the Chairman (Ms Sylvia Lim) and Vice-Chairman (Mr Low Thia Khiang or Mr Pritam Singh) sufficed as such safeguards, as these persons did not have a personal interest in FMSS. When cross-examined as to why the standing instruction was regarded as sufficient, Ms Sylvia Lim testified that this was because it would have been the responsibility of the Chairman and Vice-Chairman to satisfy themselves that the cheques they were being asked to sign were justified. Yet, it is clear that it is not the defendants' case that the Chairman and Vice-Chairman took the effort of satisfying themselves that *each and every* cheque presented to them for signature was justified. Rather, they accept that the only system in place was



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one that included collecting feedback from residents and estate walks to determine that the MA's works have been generally satisfactory (see above at [143]). This is also evident from the following exchange in the cross-examination of Ms Sylvia Lim:

> Q. No. My question is: Where do you say you were, on the ground, personally checking every item before you signed the cheque?
>
> A. No, it was not a bean-counting exercise, Mr Singh.
>
> Q. I didn't say it was.
>
> A. It was an overall assessment of how things were being run at the town, and we satisfied ourselves that things were being managed and --
>
> Q. Ms Lim, my question is: Where, in your affidavit, do you say that you were personally on the ground, verifying the work that was done, before signing the cheque in relation to that work? Where did you say that?
>
> A. It's not a bean-counting exercise, Mr Singh.

349 In my judgment, the fact that there was a system to monitor the MA's general work performance does not mean that there were sufficient safeguards to address the risk posed by conflicted persons certifying payments to FMSS. This was not a system meant to ensure that *each* payment was justified. The plaintiffs' case is not that FMSS's services were wholly or generally unsatisfactory as a result of an abdication of its duties under the MA and EMSU contracts. Rather, it is that there was insufficient oversight over the payment process such that there was an inherent risk of unjustified payments occurring. This, they say, is something that could only have been addressed if there was a system in place to ensure that each cheque presented to the Chairman or Vice-Chairman for their signature was fully verified and justified by independent parties.



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350 The fact that there were control failures stemming from the involvement of the conflicted persons can be illustrated with reference to one such invoice. Mr Yeo Soon Fei, who was at the material time a 20% shareholder of FMSS as well as Operations Manager and Deputy General Manager of AHTC, was brought through the approval process for an invoice in cross-examination. The invoice was for the MA fees in the sum of $454,336.20 for the month of April 2013 issued by FMSS. Mr Yeo Soon Fei signed off with a stamp that said "I, certify that the works has been delivered/completed". Ms How Weng Fan's signature can also be found on the invoice as an authorised signatory of FMSS. Yet, as a shareholder of FMSS, it is clear that Mr Yeo Soon Fei was not in the position to *independently* certify that works had indeed been satisfactorily delivered. In fact, his evidence is that despite what the stamp said, his signature on the invoice did not mean that FMSS had performed its work satisfactorily. Rather, an officer signing on the invoice that "works have been delivered/completed" was merely signifying that "the figures found on the invoice are accurate as against the summary breakdown of the MA fees". In other words, as Mr Yeo Soon Fei accepted in cross-examination, an officer was not actually certifying that the works were received or that the purchases were made. Instead, he was simply tallying up the numbers. After the tallying up was done, the relevant invoice was stamped and signed, and the sum was consolidated in a voucher journal report together with other outstanding payments for signature by the Deputy General Manager or the General Manager, who was another conflicted person. Following this, a cheque for the consolidated amount would be signed. In the case of the invoice before Mr Yeo Soon Fei, the cheque was signed by Mr Danny Loh, who was a conflicted person as well, and Ms Sylvia Lim.

351 I pause to note that Mr Yeo Soon Fei's evidence, that the stamp on the invoice was not actually certifying that works had been completed, has further



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implications. As counsel for AHTC Mr Chan pointed out during cross-examination, this would appear to be a breach of r 61 of the TCFR, which requires that there be a certification that payments are in accordance with the terms of the underlying agreement and that work has been properly done. If the stamp in each instance was merely a certification that the numbers tallied, then r 61(1) would not have been complied with. However, as this was not a pleaded breach, I shall say no more on this matter.

352 What is evident from the above is that there were failures on two levels. First, the involvement of the conflicted persons, in this case Ms How Weng Fan, Mr Yeo Soon Fei and Mr Danny Loh, gave rise to a conflict of interest and thus a control failure that was not rectified by the mere co-signature of the Chairman or the Vice-Chairman. Any verification of works, if at all done, would have been certified by the conflicted persons or property officers under their supervision. Thus, Ms Sylvia Lim's evidence that the cheques presented to her for signature would be accompanied by supporting documents showing certification that the goods and/or services had been satisfactorily received does not assist the defendants, as these were certifications by conflicted persons. On a second level, no proper verification, even by the conflicted persons, was undertaken, as the signature at least in some instances merely followed a tallying exercise. There was a systemic control failure as a result of both these factors.

353 I am cognisant that given the realities of the situation, it would have been impractical for the Chairman or Vice-Chairman to personally verify that all the works had been carried out to AHTC's satisfaction before signing each individual cheque. However, the plaintiffs' allegation is not that this ought to have been done, or to require the defendants to engage in what Ms Sylvia Lim termed a "bean-counting exercise". Rather, the plaintiffs' case is that given the involvement of the conflicted persons, there was a systemic control failure



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which could not have been rectified by the standing instruction. This is keenly demonstrated in the following exchange during the cross-examination of Mr Pritam Singh:



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Q. Thank you. Was this issue ever raised that because of this particular outcome or possibility, if there's a profit [to FMSS], there should be an independent verification somewhere along the process so that there is a break in chain between the FMSS documents and what is then put before the person asked to sign?

A. Mr Singh, I believe we operated on the basis that the chairman, and in my case, if I was asked to sign a cheque, would be that break, that we are not related to the managing agent and ultimately we are the ones who will have to sign off and take responsibility for that payment.

…

Q. But we know that those who signed, in the main, would rely on what has been already verified and stated in the documents; right?

A. Yes.

Q. And so because of what I just described, the interests of the secretary and the deputy secretary and general manager both to the fact and the amounts that are paid to FMSS, was it ever discussed that there should be someone independent appointed to oversee this process so that it is not all done on both sides by the same people, excluding the chairman and the vice-chairman, of course?

A. I do not believe so, but precisely for that reason, because we operated with the chairman or vice-chairman not being related to FMSS as being that insurance, if I can put it that way.

Q. Right. But the insurance really doesn't lie in the signing of the cheques, because that's the end of the process, and it relies on what comes before the chairman and the vice-chairman. The insurance lies at two levels. One is the verification of the work, and the second level is the computation of the amounts in accordance with the underlying contract or right. Yes?

[…]

A. Sir, the verification of the works would include information that is being shared to us or to the person who is eventually signing, also by the fact that they are



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> the MP on the ground, they would get feedback about certain issues, and that also plays a part in the verification process.
>
> Q. I understand. But that's different from the specific instance of a payment that comes before you for which you have to sign; right?
>
> A. Agree.
>
> Q. And I'm talking about that specific instance of that specific payment. Was it ever discussed that there should be a safeguard for those specific instances where the work ought to be verified by someone independent of FMSS and the calculations and the contractual right to those amounts are computed by someone independent of FMSS? Did that occur to any of you?
>
> A. I don't believe the discussion of such a safeguard was pursued after we assured ourselves that the final signatory would be the one who would be responsible for FMSS.

354 In the circumstances, I find that the approval process for payments to FMSS was insufficiently rigorous given the involvement of the conflicted persons. This amounted to control failures for which the first to seventh defendants are responsible. However, there was little evidence as to how the payment control system was set up, and the extent to which each defendant was involved in setting it up. In the circumstances, I can only assess the defendants' responsibility generally as town councillors and senior management in not rigorously ensuring that control failures did not exist, or alternatively for allowing these control failures to persist. The question is whether this amounted to a breach of the fiduciary duties of any of the defendants, or simply a breach of their equitable duties of skill and care.

355 I first discuss Ms How Weng Fan and Mr Danny Loh. It is trite law that one of the core fiduciary duties is the requirement for a fiduciary to remain free of any potential conflicts between his fiduciary duties and his interests (see



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*Snell's Equity* ([166] *supra*) at para 7-018), but that there is no breach of this duty if the principal was already aware of the fiduciary's potential conflict of interest (see [317] above). As I have pointed out at [234]–[235] above, it must have been the understanding of all involved in the appointment of Ms How Weng Fan and Mr Danny Loh under the first MA and EMSU contracts that they would serve two masters, AHTC and FMSS, as senior employees of both. Further, as I have found at [317] above, all the town councillors must be taken to have known at the outset that Ms How Weng Fan and Mr Danny Loh had some shareholding interest in FMSS, even in the absence of any proper disclosure on the part of the defendants. The position is even clearer as regards the FMSI EMSU contract as it was known that Mr Danny Loh was the sole proprietor of FMSI. Thus, the *existence* of the conflict must have been known to AHTC at the time or shortly after the payment process was structured, when Ms How Weng Fan, Mr Danny Loh and various other conflicted persons became involved in the payment process. In any case, as I have observed at [336] above, Ms How Weng Fan and Mr Danny Loh's shareholding in FMSS would have become common knowledge by the time the second MA and EMSU contracts were awarded. I am therefore not convinced that on these particular facts, Ms How Weng Fan and Mr Danny Loh were in breach of their fiduciary duties in relation to the control failures.

356 Having said that, Ms How Weng Fan and Mr Danny Loh ought to have realised the importance of taking steps to manage their conflicts of interest in the payment process. Although it was not said to be deliberate, their failure to do so exposed AHTC to the risk of making improper or excessive payments. During cross-examination, Ms How Weng Fan appeared to concede that it was "in FMSS's interests to have a payment process where everything was checked and verified by FMSS before the cheques were signed", and that she did not advise Ms Sylvia Lim to put in further independent checks apart from the



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standing instruction discussed above. Thus, as far as the control failures are concerned, I find that Ms How Weng Fan and Mr Danny Loh breached their equitable duties of skill and care in not having in place adequate safeguards in the payment process to address the conflicts of interest.

357 I reach similar conclusions against the first to fifth defendants. They, too, ought to have realised and taken steps to manage the conflicts of interest in the payment process. The very fact that the standing instruction was put in place at a Town Council meeting suggests that the first to fifth defendants were cognisant of the issue. Yet, they did not take further steps to adequately address it. I therefore find that the control failures represented a breach of the equitable duties of skill and care of the first to fifth defendants.

358 I pause to observe that it is not the plaintiffs' case that the defendants deliberately constructed a system with these control failures and then allowed them to persist so that FMSS would be able to receive payments which were unjustified. This is critical to the analysis above. The absence of a deliberate intent changes the balance of the analysis from breach of fiduciary duties to breach of the equitable duties of skill and care.

359 My findings on liability should not be taken to mean that the control failures in fact resulted in loss to AHTC constituting the entirety of the payments made to FMSS under the first and second MA and EMSU contracts. Given my finding that the first to seventh defendants have breached their equitable duties of skill and care, the burden is on the plaintiffs to prove that loss was indeed suffered, in the same way one would for breach of a duty of skill and care in tort (see [243] above).



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360 The foregoing analysis applies with equal force to payments made to FMSI. I note, however, that the FMSI EMSU contract was entered into between the former HTC and Mr Danny Loh trading as FMSI in October 2007, and that this contract was migrated to AHTC following the amalgamation of HTC and ATC on 27 May 2011. As such, the entering into of the FMSI EMSU contract cannot be impugned as it was not a decision made by the defendants. However, the payments made by AHTC thereunder, to the extent that they were made with the involvement of the conflicted persons at the relevant period of time, suffered from the same control failures as canvassed above. For the reasons outlined above, I disagree with the defendants that just because the payments were in accordance with stipulated rates under a contract that was entered into by the former HTC and migrated to AHTC, they cannot be impugned. That is not the issue. The plaintiffs' case is that there was no independent verification that payments that were being made were for work that was in fact done or satisfactorily done. Further, I note that according to KPMG's evidence, which is undisputed, there was no standing instruction for co-signature by the Chairman or Vice-Chairman on cheques for payments to FMSI (as opposed to FMSS). This would clearly have exacerbated the control failures.

361 Thus, for the foregoing reasons, I find that the first to seventh defendants were in breach of their equitable duties of skill and care to AHTC in permitting the control failures to exist in the payment process for payments to FMSS and FMSI.

*The invoice for $106,559 dated 30 June 2011 and the invoice for $166,591 dated 31 July 2011*

362 On the plaintiffs' case, invoice FMSS/0601 dated 30 June 2011 for $106,559 has two implications. First, the plaintiffs argue that the fact that this invoice bore the signature of Ms How Weng Fan against the initials "GM" when



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she was not in fact the General Manager of AHTC at the date of the invoice, shows that there was a deliberate attempt by the defendants to conceal their plan to replace CPG with FMSS from CPG. The General Manager was Mr Jeffrey Chua, he (and therefore CPG) would have been aware of the plan if he had signed the invoice. Ms Sylvia Lim and Ms How Weng Fan's response is that there was no sinister motive. They assert that an old stamp had been incorrectly used, and that Ms How Weng Fan had signed next to the initials "GM" because she was the General Manager of *HTC* at the material time. I am inclined to give the defendants the benefit of the doubt in this regard even though Ms How Weng Fan was not the General Manager of AHTC at the relevant time, and there was equally no General Manager of HTC to speak of given the merger of HTC with ATC. It is not clear on the face of the invoice that there was a deliberate use of a stamp in order to deceive CPG. In any case, any finding on the reason for the use of this stamp does not affect the analysis and conclusion on the waiver of tender issue above.

363 Secondly, and more importantly, the plaintiffs argue that invoice FMSS/0601 represented a payment to FMSS which ought not have been made. The argument is that the invoice incorrectly included a sum of $92,000 for MA services provided in the month of June 2011 when FMSS only became MA of AHTC, at the earliest, with effect from 15 July 2011, as stated in the FMSS LOI of 15 June 2011. Thus, there was no basis for FMSS to issue the invoice on 30 June 2011.

364 It was clarified at trial that the plaintiffs' complaint, in so far as it reflects KPMG's views on the matter, is a rather narrow one. The plaintiffs' complaint is not that FMSS was not entitled to be paid the sum of $92,000 for services rendered. It was rather that the invoice for this sum was issued in the absence of any underlying contract that was in force, and there was no independent



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verification that the services had been provided. This can be seen from the following cross-examination of Mr Owen Hawkes:

> Q. Now, as far as the provision of services to – town council services to Hougang Division for the month of June, for the whole of the month of June, you are not suggesting that these services were not provided to Hougang Division during June 2011, are you, Mr Hawkes?
>
> A. The suggestion is -- no, the suggestion is that […] there is not a contract provided on which basis the payment is made, and that it is supported by complaints logs which indicate that some work was delivered but do not provide assurance that it was satisfactorily delivered or it was delivered in terms of a contract.
>
> Q. So you are not suggesting that the town council, I am not just talking about EMSU, I am talking about town council works, were not -- the services that a town council arranges for its residents, you are not suggesting that those services were not provided to Hougang Division of AHTC in the month of June 2011, are you?
>
> A. No, it is billed for, both in terms of as we can see managing agent fees which as you can see we have disputed on a different ground and EMSU services which again as you can see we have disputed on a different ground. The question is whether there was – whether the provision was in accordance with the terms of a contract which wasn't available. So you are right, we are not disputing that services were provided.

365 The issue of independent verification is considered below at [385]. As regards the contractual basis for the invoice, the defendants argue that this was the FMSS LOI. The FMSS LOI provided for two different commencement dates of FMSS's responsibilities as MA – that as MA for HTC on 15 June 2011, and MA for AHTC on 15 July 2011. In my view, the defendants are right to say that the FMSS LOI provided that FMSS's responsibilities as MA of HTC would commence on 15 June 2011. Even though the LOI states that FMSS shall take over the *staff* of HTC as opposed to the *precincts* that were under HTC (see above at [44]), it is clear that this could only be because FMSS would become



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MA for those precincts with effect from 15 June 2011. There would otherwise be no reason for FMSS to take over the staff of HTC from that date. Further, this is supported by the FMSS presentation slides of 2 June 2011, which state "FM Solutions to takeover [HTC] on 15 June 2011". The fact that approval was formally granted by the Town Council at its second meeting only on 4 August 2011 to appoint FMSS does not change the analysis that there was a contract effective from 15 June 2011 with regard to MA services for the precincts that were previously under HTC.

366 In the circumstances, I disagree with the plaintiffs that there was no contractual basis for the invoice FMSS/0601 to have been issued on 30 June 2011, and find that FMSS was MA of the HTC component of AHTC from 15 June 2011.

367 I should add that invoice FMSS/0601 also covers partly the reimbursement of salary for the staff of HTC who were ported over to the newly constituted AHTC. I had earlier concluded (at [318]) that allowing this reimbursement was improper albeit not a separate breach of fiduciary duty on the part of the defendants. To be clear, the conclusion that there was a contractual basis to make payment of this invoice does not affect that conclusion.

368 PRPTC's claim in relation to invoice FMSS/0701 dated 31 July 2011 was added by way of amendment to the statement of claim. Its complaint is similarly that FMSS had no contractual entitlement to issue the invoice as it had not been appointed as AHTC's MA at that point of time, and also that FMSS has no entitlement to issue an invoice for services rendered before it became MA. Given my findings that FMSS became MA for HTC and later AHTC with



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effect from 15 June 2011 and 15 July 2011 respectively, this claim similarly falls away.

*The payment of project management fees*

369 As noted earlier, this head of claim by AHTC relates to two sets of payments to FMSS identified by KPMG as being improper. The first comprises payments to FMSS amounting to $608,911 which are purportedly for project management fees but which AHTC alleges are in fact for MA services. The second comprises payments to FMSS amounting to $611,786 which are purportedly for project management services but which AHTC asserts are in fact in respect of a combination of MA services and project management services.

370 I first note that it is not immediately apparent whether this head of claim has been sufficiently pleaded by AHTC. As far as improper payments to FMSS were concerned, AHTC's pleaded case appears primarily to be that there was a flawed system of making payments arising from the appointment of FMSS in circumstances involving conflicts of interest, which impugned all payments made pursuant to the various contracts between FMSS and AHTC. There was no particularisation of the claim in relation to project management fees, and certainly no reference to the case that was eventually run – that the project management fees were wrongly paid because the fees were not for project management services. That being said, I do not consider that any deficiency in AHTC's pleadings is fatal to its case, as the allegation of improper payment of project management fees was raised in the KPMG report and also addressed by both parties during the course of the trial. As such, there can be no complaint that the defendants were in any way taken by surprise and suffered prejudice as a result.



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371 AHTC's claim in this regard does, however, suffer from significant defects. Most notably, it is clear that its case as pursued during trial and in its closing submissions is that the sums of $608,911 and $611,786 for purported project management fees should not have been paid out because the classification of these services as project management services was *in fact wrong.* This is made clear from the following clarification provided by Mr Owen Hawkes in response to my questions:

> Court: Sorry, before you go there Mr Rajah, can I just understand from Mr Hawkes, what is your criticism in this case? Is it a case of wrong classification? Is it a case of not exercising discretion in the right way, or not exercising discretion at all?
>
> A. So our criticism in this case, actually if you look at the report, is really quite limited. All it says is that these are amounts that were paid to FMSS for project management where, after review, we feel that they should not have been paid for as project management but should have been paid for or should have been covered under the basic fee. We don't specifically go on to allege that it happened because of one failing or another; just that it is an improper payment.
>
> Court: So you rest principally on the classification that you were advised exists?
>
> A. That is correct, yes.

372 Thus, in order to succeed in its claim, AHTC would need to show that the services were in fact wrongly classified – in other words that these were *in fact* (or included) *MA services* and not *project management services*. In my view, it has not discharged its burden in this regard.

373 Under cl 2.2 to Part 5 of the first and second MA contracts, FMSS is mandated to provide MA services which are essential and mandatory under the MA contract. These services are stipulated to include maintenance management services, accounting and financial services, administrative and secretarial



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services, publicity and community development services and so on. Under the heading of maintenance management services, the MA contracts specify that these services shall include but are not limited to the following:

> (e) to evaluate and advise on the selection of suitable contractors, specialist and suppliers for *routine* maintenance works and services including licensed electrical workers or specialists and award such tenders on behalf of the Town Council subject to the written consent of the Town Council. In such advice and evaluation, the Managing Agent must declare to the Town Council his interest, if any, in any of the Tenderer's companies; [emphasis added]

374 This ought to be contrasted with the provision of project management services under the MA contracts. Clause 2.3 of Part 5 of the MA contracts covers this:

> (a) From time to time, the Town Council may issue written notice to the Managing Agent to provide Project Management Services for various project works such as but not limited to the following at a project management fee as tendered by the Managing Agent:-
>
> > (i) Neighbourhood Renewal Programme (NRP);
> >
> > (ii) Additions & Alterations;
> >
> > (iii) Improvement Works;
> >
> > (iv) Cyclical Repairs and Redecorations;
> >
> > (v) Other Cyclical Works such as reroofing, rewiring works, replacement of booster pumps, water pumps, water tanks, water pipes, hoisting ropes/sheaves of lifts, etc;
> >
> > (vi) Overhauling and Upgrading of Lifts;
> >
> > (vii) Batteries Replacement for Emergency Battery Operated Power Supply and Automated Rescue Devices;
> >
> > (viii) Replacement of step rollers and chain rollers, step chains, handrails, and handrail rollers for escalators;
> >
> > (ix) Replacement of individual refuse chute flushing system's control panels and centralized refuse chute system's refuse handling equipment.



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375 Clauses 2.3(b) and 2.3(c) of Part 5 make clear that the projects may be carried out by new contractors employed after a tender process, or by existing term contractors, and that the MA's role here is to provide a separate team of professional and technical staff with sufficient qualifications to carry out the services listed in Annex 5E to the contract. For instance, where cyclical works and improvement works are concerned, the scope of project management services to be provided by the MA would include carrying out feasibility studies, making recommendations for rectification works, drafting technical requirements, carrying out testing and commissioning of mechanical and electrical works and so on. The crucial distinction is whether the works are "routine" or "cyclical" in nature, the latter attracting project management fees. This distinction can be a fine one and difficult to discern, with there being no clear delineation between what would fall under MA services (covering routine work) as opposed to project management services (covering cyclical work). For example, maintenance works could fall into either category, depending on whether they were routine or cyclical in nature. A careful consideration of the nature and type of the specific work would be needed before a view can be taken as to the proper classification. This is a fact-sensitive analysis.

376 According to the KPMG report which AHTC relies on in support of its claim, an amount of $608,911 was paid for MA services wrongly classified as project management services. They relate to the following six projects:

(a) term contract for repair work to external wall to prevent rainwater seepage in Hougang estate;

(b) term contract for repair work to external wall to prevent rainwater seepage for AHPETC;

(c) proposed reroofing works at various HDB flats for AHPETC;



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(d) proposed repair and redecoration at various HDB flats for AHPETC;

(e) proposed repainting and redecoration works term contract for AHPETC;

(f) repairs and redecoration to 33 blocks.

377 The sum of $611,786 that was paid to FMSS as project management fees for what was allegedly a combination of project management and MA services related to the following four projects:

(a) repair and redecoration to HDB blocks for ATC;

(b) repair and redecoration to HDB blocks for Punggol division;

(c) repairs, redecoration and improvement works to 80 blocks of flats/shops;

(d) repairs, redecoration and improvement works to 80 blocks of flats/shops.

378 The defendants take the position that the above contracts fall within the "cyclical repair and redecoration" portion of project management services per cl 2.3(a)(iv) of the MA contract. AHTC on the other hand takes the position that these were for MA services whether wholly or partly. It is clear from Mr Owen Hawkes' testimony that the basis of this position was *legal advice* which was rendered based on a review of the MA contract. Despite the reliance on such advice, it was not produced in evidence so that it could be scrutinised by the defendants and the court. In any event, I am not sure that production of the legal advice would have assisted AHTC as the conclusion is very much fact-sensitive. In my judgment, this is not a case where the contract is so unequivocal that a



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mere contractual review is able to lead to the conclusion that the services were wrongly classified as project management rather than as MA services. As stated above, cl 2.3(b) states that works under project management services can be carried out by new contractors or existing term contractors. AHTC's position that only *cyclical* maintenance works as opposed to *routine* maintenance works would fall under project management services appears to be intuitively logical on the face of cll 2.2 and 2.3. But I am of the view that AHTC needs to do more. AHTC has to show that in each instance, the classification was factually wrong. It is simply insufficient to rely on purported legal advice, which was not produced in any event, to discharge the burden of proof.

379 The point is illustrated by taking one example. Maintenance works such as repairs, redecorations and reroofing come under one of the term contracts which the MA is tasked to "manage and supervise" under Annex 5C to the MA contract, which would suggest that it falls within MA services. However, repairs, redecorations and reroofing are also cyclical works which entitle FMSS to levy project management fees. It is therefore not apparent from the contract how such works should properly be classified. In order to show the services were in fact wrongly classified, a more comprehensive and holistic analysis would be required, taking into account various factors such as the complexity of the services rendered, the scale of the project undertaken, whether the source of funding for the project was from the sinking fund, as well as the extent and nature of the supervisory function that FMSS provided. In fact, where the allegation is that the services provided by FMSS were a *mix* of project management and MA services, as AHTC alleges in relation to some of the invoices, an even more fact-intensive analysis would be needed to show that the services were predominantly for MA services. Detailed evidence is therefore required to provide the factual basis for the correct classification. AHTC, however, did not adduce such evidence.



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380 Further, it is not disputed that out of the four contracts under which project managements fees were paid for services which AHTC alleges to be a combination of project management and MA services, two were entered into by ATC prior to the 2011 GE and were subsequently taken over by AHTC after the 2011 GE. ATC had treated these two contracts as contracts for which project management services were required, and had paid CPG project management fees. The defendants were merely adopting the same classification that has been made by ATC and CPG. While I agree with Mr Owen Hawkes that past practice does not necessarily mean that the classification adopted by ATC or CPG was a correct one, this appears to me to at least further tip the scale in the defendants' favour, as there is also no evidence that allows me to conclude that CPG misclassified these contracts.

381 In the circumstances, I find that AHTC has not discharged its burden of proof in showing that the payment of project management fees was unjustified.

*Miscellaneous improper payments to FMSS*

382 Relying on the KPMG report, AHTC identifies various other instances of payments to FMSS made as a result of control failures stemming from the participation of conflicted persons in the payment process. As I mentioned at [110] above, these did not form separate pleaded claims but are presumably subsumed under the broader claim for improper payments to FMSS. In the absence of any particularisation, I shall proceed on the basis that the claim is against the first to seventh defendants generally, as opposed to any one or group of them, since the claim for improper payments to FMSS is also against the first to seventh defendants. These miscellaneous payments relate to:

(a) overpayment to FMSS in respect of overtime claims and CPF contributions – $8,990;



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(b) overpayment to FMSS for electrical parts – $3,720;

(c) payment to FMSS for electrical parts – $6,130;

(d) payments to FMSS and FMSI that were unsupported by certification of services received or contracts – $194,759;

(e) payments to FMSS without the requisite co-signature of Chairman or Vice Chairman – $80,990;

(f) unclaimed liquidated damages under the first EMSU contract – $3,000.

383 During the trial, the first to fifth defendants confirmed that they are not disputing KPMG's report in relation to the sums of $3,720 and $3,000 (at [382(b)] and [382(f)] above), and that these are the subject of claims that they have made or intend to make against FMSS in separate arbitration proceedings.

384 The first to fifth defendants further confirmed during trial that they do not dispute that payments to FMSS for electrical fittings amounting to $6,130 were made ([382(c)] above) without obtaining the requisite approval of the rates before using such fittings. However, they take the position that the amounts charged by FMSS for the electrical fittings were reasonable as the payments were for the purchase of low-value items such as fluorescent light tubes which cost a few dollars each, which Mr Owen Hawkes did not dispute in cross-examination. I take this to mean that there is no dispute that there has been a technical breach, but the defendants contend that no loss has been suffered by AHTC, which is corroborated by the fact that the KPMG report states that the amount that ought to be recovered for the payment of $6,130 was "not determinable". This is therefore solely a question of loss, which is to be proven at the next stage of the trial.



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385 The payments to FMSS or FMSI which were unsupported by certification of services received or contracts amount to $194,759 ([382(d)] above) and relate to four invoices issued by FMSS/FMSI for MA and EMSU services for the period 28 May 2011 to 28 July 2011. This includes the invoice FMSS/0601 dated 30 June 2011 which was discussed at [362]–[366] above. The remaining three invoices were for payments to FMSI for EMSU services for HTC at the fixed monthly fee of $29,400 on 28 May, 28 June, and 28 July 2011. According to KPMG, these payments represented breaches of r 61(1) of the TCFR which requires certification that payments are in accordance with the terms of the agreement and that work has been properly done. Again, the first to fifth defendants do not appear to dispute that there has been a technical breach and the dispute was on whether the lack of certification meant that the services had not been satisfactorily rendered. This is likewise an issue of loss.

386 The same can be said for the sum of $80,990 ([382(e)] above), which is for payments to FMSS between 14 July 2015 and 21 October 2015 on five invoices which were not co-signed by the Chairman or Vice-Chairman. The first to fifth defendants do not dispute that there was in fact no co-signature. They, however, argue that since the payments were made when FMSS was no longer MA and AHTC was under direct management, the rationale for the standing instruction which required the co-signature of the Chairman or Vice-Chairman had ceased to exist. Mr Owen Hawkes on the other hand took the position that the standing instruction continued to apply until rescinded. The fact that FMSS had ceased to be the MA at the relevant time was irrelevant. I accept Mr Owen Hawkes' position. While the standing instruction was introduced because of FMSS's involvement in the payment approval process, it was meant to be complied with until it was revoked, regardless of FMSS's continued involvement or otherwise. The question is again one of loss.



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387 The main point of disagreement between the parties pertains to the overpayment to FMSS for overtime claims and CPF contributions ([382(a)] above). These were for general overtime claims by FMSS employees in the sum of $7,322, as well as overtime claims for inspections conducted during the Chinese New Year public holidays in the sum of $1,668. AHTC's position, per the KPMG report, is that as the MA contract between AHTC and FMSS required the latter to provide "overtime and all direct and indirect costs as required by the performance of the Services", AHTC should not have been separately charged overtime for these services. The first to fifth defendants on the other hand contend that the general overtime claim of $7,322 was for FMSS finance staff who had put in many extra office hours to attend to the demands of the AGO audit from March 2014 to January 2015, which was different from the usual audits envisaged under the specifications of the second MA contract and thus outside the scope of the contract.

388 The scope of the MA contract according to cl 1.1 of Part 5 is as follows:

> The Contract covers the Provision of Managing Agent Services for Town Council (the "Services")
>
> The Managing Agent shall provide all labour, Managing Agent's Resources, staff transportation charges, *overtime and all direct and indirect costs as required for the performance of the Services.*
>
> [emphasis added]

The scope of services includes "basic services" which in turn includes "accounting and financial services", which is stipulated to "include but not be limited to the following":

> (a) to charge and collect on behalf of the Town Council from home owners and tenants such maintenance and service and other charges as payable and falling due from time to time to the Town Council and to issue receipts for all sums received;
>
> (b) to take all necessary steps to recover any such sums of money which comprise preparation of demand letters,



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> preparation of documents for claims before the Small Claims Tribunal including attendance at such Tribunal to present the case on behalf of the Town Council;
>
> (c) where authorized by the Town Council, to appoint solicitors at the cost of the Town Council to commence or institute legal proceedings for the recovery of the sums due.
>
> (d) to ensure that all charges, expenses, disbursements and such other outgoings whatsoever from time to time and duly approved by the Town Council in writing for or on account of the said Town or any part thereof are duly paid and discharged out of the monies so collected in Clause 2.2.2 (a) above;
>
> (e) to keep records and accounts in respect of the management of the Town. In keeping such accounts, the Managing Agent shall at all times conform with the requirements of the [TCA] and all statutes and rules and regulations (statutory or otherwise), as amended from time to time, affecting the same;
>
> (f) to prepare annual budget and supplementary budgets in accordance with statutory requirements;
>
> (g) to prepare and deliver monthly management reports and accounts to the Town Council at every monthly council meeting;
>
> (h) to prepare annual accounts in accordance with statutory requirements;
>
> (i) *to liaise with Auditor-General or such other auditors as may be appointed annually for the audit for the annual accounts; and*
>
> (j) to maintain and manage the funds of the Town Council.
>
> [emphasis added]

389 In my view, there is force in the defendants' argument that the AGO audit from March 2014 to January 2015 was a special audit that fell outside the scope of the *annual* audit contemplated in the provision quoted above. Thus, in relation to the sum of $7,322 for overtime claims and CPF contributions for FMSS finance staff who worked overtime for the special AGO audit, I am inclined to agree with the defendants that there was no breach, in the absence of evidence from AHTC as to the nature of the work carried out by the staff.

390 Similarly, I am inclined to give the defendants the benefit of the doubt in relation to the inspections conducted during the Chinese New Year public



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holidays. Whereas it would accord with common sense that regular work carried out after working hours, on weekends and on public holidays would constitute "overtime" work, it is not immediately apparent that this would extend to ad hoc work that is of a higher intensity or different nature. It was the unchallenged evidence of Ms Sylvia Lim that these inspections were specifically requested due to the high volume of bulky items disposed of by residents and commercial tenants during the festive period. Thus, it does appear to be reasonable for AHTC to be billed separately for the inspection done during the festive period in order to cope with the unusually high demand. In the circumstances, I find that this payment was also not in breach of the first to seventh defendants' duties to AHTC.

*Inconsistencies between the first to fifth defendants' position and AHTC's position in* AHPETC (CA)

391 PRPTC submits that the first to fifth defendants' position that the payments considered in the section above (from [346] to [390] above) were proper is inconsistent with the concessions AHTC made before the Court of Appeal at the hearing of *AHPETC (CA)*. However, PRPTC does not explain what consequence this inconsistency ought to have.

392 In *AHPETC (CA)*, AHTC had accepted that it had "breached the TCA and the TCFR in the ways specified in the Auditor-General's Report" (at [16(a)]). On the basis of this concession, the Court of Appeal held (at [99(b)]):

> […] AHPETC was found to have inadequate oversight of related party transactions with […] FMSS […] . AHPETC did not fully disclose related party transactions in its financial statements and *could not produce documentary evidence* to show that the [t]own [c]ouncillors had considered the full extent of the related party interests, the conflict of interests involved and the safeguards needed before AHPETC entered into the contracts with FMSS. There were lapses in the procurement of services from FMSS, and the *key officers of AHPETC also acted in clear*



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> *conflict of interests when they approved payment to FMSS* […] . [emphasis added]

To put it shortly, the Court of Appeal made findings in relation to two categories in this passage: first, concerning AHTC's lack of documentary evidence for matters such as whether the town councillors had considered Ms How Weng Fan and Mr Danny Loh's conflicts of interest; and secondly, that Ms How Weng Fan and Mr Danny Loh were permitted to act without proper oversight in making payments to FMSS notwithstanding their conflict of interest. The defendants do not contest the first finding that there is no documentary evidence. On the other hand, contrary to the second finding, the defendants argue in the present case that Ms How Weng Fan and Mr Danny Loh's positions in AHTC gave rise to *no* conflict of interest.

393 Although some or all of the first to fifth defendants, as town councillors, might be said to have been behind AHTC's conduct of *AHPETC (CA)*, there is no evidence or submission that AHTC's position in *AHPETC (CA)* was directly controlled by them (whether by controlling a majority vote in AHTC or otherwise), such that whatever position AHTC had taken then could be attributed to them as a matter of law in the present proceedings. Nevertheless, it is difficult to accept that the first to fifth defendants had stood by idly while AHTC made concessions before the Court of Appeal that suggested improper conduct on their part. To that extent, I agree with PRPTC that there is an inconsistency between AHTC's admission in *AHPETC (CA)* that Ms How Weng Fan and Mr Danny Loh acted in conflict of interest, and the first to fifth defendants' position in the present proceedings that there was no such conflict. Normally, such an inconsistency will have a significant bearing on the court's assessment of the evidence before it. That being said, it makes no difference in this case. I have already found that Ms How Weng Fan and Mr Danny Loh's positions in AHTC *did* give rise to conflicts of interest: see [352] above.



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Therefore, any inconsistency between AHTC's position in *AHPETC (CA)* and the first to fifth defendants' position in the present proceedings has no impact on the latter.

394 PRPTC's submission of inconsistent positions also calls to mind the legal doctrines of issue estoppel and abuse of process (or what is known as the extended doctrine of *res judicata*: see *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [19]). However, since no arguments have been addressed to me on this point (indeed, these doctrines have not been expressly invoked by any party), and I have already found against the defendants on the substantive issue, I say no more.

***The improper award of contracts to third parties***

*LST Architects and Design Metabolists*

395 As noted earlier at [112], the plaintiffs' complaint in relation to the award of contracts to LST Architects is twofold. First, the practice of appointing consultants to a panel following the calling of a tender *did not* mean that no tender needed to be called for each separate contract for services awarded to the consultants on the panel. As such, there was a breach of r 74(1) TCFR in the failure to call tenders for the contracts subsequently awarded to LST Architects. Secondly, that r 74(13) TCFR was also breached when seven out of the ten contracts were awarded to LST Architects over Design Metabolists when the latter had offered lower rates.

396 I begin the analysis by first examining the practice of appointing consultants to a panel. The plaintiffs' case is that such a practice is never justifiable, as the TCFR requires a tender to be called before awarding any contract for services or works in excess of $70,000. Thus, even if a panel is



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constituted and pre-agreed rates tied down under an omnibus contract, a tender must be called each time a specific project is awarded to one of the panel members. To be clear, I use the term "omnibus contract" to mean a contract under which the contractor has locked in rates for a period of time, based on clearly defined parameters and specifications, for specific contracts that may be subsequently awarded in that period. The defendants on the other hand take the position that having constituted a panel of consultants following a tender for an omnibus contract, it would be absurd to require a second tender to be called from the panel members for each project that is subsequently awarded. This is particularly so as the rates were already known based on their tender submission which was then accepted. As Mr Pritam Singh pointed out, the requisition of such consultants' services at pre-agreed rates from time to time was akin to instructing work under a contract that was already in effect.

397 To ascertain what the TCFR requires, it is useful to first start with the words of r 74(1) TCFR. The rule simply states that unless waived, "tenders shall be invited for the execution of works or for any single item of stores or services estimated to cost more than $70,000". Whereas the rule, understood literally, would appear to support the plaintiffs' position that each time a contract for more than $70,000 is to be awarded, a tender must be called in the absence of special circumstances, reading it in this manner would be too prescriptive and would unnecessarily constrain Town Councils in the manner in which they structure their terms for the supply of goods and services. I do not believe the rule disallows the award of an omnibus contract. In my view, the principal effect of this rule is to require a Town Council to only accept the lowest conforming bid unless there is sound justification to accept a higher bid. It follows that there is no prohibition against constituting panels pursuant to a tender process inviting bids for omnibus contracts which are not contract or project-specific. An omnibus contract may be considered a contract for services or work to be



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supplied "over a period" under r 74(4) TCFR. Adopting this interpretation would help Town Councils secure better rates and achieve efficiencies as the tenderer may offer more competitive prices in the hope of being awarded more than one contract during the term of the omnibus contract.

398 What does this mean in the present context? AHTC needed architectural consultancy services for projects that might arise from time to time over a three-year period. Having estimated that such services would cost above $70,000 for each project, tenders had to be called per r 74(14) of the TCFR. Instead of calling tenders on a case-by-case basis, AHTC instead called for bids for an omnibus contract based on defined parameters and specifications spelt out in the tender documents. The bids of LST Architects and Design Metabolists were both accepted. LST Architects was the lowest bidder in respect of projects valued between $0.5m and $3.66m, whereas Design Metabolists was the lowest bidder in respect of projects valued below $0.5m and above $3.66m. Since rr 74(13) and 74(16) of the TCFR require AHTC to award contracts to the lowest tender meeting specifications unless the reasons for doing otherwise are fully justified and recorded, this would mean that AHTC could and should have awarded subsequent contracts to LST Architects for projects valued between $0.5m and $3.66m, and to Design Metabolists for projects valued below $0.5m or above $3.66m, during the period of their appointment. LST Architects and Design Metabolists formed the "panel", and each contract that was to be subsequently awarded would have to go to the lower-priced of the two depending on which parameters and specifications the specific project fell within. There would be no need to call a fresh tender in each case. If this is what had happened, there would be no issue. But that was not the case.

399 AHTC's practice in the instant case was different. According to Mr Pritam Singh, the practice was that, having appointed both LST Architects



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and Design Metabolists to the "panel", it was then up to FMSS to decide which consultant it wanted to work with for each project. In fact, it was the evidence of Mr Pritam Singh that this practice was adopted to "give [the Town Council] flexibility in being able to appoint either consultant should there be a problem with either one". This position appears to be accepted by the other defendants, save for the sixth to eighth defendants. I will consider the sixth to eighth defendants' position at [407] below. Putting the issue of the sixth to eighth defendants' roles to one side, this practice would mean that despite having procured pre-agreed rates which made LST Architects the lower bidder on the panel in particular circumstances and Design Metabolists in others, AHTC and FMSS nonetheless retained the discretion to award subsequent projects to the higher bidder. In my view, AHTC could not retain this discretion under r 74 of the TCFR. As I have explained, "empanelling" a contractor through a tender under r 74 TCFR amounts to accepting the contractor's bid for an omnibus contract. It is at this point where rr 74(15) and 74(16) allows a higher-priced bid to be accepted, with reasons recorded. After the tender has been awarded, there is no residual discretion to deviate from the accepted bid in favour of a different contractor when specific projects are awarded. In the present case, seven such contracts were subsequently awarded to LST Architects even though Design Metabolists was the contractor with the lower bid, since the projects were valued above $3.66m. In view of the foregoing, I find that this practice of reserving the discretion not to award projects to the lowest bidder on a panel was a breach of r 74 TCFR.

400 The plaintiffs' second complaint is that AHTC in fact awarded the seven projects to LST Architects despite it not being the lower bidder. I address first the defendants' contention in the closing submissions that for these seven projects, LST Architects might have actually been the lowest-conforming bid. The defendants assert that even though Design Metabolists' fees for projects



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above $3.5m were supposedly capped at a fixed rate, Design Metabolists had on a previous occasion renegotiated a higher fee with ATC when faced with a large project, and was allowed to requote a much higher rate. This made Design Metabolists potentially more expensive than LST Architects for projects above $3.5m. It is surprising that the defendants ran this argument, as it was not asserted at the time of the KPMG report that LST Architects was the less expensive consultant in relation to these seven projects. More importantly, it was not pleaded nor asserted in the affidavit evidence. This was pointed out to counsel during the course of the trial. Thus, the argument was not open to the defendants to pursue. In any case, the argument is contrived. If Design Metabolists was bound to pre-agreed rates, it could only renegotiate them with AHTC's consent. I therefore agree with the plaintiffs that LST Architects was awarded the seven contracts despite its rates being higher.

401 The defendants have also argued that LST Architects was justifiably awarded the seven contracts despite not being the lowest conforming tender, because of the allegedly unsatisfactory performance of Design Metabolists. Two issues arise from this assertion. First, whether the reasons for appointing LST Architects were fully justified and recorded as required by r 74(16) TCFR. Second, given the alleged unsatisfactory performance of Design Metabolists, whether the defendants could continue awarding contracts to consultants on the "panel", or whether they were instead required to call a fresh tender in such circumstances.

402 As regards the first issue, it is not in dispute that the reasons were not properly *documented*, and that there was at the very least a technical breach of r 74(16) TCFR.



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403 On the second issue, I am of the view that it was not reasonable to award the seven contracts to LST Architects on the basis it was the only option on the panel. It appears that AHTC had considerable difficulties with Design Metabolists – the project manager was found to be "lackadaisical", and AHTC found Design Metabolists to be "inefficient and passive, thus causing delays in projects to the detriment of the residents". In fact, on one occasion, FMSS was instructed by Mr Pritam Singh to give Design Metabolists an "ultimatum" to expedite their progress on the preparation of a tender. If all of this was true, there was really no panel to speak of as Design Metabolists' shortcomings made them an untenable option. LST Architects was the only credible consultant. This is supported by the fact that during the material period, LST Architects was awarded ten contracts and Design Metabolists was awarded none. As the KPMG report states, "if [Design Metabolists] was disfavoured so as to leave [LST Architects] as the only choice on the panel, there was no meaningful panel from which to choose consultants for these projects. Accordingly, the tender process cannot be relied upon to be a rigorous control." I agree. It is clear that the defendants should not have awarded the seven contracts to LST Architects in the event that they felt that Design Metabolists was no longer a legitimate option. The appropriate course would have been to disband the panel and carry out a fresh tender exercise.

404 Finally, I should address the defendants' argument that PRPTC has no basis to claim for the payments made to LST Architects as they were made from AHTC's sinking and routine funds. It is alleged that PRPTC is not entitled to any claim arising from the sinking and routine funds. However, as PRPTC rightly points out, this is an issue of loss as PRPTC is claiming only its share of the improper payments to LST Architects, which is to be determined in the second tranche of these proceedings. In any case, it is not apparent based on the evidence before me what the source of the payments to LST Architects was.



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405 In the circumstances, I find that the award of the seven contracts to LST Architects was in breach of the TCFR. AHTC had to either award each project to the lower bidder on the panel, or, if it was felt that Design Metabolists was not appropriate, disband the panel and call tender for each project in the usual way. The members of the Tender Committee – Ms Sylvia Lim, Mr Pritam Singh and Mr Kenneth Foo – are consequently in breach of their duties of skill and care. This does not include Mr David Chua as it is the unchallenged evidence of Mr Pritam Singh that he was not involved in this particular decision.

406 I should point out that PRPTC, but not AHTC, has made this claim also against Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh. There is insufficient evidence before me on Mr Low Thia Khiang's involvement, and he was not challenged in cross-examination on this issue. I therefore find no liability on his part.

407 That leaves Ms How Weng Fan and Mr Danny Loh. In her AEIC, Ms How Weng Fan asserted that neither she nor Mr Danny Loh were involved in the decision to constitute the panel or to appoint LST Architects for the seven projects. Crucially, she was not challenged on this point in cross-examination. While her position appears at odds with Mr Pritam Singh's position that FMSS decided which consultant to appoint for each project (see [399] above), it remains for PRPTC to make its case, which must include testing Ms How Weng Fan's assertions under cross-examination. Having not done so, PRPTC's claim against Ms How Weng Fan and Mr Danny Loh on this issue must therefore fail. As for the members of the Tender Committee – Ms Sylvia Lim, Mr Pritam Singh and Mr Kenneth Foo – Ms How Weng Fan's position does not assist them for two reasons. First, they must stand or fall by the position they have taken. Second, regardless of who made the decision to award the seven projects to LST Architects, the Tender Committee members' liability stems from the system that



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was implemented which reserved the discretion to award projects to AHTC, which, as I have found, is the gravamen of the problem.

*The appointment of Red-Power*

408 The claim in relation to the appointment of Red-Power has two aspects. The first relates to the appointment of Red-Power instead of extending the services of Digo and Terminal 9 (see above at [113]); the second relates to the inclusion of Punggol-East under the contract with Red-Power after the expiry of the contract with EM Services (see above at [116]).

409 Before I deal with both aspects, I first deal with the *locus standi* of PRPTC to bring the claim in relation to Red-Power (see above at [150]). The defendants contend that PRPTC does not have *locus standi*. I disagree. PRPTC's claims in S 716/2017 are based on causes of actions which accrued before 1 December 2015, the cut-off date for the 2015 Order (see above at [7]). The claims do not stem from the fact that PRPTC suffered losses distinct from AHTC. The correct basis is that the rights of AHPETC that were related to or connected with Punggol-East before the 2015 Order became enforceable by PRPTC as a result of the 2015 Order. Red-Power was appointed on 1 July 2012 by AHPETC. Thus, PRPTC would have *locus standi* in relation to any potential breaches of duty stemming from this appointment in so far as it relates to Punggol-East pursuant to the 2015 Order given that AHPETC had that right. The defendants' true complaint therefore is not one of *locus standi* but rather of loss. If the argument is that no savings could have resulted because the services of Digo and Terminal 9 could not have been extended to Punggol-East as the contract with EM Services was still alive, that would be relevant to loss and not *locus standi.*



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410 The defendants' only defence to the first aspect is that the extension would only have been for a further 12 or 24 months. Hence, a tender would need to have been called in any event. This is not a defence, and once again at most goes to the issue of loss, in that any savings lost related only to the period of extension. It is not in dispute that there was an option to extend the Digo and Terminal 9 contracts, and that doing so would have been less costly than awarding a contract to Red-Power. Mr Pritam Singh's evidence is simply that he does not recall why AHTC did not extend the contracts with Digo and Terminal 9. He also does not recall being informed by the contracts department that any such option was available. This is an unsatisfactory response. The role of the Tender Committee is to determine when tender should be called for contracts relating to the Town Council. This must mean that the members of the Tender Committee must satisfy themselves that there was no option to extend the existing contracts before recommending that a fresh tender be called. They can do this either by examining the contracts themselves or at the very least by asking the contracts department whether such an option was available – but they must in either case ascertain whether there is an option to extend. It is unsatisfactory for them to simply disclaim any responsibility by saying that they were not informed of any option to extend existing contracts by the contracts department.

411 Accordingly, the award of a contract to Red-Power when there was an option to extend the contracts with Digo and Terminal 9 for a further 12 or 24 months was a breach of the equitable duty of skill and care on the part of the members of the Tender Committee. Whereas PRPTC has also pleaded that this represents a breach of duty on the part of Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh, I do not see how this can be the case since it is not argued that they were participants in the decision-making process.



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412 The second aspect is the inclusion of Punggol-East under the contract with Red-Power following the expiry of the contract with EM Services. The unchallenged evidence is that Tong Lee had declined to extend its coverage to include Punggol-East when asked by AHTC to do so, as it did not have sufficient resources. While this reason might not have been properly documented, it is not PRPTC's case that Tong Lee was in any way obliged to extend its services to cover Punggol-East. There is also no contractual basis to say that Tong Lee was in any way obliged to extend its services. In the circumstances, I find that there was no breach of duty on the part of any of the defendants in including Punggol-East under the contract with Red-Power.

413 Thus, I find that the appointment of Red-Power instead of extending the contracts of Digo and Terminal 9 was a breach of the duty of skill and care owed by Ms Sylvia Lim, Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo. There was no breach of duty by the remaining defendants, or in respect of the inclusion of Punggol-East in the contract with Red-Power.

*The appointment of Rentokil*

414 The claim in relation to the appointment of Rentokil similarly has two aspects. The first relates to the appointment of Rentokil over Pest-Pro, which had the lower bid (see above at [114]). The second relates to the inclusion of Punggol-East in the contract with Rentokil instead of Pest-Pro after the expiry of the contract with Clean Solutions (see above at [117]). However, these two issues are interrelated and can be dealt with together, as the crux of the dispute is whether or not the Tender Committee awarded the contract to Rentokil over Pest-Pro in breach of rr 74(13) and 74(16) TCFR because the latter had the lower bid and a comparable PQM score.



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415 The evidence is that the Tender Committee had proper and justifiable reasons for awarding the contract to Rentokil, and that the reasons were properly documented in the 17 August 2013 Tender Committee meeting minutes. The minutes state as follows:

> Property Managers of all divisions except Eunos and Serangoon confirmed that they are facing a serious problem with rodents
>
> […]
>
> It is noted that the Rat Attack programme is an expensive programme. Even after taking into account the subsidies by NEA, the amount payable (assuming Rentokil is awarded) by the Town Council would be:
>
> Contract Sum for two years : $641,190.00 (if there were no subsidy)
>
> After subsidy from NEA : $440,818.13 (if Town Council claims for the subsidy successfully.
>
> *NEA will co-fund 100% for first 3 months and 50% for next 9 months provided the Town Council achieves the required results.
>
> […]
>
> After deliberation, the Tenders Committee decided to award the contract (including the Rat Attack supplementary contract) to Rentokil Initial Singapore Pte Ltd, based on the following considerations:
>
> - Glenn's comments (when they were awarded the Rat Attack contract by Bishan-Toa Payoh Town Council) that "it was a learning experience" and "it was a culture shock" show that Pest-Pro may lack the necessary experience to run a "Rat Attack" programme;
> - Pest-Pro confirmed that their clients did not qualify for the NEA subsidy initially whereas Rentokil confirmed that their clients had been successful in their subsidy claims;
> - Rentokil's team is better qualified and includes a Senior Technical and Operations Manager who has been awarded Bachelors in Vectors and Parasite Biology and an Asst Technical Manager who is a Field biologist;
> - Rentokil is well-established (it has gained Superbrand status) and has presence world-wide whereas Pest-Pro was only incorporated in 2010;



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> - The difference in the tender sums by Pest-Pro ($$628,000.00) and Rentokil ($641,190.00) is only $13,190 over a period of 2 years.
>
> [...]

416 In my view, it is evident that the Tender Committee considered that obtaining the NEA subsidy would represent significant cost savings to AHTC. In the Committee's view, this far outweighed the relatively insignificant cost difference between the bids of Rentokil and Pest-Pro. It is clear that the Tender Committee felt that Rentokil had a track record of successfully obtaining the subsidy for its clients whereas Pest-Pro did not. In the circumstances, the Tender Committee had legitimate reasons for awarding the contract to Rentokil over Pest-Pro notwithstanding the latter's lower bid. These reasons were properly documented in the minutes cited above. Mr Goh Thien Pong from PwC appeared to concede this during cross-examination. He stated that it would have been "very helpful" if the above minutes had been given to PwC. It appears that PwC for reasons unknown did not have sight of these minutes even though they had been emailed to them. The TCFR does not require Town Councils to accept the lowest bid provided that there are sound reasons for not doing so and these reasons are properly documented. This was the case here. There was no breach of rr 74(13) or 74(16) TCFR or any of the duties of any of the defendants in this regard.

*The appointment of Titan and J Keart*

417 It is not disputed that the contracts were awarded to Titan and J Keart after tender was called, even though the existing contracts with Titan and J Keart, which were at lower rates, could have been extended at AHTC's option for an additional 12 months. According to PwC's calculations, the new contract with Titan represented an increase in rates of 67% compared to the existing contract, and the new contract with J Keart represented an increase in rates of



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between 43% (for monthly maintenance of decam) and 2567% (for annual maintenance of fire extinguishers). The situation mirrors that of the award to Red-Power save in one material aspect. In this case, there were representations by AHTC's Contracts Manager, Mr Philip Lim (a staff member of FMSS), that there was *no* option to extend the existing contracts. This difference is of significance, but before I discuss it, I will deal with a further point which the defendants make.

418 In closing submissions, the defendants have argued that there were advantages in calling a fresh tender as opposed to renewing the existing contracts as it enabled a better deal to be secured by negotiating a longer term contract for a lower rate at an earlier period in time. However, this is not the pleaded defence. The pleaded defence is that the Tender Committee relied on the representations by Contracts Manager Mr Philip Lim that there was no option to extend the existing contracts with Titan and J Keart. This was the operative factor which caused the tender to be called and the contract awarded to Titan and J Keart. But for the representations, the existing contracts would have been extended. This puts paid to the argument. In any case, I find these purported advantages to be speculative at best – it defies logic for a contracting party to enter into a new contract at much higher rates when it could have extended the existing contract at lower rates for one year. There is no evidence that had the existing contracts with Titan and J Keart been extended for an additional year, AHTC would have been placed in a worse bargaining position. There was also no evidence that better rates were secured as a result of calling the tender as opposed to extending the contracts with Titan and J Keart.

419 I turn to the representations of Mr Philip Lim. The fact of the representations and the defendants' reliance on them are not in dispute. The correspondence shows that on 3 December 2014, Mr Philip Lim emailed the



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members of the Tender Committee to inform them that various term contracts for Punggol-East, including the existing term contracts with Titan and J Keart, were due to expire on 31 March 2015. In the table summarising the term contracts, the last column set out any options to extend, and the term contracts with Titan and J Keart were noted as "NA". Ms Sylvia Lim replied to the email to ask whether there was an option to extend, to which Mr Philip Lim replied "[t]here are no options to extend". Ms Sylvia Lim then instructed "ok then, pls proceed to call tender for all 5".

420 Was it reasonable for the members of the Tender Committee to have relied on the representations of Mr Philip Lim? I am cognisant that Mr Philip Lim was the Contracts Manager and that it is within his job scope to be aware of matters such as these. As I have stated above at [410], it was the responsibility of the members of the Tender Committee to satisfy themselves that there was no option to extend the existing contracts, although they could do so by properly directing the contracts department to examine the existing contracts. Thus, the Tender Committee's reliance on the representations of Mr Philip Lim in deciding to call a fresh tender does not mean that they have breached their duties to AHTC.

421 However, the analysis does not stop there. After the bids were evaluated and it was ascertained that Titan and J Keart had submitted the lowest bids, it ought to have occurred to the Tender Committee that they were going to be awarding fresh contracts to existing contractors. The Tender Committee was aware of this – the decision to award the contract to Titan, for example, recorded the reason for the award as: "The company which is the existing contractor for the Punggol-East Division had submitted the lowest price quote and rank 1st in the PQM scores." Further, it would also appear that the Tender Committee was aware that the same contractors had put in bids for prices that were much higher



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than their existing rates – the tender evaluation report in relation to Titan's bid, for example, stated that Titan's tendered amount was $3.15m and that their current contract amount was approximately $2.4m.

422 Once the members of the Tender Committee realised that both Titan and J Keart were proposing to charge *much higher* rates than under their existing term contracts, it would have been incumbent on them to satisfy themselves that the drastic increase was justified. At that time, one would have expected them to examine the existing contracts to understand what had changed. If they had done so, they would have realised that Mr Phillip Lim's representations were incorrect. The award of fresh contracts to Titan and J Keart would have been avoided.

423 As such, I am of the view that the award of fresh contracts to Titan and J Keart was in breach of the equitable duties of skill and care of the members of the Tender Committee. Again, even though PRPTC has claimed the same against Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh, I decline to find any liability on their part given their lack of involvement in the decision-making process. I also disagree with PRPTC that the award of these contracts gave rise to breaches of the defendants' fiduciary duties as opposed to their duty of skill and care, as there was no evidence that these breaches were the result of anything more than negligence.

***Improper payments to third parties***

*12 invoices totalling $171,112.62*

424 The allegation is that the first to fifth defendants had breached their fiduciary duties, statutory duties and duty of skill and care in causing payment to be made on 12 invoices totalling $171,112.62 without supporting documents



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or evidence of work done. The allegation as clarified in the closing submissions is a fairly narrow one. It is not that these payments were improper because no work was done, but that such supporting documents had not been obtained by AHTC *at the time* payment was made.

425 No supporting documents in respect of these 12 invoices were adduced in evidence. There is disagreement between the parties as to whether such supporting documents in fact exist and whether they are in the possession of PRPTC. Mr Vincent Koh's evidence is that all supporting documents were handed over to PRPTC in December 2015. On the other hand, PRPTC relies on an email from February 2017 as evidence that there remained outstanding monthly services reports for six of the 12 invoices on that date. However, given the nature of the claim, I do not think that it is necessary for me to make any findings as to whether the supporting documents in fact exist and whether they are in PRPTC's possession. The allegation is in essence that the defendants were in breach of their duties in allowing payments to be made where supporting documents in the form of monthly service reports or photographs of work done do not appear to have been obtained. Even assuming that such supporting documents were not obtained, I am not convinced that there would be breach of any of the duties owed by the defendants if they had taken steps to satisfy themselves that the work had indeed been done.

426 It is the uncontradicted evidence of Mr Vincent Koh that for routine works which form six of the 12 invoices in question, the use of monthly service reports was optional. Such reports set out a description of the work that was done but were not necessary under AHTC's standard operating procedure for payment of routine works. To satisfy themselves that the routine works have been properly performed, the property officers would conduct physical checks on-site on a periodic basis before preparing a work order to certify that the works



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had been completed. In such circumstances, I do not think that the absence of monthly service reports and other forms of supporting documents suffices to show that the defendants had breached their duties in making payment on the 12 invoices.

427 Further, in relation to the other six invoices in question, Mr Vincent Koh's evidence is that these payments do not require supporting documents as they relate to work done by the contractor to set up polling stations for the 2015 GE. In this regard, the HDB and the Elections Office were satisfied that such polling stations had been properly set up. They had reimbursed AHTC for its costs in this regard. I note that PwC was not aware that HDB had reimbursed AHTC for its costs of setting up polling stations when the PwC report was prepared. Reimbursement by the HDB would only have taken place if the work had been satisfactorily completed. Thus, I do not believe that the defendants were in breach of their duties in making payment.

428 This particular claim is very different from the claim that improper payments were made to FMSS/FMSI due to the control failures (see above at [347]). This claim pertains to alleged improper payments to *third party contractors*. There is no allegation that the Property Officer or any other AHTC or FMSS staff involved in verification of the works had any interest in the third party contractor. There was thus no conflict of interest in the payment process that would have necessitated a higher standard of review or verification that works had been satisfactorily completed.

429 Accordingly, I do not find that any of the defendants have breached their duties in relation to these 12 invoices. However, these 12 invoices are subsumed under the 56 invoices which form the next head of claim which is an



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independent breach. This is a breach alleged only by PRPTC. I shall discuss that issue next.

*56 invoices totalling $674,388.70*

430 The breach alleged here is technical in nature, namely, that payments were made on 56 invoices totalling $674,388.70 even though those invoices were not properly authorised or certified by the Head of Department for the purpose of r 56(4)(*c*) TCFR. The rule provides:

> (4) It is the responsibility of the Head of Department to satisfy himself that −
>
> (*a*) the services specified have been duly performed;
>
> (*b*) the goods purchased have been properly held or applied for the purpose intended;
>
> (*c*) the prices charged are either according to contracts or approved scales, or fair and reasonable according to current local rates;
>
> (*d*) authority has been obtained as quoted, and the computations and castings have been verified and are arithmetically correct; and
>
> (*e*) the persons named in the vouchers are those entitled to receive payment.

431 The crux of the dispute is whether r 56(4)(*c*) TCFR required the Head of Department in this case to have signed on the invoice to show that he was *satisfied* the prices charged were according to the contracts or approved scales, or were fair and reasonable according to current local rates. The defendants contend that this was not necessary and that it was sufficient for the Head of Department to have signed on what the defendants call the "voucher journal report". There was a prior question of who was the Head of Department on the facts. PRPTC takes the position that the Head of Department is the Property Manager. However, I find the evidence of Mr Vincent Koh that the Head of Department in relation to invoices that did not concern estate management was



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the Assistant Finance Manager (there being no Finance Manager in AHTC at the material time) to be reasonable. In any event, nothing really turns on this.

432 Understanding this issue requires a brief overview of the payment approval process that was in place at the material time. The payment process generally involved the following steps:

(a) "Work Orders" were approved and issued on behalf of AHTC, which supposedly served as certification by AHTC that work and services had been duly provided and received.

(b) The invoice was received from the vendor.

(c) "Payment vouchers" were approved and issued on behalf of AHTC, which served as an internal record and confirmation that payment should be made.

(d) Cheque or bank transfer instructions were issued and signed by designated signatories of AHTC. As discussed at [348] above, payments to FMSS would trigger the standing instruction requiring the co-signature of the Chairman or Vice-Chairman of AHTC.

433 The above procedure was further explained in greater detail in the evidence of Mr Vincent Koh with reference to estate management work, which formed the bulk of the work for which the 56 invoices were issued. According to Mr Vincent Koh:

(a) After a Property Officer detected or was notified of a problem with estate management, the Property Officer would inspect the site or investigate the source of the problem.



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(b) Where the rectification of the problem fell within routine estate works such as cleaning and lift maintenance works or within the scope of the existing term contracts, there was no need for a written instruction to be issued. As for non-routine works or routine estate works that fell outside the scope of term contracts, the Property Officer would issue a written instruction to the contractor to obtain quotations.

(c) Where the quotation exceeded $300, $1,000 or $5,000, the Property Officer would need to obtain the approval from the Property Manager, General Manager or Chairman respectively before instructing the contractor to proceed with the works.

(d) After the completion of the work, the Property Officer would inspect the site to verify that the work had been completed. That the Property Officer had done this was evidenced by the Work Order being signed by him next to the words that stated "this work is satisfactorily completed on [date]".

(e) The contractor would then make a payment claim to AHTC by submitting a Job Sheet or Claim of Completion together with supporting documents such as the issued written instruction, photos and inspection reports, if any.

(f) The contractor's claims and supporting documents would be checked by the Property Officer or the Senior Property Officer, after which the Work Order was endorsed by the Property Manager.

(g) After the Work Order was endorsed by the Property Manager, the contractor would issue an invoice accompanied by a summary of all invoices and supporting documents submitted by the contractor.



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(h) The invoice was then processed by the Property Officer who would match the invoice with the Job Sheet to check that the invoiced amount tallied with the value of work completed according to the Work Order.

(i) These documents were then handed over to the Admin Department to generate a Voucher Journal Report from the accounting system.

(j) The Voucher Journal Report was checked and signed off by the Property Manager, and passed to the Finance Department together with all accompanying documents.

(k) The Finance Department ensured that the documents were in order and then prepared a Payment Voucher and cheque.

(l) The Payment Voucher, Voucher Journal Report and accompanying documents were reviewed by the Deputy General Manager or General Manager, before approval was given for the cheque to be sent for signature by the authorised signatories.

434 It is evident from the above that in so far as estate management works were concerned, the Head of Department, *ie*, the Property Manager (as distinct from the Property Officer), was involved at two stages. First, in endorsing the Work Order so that the contractor could raise the invoice. Second, in signing the Voucher Journal Report. The question then is whether, having regard to the entire process above, this satisfies r 56(4)(*c*) TCFR.

435 According to the evidence of Mr Goh Thien Pong from PwC, r 56(4)(*c*) TCFR requires that the *invoice*, and not the Voucher Journal Report, be signed



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by the Head of Department as a form of certification that the goods and services were correctly billed prior to payment. It is insufficient for the Head of Department to sign the Voucher Journal Report even if it is for the same amount as in the corresponding invoice. Mr Goh Thien Pong explains his position as follows:

> Q. But if you see the head of department's signature on another document which shows that he has certified, he has approved, that same amount that now appears on the invoice, that would be all right, correct?
>
> …
>
> A. That is still not all right. Let me explain, your Honour, because each and every of these payment documents, from written instructions work order, invoices, supporting documents JV and purchase voucher -- payment voucher each of them serves a purpose. You know so the person, for example, written instruction is actually an instruction -- it is actually a purchase order to get the supplier to provide services and goods. It has to be approved by the department head.
>
> Now, when the goods or services are provided, then the department head will sign on the work order together with the supporting documents, that is to certify work done.
>
> Now when the invoice is sent by the vendor to the town council then the department head is supposed to check this invoice amount to the contract or written instructions or work order and that would be certified by the department head. So to show that he himself is satisfied with the amount billed.
>
> And then after that, when it is sent for posting, [then] somebody, you know, that is finance department people will sign on the journal voucher and then the last thing then is send for approval on payment voucher.
>
> So each of these documents serves its own purpose. It doesn't mean that a person sign on one of them you know you can actually substitute another just because he didn't sign it on the letter.

436 I understand Mr Goh Thien Pong to be saying that rr 56(4)(*a*) and (*b*) TCFR require the Head of Department to check and sign the Work Order, as only by doing that does he certify that work has been performed or goods have



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been delivered. However, r 56(4)(*c*) requires the Head of Department to check and sign the *invoice* because that is the only way to satisfy himself that the "prices charged" by the contractor were correct. Mr Goh Thien Pong takes this view not because r 56(4)(*c*) specifically stipulates that the *invoice* must be signed. Instead, he relies on AHTC's unwritten protocol at that time which required the Head of Department to sign off on the invoice. The fact that there was a departure from this internal protocol in relation to these 56 invoices suggested that the Head of Department had not in these cases satisfied himself that the amounts charged in those invoices were correct. In fact, out of the 200 invoices reviewed by PwC, 144 invoices were actually signed by the Head of Department, but these 56 invoices were not.

437 On balance, I consider that even if r 56(4)(*c*) does not stipulate a particular procedural requirement, the internal protocol developed by AHTC by which the Head of Department would satisfy himself that the prices charged were in accordance with the contract or were fair and reasonable ought to have been followed in the case of the 56 invoices. That the bulk of invoices reviewed by PwC did feature the Head of Department's signature on the invoice suggests that such a protocol was in place, even though it might not have been documented. It is not apparent that a signature on the Voucher Journal Report would serve the same purpose as a signature on an invoice, particularly if the former is primarily intended, as the workflow set out above suggests, for accounting purposes. Thus, I find that r 56(4)(*c*) TCFR has been breached.

438 The next question is whether the breach of this rule, which *prima facie* is a breach on the part of the Head of Department, amounts to a breach of any of the duties of the first to fifth defendants. PRPTC's claim, as with the majority of its other claims, is against the first to fifth defendants generally for the breach of their fiduciary duties, statutory duties and duties of skill and care. However,



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I do not believe that the evidence demonstrates the involvement of any of these five defendants in the payment approval process, or that they had allowed, knowingly or inadvertently, a departure from the internal protocol. It is not apparent to me that Mr Low Thia Khiang, Mr David Chua and Mr Kenneth Foo were involved at all. Also, it is Mr David Chua and Mr Kenneth Foo's evidence that they were not involved, and they were not contradicted on this point.

439 On the other hand, Mr Pritam Singh and Ms Sylvia Lim would have been more involved in the payment approval process by virtue of their positions as Chairman or Vice-Chairman of AHTC at the material time. Their names are found in some instances in the column of "payment approver" for the 56 invoices. Nevertheless, it is not clear on the evidence what the extent of their involvement was. I understand from Mr Goh Thien Pong's evidence that PwC treated Mr Pritam Singh and Ms Sylvia Lim as the "payment approver" in some instances because their signatures were found on the Payment Voucher. However, looking at the payment approval process in Mr Vincent Koh's evidence, it is not apparent that the payment approver needs to check the signature on the invoice, as opposed to relying on other evidence, before signing on the Payment Voucher. In the circumstances, I am unable to conclude that the mere failure to notice that the invoice had not been certified by the Property Manager (or the Assistant Finance Manager as the case may be) amounted to a breach of duty on the part of Ms Sylvia Lim and Mr Pritam Singh. I emphasise that the breach of r 56(4)(*c*) TCFR is a technical one, and there has been no allegation that the works were not satisfactorily completed or that the payments were wrongfully paid out, or that there was a heightened need for caution as the payments were to conflicted entities (as in the case of the control failures discussed at [347] above in relation to the payments to FMSS). For such a technical breach on the part of FMSS's staff to constitute a breach of the equitable duties of skill and care of any of the defendants, there would have to



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be clear evidence before me of what they ought to but failed to do. Thus, I do not find that PRPTC has succeeded in this claim against any of the defendants.

***Summary of findings on breaches of duties against the first to seventh defendants***

440 It is convenient to briefly summarise the findings of liability above against the first to seventh defendants at this juncture before I turn to consider the allegations of dishonest assistance and knowing receipt against the sixth to eighth defendants, the defences put forth by the defendants, and the remedies the plaintiffs are entitled to pursue.

441 For the reasons set out above at [245]–[334], I find that the waiver of tender and appointment of FMSS pursuant to the first MA and EMSU contracts was a breach of the fiduciary duties owed by Mr Low Thia Khiang, Ms Sylvia Lim and Ms How Weng Fan. All three of them were clearly involved from the beginning to effect the appointment of FMSS without tender, and I have found that they had collateral motives in doing so. Their conduct was improper and the attempt to cloak the same with a veneer of truth and credibility collectively leads to the conclusion that they had not acted honestly and therefore breached their duty of unflinching loyalty to AHTC as fiduciaries. Mr Danny Loh was also in breach of his fiduciary duties as regards the award of the first EMSU contract.

442 As discussed at [303]–[310] above, it was not apparent from the evidence before me whether Mr David Chua and Mr Kenneth Foo were involved in the entire scheme to replace CPG with FMSS, save that they were at different points of time copied in the relevant emails. As for Mr Pritam Singh, there was also a lack of clear documentary evidence of his involvement, and I do not think that his inclusion in some emails together with other elected MPs



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sufficed. In the absence of any substantial cross-examination in relation to his involvement and the thinness of the documentary evidence of his involvement, I find that PRPTC has failed to make its case out against him in relation to any breach of fiduciary duties. I, however, find that the appointment of FMSS pursuant to the first MA and EMSU contracts was in breach of the third to fifth defendants' duties of skill and care.

443 As explained at [335]–[345] above, I do not find that the appointment of FMSS pursuant to the second MA and EMSU contracts represented a fresh or continuing breach, but rather that this was a consequential loss flowing from the breaches of fiduciary duties and duties of skill and care in relation to the waiver of tender in 2011 for the first MA and EMSU contracts.

444 As for the improper payments made to FMSS and FMSI discussed at [347]–[390] above, even though the control failures stem very much from the involvement of conflicted persons, which is a by-product of the breaches in the appointment of FMSS, I do not consider that the control failures or the payments to FMSS and FMSI represented a breach of the fiduciary duties of the first to seventh defendants. Rather, they ought to have been more conscientious in regulating the payment process given the involvement of conflicted persons, and were thus in breach of their duties of skill and care. However, I do not find that any of the defendants' liability for control failures resulting in payments to FMSS extended to the invoices dated 30 June 2011 and 31 July 2011, the alleged wrongful classification of project management services or the payment for overtime claims. Having said that, to the extent that these payments were made under the MA contracts, the earlier conclusions on breach of fiduciary duties in the award of the said contracts apply to them as well.



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445 For the reasons set out at [395]–[423] above, I find that the award of contracts to LST Architects, Red-Power (but not the inclusion of Punggol-East under the same), Titan and J Keart were in breach of the duties of skill and care owed by the members of the Tender Committee, *ie*, Mr Pritam Singh, Ms Sylvia Lim, Mr David Chua and Mr Kenneth Foo. However, as stated above at [405], Mr David Chua was not involved in the decision to appoint LST Architects and is thus not liable for the same. As I have found at [414]–[416] above, the appointment of Rentokil was justified and not in breach of any of the defendants' duties.

446 Finally, as discussed at [424]–[439] above, I do not find that the first to fifth defendants have breached their duties to AHTC in relation to the 12 and 56 invoices which formed the basis of allegedly improper payments to third parties.

447 For ease of reference, I summarise the above findings, as well as the issues for which I have not found liability, in the table on the following pages. To be clear, this table does *not* include any secondary liability on the part of the sixth to eighth defendants for dishonest assistance or knowing receipt (which I address at [448]–[458] below).



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<table>
<tr><th rowspan="2">S/N</th><th rowspan="2">Claim</th><th colspan="7">Liability of:</th></tr>
<tr><th>Ms Sylvia Lim</th><th>Mr Low Thia Khiang</th><th>Mr Pritam Singh</th><th>Mr David Chua</th><th>Mr Kenneth Foo</th><th>Ms How Weng Fan</th><th>Mr Danny Loh</th></tr>
<tr><td colspan="9">Waiver of tender and appointment of FMSS as MA and EMSU provider</td></tr>
<tr><td>1</td><td>First MA contract</td><td colspan="2">Breach of fiduciary duties</td><td colspan="3">Breach of duties of skill and care</td><td>Breach of fiduciary duties</td><td>No breach</td></tr>
<tr><td>2</td><td>First EMSU contract</td><td colspan="2">Breach of fiduciary duties</td><td colspan="3">Breach of duties of skill and care</td><td colspan="2">Breach of fiduciary duties</td></tr>
<tr><td>3</td><td>Second MA and EMSU contracts</td><td colspan="7">No independent or continuing breach, but possible consequential loss</td></tr>
<tr><td colspan="9">Payments to FMSS</td></tr>
<tr><td>4</td><td>Control failures</td><td colspan="7">Breach of duties of skill and care</td></tr>
<tr><td>5</td><td>Invoice for $106,559 dated 30 June 2011</td><td colspan="7">No breach</td></tr>
</table>



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| S/N | Claim | Liability of: | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | **Ms Sylvia Lim** | **Mr Low Thia Khiang** | **Mr Pritam Singh** | **Mr David Chua** | **Mr Kenneth Foo** | **Ms How Weng Fan** | **Mr Danny Loh** |
| | and invoice for $166,591 dated 31 July 2011 | | | | | | | |
| 6 | Payment of project management fees | No breach | | | | | | |
| 7 | Miscellaneous improper payments to FMSS | Breach of duties of skill and care, except re. payments for overtime claims | | | | | | |
| **Improper award of contracts to third parties** | | | | | | | | |
| 8 | LST Architects | Breach of duties of skill and care | No breach | Breach of duties of skill and care | No breach | Breach of duties of skill and care | No breach | |



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<table>
<tr><th rowspan="2">S/N</th><th rowspan="2">Claim</th><th colspan="7">Liability of:</th></tr>
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<tr><td>9</td><td>Red-Power</td><td>Breach of duties of skill and care, except re. inclusion of Punggol-East</td><td>No breach</td><td colspan="3">Breach of duties of skill and care, except re. inclusion of Punggol-East</td><td colspan="2">No breach</td></tr>
<tr><td>10</td><td>Rentokil</td><td colspan="7">No breach</td></tr>
<tr><td>11</td><td>Titan and J Keart</td><td>Breach of duties of skill and care</td><td>No breach</td><td colspan="3">Breach of duties of skill and care</td><td colspan="2">No breach</td></tr>
<tr><td colspan="9">Improper payments to third parties</td></tr>
<tr><td>12</td><td>12 invoices without supporting documents</td><td colspan="5">No breach</td><td colspan="2">Not claimed</td></tr>
</table>



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| S/N | Claim | Liability of: | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | **Ms Sylvia Lim** | **Mr Low Thia Khiang** | **Mr Pritam Singh** | **Mr David Chua** | **Mr Kenneth Foo** | **Ms How Weng Fan** | **Mr Danny Loh** |
| 13 | 56 invoices without Head of Department signature | No breach | | | | | Not claimed | |



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***Liability for dishonest assistance and knowing receipt***

448 I shall now consider the liability of Ms How Weng Fan, Mr Danny Loh (in his personal capacity and as sole proprietor of FMSI) and FMSS (*ie*, the sixth to eighth defendants) for dishonest assistance and knowing receipt. These are forms of accessory and recipient liability respectively for breaches of fiduciary duties by others. Based on my findings thus far, such liability can only relate to Ms Sylvia Lim and Mr Low Thia Khiang's breach of fiduciary duties in entering into the first MA and EMSU contracts. It is also worth clarifying the differing extents of the plaintiffs' claims, which I set out in the table below:

<table>
<tr><th></th><th>Ms How Weng Fan</th><th>Mr Danny Loh</th><th>FMSS</th></tr>
<tr><td rowspan="2">AHTC's claims</td><td colspan="3">Dishonest assistance</td></tr>
<tr><td>–</td><td>Knowing receipt (as FMSI)</td><td>Knowing receipt</td></tr>
<tr><td>PRPTC's claims</td><td colspan="2">Dishonest assistance</td><td>Knowing receipt</td></tr>
</table>

449 As I shall explain, I find the sixth to eighth defendants liable for dishonestly assisting Mr Low Thia Khiang and Ms Sylvia Lim's breach of their fiduciary duties with regard to the first MA and EMSU contracts. The extent of this liability as a matter of loss, in particular as regards the second MA and EMSU contracts, is discussed at [630] below. Further, I find FMSS liable for knowing receipt with regard to the first MA and EMSU contracts. The extent of this liability as a matter of loss does *not* extend to the second MA and EMSU contracts – this will be discussed below at [631]–[632]. Mr Danny Loh as FMSI is not liable for knowing receipt as regards the FMSI EMSU contract, since there is no finding of any breach of fiduciary duties in this regard.



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*The law*

450 The law in Singapore on dishonest assistance and knowing receipt was authoritatively discussed by the Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage III*"). The Court of Appeal held at [20] that the elements of a claim in dishonest assistance are:

(a) The existence of a trust;

(b) A breach of that trust;

(c) Assistance rendered by the third party towards the breach; and

(d) A finding that the assistance rendered by the third party was dishonest.

451 I pause here to note that the threshold requirement for liability in *George Raymond Zage III* was thus said to be the existence of a *trust*. In reliance on this, the sixth to eighth defendants submit that since there is no trust in respect of a Town Council's assets, there can be no liability for dishonest assistance in respect of those assets. There is no merit in this submission. In *George Raymond Zage III*, the Court of Appeal referred to two of its previous decisions in setting out the elements of dishonest assistance at [20]: *Bansal Hemant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 ("*Bansal*") and *Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 2 SLR(R) 94 ("*Caltong*"). In *Bansal*, the Court of Appeal referred to the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 2 AC 378 ("*Royal Brunei Airlines*") (at [29]) and held that the first element of the claim was the existence



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of a trust (at [30]). On the other hand, in *Caltong*, the Court of Appeal likewise referred to *Royal Brunei Airlines*, but elucidated the first element as "a disposal of … assets *in breach of trust or fiduciary duty*" [emphasis added] (at [33]). In *Royal Brunei Airlines* itself, the Privy Council referred to this liability as involving "a breach of trust or fiduciary obligation" (at 392). There is nothing to suggest that liability for dishonest assistance should be limited to cases where a trust exists. As such, I am satisfied that the gloss put on the test in *Bansal* and *George Raymond Zage III*, that this liability attaches in relation to property held on trust, was merely a shorthand used by the court for the existence of a fiduciary relationship. It suffices for liability that there was a breach of fiduciary duty.

452 The Court of Appeal in *George Raymond Zage III* explained the requirement of dishonesty in dishonest assistance as involving the defendant's "knowledge of the irregular shortcomings of the transaction" such that "ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them" (at [22]).

453 As for knowing receipt, the Court of Appeal held in *George Raymond Zage III* at [23] that the elements of such a claim are:

(a) A disposal of the plaintiff's assets in breach of fiduciary duty;

(b) The beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and

(c) Knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty.

454 This third element of knowledge was reformulated by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch



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437. Nourse LJ held that "the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" (at 455E). In *George Raymond Zage III*, the Court of Appeal expounded on this definition (at [32]):

> … [A]ctual knowledge of a breach of trust or a breach of fiduciary duty is not invariably necessary to find liability, particularly, when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt. The test of unconscionability should be kept flexible and be fact centred.

*Whether the sixth to eighth defendants are liable for dishonest assistance*

455 In both dishonest assistance and knowing receipt, the knowledge of the controlling minds of a company can be imputed to that company: see *Caltong* at [30]. As such, the knowledge of Ms How Weng Fan and Mr Danny Loh can be imputed to FMSS, particularly since it was undisputed that they were its controlling minds.

456 I find on the evidence that it is clear Ms How Weng Fan, Mr Danny Loh and FMSS dishonestly assisted in Mr Low Thia Khiang and Ms Sylvia Lim's breach of fiduciary duties with regard to the appointment of FMSS pursuant to the first MA and EMSU contracts. Ms How Weng Fan was very much involved in the machinations of both Mr Low Thia Khiang and Ms Sylvia Lim right from the beginning, having been roped into the discussion to replace CPG with FMSS as early as 9 May 2011 (see above at [27]). Ms How Weng Fan remained intimately involved throughout the process leading up to the appointment of FMSS under the first MA contract, and subsequently through her involvement as Deputy Secretary and General Manager of AHTC (see above at [16]). The involvement of Mr Danny Loh at the beginning is less clear, but I find on



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balance that he was equally aware of and rendered assistance towards the appointment of FMSS, since he was responsible for the setting up of FMSS in the midst of the formulation of the plan to replace CPG with a MA that Mr Low trusted, and was ideally placed given his experience in estate management matters through his involvement in FMSI with HTC. He was also Ms How Weng Fan's husband, and was likely to have been privy to the discussions between her and Mr Low Thia Khiang and Ms Sylvia Lim, particularly since these discussions would have been important to both of them as the incoming management team for FMSS, the new MA.

457 The assistance rendered was also clearly dishonest on the facts, as Ms How Weng Fan and Mr Danny Loh would have been aware that AHTC was in breach of its various obligations under the TCFR in waiving a tender without proper justification. They were no doubt at least in part motivated by their own financial interests as shareholders of FMSS. This, in my view, is sufficient to find dishonest assistance on the part of Ms How Weng Fan, Mr Danny Loh and FMSS. As noted earlier, the extent of this liability is a matter of loss, which is discussed at [630] below.

*Whether the sixth to eighth defendants are liable for knowing receipt*

458 I find that FMSS is also liable for knowing receipt in respect of the payments to it under the first MA and EMSU contracts. As I have found that the appointment of FMSS pursuant to the first MA and EMSU contracts represented deliberate breaches of fiduciary duties by Ms Sylvia Lim and Mr Low Thia Khiang, it is clear that the payments to FMSS flowing from those contracts represent a disposal of the plaintiffs' assets in breach of fiduciary duty. Given Ms How Weng Fan and Mr Danny Loh's participation in and awareness of the circumstances of FMSS's appointment, I also find that it would be



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unconscionable for FMSS to retain the benefit of this receipt. As such, I find it liable for knowing receipt. Once again, the extent of this liability depends on the kind of loss which is caught by knowing receipt, which I discuss at [631]–[632] below. For now, it suffices for me to note that for the reasons I elaborate upon there, liability for knowing receipt *cannot* attach to payments to FMSS flowing from the *second* MA and EMSU contracts, because the second MA and EMSU contracts were not themselves entered into in breach of fiduciary duty. This sets liability for knowing receipt apart from that for dishonest assistance.

***Whether the claims are time-barred***

459 The writ in S 668/2017 (by AHTC) was filed on 21 July 2017. The writ in S 716/2017 (by PRPTC) was filed on 3 August 2017. As such, the defendants argue that all the claims accruing before 21 July 2011 (in respect of AHTC) and 3 August 2011 (in respect of PRPTC) were time-barred by virtue of ss 6 and 22 of the Limitation Act (Cap 163, 1996 Rev Ed): see [158] above. In response, the plaintiffs make a number of submissions to show that none of the claims was time-barred. In particular, they rely on exceptions to limitation under ss 22(1) and 24A(3)(*b*) of the Limitation Act. It is worth noting that the plaintiffs do not seek to rely on the fraud-based exception under s 29(1) of the Limitation Act.

460 There are only two heads of claim that I have found liability for and which could *potentially* fall outside a six-year limitation period:

(a) The first is for entering into the first MA contract on 8 July 2011. This includes the liability of Ms Sylvia Lim, Mr Low Thia Khiang, and Ms How Weng Fan for breach of fiduciary duties, and of Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo for breach of their equitable duties of skill and care, as well as the dishonest assistance and knowing receipt by the sixth to eighth defendants.



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(b) The second relates to the first to seventh defendants' breach of their duties of skill and care in relation to four invoices issued by FMSS/FMSI between 28 May 2011 and 28 July 2011 ("the four invoices"): see [385] above. In respect of AHTC, only three of these invoices (*ie*, with the exception of the invoice for $29,400 dated 28 July 2011) fall outside a six-year limitation period. In respect of PRPTC, all four invoices fall outside a six-year limitation period.

These are therefore the only two heads of claim I need to address in relation to the limitation issues. In my view, both heads of claim are not time-barred by reason of s 24A(3)(*b*) of the Limitation Act. In addition, a further exception under s 22(1) of the Limitation Act applies to the claim for breach of fiduciary duties in relation to the first MA contract such that no limitation period is applicable to it. Before I explain my reasons, I will consider the other arguments raised by the plaintiffs.

461 AHTC argues that on the facts, the claim in relation to the first MA contract only accrued after the relevant 6-year limitation period commenced. This is on the basis that the claim accrued either upon the formal ratification of the first MA contract by AHTC on 4 August 2011, or upon the payment of the first invoice under the contract on 21 July 2011. In so far as the claims for breach of fiduciary duties and of duties of skill and care are concerned, this cannot be correct. On the facts which I have found, Ms Sylvia Lim, Mr Low Thia Khiang, and Ms How Weng Fan acted in breach of their fiduciary duties to AHTC by entering into the first MA contract, and Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo acted in breach of their duties of skill and care in failing to question these actions. To the extent that the defendants then procured the ratification of the first MA contract by AHTC, they perpetuated this same breach, as opposed to committing a fresh breach for the first time. As such, this



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cause of action accrued on 8 July 2011 when the FMSS LOI was first signed by Ms Sylvia Lim (see [48] above). The same analysis must apply to liability for dishonest assistance in relation to these facts, since that liability is parasitic upon the breach of fiduciary duties (see [451] above).

462 On the other hand, since the first payment under the first MA contract was made on 21 July 2011, the sixth to eighth defendants could only have received this payment on or after that date. As the trigger for liability for knowing receipt is beneficial receipt, and not the breach itself (see [453] above), the sixth to eighth defendants' liability for knowing receipt falls within the limitation period in respect of AHTC. No limitation issue therefore arises.

463 PRPTC argues that the defendants breached their duty to rectify their breaches of their duties, which amounted to a fresh breach on each day until the breaches were rectified. Without going into the circumstances where such a continuing obligation may be found, I have no doubt that it cannot be found in the ordinary case of a fiduciary relationship. If it were otherwise, this would render ss 6(7), 22(1) and 22(2) of the Limitation Act virtually surplusage, because there would then rarely be a case where the six-year limitation period set out in ss 6(7) and 22(2) would apply; nor would there be a need for an exception to this limitation period under s 22(1).

*The knowledge exception under s 24A(3)(*b*) of the Limitation Act*

464 The plaintiffs argue that by virtue of s 24A(3)(*b*) of the Limitation Act, a 3-year limitation period started to run only from the date AHTC could be said to have acquired the knowledge required for bringing the various claims against the defendants. The date on which such knowledge was acquired is variously said to be the date KPMG issued its report (31 October 2016), or the date of



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appointment of the Independent Panel (17 February 2017) since it was the controlling mind of AHTC's suit. I agree that s 24A(3)(*b*) is applicable in the present case in respect of both heads of claim. As a result, none of the plaintiffs' claims would be time-barred. However, I differ from the plaintiffs' view of the date on which the relevant knowledge was acquired (see [473] below).

465 Section 24A of the Limitation Act provides:

> **Time limits for negligence, nuisance and breach of duty actions in respect of latent injuries and damage**
>
> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).
>
> …
>
> (3) An action to which this section applies, other than one referred to in subsection (2) [damages in respect of personal injuries], shall not be brought after the expiration of the period of —
>
> > (*a*) 6 years from the date on which the cause of action accrued; or
> >
> > (*b*) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).
>
> (4) In subsections (2) and (3), the knowledge required for bringing an action for damages in respect of the relevant injury or damage (as the case may be) means knowledge —
>
> > (*a*) that the injury or damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
> >
> > (*b*) of the identity of the defendant;
> >
> > (*c*) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that



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> person and the additional facts supporting the bringing of an action against the defendant; and
>
> (*d*) of material facts about the injury or damage which would lead a reasonable person who had suffered such injury or damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (5) Knowledge that any act or omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant for the purposes of subsections (2) and (3).
>
> (6) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire —
>
> (*a*) from facts observable or ascertainable by him; or
>
> (*b*) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek.
>
> (7) A person shall not be taken by virtue of subsection (6) to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

466 The primary issue is the requisite level of knowledge that the plaintiff must have for the purpose of s 24A(3)(*b*). However, before I consider that issue, there are several threshold issues that must first be addressed. First, there is the question of whether a claim for breach of fiduciary duties (whether framed as a claim for equitable compensation or otherwise) is properly considered an action for "damages" under s 24A(1). Strictly speaking, equitable compensation (and, *a fortiori*, other equitable remedies) cannot be equated with damages: see [554] below. On the other hand, in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163, the High Court accepted, at least implicitly, that s 24A could apply to claims for breach of fiduciary duty (at, *eg*, [246]). Likewise, in *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] 4 SLR 320 ("*Sinwa*"),



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although the High Court rejected the submission based on s 24A, it was at least prepared to consider whether claims for, *inter alia*, an account of profits (see *Sinwa* at [10]) fell within the scope of s 24A(3)(*b*) (*Sinwa* at [41]–[46]). I share the same view as that in *Sinwa*. It is also worth noting that in the present case, I have found Mr Pritam Singh, Mr David Chua and Mr Kenneth Foo to have acted negligently in relation to the first MA contract. Since this can found a claim in the tort of negligence, it would fall within the scope of s 24A(1). It would be anomalous for the liability of Ms Sylvia Lim, Mr Low Thia Khiang and Ms How Weng Fan for acting in breach of fiduciary duties in relation to the same events to then fall outside s 24A. In any event, since the defendants have made no challenge on this point, I will proceed on the basis that s 24A(1) is satisfied.

467 Second, I address AHTC's submission that any limitation period only started running when the Independent Panel was appointed. I do not accept this submission. If this were so, the limitation of the claims against the defendants, regardless of their nature, would be at large so long as the appointment of the Independent Panel is delayed until the action is ready to be brought. A similar point was made by Steven Chong J (as he then was) in *Sinwa* at [44] in relation to the bringing of derivative actions by shareholders. In the same passage, Chong J also pointed out that s 24A(3)(*b*) refers to "the earliest date on which the plaintiff *or any person in whom the cause of action was vested before him*" [emphasis added] had the relevant knowledge. Thus, the date at which the cause of action was vested in the Independent Panel, or in PRPTC, is immaterial since s 24A(3)(*b*) looks at when the original cause of action was vested, which would have been when it was vested in AHTC.

468 Third, I equally cannot accept the first to fifth defendants' argument that *their* knowledge of the material facts should be attributed to AHTC for the purposes of considering when AHTC had the requisite knowledge of the cause



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of action. In *Julien v Evolving Tecknologies and Enterprise Development Co Ltd* [2018] BCC 376 ("*Julien*"), the Privy Council, on appeal from Trinidad and Tobago, was asked to interpret a limitation provision which is materially identical to s 29(1)(*b*) of the Limitation Act in Singapore. Section 29(1)(*b*) provides that where any fact relevant to the cause of action is deliberately concealed from the plaintiff by the defendant, the limitation period shall not commence until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it.

469 In *Julien*, it was common ground between the parties that "the knowledge of, or ability to discover the alleged breach by [the company]'s former directors cannot be attributed to [the company], for the simple reason that they are the alleged wrongdoers and [the company] is the alleged victim" (at [5]). The Privy Council clearly accepted this proposition as it proceeded to consider whether the knowledge of the company's sole *shareholder* could be attributed to the company instead. It then said, in passing, at [61]:

> … [T]here is no obvious reason why time should run in favour of the directors of a company who have committed a deliberate breach of duty, or deliberately concealed a breach of duty, for as long as they choose to retain control of the company as its Board. …

I agree that it would be unjust to allow fiduciaries to run down the clock on any allegations of wrongdoing simply by maintaining control over their principal. I would hold that this position, accepted by the Privy Council in *Julien*, is of equal applicability to the knowledge contemplated by s 24A(3)(*b*) of the Limitation Act.

470 I now turn to the primary issue of the requisite level of knowledge for the purpose of s 24A(3)(*b*). This was considered by the Court of Appeal in *Lian Kok Hong v Ow Wah Foong and another* [2008] 4 SLR(R) 165 ("*Lian Kok*



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*Hong*") at [27]–[42]. In *Lian Kok Hong*, the Court of Appeal summarised the principles as follows (at [42]):

> (a) First, in respect of s 24A(4)(*a*) read with s 24A(5), *viz*, attributability, the claimant need not know the details of what went wrong, and it is wholly irrelevant whether he appreciated that what went wrong amounted in law to [*eg*] negligence, as long he knew or might reasonably have known of the factual essence of his complaint.
>
> (b) Second, the requirements under ss 24A(4)(*b*) and 24A(4)(*c*) as to the identity of the defendant or otherwise, which we have not elaborated on above because of their relative simplicity, should be addressed when appropriate.
>
> (c) Third, in relation to s 24A(4)(*d*), the material facts referred to need not relate to the specific cause of action, and the assumptions as to the defendant not disputing his liability and his ability to satisfy a judgment, coupled with the requirement of "sufficient seriousness", must be read to mean that the case must be one sufficiently serious for someone to actually invoke the court process given these assumptions.
>
> (d) Finally, conditioning the above is the *degree* of knowledge required under paras (a) to (c), and this does not mean knowing for certain and beyond the possibility of contradiction.

471 The principle summarised in (a) above is worth noting. In *Lian Kok Hong* at [33] the court endorsed the view that it was inappropriate to insist on "extremely non-judgmental language" in characterising the facts which the plaintiff is expected to know for the requisite knowledge to be found; instead, where the cause of action involves certain defects, mistakes or wrongdoing, the requisite knowledge should include some awareness of the shortcomings of the conduct in question.

472 In the present case, for the reasons discussed at [469] above, the knowledge that Ms Sylvia Lim and Mr Low Thia Khiang possessed in relation to their own conduct in appointing FMSS under the first MA contract cannot be attributed to AHTC for the purposes of s 24A(3)(*b*) of the Limitation Act. On



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the other hand, there is no reason to wait for control over AHTC to be handed over to a third party, such as the Independent Panel, before the requisite knowledge is found (see [467] above). This is because once the requisite knowledge exists beyond the authors of the alleged wrongdoing, steps could be taken in response: in the case of AHTC, one such step is for HDB to apply for relief under s 21(2) of the TCA, as it did in *AHPETC (CA)*; in the case of a company, the relevant step would be a derivative action by shareholders (see *Julien* at [43]). Section 24A(3)(*b*) provides for a reasonable period of three years between this point and the deadline to commence a claim.

473 Based on *Lian Kok Hong*, I do not think that the requisite knowledge was only available when KPMG issued its report on 31 October 2016. In my view, the Auditor-General's Report issued on 9 February 2015 (see [21] above) provided a sufficient level of detail for s 24A(3)(*b*) to be engaged. This report observed, for example, that the town councillors could not show that they had considered the extent of the related party interests and safeguards needed before entering into contracts with FMSS, such that the integrity of the payments to FMSS was open to question. This was, at least in part, the factual essence of the plaintiffs' complaint in respect of the first MA contract. The Auditor-General's Report likewise made observations going to the essence of the complaint in relation to the four invoices. For example, it observed that AHTC had been unable to provide documents, such as job sheets summarising the works carried out, for transactions taking place shortly after AHTC was formed from the merger of ATC and HTC. It would have been reasonably clear that those responsible for any wrongdoing or shortcomings in relation to the observations above would likely include Ms Sylvia Lim and Mr Low Thia Khiang. Granted, it would have been difficult to crystallise the cause of action without further investigations (such as those by KPMG), but the time for such forensic



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investigations rightly falls *within* the three-year limitation period under s 24A(3)(*b*), and not before.

474 I therefore find that the plaintiffs' claims in respect of the first MA contract and the four invoices fall within s 24A(3)(*b*) of the Limitation Act, and the three-year limitation period commenced on 9 February 2015 when the Auditor-General's Report was issued. These claims would therefore not be time-barred in respect of any of the defendants.

*The trust-related exceptions under s 22(1) of the Limitation Act*

475 The plaintiffs submit, in the alternative, that their claims for breach of fiduciary duties were not time-barred on the basis of the exceptions set out in s 22(1) of the Limitation Act:

> **22.**—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

Any claim that could be brought within the scope of either s 22(1)(*a*) or s 22(1)(*b*) would therefore be subject to no limitation period at all.

476 A plain reading of s 22(1) shows that a prerequisite for either limb of s 22(1) is that the plaintiff is "a beneficiary under a trust". In relation to s 22(1)(*a*), there must be a "fraudulent breach of trust" involving the defendant *qua* "trustee". In relation to s 22(1)(*b*), the claim must be against the defendant *qua* "trustee" for the recovery of "trust property or the proceeds thereof" that is



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either "in the possession of the trustee" or "previously received by the trustee and converted to his use". It is therefore immediately apparent that neither the claim in respect of the four invoices, nor the claim in respect of the first MA contract in so far as breach of *the equitable duties of skill and care* were concerned, could potentially fall within s 22(1). For present purposes, the only claim which is relevant is the claim for breach of fiduciary duties in relation to the first MA contract, as the other breaches of fiduciary duties occurred within the 6-year limitation period.

477 In *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Yong Kheng Leong*"), the Court of Appeal took the view, albeit *obiter* (see [35]), that "trustee" for the purposes of both limbs of s 22(1) extends to what is called a "Class 1 constructive trustee" but not a "Class 2 constructive trustee", as a potentially indeterminate period of liability could only be justifiably imposed upon the former (at [51]). It also explained the distinction between the two classes, and held that company directors ought to be considered Class 1 constructive trustees:

> 46 This is the essence of the distinction between Class 1 and Class 2 constructive trustees. If a person holds property in the position of a trustee (and *there is no doubt that a director is regarded as a trustee over the company's property* … ) and deals with that property in breach of that trust, he will be a *Class 1 constructive trustee*; whereas a wrongdoer who fraudulently acquires property over which he had never previously been impressed with any trust obligations, may, by virtue of his fraudulent conduct, be held liable in equity to account as if he were a constructive trustee. But the latter is not a case of someone who had ever in reality been a trustee of that property; and it is only by virtue of equity's reach that such a person is regarded as a *Class 2 constructive trustee*.
>
> …
>
> 48 … When [the defendant director] disposed of [the plaintiff company]'s assets unlawfully, whether to his wife or to himself through his wife, *he was undoubtedly a Class 1 constructive trustee because he had dealt with that property in*



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> *breach of the trust and confidence that had been placed in him as a director.*
>
> [emphasis added]

478 It is worth emphasising that directors are not constituted Class 1 constructive trustees by the act of receiving misappropriated company assets. Instead, company directors are regarded for limitation purposes as being in possession of the company's assets from the start; any misapplication of those assets therefore constitutes them as Class 1 constructive trustees. This point was recently reaffirmed by the UK Supreme Court in *Burnden Holdings (UK) Ltd v Fielding and another* [2018] AC 857 ("*Burnden Holdings*"). In *Burnden Holdings*, the Supreme Court discussed s 21(1) of the Limitation Act 1980 (c 58) (UK) ("Limitation Act 1980"), which is identical to s 22(1) of the Limitation Act in Singapore (set out at [475] above). Lord Briggs, delivering the unanimous judgment of the Supreme Court, said:

> 18 It is necessary to bear in mind that section 21 is primarily aimed at express trustees, and *applicable to company directors by what may fairly be described as a process of analogy*. An express trustee, such as a trustee of a strict settlement, might or might not from time to time, or indeed at all, be in possession or receipt of the trust property. …
>
> 19 By contrast, *in the context of company property, directors are to be treated as being in possession of the trust property from the outset*. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning of [s 21 Limitation Act 1980] at all. …
>
> [emphasis added]

479 The upshot of the analysis in *Yong Kheng Leong* and *Burnden Holdings* is that company directors are Class 1 constructive trustees as long as they misapply the company's assets. Therefore, any claim by a company against its director for a *fraudulent* misapplication of the company's assets will be subject



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to no limitation period by virtue of s 22(1)(*a*) of the Limitation Act, even if the director did not misappropriate them to himself.

(1) Application to the present case: ss 22(1)(*a*) and (*b*)

480 In the light of the parallels that I have drawn between company directors and town councillors, particularly in relation to the nature of the fiduciary duties that they owe, it is safe to say that town councillors are the "fiduciary stewards" of their Town Council's assets (see *Burnden Holdings* at [19], quoted at [478] above). As such, the same analysis above must apply in relation to the misapplication of AHTC's funds by Ms Sylvia Lim and Mr Low Thia Khiang in breach of their fiduciary duties.

481 It is not the plaintiffs' case that any of AHTC's funds were received by Ms Sylvia Lim or Mr Low Thia Khiang (or for that matter any of the first to fifth defendants), or converted to their use. As such, s 22(1)(*b*) of the Limitation Act is not engaged as regards them.

482 I therefore only need to consider s 22(1)(*a*) in respect of Ms Sylvia Lim and Mr Low Thia Khiang. A necessary ingredient of s 22(1)(*a*) is that there must be "fraud or fraudulent breach of trust" on the defendant's part; the question is therefore whether Ms Sylvia Lim and Mr Low Thia Khiang's conduct in relation to the first MA contract was "fraudulent" in this sense.

483 In *Yong Kheng Leong*, the Court of Appeal adopted (at [52]) the definition of "fraud" set out by the English Court of Appeal in *Gwembe Valley Development Co Ltd (in receivership) and another v Koshy and others (No 3)* [2004] 1 BCLC 131 at [131]–[132] for the purposes of s 22(1)(*a*) of the Limitation Act (although this was once again strictly speaking *obiter* – see *Yong Kheng Leong* at [35]):



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> 131 In [*Armitage v Nurse and others* [1998] Ch 241 ("*Armitage*")] at 251, 260 Millett LJ held that, in this context, a breach of trust is fraudulent, if it is dishonest. He accepted counsel's formulation that dishonesty—
>
> > … connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, *either knowing that it is contrary to the interests of the company or being recklessly indifferent whether it is contrary to their interests or not.*
>
> and added:
>
> > It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in the interests of the beneficiaries then he is acting dishonestly.
>
> 132 The correctness of this guidance was not in issue before us. We were also referred to the recent decision of the House of Lords in [*Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 ("*Twinsectra*")]. Lord Hutton, giving the leading speech, emphasised the objective and subjective aspects of the 'combined test' … :
>
> > which requires that before there can be a finding of dishonesty it must be established that *the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.*
>
> [emphasis added]

Thus, as the High Court explained in *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 ("*Lim Ah Leh*") at [197], "whereas the content of 'fraud' is to be derived from Millett LJ's definition in *Armitage*, the perspective from which the central concept of dishonesty should be assessed is informed by Lord Hutton's test in *Twinsectra*".

484 It is clear to me that Ms Sylvia Lim and Mr Low Thia Khiang's breach of fiduciary duties in relation to the first MA contract falls within the scope of s 22(1)(*a*). Here, it must be borne in mind that the definition of "fraud" for the



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purposes of s 22(1)(*a*), which I have just set out above, does not necessarily conform with a casual understanding of "fraud" as encompassing only the most serious forms of commercial wrongdoing. Under this definition, there is no need for any element of deceit or personal gain. *All that is required is for the fiduciary to have known that his actions were not in his principal's interests, or to have been reckless as to the same.* In other words, only a purely negligent or entirely innocent breach of fiduciary duties would fall outside the scope of "fraud" under s 22(1)(*a*). It is clear from my analysis of the facts that the breach of fiduciary duties in the present case could not have been purely negligent or entirely innocent. Acting for improper purposes and in deliberate violation of the TCFR (see [300] above) must fit easily within this definition of fraud. Ms Sylvia Lim and Mr Low Thia Khiang's breach of fiduciary duties thus falls within s 22(1)(*a*) of the Limitation Act and is therefore not time-barred.

485 I next turn to the sixth to eighth defendants. It would appear that AHTC's funds were received and converted to their use, since FMSS received them beneficially and Ms How Weng Fan and Mr Danny Loh were its owners. There, however, remains the difficulty of whether they were (at a minimum) Class 1 constructive trustees, since that is what is needed for s 22(1) to be engaged. Liability as a dishonest assistant or a knowing recipient, in and of itself, can only give rise to a Class 2 constructive trust, since these are quintessential examples of strangers to the trust. Thus, s 22(1) cannot apply if the only grounds for liability are for dishonest assistance or knowing receipt. It seems clear that FMSS is not a Class 1 trustee, and neither is Mr Danny Loh so far as the first MA contract is concerned, since his liability in that regard is only for dishonest assistance and knowing receipt, and not for breach of fiduciary duties.



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486 The final question, then, is whether Ms How Weng Fan is a Class 1 constructive trustee as a result of her breach of fiduciary duties in relation to the first MA contract. The issue here is whether an employee-fiduciary such as Ms How Weng Fan can be considered a "steward" of AHTC's property, such that she can be treated as being in possession of it for the purposes of limitation (see *Burnden Holdings* at [19]; and [480] above). This question appears to be a novel one. For example, in Yip Man and Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 ('"Navigating the Maze"') at para 47, the authors raised a similar question but did not offer a view. They cited only (at n 115) a passing remark set in parentheses by Leeming JA in the New South Wales Court of Appeal in *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494 ("*Hasler*") at [152] for the proposition that an employee-fiduciary owed fiduciary duties of stewardship over the company's property.

487 In my view, Ms How Weng Fan was a Class 1 constructive trustee when FMSS was appointed as MA under the first MA contract. Given that I have found Ms How Weng Fan to owe AHTC a "single-minded loyalty" (see [235]–[237] above), it would be incongruous to hold that she was a Class 2 constructive trustee, akin to a complete stranger to the transaction – and in the same position as, *eg*, Mr Danny Loh, who had no appointment at all in AHTC at the time. As the Deputy Secretary of AHTC at the time, a role which I have found to be akin to a Secretary-designate and which was accorded many of the same powers of expenditure and oversight as the Secretary (see [231] above), Ms How Weng Fan was in a position of stewardship and control over AHTC's property. As such, I am satisfied that she may be classified in the same category as the town councillors for limitation purposes. Section 22(1)(*b*) of the Limitation Act therefore allows for the claim as regards the first MA contract to



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be brought against Ms How Weng Fan without limitation. Further, for the same reasons as at [484] above (in relation to Ms Sylvia Lim and Mr Low Thia Khiang's conduct), Ms How Weng Fan's conduct also engaged the exception to limitation under s 22(1)(*a*).

488 Before I leave this issue, I will address the first to fifth defendants' argument that fraud under s 22(1)(*a*) must be expressly pleaded and proven, and that this has not been done in the present case. This proposition is derived from the Court of Appeal's decision in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand*") at [219]. Although the Court of Appeal found that the defendant in that case had acted improperly as he had transferred to himself assets held by his family companies that did not belong to him, it held that this did not mean he had acted fraudulently in respect of the particular plaintiff in question. It was in this context that the court commented that "fraud must be expressly pleaded and proved". However, this must be understood in light of the fact that the plaintiff there had been joined to the suit by the trial judge *after* judgment had been issued against the defendant on the question of liability. Remedies were then awarded to the plaintiff without him having filed any pleadings (see *Ernest Ferdinand* at [217]).

489 The present case is at the opposite end of the spectrum. The fraud within the meaning of s 22(1)(*a*) of the Limitation Act which I have referred to at [484] above, consists of precisely those allegations which are at the heart of the plaintiffs' pleaded cases in relation to the first MA contract (see [92]–[95] above). A finding of fraud in the context of s 22(1)(*a*) therefore cannot possibly prejudice the defendants. Furthermore, as the High Court put it in *Lim Ah Leh* ([483] *supra*) at [201(c)], "a breach of trust as a cause of action has no fixed set of elements … sometimes 'fraud' is necessary, sometimes it is simply present".



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I do not therefore expect to see any explicit reference to "fraud" in the plaintiffs' pleaded cases, especially considering the specific definition of fraud that applies for the purposes of s 22(1)(*a*). As such, the defendants do not gain any assistance from *Ernest Ferdinand*.

490 In summary, the defendants' limitation defence, either in respect of the claims in relation to the first MA contract, or the claim in relation to the four invoices, does not succeed. On both heads of claim, the plaintiffs can rely upon s 24A(3)(*b*) of the Limitation Act, which affords a sufficient extension of the limitation period. Further, and in the alternative, the plaintiffs can also rely on s 22(1)(*a*) of the Limitation Act to establish an exception to limitation in respect of Ms Sylvia Lim, Mr Low Thia Khiang, and Ms How Weng Fan's breach of fiduciary duties in relation to the first MA contract. Section 22(1)(*b*) establishes a further exception to limitation for the same claim so far as Ms How Weng Fan is concerned. The remainder of the defendants' liabilities to the plaintiffs only arises later and within the limitation period, and no defence of limitation is applicable to it.

### *The defence of good faith under s 52 TCA*

491 The defendants submit that even if they are otherwise liable in respect of the plaintiffs' claims, they are protected from liability by s 52 of the TCA (see [157] above). Section 52 provides:

> **Protection from personal liability**
>
> **52.** No suit or other legal proceedings shall lie personally against any member, officer or employee of a Town Council or other person acting under the direction of a Town Council for anything which is in good faith done or intended to be done in the execution or purported execution of this Act or any other Act.



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492 The plaintiffs submit in response that s 52 TCA protects town councillors from suits *by third parties*, and not *by the Town Council* (see [123] above). They also argue that the defendants do not fall within s 52 as they have not acted in good faith. I will discuss these arguments in turn.

*Whether the s 52 TCA defence can be invoked against the Town Council*

493 The principles of statutory interpretation are well-established. They are set out in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) and were explained by the Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"). The Court of Appeal summarised the proper approach for the court in "undertaking a purposive interpretation of a legislative provision" as follows (at [37]):

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

494 I accept that on one reading, a possible interpretation of s 52 TCA is that it provides for immunity in respect of all claims, regardless of the claimant, against (*inter alia*) members and officers of a Town Council, so long as the claims relate to things done in good faith and in the execution of any Act. For convenience, I will refer to this as "the expansive reading". However, this is not the only possible reading of s 52. It could also be read as applying only to claims brought by third parties. The starting point of this interpretation is that when a person acts in the name or on behalf of the Town Council, both that person and the Town Council may incur potential liabilities to third parties. The immunity



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provision may be seen as an effort to carve out the liability of the individual to such a party, leaving the liability of the Town Council itself to that party intact. This may be seen in the use of the qualifier "personally", which is also reflected in the caption "protection from personal liability" – *ie*, "personal" liability of a member, officer or employee to third parties, as opposed to institutional or corporate liability of the Town Council to third parties. This contrast suggests that the premise of s 52 TCA concerns liability to third parties only, because only in that context is it necessary to draw a distinction between personal and non-personal liability. Otherwise, the word "personally" would be surplusage, as under the expansive reading s 52 would have the same meaning with or without it.

495 In my view, this interpretation must prevail over the expansive reading. Apart from rendering the use of the word "personally" surplusage, I find that the expansive reading leads to a result that may be said to be unworkable or impracticable. Moreover, considered in context, s 52 TCA could not have been intended to confer a blanket immunity on a member, officer or employee of a Town Council against liability owed to the Town Council arising from their conduct in that capacity purely because they have acted in good faith. I will explain why.

496 Under the first step of ascertaining the possible interpretations of the statutory provision, the Court of Appeal in *Tan Cheng Bock* said that the court can have recourse to canons of statutory construction. The court gave the example of the rule that "Parliament is presumed not to have intended an unworkable or impracticable result, so an interpretation that leads to such a result would not be regarded as a possible one" (at [38]), citing its earlier judgment in *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 ("*Soh Seow Poh*"). In *Soh Seow Poh* at [40], the Court of Appeal had said:



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> … The courts have given a wide meaning to the phrase "absurd results" that goes beyond the plain English meaning of being silly or ridiculous. The extent to which the presumption applies depends "on the degree to which a particular construction produces an unreasonable result [and the] more unreasonable a result, the less likely it is that Parliament intended it" (*per* Lord Millett in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 at 238). …

497 I would be slow to reach the conclusion that a likely interpretation of s 52 TCA is the expansive reading, because this would be an unworkable and impracticable result. The unworkability lies in the very essence of the defendants' reliance on s 52 in the present case: the expansive reading of s 52 would cast doubt on the ability of the Town Council to bring claims against those acting on its behalf, when there is simply no good reason for this immunity. There are several layers to the impracticability of such an interpretation.

498 First, s 52 TCA does not apply just to town councillors, but also to all officers, employees, and even any person acting under the direction of the Town Council. This could include persons who have contracted with the Town Council – for example, the MA and its employees. The upshot of the expansive reading is that the Town Council would be unable to enforce any legal obligations owed to it by these persons, so long as the conduct in question related to the performance of statutory duties and was in good faith. Where these conditions are met, the Town Council would be unable to enforce terms of the MA and EMSU contracts, terms of employment contracts, and even duties owed in tort and fiduciary duties. This undoubtedly interferes with the Town Council's freedom to contract on such terms as it sees fit. It can hardly be said that s 52 TCA was enacted for that purpose. It may appear at first glance that such a position is reasonable because of the requirement of good faith in s 52. However, many contractual obligations, tortious duties of care, and even



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fiduciary duties may be breached even when acting in good faith. Indeed, good faith is not an ingredient in many contractual bargains. The expansive reading of 52 TCA rewrites all of these obligations. The point is brought into sharp focus in the case of the MA contract or a contract of employment. Both are contracts entered into by the Town Council on terms which are freely negotiated at arm's length, and in the instance of the MA, pursuant to a tender. It seems extraordinary that the liability of the MA or the Town Council's employees could be excused on the ground of good faith even if the terms of the contract say otherwise. If Parliament had intended s 52 to have such an extravagant effect, I would have thought that it would have made this clear in express terms.

499 It is no answer to this criticism to say that when a person breaches their legal obligations to the Town Council, they will cease to act "in the execution or purported execution of" the statutory provisions. The nature of an immunity provision is such that it would usually only need to be resorted to when the actions in question are not entirely within the four corners of the applicable laws. As the High Court of Australia observed in *Little v The Commonwealth* (1947) 75 CLR 94 ("*Little*") at 108:

> Protective provisions … restricting or qualifying rights of action have long been common in statutes affecting persons or bodies discharging public duties or exercising authorities or powers of a public nature. In provisions of this kind it is common to find such expressions as … "anything done in execution of this statute" … . Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment. …

I made a similar point in my analysis of the proviso in s 14(1) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) in *Estate of Lee Rui Feng Dominique*



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*Sarron, deceased v Najib Hanuk bin Muhammad Jalal and others* [2016] 4 SLR 438 ("*Dominique Sarron Lee*") at [46]–[48].

500 Second, as alluded to in the quotation from *Little* above, immunity provisions of the form used in s 52 TCA are commonplace in our statute books. This can be confirmed by a cursory search, the results of which are too numerous to list. Of these, a number of statutes contain immunity provisions that are identical, *mutatis mutandis*, to s 52 TCA. A small sampling of these would suffice for present purposes:

> **Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed)**
>
> **132.** No action shall lie against the Commissioner or any officer appointed under this Act or any person acting under the direction of the Commissioner or that officer in respect of any matter or thing done in good faith for the purpose of carrying out the provisions of this Act.
>
> **Agency for Science, Technology and Research Act (Cap 5A, 2002 Rev Ed)**
>
> **17.** No suit or other legal proceedings shall lie personally against any member, officer or employee of the Agency or other person acting under the direction of the Agency for anything which is in good faith done or intended to be done in the execution or purported execution of this Act.
>
> **Animals and Birds Act (Cap 7, 2002 Rev Ed)**
>
> **78.** No suit or other legal proceedings shall lie against the Board, the Director-General or any authorised officer, police officer, officer of customs or any other person acting under the direction of the Board or Director-General for anything which is in good faith done in the execution or purported execution of this Act.
>
> **Civil Service College Act (Cap 45, 2002 Rev Ed)**
>
> **16.** No suit or other legal proceedings shall lie personally against any officer or employee of the College, member or person acting under the direction of the College, for anything which is in good faith done or intended to be done in the



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> execution or purported execution of this Act or any other written law.

501 I have set out these examples to show the breadth of impact the expansive reading would have on the ability of government-linked entities to enforce legal obligations owed to them. In many of these instances, the public body in question is a corporate body with separate legal personality, capable of bringing suits in its own name: see s 3 of the Agency for Science, Technology and Research Act; s 2 of the Animals and Birds Act read with s 3 of the National Parks Board Act (Cap 198A, 2012 Rev Ed); and s 3 of the Civil Service College Act. In each of these statutes, the immunity provision provides for the immunity of a wide range of persons, including anyone acting under the direction of the public body. The expansive reading would seriously disrupt the ability of these entities to balance and protect their legal interests through a freely negotiated contractual bargain, the means by which bodies corporate usually do so.

502 Third, it is useful to juxtapose s 52 TCA with s 391 of the Companies Act and s 60 of the Trustees Act. On the defendants' argument, s 52 TCA has the effect of *relieving* the liability of, *inter alia*, the fiduciaries of the Town Council (although it is in fact drafted in the form of an *immunity*). Section 391 of the Companies Act and s 52 of the Trustees Act serve similar purposes. The former gives the court discretion to grant relief to, *inter alia*, company directors who have breached their duties:

> **Power to grant relief**
>
> **391.**—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either



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> wholly or partly from his liability on such terms as the court thinks fit.

In a similar vein, s 60 of the Trustees Act gives the court discretion to grant relief to trustees who have breached their duties:

> **Power to relieve trustee from personal liability**
>
> **60.** If it appears to the court that a trustee … is or may be personally liable for any breach of trust, … but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same.

503 As opposed to s 52 TCA and the other *immunity* provisions which I have just discussed, s 391 of the Companies Act and s 60 of the Trustees Act are framed as provisions for *relief* from liability, not the *exclusion* of liability in the first place. In fact, s 391 and s 60 both enable the court to exercise a discretion to give only *partial* relief from liability. The grant of relief is subject to the requirements of honesty, reasonableness and fairness, which appear to be more specific and more stringent than that of "good faith". Yet, relief is only discretionary. Both provisions are also expressly framed in the manner of a discretion to be exercised if "it appears to the court" that the fiduciary ought to be relieved from liability. On the other hand, s 52 TCA gives the court no discretion either in the conferring of immunity or the extent to which it should be conferred: so long as the defendant has acted in good faith in the execution of any Act, he is absolutely immune from liability. In my view, this further justifies caution in accepting the expansive reading.

504 Fourth, the expansive reading would perhaps extend so far as to provide immunity against criminal prosecution. This is because criminal prosecutions fall within the scope of "suit or other legal proceedings" on a literal reading.



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This would undermine other provisions of the TCA that provide for criminal liability of those acting on behalf of the Town Council. For example, prior to 2017, s 33 TCA provided:

> (6) A Town Council shall not disburse any moneys —
>
> > (*a*) from any sinking fund otherwise than for the purposes of …
> >
> > …
> >
> > (*b*) from the Town Council Fund except for the purpose of …
> >
> > …
>
> (6A) Any Town Council which contravenes subsection (6)(*a*) or (*b*) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000.
>
> (6B) Where a Town Council is guilty of an offence under subsection (6A) and *that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of its chairman or secretary*, or any person who was purporting to act in any such capacity, he, as well as the Town Council, *shall also be guilty of that offence* and shall be liable to be proceeded against and punished accordingly.
>
> [emphasis added]

505 Both ss 33(6A) and 33(6B) are clearly framed as strict liability offences. A Chairman or Secretary can easily commit the s 33(6B) TCA offence while acting in good faith – for example, by taking an over-zealous interpretation of the scope of what is permitted under ss 33(6)(*a*) and 33(6)(*b*). By Act 17 of 2017, s 33(6B) was repealed and replaced with an omnibus penalty provision, s 48A TCA. Section 48A(2) read with s 48A(3)(*a*) of the TCA has a similar effect to the old s 33(6B) set out above. It would be unusual to say the least to have the scope of such an offence to be qualified to such a significant extent by s 52 TCA if the expansive reading is accepted.



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506 I pause here to note that AHTC made a similar argument that on the expansive reading, provisions such as r 56 TCFR would be rendered "toothless". As I discussed at [210] above, r 56 TCFR imposes personal liability on officers for payments made without authority or upon an incorrect certification, apparently on a basis of strict liability. Although I can see the force in this argument, little if any weight can be placed upon it. This is because r 56 TCFR, unlike ss 33(6A) and 33(6B) TCA, is secondary legislation; and s 52 TCA is primary legislation. If there is any inconsistency between them, it is r 56 TCFR that must be read in accordance with s 52 TCA, not the other way round.

507 Having explained why I consider the expansive reading to be unworkable, I turn to briefly consider the legislative purpose or object of the provision. This discussion is brief because there is little material to work with. There was no discussion in Parliament of s 52 TCA, and there is little in the structure or context of the TCA that sheds light on the purpose of s 52 beyond the words of the provision itself. Nevertheless, some observations may be made about the purpose of immunity provisions in general, in contrast with other related provisions, such as relief provisions (see [503] above). Recently, the Court of Appeal had occasion to discuss this topic in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*"). The court concluded (at [50]):

> … [S]tatutory immunity clauses share certain characteristics. *First*, they are *exceptional* in that they preclude claims being brought against certain classes of persons under prescribed conditions where ordinarily, such persons might otherwise be subject to some liability. *Second, statutory immunity clauses commonly seek to protect persons carrying out public functions. It is on account of the responsibilities that burden the exercise of such public functions and the desire not to hinder their discharge that such immunity clauses are commonly justified.* Thus, as was noted in [*Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481 ("*Rosli bin Dahlan*")], immunity from suit may be justified in order to safeguard the ability of prosecutors



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> to exercise their prosecutorial discretion independently without fear of liability. Similarly, in the context of s 14(1) of the Government Proceedings Act … the High Court in [*Dominique Sarron Lee* ([499] *supra*)] observed (at [51]) that the immunity granted to members of the SAF was justified by the need to ensure that they would not be burdened by the prospect of legal action when training, and ultimately to safeguard the effectiveness of the SAF's training as well as its operations. *Third*, and as a corollary to this, such immunity generally would not extend to the misuse or abuse of the public function in question; nor would the immunity typically apply where its beneficiary exceeded the proper ambit of the functions of his office. Thus, it was held that prosecutorial immunity would not extend to protect against claims for malicious, deliberate or injurious wrongdoing: *Rosli bin Dahlan* at [98]; similarly, a bailiff's immunity against excessive seizure claims would not apply where the bailiff *knowingly* acted in excess of his authority; and a member of the SAF would not be exempted from liability in tort for causing death or personal injury to another member where his act or omission was not connected with the execution of his duties as a member of the SAF. [emphasis added]

508 As the Court of Appeal surmised, the objective of an immunity provision in favour of those acting on behalf of public bodies in discharging their functions is to ensure that they can do so without undue concern about being subject to legal proceedings. At the same time, the nature of immunity provisions makes them exceptional. In my view, this suggests that the prospect of legal proceedings in question refers to claims brought by third parties, and not by the public body itself. This is because there is no reason to suppose that the effective discharge of public duties requires the actions of those acting in a public capacity to have no consequences whatsoever *vis-à-vis* the public body so long as they are undertaken in good faith. On the contrary, such persons ought to be legally accountable to the public body for their misdemeanours regardless of whether they acted in good faith or otherwise.

509 AHTC relies on the case of *B(M) v British Columbia* [2000] BCSC 735 ("*B(M)*") to make a similar point on the purpose of immunity provisions. In



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*B(M)*, the British Columbia Supreme Court cited the following rationale (at [162]):

> "There are a number of cogent reasons why bodies exercising discretionary statutory duty have been granted immunity. Firstly, the decisions made by these bodies often involve the balancing of a number of divergent interests. Secondly, the court should not simply substitute its view for that of the authority and assign liability accordingly. Furthermore, the court may often lack the experience and expertise in a particular field necessary to make a discerning decision. Finally, to hold public authorities liable for their errors in judgment by way of a civil action may well impede the decision-making process by discouraging public officers from experimenting with programs aimed at furthering social interests, such as rehabilitation."

It must be pointed out that this discussion in *B(M)* concerned the *common law* concept of good faith in the context of the *tort* liability of a *public authority* for negligence (as set out in the well-known case of *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004). Although the context is therefore entirely different, I agree that the same reasons generally underlie the statutory immunity provisions that apply to those acting on behalf of public bodies. Once again, while these reasons justify granting immunity against claims by third parties, they do not justify the same approach to claims by the public body itself.

510 The expansive reading is neither the most appropriate one as a matter of statutory construction (in the first stage of the *Tan Cheng Bock* test), nor is it fully consistent with the object and purpose of s 52 TCA in so far as it can be discerned (in the second stage of the *Tan Cheng Bock* test). In my view, the proper interpretation of s 52 TCA is one which treats its subject matter as limited to claims by third parties and not the Town Council itself: see [494] above. This interpretation accords with the conclusions that ought to be drawn at all three stages of the *Tan Cheng Bock* test.



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*Whether the defendants have acted in good faith*

511 Although I have found that s 52 TCA cannot apply to claims brought by a Town Council against its members and officers, I will briefly consider whether Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh would have immunity in respect of any of the claims which I have found them liable for on the assumption that the section applies, since parties have made submissions on this issue.

512 In *Ng Eng Ghee* ([223] *supra*), the Court of Appeal discussed in detail the concept of "good faith" as it applied under s 84A(9)(*a*)(i)(A) of the Land Titles (Strata) Act. This provision concerned whether a collective sale transaction was entered into in good faith. However, the Court of Appeal's instructive discussion of "good faith" is of general applicability:

> 132 In [*Dynamic Investments Pte Ltd v Lee Chee Kian Silas and others* [2008] 1 SLR(R) 729], the High Court reviewed several English cases involving the meaning of "good faith" in specific statutory contexts … and concluded that the "core meaning" of "good faith" under s 84A(9) of the [Land Titles (Strata) Act] involved just "honesty or absence of bad faith" (at [17]). In *Street v Derbyshire Unemployed Workers' Centre* [2004] 4 All ER 839 ("*Street v Derbyshire*") at [42], Auld LJ pointed out that "motive, or honesty of motive was all" … . However, **the meaning of good faith is always contextual**. In *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127, Finn J … penetratingly noted at 130 that:
>
> > *The significance of the statutory context in which the formula is used is in the illumination it gives as to what is that required state of affairs. It has correctly been observed that the term 'good faith' (or its now less fashionable Latin equivalent 'bona fide') is a protean one having longstanding usage in a variety of statutory and, for that matter, common law contexts. …*
> >
> > The burden of the formula can vary significantly given the purpose it is intended to serve in a given setting. In one context it can focus inquiry upon a person's reason for action (eg as with the good faith duty of company



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> directors); in another, to a person's state of knowledge when a particular event occurs.
>
> [emphasis added]

Similarly, in *Street v Derbyshire* (at [41]), Auld LJ pragmatically acknowledged that:

> **Shorn of context, the words 'in good faith' have a core meaning of honesty. *Introduce context, and it calls for further elaboration.*** … The term is to be found in many statutory and common law contexts, and *because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another.* [emphasis added]

133 In our view, the term **"good faith" under s 84A(9)(*a*)(i) must be read in the light of the SC's role as fiduciary agent** (at general law and, now, under s 84A(1A)), and whose power of sale is analogous to that of a trustee of a power of sale. Thus, in our view, **the duty of good faith under s 84A(9)(*a*)(i) requires the SC to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously**, and to hold an even hand between the consenting and the objecting owners in selling their properties collectively. *In particular, an SC must act as a prudent owner to obtain the best price reasonably obtainable for the entire development.* …

[emphasis in original in italics; emphasis added in bold]

513 In *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460 ("*Mid Density*"), which both AHTC and the first to fifth defendants cited in support of their respective positions, the Full Court of the Federal Court of Australia considered a statutory provision which protected a council from liability for "any advice furnished in good faith" in relation to certain issues pertaining to flooding (see *Mid Density* at 465). The claim against the council in that case was for negligent advice. The court's wide-ranging analysis of the meaning of "good faith" can be summarised in short as revealing two strands. The first referred to the existence of an honest state of mind; the second referred to the use of reasonable caution and diligence (*Mid Density* at 467–468). The court held that both meanings of "good faith" applied



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cumulatively in the statutory provision in question (at 469). Ultimately, it found that the defendant council had not acted in good faith, as it had given advice without making any real attempt to consider the vital documentary information, albeit perhaps honestly (at 469).

514 The successor to the statutory provision in *Mid Density* was considered by the High Court of Australia in *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 ("*Bankstown City Council*"). This provision was now in a more consolidated form, and excluded liability on the basis of good faith in respect of both advice and any act or omission in relation to certain issues pertaining to flooding (see *Bankstown City Council* at [24]). The High Court of Australia cited *Mid Density*, but sounded a note of caution:

> … [G]iven the range of advice, acts and omissions to which [the immunity provision] may apply, what is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute.

515 In my view, these cases all shed light on the proper interpretation of "good faith" under s 52 TCA. Just as the court observed in *Bankstown City Council*, s 52 TCA covers a vast range of conduct involving any number of legal relationships. It is unwise to attempt a full exegesis of the meaning of good faith in s 52 TCA. On the other hand, it is hard to imagine a concept of good faith that does not require even a basic minimum degree of honesty and diligence. In specific contexts, a bit more can be said. Thus, where the duty in question is a core fiduciary duty, good faith would invariably require honesty coupled with the faithful and conscientious discharge of that duty, as suggested in *Ng Eng Ghee* at [512] above. A breach of fiduciary duty that is anything other than innocent or perhaps negligent therefore cannot gain the protection of s 52 TCA. As such, Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr



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Danny Loh fall outside s 52 TCA in respect of their breaches of fiduciary duties. As far as the sixth to eighth defendants' liability for dishonest assistance and knowing receipt is concerned, the first hurdle to applying s 52 TCA is the requirement that the defendant in question be a member, officer or employee of AHTC (or acting under its direction) at the time. This rules out FMSS's liability, as well as Mr Danny Loh's liability for dishonest assistance in relation to the first MA contract. In any case, so far as the remainder of Ms How Weng Fan and Mr Danny Loh's liability for dishonest assistance is concerned, the culpability required for such liability (*ie*, dishonesty), just as in the case of their breaches of fiduciary duties, means that the s 52 TCA immunity would not be available almost as a matter of course.

516 Although the defendants cited *Toronto Party* ([168] *supra*) in support of a less stringent standard, this case does not assist them. In *Toronto Party*, the Ontario Court of Appeal expressly accepted that the personal liability of municipal councillors was based on the notion of misfeasance in public office, and therefore required bad faith or *malice*: *Toronto Party* at [43] and [51]. *Toronto Party* cannot be taken to have equated this standard of bad faith *qua* malice with the statutory defence of good faith which it separately considered (at [45] and [52]): see *Toronto Party* at [64]. In any event, bad faith *qua* malice is clearly not synonymous with the lack of good faith in any of the senses discussed in *Ng Eng Ghee*. Instead, it constitutes a different and higher bar. Malice is not a relevant ingredient for absence of good faith. In any case, my findings in respect of Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh in relation to the first MA contract (see, *eg*, [290], [300] and [311] above) cannot be said to be compatible with the assertion that they acted in good faith, even if malice was a relevant part of the test.



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***Other defences raised by the sixth to eighth defendants***

517 The sixth to eighth defendants make a number of further arguments in their defence. I do not accept any of them, and I will briefly explain why.

*Relief under s 60 Trustees Act*

518 In addition to the immunity provision under s 52 TCA, Ms How Weng Fan and Mr Danny Loh also submit that if they are held to be trustees (as PRPTC asserts), they ought to be relieved of liability under s 60 of the Trustees Act. As set out at [502] above, s 60 gives the court the discretion to relieve trustees from liability for a breach of trust if the trustees have acted honestly and reasonably, and ought fairly to be excused. As I explain at [535]–[539] below, I do not accept PRPTC's submission that Ms How Weng Fan and Mr Danny Loh are trustees. Therefore, s 60 of the Trustees Act does not apply.

519 In any case, Ms How Weng Fan and Mr Danny Loh have failed to plead s 60 of the Trustees Act in their defence. They appear to suggest that this is because the allegation that they were trustees was only made by PRPTC in its opening statement. It is, however, clear that PRPTC did in fact plead this allegation in its statement of claim. It is therefore not open to them to rely on s 60 in the first place.

520 Furthermore, I would in any event have declined to grant relief under s 60 in respect of the Ms How Weng Fan and Mr Danny Loh's liability. This is because given the findings on their knowledge and motivations (see [457]–[458] above), I cannot conclude that that they were acting honestly and reasonably, as s 60 requires.



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*Estoppel*

521 In respect of AHTC's claim in S 668/2017 only, the sixth to eighth defendants pleaded *promissory estoppel* in their defence. The estoppel was said to arise from AHTC's conduct in entering into the first and second MA contracts and procuring Ms How Weng Fan and Mr Danny Loh's appointments as Deputy Secretary/General Manager and Secretary in AHTC, making it unjust for AHTC to resile from the first and second MA contracts and impute fault on the sixth to eighth defendants. In their submissions, however, the sixth to eighth defendants now pursue a different defence: that there was a course of dealing between them and AHTC amounting to an *estoppel by convention*. The contents of this alleged estoppel are also different: the sixth to eighth defendants say that the common assumption that directors of the MA would become Secretary and Deputy Secretary of AHTC meant that any conflicts of interest arising from this arrangement would be "no issue".

522 I agree with PRPTC that the sixth to eighth defendants should not be allowed to rely on an unpleaded submission of estoppel by convention. Given that no estoppel defence has been pleaded by the sixth to eighth defendants against PRPTC in S 716/2017, and an entirely different estoppel defence was pleaded against AHTC in S 668/2017, it is not permissible for the sixth to eighth defendants to assert an estoppel by convention for the first time in their submissions.

523 Moreover, critical elements of the alleged estoppel by convention are not only unpleaded but also unproven. Although there is no doubt that Ms How Weng Fan and Mr Danny Loh's appointments in AHTC were the direct result of FMSS's appointment as MA (see [234] above), what this meant was that any potential conflicts of interest in relation to Ms How Weng Fan and Mr Danny



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Loh needed to be managed by taking appropriate measures, such as preventing them from playing crucial roles in the approval of payments to FMSS (see [236]–[237] above). This is a far cry from what the sixth to eighth defendants now assert, which is that AHTC's appointment of Ms How Weng Fan and Mr Danny Loh implied that it would waive or ratify any conflicts of interest so that any such conflicts would be "no issue". There is no evidence that this was the common assumption between them.

524 It is also worth noting that even if I were to accept that the alleged estoppel by convention had arisen, based on the sixth to eighth defendants' arguments it would only extend to their liability for the improper payments resulting from the control failures referred to at [347]–[361] above, and would have no bearing on their liability for, *eg*, breach of fiduciary duties and dishonest assistance.

*Whether the Independent Panel was properly appointed*

525 In their submissions, the sixth to eighth defendants also question the validity of the appointment of the Independent Panel on numerous grounds. For example, they take issue with the resolution passed by AHTC appointing the Independent Panel under s 32(2) TCA, which resolved that s 32(3) TCA was not to apply to the delegation to the Independent Panel. They argue that the resolution was invalid as it sought to oust the application of s 32(3). This is because s 32(3) provides that the Town Council may continue to exercise powers delegated under s 32, and s 32(3) cannot be ousted by a resolution of the Town Council.

526 In my view, these arguments are irrelevant to the present case. Even if the resolution was invalid to that extent, this would not affect the validity of the



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appointment of the Independent Panel itself, nor the action that is brought on behalf of AHTC.

**Remedies**

527 I turn to the available remedies. To recapitulate, I found the first to seventh defendants liable on some heads of claim by virtue of breach of fiduciary duty, and on other heads of claim by virtue of breach of the equitable duty of skill and care. These findings, summarised at [440]–[447] above, remain unchanged given my conclusion that the defendants are unable to invoke any of the pleaded defences. I also found the sixth to eighth defendants liable to the plaintiffs variously in dishonest assistance and knowing receipt in respect of the first MA and EMSU contracts as they were awarded in breach of fiduciary duties.

528 The present trial has been bifurcated into a first stage, on determination of liability (which is the subject of this judgment), and a second stage, on assessment of reliefs. In the second stage of this trial, I shall have to assess the precise reliefs, and the amounts, that should be ordered in favour of the plaintiffs for each of the breaches which I have found. This exercise is greatly complicated by the fact that the plaintiffs claim a multitude of remedies that cut across their various heads of claim. This has made the task of unpacking the breaches alleged, relating them to the specific remedy claimed, and thereafter assessing whether the remedy sought is appropriate, a challenging endeavour, adding in no small part to the complexity and length of this judgment. These are difficulties I had alluded to at the start of this judgment (at [3] above).

529 In my view, the sensible approach to the question of the appropriate remedies is to first address the legal issues that arise from the remedies sought



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by the plaintiffs. These issues concern the permissibility of the remedies sought, the relevant guiding principles, the burden of proof to be discharged, and the interaction between the various remedies. Addressing these issues will lay the groundwork for the assessment of reliefs, and I do this in the remaining sections of this judgment.

530 I will first set out an overview of the remedies claimed by the plaintiffs solely in respect of the claims which I have found to be established. (In this paragraph, "S/N" refers to the entries in the table at [447] above in which I summarised my findings on liability.)

(a) In respect of Ms Sylvia Lim and Mr Low Thia Khiang's breaches of *fiduciary duties* (see S/N 1–2):

(i) The plaintiffs assert that Ms Sylvia Lim and Mr Low Thia Khiang are custodial fiduciaries. PRPTC further asserts that they are trustees. On these bases, the plaintiffs claim equitable compensation in the form of "substitutive compensation". They seek an order for a common account as a precursor to the payment of equitable compensation.

(A) In particular, AHTC contends that the sum of compensation payable ought to be $33,717,535, being the total payment that was made to FMSS and FMSI, "subject to [the defendants] showing otherwise in a proper account and inquiry".

(B) AHTC further contends that the minimum sum of compensation payable is the difference between the MA fees paid to FMSS under the first and second MA contracts, and the fees which would have been payable



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to CPG for the same duration had CPG continued as MA. Although AHTC frames this as an alternative argument, it is not entirely clear whether it is also intended to set a baseline for the compensation based on the argument above.

(ii) AHTC also seeks against Ms Sylvia Lim and Mr Low Thia Khiang, "[i]f necessary", an account of profits, and a declaration that such profits (or their traceable proceeds) are held on constructive trust (or subject to an equitable lien) in favour of AHTC.

(iii) The plaintiffs argue that the first and second MA and EMSU contracts are void because they are *ultra vires* AHTC as a matter of public law. The consequence would not be liability on the part of Ms Sylvia Lim or Mr Low Thia Khiang; instead, Ms How Weng Fan, Mr Danny Loh and FMSS must make restitution of the payments they have received under the contracts. AHTC further pleads in the alternative that the first and second MA and EMSU contracts are *voidable* as they were entered into in breach of fiduciary duties, with similar consequences following from the contracts being found to be void.

(b) In respect of Ms How Weng Fan and Mr Danny Loh's breaches of *fiduciary duties* (see S/N 1–2, 4), the plaintiffs make the same claims, *mutatis mutandis*, as against Ms Sylvia Lim and Mr Low Thia Khiang in (a) above. This must be subject to the qualification that as against Mr Danny Loh, those claims, which are premised upon a breach of fiduciary



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duties, cannot pertain to the first MA contract as I have found that he did not owe AHTC fiduciary duties at the relevant time.

(c) In respect of the sixth to eighth defendants' liability for *dishonest assistance and knowing receipt* in relation to Ms Sylvia Lim and Mr Low Thia Khiang's breaches of fiduciary duties (see S/N 1–2), the plaintiffs submit as follows:

(i) By reason of their liability for knowing receipt, FMSS and Mr Danny Loh (as FMSI) are liable to account as constructive trustees for AHTC's funds received by them (as well as the traceable proceeds thereof).

(ii) By reason of their liability for dishonest assistance, the sixth to eighth defendants are liable for equitable compensation, although PRPTC does not claim equitable compensation against FMSS.

(iii) PRPTC also seeks a tracing order to determine what has happened to AHTC's funds since they were paid to FMSS.

(d) In respect of the first to seventh defendants' breaches of *duties of skill and care* (see S/N 1–2, 4, 7–9, 11), the plaintiffs seek equitable compensation or damages.

(e) In respect of all the payments which have been impugned under the claims above, PRPTC additionally claims that for each improper payment, rr 56(1) and 56(2) TCFR make the defendant(s) who approved or certified it liable for the full sum disbursed.



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(f) In respect of the first to eighth defendants' liability to the plaintiffs as a whole, in addition to costs and judgment interest, the plaintiffs seek their costs of investigating the defendants' breaches.

531 I will now consider the preliminary legal issues arising from the remedies claimed by the plaintiffs. As will be evident, most of the difficulties here arise from the nature and extent of the equitable remedies available for breach of fiduciary duties, and their interaction with each other and with other remedies.

***Remedies for breach of fiduciary duties***

*Equitable compensation*

532 The plaintiffs' claim for equitable compensation for breach of fiduciary duties raises a number of important legal questions. Since the issue of equitable compensation for breach of fiduciary duties has yet to be dealt with comprehensively by the Singapore courts, many of these questions are novel, and many of them are also the subject of heavy debate in common law jurisprudence and academic commentary. I will thus consider the following questions:

(a) Whether the defendants are trustees ([533]–[539]) and/or custodial fiduciaries ([540]–[544]);

(b) The nature of the order for a common account ([547]–[549]), and whether it should be ordered in the present case ([603]–[608]);

(c) The implications of *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 ("*Target Holdings*") and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 ("*AIB*") ([555]–[563]) and how the court should assess the loss suffered



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from a breach of fiduciary duties in relation to the stewardship of property by fiduciaries ([564]–[574]) – in particular, whether substitutive compensation is the correct measure of equitable compensation, whether or not a common account is sought;

(d) The legal and evidential burdens of proof for establishing loss in a breach of fiduciary duties, including when accounting for any benefits which may have been conferred on the plaintiffs ([575]–[584]); and

(e) The test for causation that applies to the breaches of fiduciary duties in the present case ([585]–[602]).

(1) The characterisation of the defendants as trustees and/or custodial fiduciaries

533 I must first pick up the issues I set aside at [161] above, which is whether the first to seventh defendants were trustees and/or custodial fiduciaries in relation to AHTC. This is an important point as far as the plaintiffs are concerned. Their argument is that concluding as such would give rise to liability for substitutive compensation and an order for a common account for breach of fiduciary duties (see [530(a)(i)] above). In other words, once it is determined that the defendants are custodial fiduciaries, substitutive compensation follows, with an order for a common account being the means by which the compensation is assessed. As I will explain, this determination is not as critical as the plaintiffs contend – in the final analysis, it does not make a difference when assessing the quantum of equitable compensation for breach of fiduciary duties. The legal principles for determining relief and assessing quantum are no different whether the fiduciary duties have a custodial element or not (see [609] below). Nonetheless, I will go on to consider whether the defendants are trustees, who are clearly custodial fiduciaries, or custodial fiduciaries generally.



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534 The essence of the plaintiffs' argument is that as custodial fiduciaries, the first to seventh defendants owe a duty to fully reconstitute AHTC's funds if they misapply the funds in breach of fiduciary duties. Thus, where I have found any of these defendants to have caused AHTC to pay out monies under contracts formed for improper purposes, their primary obligation is to make AHTC's funds whole by returning what was improperly disbursed. The plaintiffs contend that considerations of causation, foreseeability and remoteness are irrelevant in this analysis. Moreover, AHTC specifically argues that the burden is on the defendants to show that the sum they need to pay to reconstitute AHTC's funds ought to be reduced to take into account, for example, any benefits conferred on AHTC by FMSS's performance of the impugned contracts; until they do so, the defendants are *prima facie* liable for *every cent* disbursed under the MA and EMSU contracts. There is a significant strategic advantage to the plaintiffs if this argument as accepted. A shift in the burden of proof will clearly be beneficial to the plaintiffs and correspondingly onerous and potentially deleterious to the defendants. In closing oral submissions before me, counsel for PRPTC, Mr Davinder Singh SC, likewise adopted the position that it was for the defendants to prove any benefits conferred on AHTC. I turn first to consider whether the defendants are trustees, as trustees are custodial fiduciaries.

### (A) ARE THE DEFENDANTS TRUSTEES?

535 PRPTC, but not AHTC, submits that the first to seventh defendants are trustees of AHTC's property. PRPTC argues that town councillors are trustees as they have possession or control of their Town Council's assets, over which they are "custodians", and that this is analogous to the position of company directors, who are also regarded in the same vein. PRPTC adds that the first to seventh defendants' control over AHTC's funds, and the trust and confidence



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reposed in them, are also sufficient to constitute them trustees (even in respect of Ms How Weng Fan and Mr Danny Loh, who were not town councillors).

536 I do not accept the submission. In my view, it conflates the (correct) proposition that company directors owe duties which are *akin* to those of trustees with the logical leap that they therefore *are* trustees. This distinction is evident in a number of cases where this comparison has been drawn. For example, in *Yong Kheng Leong* ([477] *supra*), the Court of Appeal commented in the context of s 22(1) of the Limitation Act that "a director is *regarded as* a trustee over the company's property" [emphasis added] (at [46]), and that directors had a "trustee-*like* responsibility" [emphasis added] for their companies' assets (at [48]). The UK Supreme Court in *Burnden Holdings* ([478] *supra*) expressed this point more explicitly at [18] when it commented that directors were, in the limitation context, characterised as trustees "by what may fairly be described as a process of analogy". These cases make it clear that uniquely in the limitation context, "trustee" is taken to have a broader meaning which does not apply as a general proposition. Likewise, in *Ng Eng Ghee* ([223] supra), where the Court of Appeal found that a collective sale committee owed fiduciary duties as agents of the subsidiary proprietors, it commented that these duties were "*akin* to those of a trustee with a power of sale" [emphasis added] (at [121]). As the Court of Appeal went on to explain (at [122]):

> This analogy is … not perfect in that *the [sale committee] is not vested with legal title* to the other subsidiary proprietors' units (*whereas a trustee is typically vested with legal title* to the trust property). However, the fact that a trustee ordinarily has legal title, but the SC does not, to the property which they have the power to sell, is not relevant to the nature of their duties … [emphasis added]

The High Court in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*") at [114]



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also made the same observation in relation to the analogy with trustees in *Ng Eng Ghee*.

537 The same is true in the present case. The assets of AHTC and the monies collected from the residents were never vested in the first to seventh defendants, but belonged legally and beneficially to AHTC until they were disbursed. In such circumstances, there can be no trust, properly speaking. *A fortiori*, this also answers the point that the mere control of AHTC's property, as well as the existence of a relationship of trust and confidence (as was the case for Ms How Weng Fan and Mr Danny Loh), would suffice to constitute someone a trustee.

538 PRPTC points, however, to *Porter v Magill* ([168] *supra*), where Lord Bingham had approved the statement that "[s]tatutory power conferred for public purposes is conferred as it were upon trust, not absolutely" (at [19(1)]). Indeed, a number of the old cases cited by Lord Bingham use the language of the trust when referring to municipal councillors (see *Porter v Magill* at [19(2)] and [19(4)]). Nevertheless, he also says, almost in the same breath, that "public powers are conferred *as if* upon trust" [emphasis added] (at [19(2)]). This is therefore a step removed from suggesting that municipal councillors *are* trustees. If anything, I believe that Lord Bingham was speaking of a "trust in the higher sense" of a statutory power conferred for the purpose of a public duty as opposed to a "true trust" by using the term in this context, to borrow the distinction drawn in *Tito v Waddell* (see [183] above). Moreover, it bears remembering that *Porter v Magill* proceeded upon a contemporary statutory scheme of liability, and not on the basis of breach of trust (see [196] above). In *Westminster CC v Porter* ([199] *supra*), when Westminster City Council actually brought a claim for breach of trust against the defendant city councillor, Dame Shirley, Hart J found the description of the defendant as a "trustee" to be "inaccurate" (see [201] above).



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539 In a similar vein, there are also comments in the older English cases both for and against the proposition that company directors are trustees: see L S Sealy, "The Director as Trustee" [1967] CLJ 83 at 86, citing *In re Exchange Banking Company (Flitcroft's case)* (1882) 21 ChD 519 ("*Flitcroft's case*") and *In re Kingston Cotton Mill Company (No 2)* [1896] 1 Ch 331 respectively. The better and more precise view remains, in my view, that directors only owe fiduciary duties *akin* to those of trustees (see [536] above) but are not trustees. I therefore conclude that directors are not trustees, and town councillors, who owe duties analogous to those of directors, are not trustees as well.

(B) ARE THE DEFENDANTS CUSTODIAL FIDUCIARIES?

540 But are the first to seventh defendants custodial fiduciaries nonetheless? Although the various types of fiduciaries referred to in the cases cited above – such as company directors – are not, strictly speaking, trustees, they are nevertheless characterised as being closely comparable to trustees. This cannot merely be another way of saying that fiduciaries and trustees both owe fiduciary duties. The connection goes further. For some fiduciaries and all trustees, part of their equitable duties involve the safekeeping, management or proper application of some pool of assets. This pool of assets is sometimes referred to as "trust property" by way of a convenient shorthand, even if there is a fiduciary relationship but no actual trust. Such duties, which may be termed *custodial* duties, can be contrasted with the remaining gamut of fiduciary duties. In the well-known taxonomy drawn by Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 ("*New Zealand Guardian Trust*") at 687:

> … Breaches of duty by trustees *and other fiduciaries* may broadly be of three different kinds. *First, there are breaches leading directly to damage to or loss of the trust property*; second, there are breaches involving an element of infidelity or



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> disloyalty which engage the conscience of the fiduciary; third, there are breaches involving a lack of appropriate skill or care. It is implicit in this analysis that breaches of the second kind do not involve loss or damage to the trust property, and breaches of the third kind involve neither loss to the trust property, nor infidelity or disloyalty. [emphasis added]

Breach of custodial duties results in loss of the first variety, *ie*, loss or damage to the trust property.

541 There is considerable authority for the proposition that fiduciaries such as company directors owe custodial duties, in that when they dispose of assets under their custody improperly or without authorisation, the remedy is restitution or reconstitution of those assets, rather than compensation by way of damages. In *Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)* [1994] 1 All ER 261 ("*Bishopsgate*"), the defendant, a director of the plaintiff company, had signed off on various wrongful dispositions of the company's assets at the behest of his brother, a co-director. The defendant's argument was that even if he had acted responsibly and sought to verify the propriety of the dispositions he was being asked to approve, he would have been persuaded by his brother to approve the dispositions anyway, or another director would have been found to sign in his place. Hoffmann LJ (as he then was) rejected this argument, reasoning that the defendant's breach of duty was the making of the improper transfers, and not whether the transfers would have occurred even if the defendant had exercised care. That being the case, the assets that were improperly transferred out of the company were in themselves the loss caused, and there was no room for arguments as to what would have happened *but for* the defendant's breach (at 265h–266a).



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542 The clearest authority on this point is the decision of Edelman J sitting in the Supreme Court of Western Australia in *Agricultural Land Management Ltd* ([3] *supra*) at [368]:

> … [W]here the claim is essentially for restoration or "substitution" of the company's asset, the necessary causal connection to establish the liability of a director for dissipation of a company asset is merely to show that the director made the transfer without authority. *The "loss" is merely the dissipation of the asset. It is not to the point to ask whether the company would have suffered financial loss in any event.* [emphasis added]

The holding in *Agricultural Land Management* that company directors are examples of custodial fiduciaries (at [363]) has been approved by the Singapore High Court in *Tongbao (Singapore) Shipping Pte Ltd and another v Woon Swee Huat and others* [2018] SGHC 165 ("*Tongbao Shipping*") at [126].

543 I am similarly of the view that company directors are custodial fiduciaries. I would suggest that the term "custodial fiduciary" is a mere label used to describe fiduciaries with custodial duties over a pool of assets, and who can in certain circumstances be ordered to reconstitute that pool of assets in the event that they misapply any of the assets. A trustee is therefore naturally the central case of a custodial fiduciary. Indeed, the plaintiffs appear to use "custodial fiduciary" in the same manner – as a shorthand for these obligations and the remedies arising from their breach, which they argue apply to town councillors such as the first to fifth defendants. Seen from this perspective, there is good reason to conclude that town councillors are custodial fiduciaries. As I have concluded in my analysis on fiduciary duties, town councillors and Town Councils are sufficiently analogous to company directors and corporations respectively and therefore ought to be regarded on the same basis for the purposes of fiduciary duties (see [216] above). Like company directors, although town councillors do not have legal title over any of their principal's



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property, their fiduciary duties essentially amount to a duty to safeguard, manage, and properly apply their principal's funds and other assets. I therefore conclude that town councillors are custodial fiduciaries and owe custodial duties analogous to company directors.

544 The plaintiffs also submit that Ms How Weng Fan and Mr Danny Loh were custodial fiduciaries. For present purposes, it is sufficient for me to say that *at the highest*, Ms How Weng Fan and Mr Danny Loh are in the same position as Ms Sylvia Lim and Mr Low Thia Khiang where the nature of their fiduciary duties and the consequences of the breach thereof are concerned. In other words, at the highest, Ms How Weng Fan and Mr Danny Loh's fiduciary duties include custodial duties over AHTC's property. However, as I have noted earlier, such a conclusion does not make a difference in the final analysis, as I find that the applicable legal principles for determining the quantum of compensation are the same regardless of whether custodial or non-custodial duties are breached (see [609] below).

(2) Equitable compensation for breach of custodial fiduciary duties

545 The question for present purposes is therefore this: where a fiduciary breaches custodial duties resulting in loss of the assets, what are the appropriate remedies? This would refer to the first category in the taxonomy drawn by Tipping J in *New Zealand Guardian Trust* (see [540] above). As the review of the law below will show, the *traditional* approach starts with an equitable process known as accounting through an order for a common account. AHTC's submission that the defendants are *prima facie* liable for every cent which they have disbursed in breach of fiduciary duty derives from the binary nature of the accounting process, in which once a transaction is impugned, the defaulting fiduciary has to return the whole amount disbursed. This measure of loss is that



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of substitutive compensation, and represents the view as stated in *Agricultural Land Management.*

546 I am, however, unable to accept this submission. *In the analysis that follows, I will suggest that the law has moved on and that this is no longer the correct or indeed preferable view.* The starting premise must be that the relief that the plaintiffs are entitled to for breach of custodial fiduciary duties, with or without accounting, cannot exceed the loss they have suffered, properly characterised. In ascertaining the recoverable loss, but-for causation must also be established. Furthermore, I am of the view that the legal burden of proving all the aspects of their claims remains squarely on the plaintiffs. As such, the responsibility for establishing the true loss lies with the plaintiffs, and that must include taking into account any benefits that they might have received as a result of the various breaches. The order for a common account changes neither the quantum of loss that the plaintiffs are entitled to, nor the burden of proof that is on them. The account is simply a starting point (and not the end) of the process by which that loss is ascertained. This view is supported by leading common law authorities. Applying this approach to the present case would mean that the loss cannot possibly be as much as the full amount disbursed under the impugned contracts.

(A) ACCOUNTING

547 In *Libertarian Investments Ltd v Thomas Alexej Hall* [2014] 1 HKC 368 ("*Libertarian Investments*"), Lord Millett NPJ commented at [167] that "[i]t is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account". It would therefore be useful to consider what that entails. The applicable principles were summarised by the Court of Appeal in *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 ("*Chng Weng Wah*"):



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> 21 Where a party has custody of a fund which it is obliged to administer for the benefit of another, such as in the case of a trust, one of the methods by which equity polices the due administration of the funds is by holding the fiduciary to account. The procedure for the accounting of funds may be further broken down into two separate categories:
>
> (a) general or common accounts, where no misconduct has been alleged; and
>
> (b) accounts on the footing of wilful default, which involves a breach of duty on the part of the fiduciary.
>
> …
>
> 22 The claim for a common account may be divided into the following three stages (see [*Snell's Equity*] at para 20–014):
>
> (a) whether the claimant has a right to an account;
>
> (b) the taking of the account; and
>
> (c) any consequential relief.
>
> …

548 As Lord Millett NPJ took pains to emphasise in *Libertarian Investments* (at [168]), "an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any *deficit* in the trust fund and seek the appropriate means by which it may be made good" [emphasis added]. This process is detailed in a number of prominent authorities, and I briefly summarise it here for reference (*AIB* ([532(c)] *supra*) at [53]–[54] *per* Lord Toulson; *Libertarian Investments* at [168]–[170] *per* Lord Millett NPJ; *Agricultural Land Management* at [339], [347]; see also "Navigating the Maze" ([486] *supra*) at paras 40–42; Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 ("'An Account of Accounts"') at paras 18, 23):

(a) In the taking of a *common account*, each unauthorised disposal of assets is "falsified", and the account is taken as though the unauthorised disposal did not occur. At the end of the process, the



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falsified disposals give rise to a deficit between the account and the actual trust property. In what may be termed "substitutive compensation", the trustee is required to make up the deficit personally, either *in specie* or in money.

(b) Where there is a breach of the trustee's duty to manage the trust property properly, such that there is trust property which the trustee ought to have obtained for the trust but did not, there can be an *account on the basis of wilful default*. (As such, contrary to what the term "wilful default" may suggest, this form of account does not simply apply whenever the breach is culpable or deliberate.) In this process, the account is "surcharged" for the benefits that the trustee failed to obtain in breach of trust. Likewise, the surcharges lead to a deficit between the account and the actual trust property, which the trustee is personally liable to make up. This is sometimes called "reparative compensation" to distinguish it from substitutive compensation for the falsification of an account.

(c) The beneficiary is entitled to opt for the remedy which puts the trust in the best possible position. Therefore, if trust property has been wrongfully used to purchase shares which have fallen in value, the beneficiary is entitled to demand reconstitution of the trust; however, if those shares have risen in value, the beneficiary is entitled to adopt the transaction and trace the trust property into the purchased shares. Likewise, if the trust property has been wrongfully used to obtain a profit, the beneficiary is entitled to seek an account of profits.

549 In the present case, we are concerned with the first variety, the common account. Under the traditional concept of *falsifying* an account, there is no room



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for any element of causation or indeed any assessment of what loss flowed from the breach: since the obligation is simply to restore whatever was improperly disbursed, it does not matter what would have happened if the breach had not occurred, or what happened after the breach occurred. Edelman J espoused this view in *Agricultural Land Management* ([3] *supra*), concluding at [342] that "the orders which followed the common account were not concerned with whether the plaintiff had suffered loss" but instead "required the defendant to pay the money equivalent of the performance of his or her duty". Separately, it is also said that it is incumbent upon the trustee to justify each disbursement made, and not for the beneficiary to show breach of trust (see Lynton Tucker, Nicholas le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) ("*Lewin on Trusts*") at para 39–005). All this is in contrast with reparative compensation via *surcharging* an account, since it involves considering the counterfactual of what benefits the trust would have obtained, and therefore proceeds on a but-for analysis that necessarily imports a notion of causation.

550 The above analysis is based on the situation of a traditional trustee. In that context, the right of a beneficiary to seek a common account from a trustee is well-established. I have assumed that a common account is likewise available against directors and town councillors, given my conclusion that they are custodial fiduciaries. However, I should point out that the position is less than clear. In Steven Elliott, *Compensation Claims Against Trustees* (2002) (unpublished DPhil thesis, University of Oxford, archived at the Bodleian Library), which is credited for pioneering the use of the term "substitutive compensation" (see *AIB* at [53] and *Agricultural Land Management* at [349]), it is said that "[d]irectors are *not* liable to have their accounts taken in court" [emphasis added], although their liability rests on the same principles as that of



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trustees (at p 24). One reason for this can be seen in *Flitcroft's case* ([539] *supra*), where Bacon V-C commented that company directors account to subscribers of the company's stock "at their general meetings, and by their balance sheets, and so on" (at 525).

551 On the other hand, since *Agricultural Land Management* was a case about directors' breach of duties, it might be thought that the analysis of accounting there must have proceeded on the assumption that an order for a common account was available against directors. However, Edelman J's extensive discussion of the common account did not specifically analyse the situation of a director, or indeed of the defendants in that case. Instead, at [363] the judgment moves from substitutive compensation being available in "a common account taken against a trustee" to substitutive compensation likewise being available against company directors, without addressing the intermediate question of whether a *common account* was available against directors. Since it was ultimately found in *Agricultural Land Management* that substitutive compensation was unavailable for other reasons (see [573] below), the outcome of the case sheds no light on the issue either.

552 As no arguments have been addressed to me on this front, I prefer not to decide the point, though I express the tentative view that if directors, and by analogy town councillors, are custodial fiduciaries, a common account ought to be available against them. Having said that, in the analysis that follows immediately, I will explain why the defendants' liability for their breach of fiduciary duties ought to be assessed by the same principles of equitable compensation, whether or not a common account is taken. Subsequently, at [603]–[608] below, I will further explain why the court should not exercise its discretion to order a common account in this case, even if such a discretion exists.



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(B) EQUITABLE COMPENSATION AFTER *TARGET HOLDINGS* AND *AIB*

553 Ever since the landmark decision of *Nocton v Lord Ashburton* [1914] AC 932, the courts have commonly awarded equitable compensation, which is a form of monetary compensation awarded as an equitable remedy, *without* the need for the taking of an account (see *AIB* at [90] *per* Lord Reed, and "An Account of Accounts" at para 26). As the High Court explained in *QAM* ([227] *supra*) at [35], equitable compensation is neither a proprietary remedy nor a remedy in the law of restitution; it is a personal remedy in equity.

554 At the same time, equitable compensation cannot be equated with damages at common law. The distinction lies in the applicability of the common law concepts of causation, foreseeability, and remoteness to equitable compensation. To put the law at its simplest, it is well-established that considerations of foreseeability and remoteness have no relevance in a claim for equitable compensation: in Singapore, see *Kumagai-Zenecon Construction Pte Ltd and another v Low Hua Kin* [1999] 3 SLR(R) 1049 ("*Kumagai-Zenecon*") at [35]; elsewhere, see the minority judgment of McLachlin J (as she then was) in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 ("*Canson Enterprises*") at [27], which has been endorsed by the House of Lords in *Target Holdings* ([532(c)] *supra*) and by the highest courts in Canada, Australia, New Zealand, and Hong Kong (see the discussions in *AIB* at [122], [123], [126], and [131] respectively). However, the issue that looms large is whether the but-for test of causation must be satisfied for the award of equitable compensation. This is a matter of active debate, at least in Singapore (see [590]–[595] below). In Singapore, this debate has focused on the tension between the decision of the Privy Council in *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 ("*Brickenden*") and the subsequent decisions of the House of Lords in *Target Holdings* and the UK Supreme Court in *AIB*. First, however,



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I will look at the implications of *Target Holdings* and *AIB* on a different, and prior, issue – whether an order for a common account changes the quantum of compensation that is payable. This is in essence asking the question whether substitutive compensation is the appropriate measure if a common account is ordered. As the analysis that follows will show, there ought to be no substantive difference in the outcome even if a common account is ordered.

555 In *Target Holdings*, the plaintiff, a finance company, instructed the defendant, a firm of solicitors, to act for it in relation to a mortgage of a commercial property. To this end, the plaintiff gave the defendant monies to be transferred to the mortgagor once the charges over the property were obtained. However, in breach of trust, the defendant paid the mortgagor £1.49m of the plaintiff's money a few days before obtaining the charges over the property. Subsequently, it emerged that the mortgagor had misled the plaintiff as to the value of the mortgaged property, and upon selling the property as mortgagee, the plaintiff recovered only £500,000. The plaintiff sought summary judgment for the entire sum disbursed by the defendant in breach of trust. The defendant sought leave to defend, arguing that the transaction might still have taken place even if the defendant had acted properly by disbursing the monies only after obtaining the charges. Since it was common ground that this was a triable issue, the question the House of Lords had to answer was a simple one: if the mortgage transaction would have been successfully completed whether or not the defendant had acted in breach of trust, such that no matter what the plaintiff would have ended up in the same position – with a property worth only £500,000 for a mortgage for a much larger sum – was the plaintiff still entitled to obtain a remedy for the sums wrongfully disbursed?

556 Lord Browne-Wilkinson, giving the sole speech in the House, held that the plaintiff was not entitled to summary judgment when it could not prove that



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the loss would not have occurred *but for* the breach of trust. In Lord Browne-Wilkinson's view, if following a breach of trust independent events such as a fall in the market result in an even greater loss to the trust, the trustee in breach should not be held accountable for these unrelated events. This, he said, reflected a degree of commonality between remedies at common law and at equity (at 432G):

> … Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. …

557 The introduction of the basic idea of but-for causation into the remedy for a wrongful disposal of trust assets is already diametrically at odds with the taking of a common account as it is traditionally understood (see [548] above), since the traditional remedy of substitutive compensation involves restoring misapplied funds, not compensating for loss. The but-for test is not relevant in that analysis, as the obligation is to reconstitute the trust assets, loss being seen through that prism. Driving home his departure from this latter view, Lord Browne-Wilkinson commented that "the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred" (at 437D). Instead, at the time the court gives its judgment, "compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach" (at 437D–E). This is an approach that strikes at the heart of falsification of an account or substitutive compensation.



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558 In *AIB*, the UK Supreme Court had the opportunity to revisit the issues canvassed in *Target Holdings*. In that case, a couple wanted to take out a second mortgage for £3.3m over their home, which was already subject to a mortgage in favour of Barclays. The plaintiff bank agreed to give them the second mortgage on condition the Barclays mortgage be fully redeemed first. The defendant solicitors acted for the plaintiff in this transaction. Due to a misunderstanding, the defendant disbursed to Barclays a sum of money from the second mortgage which was about £309,000 short of what was required to redeem the Barclays mortgage. The defendant then disbursed the remainder of the money advanced under the second mortgage to the couple. When the defendant's mistake was discovered, the plaintiff negotiated with Barclays and eventually obtained a second charge over the property subject to the Barclays mortgage having priority to the extent of about £274,000. Subsequently, the couple defaulted on the mortgages, and the property was sold for only £1.2m. Of the proceeds of sale, the plaintiff received about £868,000, with about £274,000 going to the Barclays mortgage as agreed. The plaintiff brought a claim against the defendant for breach of trust. At first instance, the plaintiff was awarded equitable compensation reflecting the shortfall of £274,000 (*AIB* at [15]). The plaintiff appealed to the Court of Appeal and then to the Supreme Court, arguing that the defendant was liable for misapplying the entire mortgage sum of £3.3m, minus the proceeds of sale of £868,000 the plaintiff had received (see *AIB* at [140]). This was an argument which adopted the same logic as the falsification of a common account.

559 The UK Supreme Court affirmed *Target Holdings* and dismissed the appeal. The decision of the court was delivered in the speeches of Lord Toulson and Lord Reed, both of which received the unanimous concurrence of the other members of the court. Lord Toulson recognised that *Target Holdings* had been



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the subject of significant criticism (see [47], [50]), but declined to depart from it (see [63]). He endorsed the view that the beneficiary should be placed in the same position as he would have been *but for* the breach (at [64]):

> … Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach … . Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.

Applying these principles, Lord Toulson held that to consider the plaintiff's loss to be £2.5m would be "to adopt an artificial and unrealistic view of the facts" when most of this sum would have been lost whether or not the defendant had discharged its duties (at [65]).

560 Lord Reed likewise rejected the criticism of *Target Holdings* (which would apply equally to the Supreme Court's decision in *AIB*) that it adopted a reparative rather than a substitutive conception of compensation (see [548] above). Instead, he clearly took the view that the measure of equitable compensation was limited to the loss which flowed from the breach and this was the amount necessary to effect restitution or reconstitution of the trust property (see [115]–[116]). In particular, Lord Reed sought to explain a distinction drawn by Lord Browne-Wilkinson in *Target Holdings* at 436C–F between an obligation to reconstitute the trust fund while the trust is still alive, and an obligation to pay compensation directly to the beneficiaries where the trust has come to an end. Lord Reed said that notwithstanding some potential ambiguity in Lord Browne-Wilkinson's words, these two remedies ought to be measured by the same principles of equitable compensation (at [108]):



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> … The direct payment of equitable compensation to the beneficiary is procedurally different from the reconstitution and distribution of the trust fund, but *the end result should not be different*: otherwise, the beneficiary would receive something other than his entitlement under the trust. Equally, *the remedy of an accounting and execution of the trust cannot require more to be paid into the trust fund than is missing from it.* [emphasis added]

561 It is immediately apparent from the foregoing that the decision in *AIB* reinforces the limited role left for the traditional conception of accounting following Lord Browne-Wilkinson's exposition of equitable compensation in *Target Holdings* (see [557] above). Notably, in *AIB*, Lord Toulson appeared to align himself with the view that *Target Holdings* had "impliedly reject[ed] … the view that the accounting remedy can operate differently from the remedy of equitable compensation" (at [63]). This rejection is made rather more explicit in Lord Reed's view, discussed in the previous paragraph, that the but-for test applies in exactly the same way in assessing equitable compensation, *whether or not one is concerned with the reconstitution of the trust*. Thus, the authors of "Navigating the Maze" ([486] *supra*) conclude that "in *AIB*, the UK Supreme Court rejected outright the application of the accounting principles even in breach of trust cases" (at para 49).

562 Some of this controversy can perhaps be blunted somewhat if we bear in mind Lord Millett NPJ's reminder in *Libertarian Investments* that an order for an account is "merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good" ([548] above). If we distinguish the order for an account from the relief which should be awarded once the deficit in the account is established, as the Court of Appeal did in *Chng Weng Wah* (see [547] above), we should accept that a deficit arising in the account from a disbursement which is falsified does not necessarily mean that the relief should be an order for the



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payment of an equivalent sum of money. Instead, under this framework for the taking of an account, the further question is whether the relief ought to be based on the traditional conception of substitutive compensation (see [548(a)] and [549] above), or equitable compensation as outlined in *Target Holdings* and *AIB*. This is where the true divergence between the two approaches lies. Thus, as Ribeiro PJ explained in *Libertarian Investments*:

> 98 … [This] ground of appeal proceeds on the mistaken premise that an order for the taking of an account and an award of equitable compensation are inconsistent remedies requiring and entitling the plaintiff to make an election between the two.
>
> 99 As Lord Millett NPJ points out, they are not mutually inconsistent. In a case like the present, where the account is aimed at ascertaining the true position between the fiduciary and the beneficiary, '*… it can be regarded as no more than a procedure ancillary to the ascertainment of other rights*'. In some cases, they may cumulatively be invoked, seeking first an account and then substantive relief. In other cases, an account may be considered unnecessary and the Court may directly award equitable compensation. …
>
> [emphasis added]

563 It is therefore important to distinguish between the taking of an account and the reliefs that follow. In my view, the same approach to equitable compensation (or an account of profits, as the case may be) ought to apply to the remedy for a breach of a fiduciary duty, whether or not this is preceded by the taking of an account. The importance of applying such an approach to equitable compensation in all cases lies partly in the need to appreciate what constitutes actionable or recoverable loss in the context of such breaches, as well as who is required to prove this loss. I turn to these questions next.

### (C) ASSESSMENT OF LOSS

564 In my view the following thread ought to be drawn from the reasoning in *Target Holdings* and *AIB*: when awarding equitable compensation, the court



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should be concerned not so much with the fact of the misapplication of the trust property, but rather the loss that arises from it, properly considered. The loss ought to be assessed not through the lens of what it takes to reconstitute the trust assets, but what is in fact the true or proper loss that was suffered. In many cases, such as where a fiduciary misappropriates trust property to an entirely irrelevant use, the misapplication *is* the loss. However, in other cases, such as on the facts of *Target Holdings* and *AIB*, it is less clear whether the entirety of the misapplied trust property constitutes the loss, especially when a part of the wrongful transaction is subsequently regularised (in the case of *Target Holdings*, by the subsequent registration of the charges, and in the case of *AIB*, by the subsequent discharge of the priority of the Barclays mortgage save for £274,000). It seems incorrect as a matter of principle to order the trust assets to be reconstituted without asking whether that is the true or proper loss.

565 This concern for the proper assessment of the loss sustained as a result of the breach animates much of the discussion in both cases. As Lord Browne-Wilkinson held in *Target Holdings* at 433E–H:

> … The argument both before the Court of Appeal and your Lordships concentrated on the equitable rules establishing the extent and quantification of the compensation payable by a trustee who is in breach of trust. In my judgment *this approach is liable to lead to the wrong conclusions* in the present case *because it ignores an earlier and crucial question, viz., is the trustee who has committed a breach under any liability at all* to the beneficiary complaining of the breach? … [T]here may be cases where the breach gives rise to no right to compensation. Say, as often occurs, a trustee commits a judicious breach of trust by investing in an unauthorised investment which proves to be very profitable to the trust. A carping beneficiary could insist that the unauthorised investment be sold and the proceeds invested in authorised investments: but *the trustee would be under no liability to pay compensation either to the trust fund or to the beneficiary because the breach has caused no loss to the trust fund.* … [emphasis added]

Likewise, in *AIB*, Lord Reed commented:



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> 105 … "[T]he basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach." That is a broad proposition, which leaves open *what precisely is meant by "loss", and how it is assessed*. As McLachlin J explained in *Canson Enterprises* [[554] *supra*], the basic obligation of a defaulting trustee is to restore the trust fund to the position it would have been in but for the default. In relation to the breach of a fiduciary duty, her Ladyship said … that, by analogy, compensation for breach of such a duty attempts to restore to the plaintiff what has been lost as a result of the breach. … [T]he "loss" is what the beneficiary has been deprived of as a result of the breach.
>
> …
>
> 107 … [A]n obligation to reconstitute the trust fund does not inexorably require a payment into the fund of the value of misapplied property: for example, *where the consequences of the breach of trust have been mitigated by subsequent events*.
>
> [emphasis added]

566 The present case is another one in which the misapplication *per se* cannot be understood to be the loss. Since I have concluded that the first MA and the EMSU contracts were awarded in breach of fiduciary duties, all the disbursements under these contracts involved the misapplication of AHTC's monies. Similarly, whether or not the requisite connecting factor is that of but-for causation or the mere existence of *some* link, which is a discussion I will come to at [589] below, all the disbursements under the second MA and EMSU contracts could similarly be characterised as the misapplication of AHTC's monies so long as the requisite connecting factor is present. This follows from the proposition that the Town Council's monies can only be expended for proper purposes. However, it does not necessarily follow that each and every cent disbursed under the impugned contracts is therefore a loss to AHTC. This would be to entirely ignore the nature of the breach, which involved entering into various contracts for the provision of services. Notably, the services bargained for are precisely the services which the AHTC town councillors were obliged



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to procure in their capacity as fiduciaries. What is inappropriate, and therefore a breach of fiduciary duty, is the pernicious conduct and *mala fide* intentions underlying and surrounding the conclusion of the contracts. In so far as these instances of inappropriate dealing had an impact on AHTC's financial situation, such impact *prima facie* represents the loss flowing from the breach. Conversely, where AHTC received what it had bargained for – in the form of services which it was in any case required to provide to its constituents – the mere fact that payment for these services stemmed from these breaches does not, without more, amount to any loss. To take any other approach would be to conflate the breach with the true or proper loss, which are separate questions.

567 In this regard, Ms How Weng Fan's uncontradicted evidence was that under the MA and EMSU contracts, AHTC was able to satisfactorily deliver, to a large extent, those services which it was required to deliver to residents under the TCA:

> … HDB … carried out regular inspections of the common areas and published the results of how each Town Council had performed in the [Town Council Management Review ("TCMR")]. … AHTC performed well for all categories of performance measured save for arrears management.
>
> …
>
> … [The TCMR] … had placed AHTC in the "good" band for estate cleanliness and lift breakdowns and the "average" banding for estate maintenance. Many of the other Town Councils also achieved "average" for estate maintenance. …

Likewise, as Mr Owen Hawkes testified:

> The suggestion isn't that the lifts didn't work, the streets were dirty. Having been to Hougang on many, many, many, many occasions it is … a perfectly pleasant area of the country. It is … the management of the town council's affairs itself rather than things like maintenance that concerned us.



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568 I would therefore suggest that (*a*) where trust property is applied in a manner which results in benefits being conferred upon the beneficiaries, but (*b*) such application amounts to a misapplication because of a breach of fiduciary duties, (*c*) the loss flowing from this misapplication (if any) is *prima facie* the difference between the value of the trust property misapplied and the value of the net benefits actually obtained by the beneficiaries. A similar approach was set out by the Court of Appeal of New South Wales at the start of [152] in *Hasler* ([486] *supra*). The force of this principle is evident when applied in a situation where the benefit which is obtained for the beneficiaries in breach of fiduciary duties is the same in substance as the benefits which would have been obtained had the fiduciaries acted in line with their duties. A prime example is where the fiduciaries are required to obtain certain services for the beneficiaries (such as MA services), and such services are in fact obtained, albeit in a manner which is in breach of fiduciary duties. It would be unreasonable to consider the entire cost of obtaining those services as a loss to the beneficiaries in those circumstances. In such a case, the interests of the beneficiaries are adequately protected if any shortfall between the value of what is obtained by the beneficiaries and what is paid in exchange for it remains recoverable as loss.

569 In my view, this is a logical corollary of the existing principles on the quantification of loss which are evident from *Target Holdings* and *AIB*:

(a) First, the assessment of loss takes into account the effects of subsequent efforts, whether through compliance with the fiduciary's duties (such as the belated obtaining of the charges by the solicitors in *Target Holdings* – see [555] above) or otherwise (such as the negotiations conducted by the plaintiff with Barclays in *AIB* – see [558] above), which regularise the originally irregular transaction in full or in part.



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(b) Second, the assessment of loss takes into account benefits which are received by the beneficiaries directly from the immediate aftermath of the misapplication of trust property (such as the £868,000 in proceeds of sale which the plaintiff received in *AIB* – see [558] above). In short, this refers to the returns from the plaintiff's efforts at mitigating its loss, such as they are. To be clear, this is purely a factual question, and not a normative statement about what the plaintiff is legally obliged to do. That is because in the context of a breach of fiduciary duties there can be no expectation nor any obligation that the plaintiff should mitigate its loss, save that the plaintiff cannot engage in "clearly unreasonable behaviour": see *Canson Enterprises* ([554] *supra*) at 163 *per* McLachlin J, cited with approval in *AIB* at [89] *per* Lord Reed.

570 It is worth emphasising that the outcome of *AIB* directly supports these observations. As Lord Reed points out at [140], the Supreme Court had to proceed on the basis that the defendant's breach involved misapplying the entire sum of £3.3m entrusted to it by the plaintiff, as this was a finding that was not being challenged on appeal. However, the Supreme Court ultimately held that the plaintiff's loss only amounted to approximately £274,000 (*AIB* at [141] *per* Lord Reed). The sum of £274,000, it would be recalled, was the priority that Barclays retained under its mortgage as eventually negotiated by the plaintiff, and therefore the additional sum that the plaintiff would have obtained under the mortgage upon the sale of the property if the defendant had discharged its duties properly. As such, the Supreme Court's assessment of the plaintiff's loss did not have any connection with the sum misapplied, and this corresponds precisely with the principles for the analysis of loss that I have set out above.

571 In my view, *Bishopsgate* ([541] *supra*) is entirely consistent with these principles. In *Bishopsgate*, counsel had sought to argue that the defendant's



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breach of fiduciary duty lay in failing to make reasonable inquiries before signing off on the wrongful transfers of shares. Hoffmann LJ rejected this contention on the basis that the transfer of shares for an unauthorised purpose was in itself a breach, and that this was a duty of strict liability. Given that the shares once transferred were lost to the company for no consideration, Hoffmann LJ correctly held that the loss was for the full amount of the shares wrongfully transferred (at 265h–266a). Furthermore, Hoffmann LJ was alive to the possibility that the shares could still be recovered, and the loss to the company could be mitigated to that extent. However, this required engaging in "doubtful litigation", which the company in that case had not commenced (at 267d). It was therefore plainly correct to decline to account for the speculative possibility of recovery in assessing the company's loss.

572 To the extent of the principles which I have outlined, I respectfully disagree with the view expressed in *Agricultural Land Management* at [342] that the default remedy for a fiduciary's breach of custodial duties is restitution or reconstitution, independent of the actual loss sustained (see [549] above). On the contrary, equitable compensation takes the performance of the fiduciary's custodial duty to be the safeguarding of the trust property *from the relevant kind of loss*, that being the loss actually suffered.

573 I should point out, however, that the analysis of the facts elsewhere in *Agricultural Land Management* also supports my characterisation of AHTC's loss, albeit on a basis which follows the traditional view of accounting. In *Agricultural Land Management*, Edelman J held that on the facts, the plaintiff could not obtain substitutive compensation. One reason for this was because falsification of a transaction under the taking of an account had to apply to the whole of a transaction, not a part of it (at [380]). Where the impugned transaction involves a disbursement of funds in return for some benefit, the



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beneficiary cannot disallow the disbursement but keep the benefit. This would suggest that, even if AHTC sought to falsify the MA and EMSU contracts under an account, it would still have to give due credit for the benefits it has obtained.

574 The present case presents a unique set of facts which is not frequently encountered in the authorities (other than in *Hasler* – see [568] above – and *Agricultural Land Management*). In the vast majority of cases involving breaches of custodial duties, the breach involves the disbursement of trust property without receiving anything in return. That was the case, for example, in *Target Holdings*, *AIB*, and *Bishopsgate*. There was therefore no need to consider whether any benefits were conferred on the beneficiaries as a result of the breach, and the disbursement could, as a starting point, be equated to the actual loss suffered. In the present case, the breach of custodial duties involved entering into contracts, in which payments were made in return for the performance of services. This brings to the fore the need to properly assess the loss which has been suffered.

(D) THE LEGAL BURDEN OF PROOF

575 In fact, AHTC does not disagree with the conclusion that the defendants should be allowed credit for the benefits conferred on AHTC by the performance of the MA and EMSU contracts. However, AHTC argues that the *defendants* should bear the burden of showing that such benefits have been conferred, barring which all the payments under these contracts would be recoverable (see [534] above). Here, I part ways with AHTC's position. My view of loss, as described above, means that the burden of proof of loss in a claim for breach of custodial duties remains firmly with the plaintiffs. It stands to reason that if the task at hand is to assess the true loss arising from the breach



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of fiduciary duties, the burden must be on the plaintiffs to take into account the benefits that were received as a result.

576 It is therefore for the plaintiffs to show their loss, which is the difference between the amount of funds actually expended by AHTC as a result of entering into the MA and EMSU contracts, and the value of the benefits conferred upon AHTC by the performance of those contracts. Speaking at a high level of generality, this would be represented by the difference between the total amount paid to FMSS, and the monetary value of the same services which FMSS delivered under those contracts (it being open to the plaintiffs to seek to rely, for example, on the price CPG would have charged if it were held to its contract and required to continue serving as the MA, as a proxy for such monetary value). That the burden of proof is on the plaintiff to show loss has been a constant refrain of the jurisprudence on breach of fiduciary duty, even amidst the debate over issues of causation: see *QAM* ([227] *supra*) at [60]–[61], citing *John While Springs (S) Pte Ltd and another v Goh Sai Chuah Justin and others* [2004] 3 SLR(R) 596 ("*John While Springs*") at [5]; and *Winsta Holding Pte Ltd and another v Sim Poh Ping and others* [2018] SGHC 239 ("*Winsta*") at [194], [222].

577 AHTC's reliance on *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 ("*Maruha*") does not assist in reversing its burden of proof to show loss. In *Maruha*, the defendant company was found to have breached its fiduciary duty to the plaintiff company in its dealings in respect of the fishing quota shared by both companies. The defendant argued that the compensation due to the plaintiff for its breach ought to be offset by the tax the defendant had paid in respect of the plaintiff's quota, and which the plaintiff was therefore saved from paying. The New Zealand Supreme Court rejected this argument on the basis that "where a defaulting fiduciary seeks an offset against the



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compensation payable for its default, *it must show* that what is to be offset was an incontrovertible benefit to the person to whom the fiduciary duty was owed" [emphasis added], and the burden of showing such a benefit was on the fiduciary (at [29]). On the facts, the defendant was unable to show that if the plaintiff had known all the facts, it would not have made arrangements to reduce or avoid the tax liability in question.

578 AHTC submits that *Maruha* stands for a general proposition as to the reversal of the burden of proof once a disbursement is disallowed on an account. I do not agree. The situation in *Maruha* concerned a separate benefit conferred on the beneficiary by the fiduciary's actions, even though it might have been connected to the breach of fiduciary duty: see *Lewin on Trusts* ([549] *supra*) at para 39–026. In contrast, what we are presently concerned with is the extent of the loss of trust property suffered through the breach. The difference between the present case and that in *Maruha* is the difference between a defence which denies the extent of the loss claimed and a defence which concedes the loss but seeks to offset it against some other benefit: see *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [20]–[23]. In the former case, the legal burden to prove its claim remains on the plaintiff, and it is only in the latter case that it is for the defendant to prove the benefit it alleges. The present case falls into the former category.

(E) THE EVIDENTIAL BURDEN OF PROOF

579 Although the legal burden of proving AHTC's loss remains on the plaintiffs, this does not mean that the defendants will benefit from any difficulties created by their failure to follow the proper procedures in disbursing AHTC's funds. On the contrary, as the court suggested in *Libertarian Investments* (see [606] above *per* Lord Millett NPJ; and *Libertarian Investments*



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at [137]–[139] *per* Ribeiro PJ), equity will draw an adverse inference against the defaulting party *provided* there is reason to believe that the transaction in question is dubious in nature. This amounts to a shifting of the evidential or tactical burden of proof, which "is nothing more than stating the plain application of the court's discretion as to when it thinks that sufficient evidence had been led so as to require a rebuttal or reply" (*John While Springs* ([576] *supra*) at [6]).

580 However, AHTC's submissions go significantly further. It argues that in addition to what KPMG found to be recoverable losses in its report, AHTC is unable to prove the full extent of its loss due to the defendants' failure to put in place a system of adequate financial controls. AHTC submits that the court should therefore view the plaintiffs' evidence "benevolently", and the defendants' evidence "critically". It cites *Carol Keefe (widow and personal representative of the estate of Thomas Keefe deceased) v The Isle of Man Steam Packet Company Limited* [2010] EWCA Civ 683 ("*Keefe*") in support of this proposition. Both the submission and the reliance on *Keefe* do not take AHTC very far.

581 Although *Keefe* is a decision that very much turns on its facts, a brief outline of the reasoning in *Keefe* helps illustrate the principles that were applied by the English Court of Appeal. *Keefe* concerned a claim in negligence against an employer by a former employee for exposure to excessive noise levels at his place of work aboard various ships. It was reasonably well-established in English law that it would generally be negligent for an employer to expose an employee to noise levels over 85dB(A) for more than 8 hours (see *Keefe* at [5], [7]). The problem for the plaintiff was that no measurements had been taken of the noise level in any of the ships on which he had worked. On the other hand, witnesses who worked with the plaintiff testified that it was extremely noisy



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where they worked, with the result that they could only communicate through sign language. An expert witness testified that this suggested noise levels of 90dB(A) or more. There were also no serious competing causes for the plaintiff's hearing loss.

582 The trial judge dismissed the claim. The Court of Appeal allowed the appeal, and held that the trial judge had failed to take into consideration the fact that the defendant was found to have had a duty to measure noise levels in its workplaces, and had breached this duty (at [18]–[19], [21]). The Court of Appeal commented that "a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings"; in such a case, "the court should judge a claimant's evidence benevolently and the defendant's evidence critically" (at [19]). In reaching this conclusion, the court drew an analogy between that scenario and one in which a defendant failed to call relevant witnesses who were at its disposal.

583 In *Keefe*, despite the lack of measurement evidence, plenty of other evidence pointed to the noise levels in the defendant's workplace having caused the plaintiff's hearing loss. There was also no plausible alternative explanation for the hearing loss, even if the defendant's breach of duty could not be established based on the precise quantitative test. Even then, the expert evidence on the use of sign language did also support the plaintiff's case as far as the quantitative test was concerned. In those circumstances, the court needed to exercise little benevolence to hold that the plaintiff had proven his case despite the lack of noise measurements.

584 The fact-sensitivity of a decision like *Keefe* bears emphasis here. As the High Court commented in *John While Springs* at [6], it amounts to an exercise



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of the court's discretion. The present circumstances are entirely different. Even if the court accepts that it ought to judge the plaintiffs' evidence benevolently and the defendants' evidence critically, it is not clear what that would entail, especially when the evidence on quantification of loss has yet to be presented. Moreover, the question in *Keefe* – whether the defendant was negligent or not – was a binary one, whereas the issue at hand is the extent of loss, which is an open-ended one. So far as the evidence currently before me is concerned, no degree of critical assessment can change the fact that the services for which FMSS was paid have been rendered to AHTC at the very least to some extent. While the court may look at the evidence of loss with some benevolence in the second stage of the trial, the burden remains on the plaintiffs to provide at least some evidence for their position on what benefits were conferred and how they ought to be valued.

(3) Causation

585 Parties have devoted a significant part of their submissions to discussions of what standard of causation, if any, applies to the loss flowing from the defendants' breach. This mirrors the currently ongoing debate in the Singapore jurisprudence on the same topic which I have alluded to earlier (at [554]).

586 In the present case, this disagreement over causation can largely be seen as another facet of the discussion above on what constitutes loss, properly considered, for breach of fiduciary duties. This is because when it comes to loss, as I have pointed out at [576] above, AHTC's net loss may be regarded as the difference between what was paid to FMSS and the market rate at which AHTC could have obtained comparable MA services (such as, for example, CPG's rates). It is true that the same analysis *could* be framed as part of a but-for



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analysis: *but for* AHTC entering into the impugned MA and EMSU contracts, it would have continued engaging CPG's services (or have called for and potentially awarded a fresh tender to CPG). Thus, as regards MA services, the loss *caused* by the defendants' breach of fiduciary duties could arguably be the amount by which the first MA contract with FMSS was more expensive than the CPG MA contract in the event that CPG were held to it for the remainder of its term, allowing for any adjustments that may be needed to account for differences in the levels of services provided under each contract. The assessment of loss already takes into account causation using this but-for analysis.

587 This same analysis also applies in essence to the second MA and EMSU contracts, which, as I held at [338] above, can only be linked to the defendants' breach of fiduciary duties by virtue of giving rise to consequential losses. As I explained at [339] above, these consequential losses are based on the allegation, in short, that had the defendants complied with their duties to AHTC in relation to the *first* MA and EMSU contracts, AHTC's MA and EMSU services would have been provided by some other contractor, and not FMSS, during the period of the *second* MA and EMSU contracts. The consequential losses in this regard would therefore be the difference between the actual cost of the second MA and EMSU contracts, and the price that AHTC would have paid for equivalent MA and EMSU services by that other contractor over the same period. (The point of comparison here, too, could be CPG's prices, *provided* it can be shown that CPG would otherwise have been the MA for the relevant period. For example, in respect of the MA fees after July 2013, it would have to be shown that the option to extend CPG's MA contract would likely have been exercised – see [94] above.) Causation on a but-for basis is again taken into account in the analysis on the assessment of loss.



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588 The foregoing analysis is not intended, of course, to preclude issues of causation from being raised if the relevant counterfactuals are brought into the picture. For example, it might be thought that the costs incurred by FMSS in building a new system to replace TCMS, which was withdrawn by AIM (see [42] above), were true losses to AHTC since no such expense was being charged by CPG in its original MA contract (if the analysis on loss takes such an approach). However, there may well be a separate question of whether such loss was in fact *caused* by the defendants' breaches. That is because, as the defendants have argued (see [137] above), AIM might have withdrawn TCMS because it was unwilling to work with a WP Town Council, regardless of the identity of the MA. Ultimately, it is for the parties to decide how they wish to run their case on such matters in the second stage of this trial.

589 I am of the view that but-for causation must be proven in any claim for breach of fiduciary duties. This would be evident, for example, in my analysis on how the benefits conferred on AHTC by FMSS's performance of its contracts should be quantified. The Singapore cases on causation for breach of fiduciary duties do not, however, speak with one voice. I will therefore discuss some of these cases and explain why I have reached this conclusion.

590 The genesis of the debate lies in this short passage from the judgment of the Privy Council in *Brickenden* ([554] *supra*) at [15] (which is commonly referred to as "the *Brickenden* rule"):

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts … *he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction*, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. … [emphasis added]



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591 In *QAM* ([227] *supra*), Vinodh Coomaraswamy J considered it necessary to reconcile *Brickenden* with *Target Holdings*, as well as the earlier decisions of the Singapore courts, such as *Kumagai-Zenecon* ([554] *supra*). He therefore suggested that under the *Brickenden* rule, liability is still assessed on a but-for basis, but shorn of any other considerations of causation, foreseeability or remoteness (see *QAM* at [43]–[47], [52]). Coomaraswamy J thought that the *Brickenden* rule should not apply to all fiduciaries, but, without deciding its precise boundaries, held that it *at least* covered (a) a fiduciary in a *well-established fiduciary relationship*, (b) who commits a *culpable* breach, and (c) who breaches a *core* fiduciary duty (at [56]).

592 Subsequently, in *Then Khek Koon* ([536] *supra*) at [108], Coomaraswamy J distilled the following principles from his decision in *QAM* and the remaining case law ("the *Then Khek Koon* approach"):

> (a) A fiduciary's liability for breaches of the equitable duties of skill and care is subject to causation, foreseeability and remoteness;
>
> (b) A fiduciary in a well-established fiduciary relationship and who commits a *culpable* breach of a core fiduciary duty is liable *even if* the object of those duties is *unable to prove but-for causation* (citing *Brickenden*); and
>
> (c) A fiduciary in a well-established fiduciary relationship and who causes loss to the trust property as a result of an *innocent* breach of fiduciary duties is liable *only if* the object of those duties is *able to prove but-for causation* (citing *Target Holdings*).

The approach in *Then Khek Koon* therefore draws a dichotomy between breaches of fiduciary duties where but-for causation needs to be proven, and



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those where it is not needed. An appeal was brought against Coomaraswamy J's decision in *Then Khek Koon* (reported as *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496), but the Court of Appeal declined to rule on this issue (at [11]).

593 In *Beyonics Technology Ltd and another v Goh Chan Peng and others* [2016] 4 SLR 472 ("*Beyonics*"), Hoo Sheau Peng JC (as she then was) interpreted the principle from *Then Khek Koon* set out at [592(b)] above in light of Coomaraswamy J's earlier comment in *QAM* at [61] that the imposition of the *Brickenden* rule comes with the consequence of requiring the plaintiff only to adduce *some* evidence to connect the breach with the loss before the *evidential* burden is shifted to the defendant to show a lack of but-for causation (*Beyonics* at [136]). Thus, Hoo JC found that *Then Khek Koon* did not dispense with the need for but-for causation where the *Brickenden* rule applied. Although there were cross-appeals against Hoo JC's decision, the issue of causation did not arise on appeal.

594 On the other hand, in *Winsta* ([576] *supra*), Chua Lee Ming J took the view that *AIB*, and not *Brickenden*, should be the law in Singapore (at [193]). He therefore rejected the distinction drawn in the earlier cases based on the existence of a well-established fiduciary relationship and a culpable breach of a core fiduciary duty. Chua J also rejected the notion that the evidential burden on causation should shift to the defendant once the plaintiff shows that the breach is in some way connected to the loss (at [194]). For convenience, I refer to this as "the *Winsta* rule", although it is in fact a position with a lineage traceable to cases such as *Target Holdings* and *AIB*.

595 There therefore appears to be three competing doctrines of causation as applied to breaches of fiduciary duties: the *Brickenden* rule, which holds that



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causation is inapplicable in every such case; the *Winsta* rule, which applies but-for causation to every such case; and the middle ground sought by the *Then Khek Koon* approach, which was based on *QAM* and refined in *Beyonics*.

596 It would naturally follow from my analysis of *Target Holdings* and *AIB* above (at [555]–[572]) that I am inclined towards the *Winsta* rule that but-for causation is a necessary element of every claim for breach of fiduciary duty. It necessarily follows that I reject the *Brickenden* rule.

597 I am also not convinced that a principled middle ground can be found between these opposing positions. The three key factors identified in the *Then Khek Koon* approach on which but-for causation turns are (a) whether the fiduciary relationship is *well-established*, (b) whether the breach is *culpable*, and (c) whether the breach is of a *core* fiduciary duty. Although these may be intuitive distinctions to make, they are in fact novel distinctions – liability for breach of fiduciary duties does not generally depend on whether the fiduciary relationship is well-established, or whether the breach is culpable. It would appear that they have been fashioned specifically in response to the perceived rigours – or one might say, difficulties – of the *Brickenden* rule.

598 By attempting to bridge the perceived divide in the existing case law without departing from any existing cases, the *Then Khek Koon* approach runs into the problem of trying to reconcile itself with these existing cases. That is because, unsurprisingly, the cases do not recognise any dichotomy based on but-for causation between breaches of fiduciary duties. For example, in *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633 ("*Ohm Pacific*"), the Court of Appeal had found a breach of fiduciary duties by a solicitor to her client as she had acted in conflict of interest. However, it dismissed the client's claim against the solicitor on the basis that "it is necessary … to prove a causal



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connection between the breach of duty and the alleged loss", and causation had not been proven (at [27]). This holding is cited in *Then Khek Koon* (at [106(e)]) as the applicable principle in the *Target Holdings* class of cases. However, there is no reason to think that *Ohm Pacific* falls into the *Target Holdings* class of cases in the first place. On its facts, *Ohm Pacific* is clearly a case of a fiduciary in a well-established fiduciary relationship (*ie*, the solicitor-client relationship) who had committed a culpable breach of a core fiduciary duty (*ie*, acting in conflict of interest). Based on the *Then Khek Koon* approach, *Ohm Pacific* would fall into the *Brickenden* class of cases, for which but-for causation is irrelevant. It therefore stands in direct opposition to the *Then Khek Koon* approach. Indeed, *Ohm Pacific* reflects the fact that Singapore law has traditionally followed the position taken by the *Winsta* rule (see "Navigating the Maze" ([486] *supra*) at para 21 and n 49).

599 The facts of the present case also reveal a difficulty with the distinction drawn in the *Then Khek Koon* approach based on whether a fiduciary relationship is "well-established". It was held in *QAM* at [57] that senior employees were in the category of well-established fiduciary relationships. The same must therefore be true of Ms How Weng Fan and Mr Danny Loh in the present case. Under the *Then Khek Koon* approach, since they have breached the core fiduciary duty of loyalty in a culpable way, but-for causation would not need to be established in respect of the claim against them.

600 The *Then Khek Koon* approach would lead to a different result in respect of Ms Sylvia Lim and Mr Low Thia Khiang because they do not fall into a well-established category of fiduciaries. This is evident from *Then Khek Koon* itself, which involved a claim arising from the Court of Appeal's decision in *Ng Eng Ghee* ([223] *supra*) that members of a collective sale committee of a private housing estate had breached fiduciary duties to the subsidiary proprietors in the



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estate. Some of these subsidiary proprietors who had objected to the collective sale then commenced a claim against two members of the collective sale committee seeking to recover the balance of their legal costs. Coomaraswamy J interpreted *Ng Eng Ghee* as having held that the fiduciary relationship owed by the committee members was "*sui generis*" and a "modern *analogue*" [emphasis added], as opposed to a classic case, of a principal-agent relationship (*Then Khek Koon* at [113]). In other words, the fiduciary relationship in question was not a well-established one, and but-for causation therefore had to be satisfied (see [112]). I should think that these observations are of equal applicability to town councillors. I found town councillors to owe fiduciary duties to their Town Council not because they were in an established fiduciary relationship, but based on an analysis of the particular circumstances of the relationship, drawing on an analogue with company directors (see [206]–[219] above). As such, the fiduciary relationship between town councillors and their Town Councils would not be a well-established one. There would accordingly be a need for the plaintiffs to establish but-for causation in relation to Ms Sylvia Lim and Mr Low Thia Khiang's breaches of fiduciary duties.

601 Applying the *Then Khek Koon* approach, the conclusion would thus be that Ms How Weng Fan and Mr Danny Loh would be liable for losses without the need to satisfy a but-for test, whereas Ms Sylvia Lim and Mr Low Thia Khiang would only be liable for losses where but-for causation was proven. This is an unpalatable conclusion, since the fiduciary obligations owed by town councillors should not be less stringent than those owed by senior Town Council appointment holders and employees. It demonstrates the artificial distinctions that would result if the *Then Khek Koon* approach applied. It seems unprincipled to require the plaintiffs to show but-for causation with regard to Ms Sylvia Lim and Mr Low Thia Khiang, but not with regard to Ms How Weng Fan and Mr



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Danny Loh. Even though this is the first case where town councillors appointed under the TCA have been found to owe fiduciary duties, the strong parallels between town councillors and fiduciaries such as company directors place them closer to the core idea of a fiduciary, as compared to "well-established" fiduciaries such as senior employees, whose fiduciary status is contingent on the circumstances and nature of their employment. Furthermore, culpability for the breach of fiduciary duties in question would, if anything, rest primarily with Mr Low Thia Khiang and Ms Sylvia Lim, who devised and implemented the plan to appoint FMSS. I thus find the *Then Khek Koon* approach difficult to accept, and decline to follow it.

602 The *Winsta* rule avoids the hardships potentially imposed on fiduciaries by the *Brickenden* rule, and serves as a principled and consistent approach to causation. It also has the elegance of simplicity. In my respectful view, the attempt to seek a middle ground between these rules does not achieve any of these goals. As such, I hold that but-for causation must be proven in respect of the claims for breach of fiduciary duties against Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan and Mr Danny Loh.

(4) Whether the court should order a common account

603 The foregoing analysis makes it clear that whether or not the plaintiffs obtain an order for the taking of an account, my assessment of the equitable compensation they are entitled to would be based on the same principles. Nevertheless, an equally important question is whether I should exercise my discretion to make such an order, even if such a discretion existed (a concern I outlined at [550]–[552] above). In the circumstances of the present case, I would decline to do so.



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604 As Lord Millett NPJ explained in *Libertarian Investments* at [167], where custodial duties exist, the beneficiary's entitlement to an account is as of right (and without the need to establish a breach); however, at the same time, "like all equitable remedies an order for an account is discretionary". This is also the position taken in Singapore. In *Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260, the High Court held (at [80]–[81]) that while an executor of an estate was obliged to keep accounts and furnish them upon the beneficiaries' request, the court may decline to order an account where "it would be oppressive to require the executor to so account, or for some other good reason, the court in its discretion thinks it wrong to make an order".

605 Similarly, in *Lim Ah Leh* ([483] *supra*), the High Court commented that "judicial discretion continues to temper the beneficiary's perpetual right to an account" (at [186]). In that case, Coomaraswamy J exercised his discretion to decline the plaintiff's request for an account covering a span of 24 years for two reasons: first, an account reaching so far into history would be an unduly burdensome undertaking when compared to the lack of any evidence to suggest that it would uncover any fraudulent activity (at [247]); second, there was reason to believe that the plaintiff had been aware all along of the kinds of transactions being carried out in respect of the trust property (at [249], [251]). Although there was an appeal against Coomaraswamy J's decision, this point was not challenged on appeal: *Lim Ah Leh v Heng Fock Lin* [2019] SGCA 26 at [12].

606 A related reason for the court declining to order an account is where the whereabouts of the trust property are already apparent from the available evidence. Thus, in *Libertarian Investments*, the Hong Kong Court of Final Appeal reversed the orders of the courts below for an account. Lord Millett NPJ summarised the reasons for reversing the lower courts as follows (at [174]):



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> I agree with Ribeiro PJ and for the reasons given by him that there was more evidence before the court than the courts below have given credit for, and that *further accounts and enquiries are unlikely to be fruitful*. After this time the number and cost of shares which the defendant ought have acquired and falsely said that he had acquired is little more than informed guesswork and *the quality of the answer is unlikely to be improved by further inquiry*. Where the absence of evidence is the consequence of the fiduciary's own breach of duty the court is not without resource, for it can have resort to three principles. *First*, it may be able to take the fiduciary at his own word and use his falsehoods to establish the facts as if they were true even though they are known to be untrue. *Secondly* the court is entitled to make every assumption against the party whose conduct has deprived it of necessary evidence. And *thirdly* the court is entitled to be robust and do rough and ready justice without having to justify the amount of its award with any degree of precision. [emphasis added]

607 In other words, if sufficient evidence, or all the evidence that can reasonably be expected to be found, is already before the court, little is gained by an order for an account. This is all the more so where the transactions that were made with the trust property are already known. Thus, in *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 204 ("*B2C2*"), the Singapore International Commercial Court declined to grant an order for an account as there was no dispute as to the identity and whereabouts of the trust assets (at [5]).

608 In my view, the present case is closely analogous on the issue of accounting with *Libertarian Investments* and *B2C2*. Although there may be doubts as to the *propriety* of various transactions approved by the defendants, there is not, and has never been, any confusion as to *where and to whom* AHTC's funds were paid in respect of every disbursement made. Given that the order for an account concerns the identification of trust property, I do not see any purpose in granting this order when each transaction involving AHTC's funds has plainly been recorded or has since been comprehensively investigated by the Auditor-General, KPMG and PwC. In relation to the disputes as to



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whether and to what extent AHTC has overpaid for services, or whether and to what extent certain services have been satisfactorily delivered, these are matters of quantification of loss. They are for the plaintiffs to prove in the next phase of this bifurcated trial, and the common account is not intended to help them in this regard. I therefore decline to order an account.

(5) Summary of the principles applicable to breaches of fiduciary duties

609 Drawing together the strands of the analysis above, the plaintiffs' claim for equitable compensation for the breaches of fiduciary duty in relation to the MA and EMSU contracts may be approached as follows. First, I would not exercise my discretion to order a common account because there is no issue of to whom AHTC's funds have been disbursed ([603]–[608]). Second, whether a common account is taken makes no difference to the relief: the same principles of equitable compensation apply in assessing quantum ([553]–[563]). Third, the starting point of the assessment is to properly determine the loss suffered by AHTC ([564]–[574]). This includes the funds disbursed by AHTC under the impugned contracts, but must therefore correspondingly take into account benefits conferred on AHTC as a result of the performance of the contracts. The legal and evidential burden of proof of loss lies with the plaintiffs ([575]–[584]). Fourth, the plaintiffs must also prove that the loss which they claim would not have been suffered but for the breach of fiduciary duties ([585]–[602]). That does not mean, however, that the court will not do equity by drawing the appropriate inferences against the defendants where appropriate ([579]).

*Account of profits*

610 I will now briefly discuss the broader question of how the various remedies sought by the plaintiffs interact. I will then turn back to the other



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remedies the plaintiffs seek for breach of fiduciary duties, starting with their claim for an account of profits.

611 In a claim for breach of fiduciary duty, the plaintiff may obtain an award of equitable compensation or an account of profits, but not both: *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 ("*Tang Man Sit*") at 521B. As the Privy Council explained in *Tang Man Sit*, the two claims are alternative and inconsistent. A claim for compensation and another for restitution in respect of the same breach will also generally be alternative and inconsistent (see *Tang Man Sit* at 523D). The upshot is that the plaintiff must ultimately elect between them. Conversely, where the remedies are cumulative, the plaintiff need not choose: *Tang Man Sit* at 522D. When there are cumulative remedies against multiple defendants, the plaintiff may pursue them against each defendant, subject to controlling rules such as the rule that a plaintiff can only recover an aggregate sum equal to his loss from the defendants combined, and not more. These controlling rules are summarised in *Tang Man Sit* at 522F–H, and I do not need to go into them in detail at this stage.

612 In the present case, although AHTC has argued that an account of profits ought to be ordered against each of the defendants "[i]f necessary", there is no precise allegation that Ms Sylvia Lim and Mr Low Thia Khiang have in fact made any profits from their conduct. I have also seen no evidence to suggest that this has been the case. As such, there is no basis to award AHTC an account of profits in respect of them.

613 In respect of Ms How Weng Fan and Mr Danny Loh's breaches of fiduciary duties, it is open to the plaintiffs to seek an account of profits in the alternative to the other remedies. If the plaintiffs elect for an account of profits, they may seek an order that Ms How Weng Fan and Mr Danny Loh hold such



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profits on a constructive trust for the plaintiffs. I therefore leave it to the plaintiffs to make their election.

*Whether the MA and EMSU contracts are void or voidable*

(1) Rescission for breach of fiduciary duties

614 The plaintiffs also argue that the MA and EMSU contracts are liable to be rescinded if they were entered into in breach of fiduciary duty. The equitable basis to seek rescission of a contract generally comes hand-in-hand with a finding that the contract was entered into in breach of fiduciary duty: see Cope, *Equitable Obligations* ([228] *supra*) at para 8.300 and *Maguire v Makaronis* (1997) 188 CLR 449 at 467. This is provided that there are no bars to rescission, and the defendants have not suggested that there are any in the present case. The plaintiffs are therefore entitled to seek rescission of the first MA and EMSU contracts. Rescission is not available against the second MA and EMSU contracts as they were not entered into in breach of fiduciary duties. However, a number of points ought to be borne in mind in pursuing this remedy.

615 First, it is trite that rescission operates as between the contracting parties. Therefore, if the plaintiffs rescind the first MA and EMSU contracts, it is FMSS (and not any of the other defendants) which must return the benefits it received under the contract. Rescission is therefore not a remedy available against the other defendants.

616 Second, the same fundamental principles that limit recovery of equitable compensation to the plaintiffs' true loss also animate the principles that apply where a contract is rescinded, resulting in it being unwound. This means that parties on both sides of the contract need to return the benefits, *in specie* or in money, conferred on them under the contract. This principle is well-established



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in the context of contracts entered into by fiduciaries in conflict of interest: *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215 at 239–240, citing *Cook v G S Deeks and others* [1916] AC 554. These cases held that where the benefits received by the principal under the contract were benefits in which it had no prior legal or beneficial interest, they had to be returned upon rescission. The principal could only keep the benefits by affirming the contract rather than rescinding it. Otherwise, the court would be rewriting the contract for the principal's benefit. I see no reason for this rule not to apply in the present case. If the contracts are void, the benefits conferred on AHTC by FMSS's performance of the MA and EMSU contracts ought to be returned. As such, the payments which FMSS must return to the plaintiffs upon the rescission of the contracts must be considered in light of the plaintiffs' obligation to return to FMSS the value of the benefits conferred upon AHTC under the contracts. This may result in the same loss as that in the case of equitable compensation (see [576] above). Accordingly, it is unlikely that rescission will allow the plaintiffs to obtain relief of a greater quantum than what they will receive by way of equitable compensation.

617 Ultimately, all the remedies available to the plaintiffs which are directed at the recovery of loss (rather than the disgorgement of profits) go towards the recovery of the same overall net loss to AHTC arising from the breach of fiduciary duties in entering into the first MA and EMSU contracts. Different remedies may apply to different defendants, and in respect of some of the defendants, multiple remedies may be pursued. What this cannot change is that there is only one sum representing AHTC's overall net loss, which sets the upper limit of the plaintiffs' loss.



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(2) Consequences of unlawfulness in public law

618 The plaintiffs further argue that the first and second MA and EMSU contracts are void *ab initio* (*ie*, void from the start) because they are unlawful as a matter of public law. Their specific allegations are that the MA and EMSU contracts were irrational, entered into in bad faith or for improper purposes, or that irrelevant considerations were taken into account. Notwithstanding these allegations, it is clear at a minimum that AHTC awarded the first MA and EMSU contracts in breach of r 74 TCFR, which renders these contracts unlawful as a matter of public law: see [300] and [331] above. On the other hand, where the second MA and EMSU contracts are concerned, I have not made any findings which would suggest that they suffer from any public law illegality.

619 Although the present proceedings are not proceedings for judicial review, the plaintiffs are nevertheless entitled to challenge the lawfulness of the award of the first and second MA and EMSU contracts at public law. This is known as a collateral challenge: see William Wade and Christopher Forsyth, *Administrative Law*, 11th ed (2014) ("*Wade & Forsyth's Administrative Law*") at p 235. Although it is well-established that an act of a public body which is *ultra vires* for any reason is a nullity and therefore void *ab initio*, this simple rule has been the cause of much difficulty. For instance, in proceedings for judicial review, the court may find that the public body has acted unlawfully, but decline to provide any remedy. This could be, for example, because of a finding that the applicant lacked standing, or by virtue of the court's exercise of its inherent discretion: see *Wade & Forsyth's Administrative Law* at pp 249–250. A strict application of the rule that unlawful acts are void *ab initio* would mean that a court hearing a collateral challenge would have to treat such acts as a nullity, despite the fact that a court exercising powers of judicial review could have declined to intercede.



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620 In a collateral challenge there are similarly situations where unlawfulness ought to result in the acts in question being merely voidable, and not void. Here, a distinction may be drawn between acts which are *ultra vires* in the narrow sense, where the public body has acted in excess of its substantive powers, and acts which are unlawful for other reasons, such as irrationality, improper purposes, or procedural unfairness (which may also be considered "*ultra vires*", but in the broad sense). This is because there is good reason for acts that fall within the latter category not to be null and void *ab initio*. In other words, acts which are *ultra vires* only in the broad sense ought to be voidable, not void, in a collateral challenge. This includes the first MA and EMSU contracts. Before I can reach that conclusion, however, I must address the English cases, which do not speak with one voice on this question.

621 In support of its contention that the impugned contracts are void, PRPTC cites the decision of the English Court of Appeal in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306 ("*Allerdale BC*"). In this case, a local council wanted to build a swimming pool and time-share accommodation, and engaged a company to do so. The council gave the company a guarantee of £6m to finance this project. When the company eventually went into liquidation, the financing bank sought to call on the council's guarantee. The Court of Appeal dismissed the bank's claim against the council. It held that the provision of time-share accommodation was not something the council was authorised to do under its statutory powers. As such, the entire contractual scheme for the development, including the guarantee, was void *ab initio* and the bank could not enforce it: *per* Neill LJ at 333B, 335H–336C; *per* Peter Gibson LJ at 347D; *per* Hobhouse LJ at 348B.

622 Although the Court of Appeal in *Allerdale BC* was unanimous on the outcome of the case, the judges made differing remarks on the scope of the rule



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that *ultra vires* acts are void. Peter Gibson LJ declined to express any views on this question (at 347E). Neill LJ took the view which PRPTC seeks to rely on, which is that all *ultra vires* contracts are void, regardless of the reason for their unlawfulness (at 343C–E):

> It was argued on behalf of the bank that in private law proceedings against a public authority the court should exercise a similar discretion where the decision was ultra vires not for lack of statutory capacity but because of some procedural impropriety. In private law too, it was said, there were gradations of ultra vires. …
>
> I feel bound to reject these submissions. I know of no authority for the proposition that the ultra vires decisions of local authorities can be classified into categories of invalidity. I do not think that it is open to this court to introduce such a classification. Where a public authority acts outside its jurisdiction in any of the ways indicated by Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, 171 the decision is void. In the case of a decision to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity. I see no escape from this conclusion. …

It is worth noting that although Neill LJ found himself bound to conclude that this was the law, he also considered it to be unsatisfactory: *Allerdale BC* at 344B. That was because Neill LJ recognised the unfairness of allowing public bodies to escape their contractual obligations by invoking some legal defect of a procedural nature, of which the contracting party could not have known.

623 In contrast, Hobhouse LJ appeared to take a more nuanced view (at 356H–357E):

> Private law issues must be decided in accordance with the rules of private law. … When the activities of a public law body, or individual, are relevant to a private law dispute in civil proceedings, public law may in a similar way provide answers which are relevant to the resolution of the private law issue. But after taking into account the applicable public law, the civil proceedings have to be decided as a matter of private law. The



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> issue does not become an administrative law issue; administrative law remedies are irrelevant.
>
> … It remains necessary to ask what amounts to a defence to a private law cause of action. *Want of capacity is a defence to a contractual claim; breach of duty, fiduciary or otherwise, may be a defence depending upon the circumstances. To say that administrative law categorises all grounds for judicial review as "ultra vires' does not assist. In civil proceedings the question is whether, after taking into account the relevant public law, there is on the facts a private law defence.* By a parity of reasoning, how a Divisional Court would have decided an application for judicial review and what remedy, if any, it would have granted in the exercise of its discretion is not material.
>
> [emphasis added]

624 All of these remarks in *Allerdale BC* were *obiter*, since the council lacked capacity to enter into the contract; what the consequences of other kinds of illegality that did not go to capacity ought to be thus did not matter. This was pointed out by the English Court of Appeal in the subsequent case of *Charles Terence Estates Ltd v Cornwall Council* [2013] 1 WLR 466 ("*Charles Terence Estates*") at [30]. In *Charles Terence Estates*, the defendant council sought to avoid contracts entered into by its two predecessor councils on the basis that they lacked the lawful authority to do so. The High Court refused to allow the plaintiff to enforce the contracts, holding that the councils had acted in breach of fiduciary duty in entering into them, with the result that they were void. The Court of Appeal reversed this decision and unanimously held that the councils had the capacity to enter into these contracts, and had not breached their fiduciary duties (at [24]).

625 However, Maurice Kay LJ, with whom the other two judges agreed, went on to consider the consequences if the councils were found to have breached their fiduciary duties. Maurice Kay LJ considered *Allerdale BC* and said that he preferred the analysis of Hobhouse LJ over that of Neill LJ on this point. Without going so far as to decide where exactly the distinction was to be



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drawn, he held a lack of legal capacity resulted in a void contract, whereas a breach of fiduciary duty would only provide a potential defence against enforcement of the contract, depending on the circumstances (*Charles Terence Estates* at [37]). Likewise, Etherton LJ said:

> 48 In the private law context of a company the point was explained by Browne-Wilkinson LJ in his classic exposition in [*Rolled Steel Products (Holdings) Ltd v British Steel Corporation and others* [1986] Ch 246 at 302–303, 304]:
>
> …
>
> "A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void. But the objects of a company and the powers conferred on a company to carry out those objects are two different things … . If the concept that a company cannot do anything which is not authorised by law had been pursued with ruthless logic, the result might have been reached that a company could not (ie, had no capacity) to do anything otherwise than in due exercise of its powers. But such ruthless logic has not been pursued and *it is clear that a transaction falling within the objects of the company is capable of conferring rights on third parties even though the transaction was an abuse of the powers of the company* …
>
> 49 *I can see no sound reason why the position should be any different where what is in issue is the validity of a commercial private law transaction between a corporation which is a public body and a third party*. The existence of public law remedies for breach of public law duties should make no difference to the private law consequences of ultra vires (want of capacity), on the one hand, and breach of duty in respect of a transaction within the capacity of the corporation, on the other hand.
>
> …
>
> 51 … In so far as [Neill LJ in *Allerdale BC*] indicated that any decision of a public body which could be impugned in judicial review proceedings is a nullity for all purposes, including the enforcement in civil proceedings of private law rights under a commercial agreement between the public authority and a third party, I respectfully do not agree with him.
> …
>
> [emphasis added]



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626 I agree with the views set out in *Charles Terence Estates*. Moreover, in between the decisions in *Allerdale BC* and *Charles Terence Estates*, the UK Parliament evidently saw the need to address what Neill LJ in *Allerdale BC* considered to be the unsatisfactory state of the law (see [622] above), and effectively reversed *Allerdale BC* in relation to contracts made by local authorities by passing the Local Government (Contracts) Act 1997 (c 65) (UK): see Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th Ed, 2012) ("Craig, *Administrative Law*") at para 5–045, p 145. *Allerdale BC* was also the subject of forceful criticism on this issue in Craig, *Administrative Law* at para 5–045, p 144.

627 In the present case, the plaintiffs allege that the MA and EMSU contracts were infected by public law illegality on several grounds, but they do not allege that AHTC lacked capacity to enter into these contracts altogether. As such, I find that at the highest, only the first MA and EMSU contracts are voidable on the basis of public law illegality (there being no finding that the second MA and EMSU contracts were unlawful). The collateral challenge against these contracts thus puts the plaintiffs in no better position than they are already in, by virtue of the equitable remedy of rescission for breach of fiduciary duties (see [614]–[617] above).

628 In any case, even if I am wrong and the first MA and EMSU contracts are void *ab initio*, it is not clear to me whether such a finding is more favourable to the plaintiffs than the remedy of equitable compensation for breach of fiduciary duties, which they are already entitled to. This is because the principles requiring the rescinding party to return benefits it received under the contract (discussed at [616] above) are equally applicable in the case of a void contract: see *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 at 230B–E. My suggestion at [616]



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above that the plaintiffs would be in a similar position either way therefore applies in this eventuality as well.

***Remedies for dishonest assistance and knowing receipt***

629 There is no doubt that those liable for dishonest assistance and knowing receipt are liable to account as constructive trustees. However, the nature and extent of the liability for dishonest assistance and knowing receipt differ, reflecting their distinct bases.

630 Dishonest assistance, as a form of accessory liability, has the effect of holding the dishonest assistant liable in the same manner as a trustee or fiduciary. This is a personal equitable remedy, which is the equivalent of equitable compensation (see *Lewin on Trusts* ([549] *supra*) at para 40–015). It follows that dishonest assistants can be liable for consequential losses, just as fiduciaries themselves are (see *Snell's Equity* ([166] *supra*) at para 30-080). In the present case, that means that the sixth to eighth defendants are liable in dishonest assistance for the same losses for which Ms Sylvia Lim and Mr Low Thia Khiang are liable, including the consequential losses flowing from the second MA and EMSU contracts (to the extent that they are proven).

631 Knowing receipt is a receipt-based liability, and is inextricably connected not just with the existence of a breach of fiduciary duty, but also the receipt of assets disposed of in breach of fiduciary duty. It does not attach to other kinds of loss, even if they follow from a disposal of assets in breach of fiduciary duty. This is illustrated by the English Court of Appeal's decision in *Brown and another v Bennett and others* [1999] 1 BCLC 649 ("*Brown v Bennett*"). In that case, the defendant company had bought another company, Pinecord, which was being sold by its receivers. A claim for knowing receipt



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was brought against the defendant company and its directors, on the basis that those same directors had been the directors of Pinecord and had intentionally put it into financial difficulties in breach of their fiduciary duties. However, the propriety of the receivers' sale of Pinecord itself was not disputed. The claim was struck out, and this ruling was upheld by the Court of Appeal. Delivering the judgment of the court, Morritt LJ held that "the *receipt* must be the *direct consequence* of the alleged breach … of fiduciary duty of which the recipient is said to have notice" [emphasis added] (at 655). In other words, knowing receipt must be pursuant to a disposal of assets in breach of fiduciary duties. If the disposal of the relevant assets was in itself proper, the fact that the disposal was at a loss to the beneficiaries as a result of earlier breaches cannot give rise to liability for knowing receipt: see *Lewin on Trusts* at para 42–045; Cope, *Equitable Obligations* ([228] *supra*) at para 6.180; and Virgo, *Principles of Equity* ([166] *supra*) at p 598.

632 In the present case, I have found that Ms Sylvia Lim and Mr Low Thia Khiang have breached their fiduciary duties to AHTC in relation to the first MA and EMSU contracts, but *not* in relation to the second MA and EMSU contracts. Thus, only payments made under the first MA and EMSU contracts constitute disposals of AHTC's assets in breach of fiduciary duty. Payments made under the second MA and EMSU contracts do not flow from any breach of fiduciary duties and therefore cannot be recovered on the basis of knowing receipt. Any losses that result can only potentially constitute consequential losses flowing from the original breach of fiduciary duties in relation to the award of the first MA and EMSU contracts (see [338] above). As such, the liability of FMSS for knowing receipt only extends to payments received under the first MA and EMSU contracts, and no further. The remedy can be both personal and



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proprietary (see *Lewin on Trusts* at para 42–025). This reflects the fact that the knowing recipient necessarily receives the trust property.

633 In addition, PRPTC seeks a tracing order in respect of the monies which FMSS received. If assets received by FMSS in knowing receipt were converted into other traceable assets, there is no doubt that PRPTC is entitled to trace its claim into those assets instead of obtaining equitable compensation. I therefore grant the tracing order, subject to PRPTC's election not to pursue equitable compensation against FMSS.

***Remedies for breach of equitable duties of skill and care***

634 It suffices simply to note that there is no controversy over the nature of the remedy that should be ordered for the defendants' breaches of their equitable duties of skill and care. The remedy may be termed "equitable compensation", but is identical in nature and quantum to damages for negligence (see [243] above, citing *Mothew* at 17C–H). There is no need to say much more about these breaches in this judgment, which does not deal with the quantification of damages.

***Liability under r 56 TCFR***

635 PRPTC argues that rr 56(1) and 56(2) TCFR provide a basis on which the first to seventh defendants would be responsible for repaying each of the improper payments made to FMSS and the third party contractors which they had personally approved or certified. This does not appear to me to be an argument that was pursued with any seriousness, as PRPTC simply asserts that the provisions provide such a basis without explaining how. In my judgment, it is clear from the plain words of these provisions that PRPTC's argument is untenable:



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> **56.**—(1) Any officer allowing or directing any disbursement without proper authority shall be responsible for the amount.
>
> (2) In the event of any wrongful payment being made in consequence of an incorrect certification on a voucher, the certifying officer shall be responsible for the wrongful payment.

636 It is clear that neither of these provisions applies to improper payments generally, but rather only to payments that are improper because they were made "without proper authority" (r 56(1)) or "in consequence of an incorrect certification on a voucher" (r 56(2)). This does not describe any of the categories of improper payments discussed above. The category that comes the closest relates to the 56 invoices totalling $674,388.70, but even then PRPTC has not shown that the payments made were "wrongful … in consequence of an incorrect certification". As I have stated above at [438], PRPTC's complaint in this regard is a technical one that relates to the proper certifier under r 56(4)(*c*) TCFR, and there has been no allegation that any of these payments was made *without authority* or was wrongful *in consequence of an incorrect certification*. PRPTC therefore cannot rely on rr 56(1) and 56(2) TCFR.

***Cost of investigations***

637 The plaintiffs complain that the defendants' breaches have resulted in them incurring expenses in investigating those breaches. AHTC pleads recovery of these expenses as part of costs to be awarded, whereas PRPTC pleads recovery of these expenses as a matter of compensation.

638 In *John While Springs* ([576] *supra*) at [8] and *QAM* ([227] *supra*) at [114], the High Court proceeded to assess the quantum to be awarded to the successful plaintiffs for the expenses of investigating the defendants' breaches of fiduciary duties. While in *John While Springs* recovery of these expenses was characterised as damages, in *QAM* the court chose to characterise this as



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equitable compensation. On the other hand, in *Winsta* ([576] *supra*), the High Court held (at [238]–[239]) that investigation expenses were recoverable as loss in the context of the tort of conspiracy, on the basis of the line of authority followed in *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667 at [57]–[59], but that otherwise the normal position was that expenses incurred in expectation of legal proceedings could only be recovered as costs (citing *Bolton v Mahadeva* [1972] 1 WLR 1009 at 1014H). Since the claim in conspiracy had failed in *Winsta*, the court held that the investigation expenses could only be recovered as costs, although it also noted that it was unlikely to make a difference either way.

639 In my view, it is preferable to consider the claim for investigation expenses as giving rise to equitable compensation, as it is a loss flowing from the breaches of fiduciary duties and the equitable duties of skill and care. This is reinforced by the principle that equitable compensation for breaches of fiduciary duties are not subject to the doctrines of foreseeability and remoteness (see [554] above). Therefore, once it is shown that the investigation expenses flow from the breaches of fiduciary duties, there is no requirement to establish any further connection other than but-for causation. This analysis also means that the plaintiffs cannot recover their costs of investigation which resulted solely from their pursuit of claims in which they have been unsuccessful. In other words, they are not entitled to recover costs of investigation which cannot be connected by the usual legal principles for the assessment of loss to at least one of the successful heads of claim.

640 I am therefore inclined to allow both plaintiffs to pursue their claim for investigation expenses against the defendants in the form of equitable compensation if they so choose, and to lead the necessary evidence at the assessment stage of this trial. This is despite the fact that AHTC pleaded this



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claim as one for an award of costs: I am satisfied that the defendants have been put on notice as to the nature of the claim, and have suffered no prejudice given that the consequences of characterising the claim as one for compensation or for costs appear to be the same. By this analysis, the claim for the costs of investigations is no longer strictly speaking a separate remedy sought, but a part of the consequential loss for the various breaches.

***Assessment of reliefs***

*Bifurcation of S 668/2017*

641 As mentioned at [133] above, PRPTC applied for and was granted a bifurcation of S 716/2017, whereas AHTC withdrew its application to bifurcate S 668/2017 on the basis that the granting of the common account which AHTC sought would effectively constitute a bifurcation of the action.

642 I have, however, ruled against AHTC's request for an account (see [608] above). AHTC is still entitled to equitable compensation or any other available remedy, but unless the action in S 668/2017 is bifurcated, AHTC will not have had any opportunity to adduce evidence as to the appropriate quantum of equitable compensation. To effectively allow a bifurcation of S 668/2017 at this stage cannot cause any prejudice to the defendants, since AHTC's original request for an account would have resulted in an outcome which was in substance the same as an order for bifurcation. Furthermore, PRPTC's claims, which are even more extensive in many instances, have been bifurcated. I therefore allow the plaintiffs to adduce evidence of the amount of the appropriate remedies to be awarded to them at the next stage of these proceedings.



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*Summary of applicable reliefs*

643 In conclusion, I set out a table of the claims for which I have found each defendant liable (using the same terminology as that in the summary table at [447] above), and the remedies which the plaintiffs are entitled to pursue, keeping in mind the rules against double recovery:

| **Defendants' liability** | **Permissible remedies** |
|---|---|
| Breaches of fiduciary duties | |
| 1. *First MA and EMSU contracts*: Ms Sylvia Lim, Mr Low Thia Khiang, Ms How Weng Fan<br>2. *First EMSU contract only*: Mr Danny Loh | Equitable compensation<br>Rescission (of the first MA and EMSU contracts)<br>Account of profits (in relation to Ms How Weng Fan and Mr Danny Loh only) |
| Breaches of equitable duties of skill and care | |
| 3. *First MA and EMSU contracts*: Mr Pritam Singh, Mr David Chua, Mr Kenneth Foo<br>4. *Control failures*: First to seventh defendants<br>5. *Miscellaneous improper payments to FMSS, except payments for overtime claims*: First to seventh defendants<br>6. *LST Architects*: Ms Sylvia Lim, Mr Pritam Singh, Mr Kenneth Foo<br>7. *Red-Power, except for the inclusion of Punggol-East; Titan and J Keart:* Ms Sylvia Lim, Mr Pritam Singh, Mr David Chua, Mr Kenneth Foo | Equitable compensation (based on damages in tort) |



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| Dishonest assistance | |
|---|---|
| 8. *First MA and EMSU contracts*: Ms How Weng Fan, Mr Danny Loh, FMSS | Equitable compensation |
| Knowing receipt | |
| 9. *First MA and EMSU contracts*: FMSS | Equitable compensation, or recovery of trust property or its traceable proceeds (via the tracing order) |

644 I will hear parties on costs; unless the parties are able to come to an agreement on costs, they are to file written submissions on costs, limited to 20 pages each, within three weeks of this judgment.

Kannan Ramesh
Judge

Chan Ming Onn David, Joseph Tay Weiwen, Cai Chengying, Fong Zhiwei Daryl, Lin Ruizi, Zhang Yiting and Mark Yeo (Shook Lin & Bok LLP) for the plaintiff in S 668/2017;
Davinder Singh s/o Amar Singh SC, Sngeeta Rai, Lea Woon Yee, Chan Yong Wei, Lin Xianyang Timothy, Tan Mao Lin, Stanley Tan Jun Hao, Hanspreet Singh Sachdev and Gerald Paul Seah Yong Sing (Davinder Singh Chambers LLC) for the plaintiff in S 716/2017;
Chelva Retnam Rajah SC, Eusuff Ali s/o N B M Mohamed Kassim, Chan Xian Wen Zara, Isaac Riko Chua and Yong Manling Jasmine (Tan Rajah & Cheah) for the first to fifth defendants;
Netto Leslie, Netto Leslie née Lucy Michael, Srijit Jeshua Shashedaran and Roqiyah Begum d/o Mohd Aslam (Netto & Magin LLC) for the sixth to eighth defendants.



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