IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 37

Suit No 751 of 2017

Between

Tonny Permana

… *Plaintiff*

And

(1) One Tree Capital Management Pte Ltd
(2) Gerald Yeo

… *Defendants*

JUDGMENT

[Agency] — [Construction of agent's authority] — [Written authority]
[Agency] — [Duties of agent] — [Care, skill and diligence]
[Agency] — [Duties of agent] — [Breach]
[Companies] — [Fraudulently inducing investment]
[Tort] — [Misrepresentation] — [Fraud and deceit]
[Contract] — [Misrepresentation Act]
[Equity] — [Fiduciary relationships] — [When arising]
[Equity] — [Fiduciary relationships] — [Duties]
[Contract] — [Contractual terms] — [Implied terms]
[Contract] — [Contractual terms] — [Express terms] — [Entire agreement]
[Tort] — [Negligence] — [Duty of care]
[Tort] — [Negligence] — [Breach of duty]
[Equity] — [Dishonest assistance]

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Tonny Permana
v
One Tree Capital Management Pte Ltd and another

[2021] SGHC 37

General Division of the High Court — Suit No 751 of 2017
Chan Seng Onn J
14–16, 21 July, 16 October 2020

16 February 2021 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This case involves an investor making multiple allegations – fraud, negligence and breaches of various contractual and fiduciary duties – against his agents who rendered advice on his investment. The investment failed under questionable circumstances that, on their face, did not directly involve the agents. Both sides, unfortunately, suffered losses as a result of the failed investment, and the investor now seeks redress against his agents. The dispute presents interesting questions on the law of agency, specifically the duties owed by agents. As such, I have provided in the course of this Judgment a proposed framework for dealing with these issues.

2 The plaintiff, Tonny Permana, is an Indonesian businessman and investor.[1] The first defendant, One Tree Capital Management Pte Ltd, is a Singapore incorporated company,[2] and is in the business of investment fund management.[3] Part of its business involves facilitating deals between investors and prospective investees in need of funding, *ie*, acting as a middleman.[4] The second defendant, Gerald Yeo, is the director and sole shareholder of the first defendant. It is undisputed that the first defendant acted, at all material times, through the second defendant. I will hence refer to them collectively at the relevant portions of this Judgment as "the defendants".

3 The dispute between the parties has its genesis in a project undertaken by Midas Landmark Sdn Bhd (which was later renamed CHN Commodity Trade Centre Sdn Bhd – for ease of reference, I refer to the company simply as "Midas"). Midas sought to purchase and renovate an existing shopping mall in Kuala Lumpur, Malaysia ("the Mall") – I refer to this endeavour as the "Chinamall Project". Midas required funding for this project, and the defendants were aware of this. Thus, the defendants raised to the plaintiff the prospect of investing in the Chinamall Project.[5] The plaintiff agreed to make, and did make, an investment of about US$1.6m in the Chinamall Project. In the months that followed, the defendants continued to liaise with the plaintiff over the status of his investment, and several changes were made to the structure of the plaintiff's investment.

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1 Plaintiff's Closing Submissions ("PCS") at para 1; Defendants' Closing Submissions ("DCS") at para 1.

2 1DBAEIC at p 4, para 5.

3 1DBAEIC at p 4, para 6.

4 DCS at para 3; Gerald Yeo's Affidavit of Evidence-in-Chief at para 6.

5 1PBAEIC at p 32, para 9; PCS at para 5.

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4 However, the investment did not bear fruit. The management of the Mall obtained a winding up order against Midas in the Malaysian courts on 4 December 2015.[6] Despite the efforts of the defendants to appeal against the order, the winding up and liquidation of Midas proceeded. No dividends were paid out to the plaintiff, and he was not repaid the US$1.6m he invested in the Chinamall Project. The plaintiff also failed to recover the sum of US$1.6m from Midas' insolvency, because the defendants were unsuccessful in their attempts to recover the sum *qua* creditor in the insolvency proceedings. The plaintiff now claims from the defendants, *inter alia*, the value of his investment. The specific terms of the plaintiff's investment, the circumstances leading to his making of the investment and the defendants' involvement in the same form the heart of the present dispute.

5 The thrust of the plaintiff's claim is that the defendants "unilaterally engineered a drastic change in the nature/structure of his investment during the course of the investment".[7] The plaintiff alleges that such conduct by the defendants, along with the correspondence and dealings between them in the course of the investment, constituted (a) fraudulent misrepresentation; (b) misrepresentation under the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act"); (c) a breach of fiduciary duties; (d) a breach of "duties as agent"; (e) negligence; and/or (f) dishonest assistance. The first five allegations pertain to both defendants, while the allegation of dishonest assistance pertains solely to the second defendant.[8] Importantly, amidst the various allegations levelled against the defendants, the plaintiff has repeatedly

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6 PCS at para 31.

7 PCS at para 4.

8 PCS at para 33; Statement of Claim (Amendment No 4) ("SoC") at para 51.

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emphasised that the defendants were *his* "*agents*" in the course of his investment.[9] This undergirds the plaintiff's case. From this, questions arise on the law of agency and the duties owed by middlemen "agents" to their principals, which I address in the course of my Judgment.

6 I add that while the defendants initially filed a counterclaim against the plaintiff, they informed the court during the Judge pre-trial conference on 8 June 2020 that they will not be pursuing this counterclaim.[10] I accordingly do not consider it in my Judgment.

7 Having considered the evidence and the parties' submissions, I dismiss all of the plaintiff's claims with costs to the defendants. In this Judgment, I provide the reasons for my decision.

The facts

Background and preliminary negotiations between the parties

8 On or around 11 October 2013, the defendants were approached by one Mr Tan Chong Whatt and his son, one Mr Tan Chor Keng (collectively, "the Tans").[11] The Tans informed the defendants of their desire to procure investors to provide funding for the proposed acquisition and renovation of the Mall, *ie*, the Chinamall Project.

9 According to the defendants, Mr Tan Chong Whatt informed them that he and one Mr Wang Jianguo were the two promoters of the Chinamall Project.

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9 See PCS at paras 8, 33(a)(iii), 33(b)(iii), 35, 36.

10 Minute Sheet (Pre-Trial Conference) dated 8 June 2020 at p 11.

11 1DBAEIC at p 7, para 21.

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Their plan was to use Midas as a joint venture vehicle to facilitate the acquisition of the Mall and the execution of the project.[12] Mr Tan Chong Whatt informed the defendants that Midas had already entered into a Sale and Purchase Agreement on 8 August 2012 to acquire the Mall for RM200m, of which a deposit of RM20m had already been paid. However, Mr Tan Chong Whatt claimed that Midas would be able to renegotiate and revise the consideration to RM100m.[13] The China Project would therefore, according to Mr Tan Chong Whatt, cost RM120m in its entirety, comprising RM100m as the purchase price of the Mall, and RM20m in renovation costs. As noted, RM20m had already been paid up front. Of the remaining, the Tans envisaged RM50m to be raised "from a consortium of investors procured by [the first defendant]", and RM50m to be obtained by way of a bank loan.[14] With this information, the defendants began searching for prospective investors in the Chinamall Project. This was how the plaintiff came into the picture.

10 The plaintiff and the defendants had prior dealings in the form of the former's investment in a project known as the "Yang Kee Deal".[15] The Yang Kee Deal involved the plaintiff investing about S$1.5m in a Singapore logistics company. This involved the plaintiff subscribing for convertible loans in the said company. In the course of the deal, the defendants acted as middlemen, and facilitated the plaintiff's investment in the Yang Kee Deal.[16] The plaintiff made a tidy profit. The defendants were paid for their assistance in the plaintiff's

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12 1DBAEIC at p 8, para 22.

13 1DBAEIC at p 8, para 23.

14 1DBAEIC at p 8, para 24.

15 1DBAEIC at pp 3 to 5.

16 1DBAEIC at p 6, para 15.

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investment in the Yang Kee Deal in or around April 2012.[17] According to the defendants, following the success of the plaintiff's investment in the Yang Kee Deal, the plaintiff sought further investments, and contacted the defendants to this effect.[18]

11 Consequently, on or around 19 November 2013, the plaintiff and the second defendant discussed the idea of the former making an investment in the Chinamall Project. It is unclear whether this occurred over a phone call or *via* a meeting in person in Singapore.[19] What is material and undisputed is that during this discussion, the second defendant shared with the plaintiff the details of the Chinamall Project.[20] Notes of the discussion, specifically on the nature of the Chinamall Project, were summarised in an email dated 19 November 2013 ("the 19 November 2013 email") from the second defendant to the plaintiff's assistant, Ms Denie Tiolani ("Ms Tiolani").[21]

12 The 19 November 2013 email states, in material part, the following.[22]

(a) The Chinamall Project was a "fast turnaround" project. This was material to the plaintiff as it suggested a quick return on his investment.

(b) The project had a "comfortable collateral buffer position", given that project sponsors had already invested RM20m, and another RM30m to RM50m in investments was expected.

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17 1DBAEIC at p 7, para 20.

18 1DBAEIC at p 9, para 25.

19 1PBAEIC at p 32, para 9; 1DBAEIC at p 9, paras 25 to 29.

20 1PBAEIC at p 32, paras 9 to 10; 1DBAEIC at p 9, paras 28 to 29.

21 1DBAEIC at pp 108 to 109; 1AB at pp 111 to 112.

22 1PBAEIC at pp 36 and 37, para 16; 1DBAEIC at pp 108 to 109.

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(c) More than half of the units in the Mall (63%) were taken up by prospective tenants. The proposed rental rate of RM10 per square foot would result in a rental income "of RM45 million which makes debt servicing very comfortable".

(d) The project sponsors were prepared to provide personal guarantees, pledge all their shares in the project, and provide a conversion option into shares.

The plaintiff accepts that after the aforementioned discussion and his perusal of the 19 November 2013 email, he was "interested in investing in the Chinamall Project as it appeared to be a good investment deal".[23]

13 On or around 21 November 2013, the plaintiff and the second defendant met in Jakarta.[24] The plaintiff was provided with a draft document entitled the "China Mall (KL) Project Term Sheet" ("the Term Sheet"), which set out the terms of the potential investment in the Chinamall Project.[25] The material parts of the Term Sheet are as follows:[26]

> **China Mall (KL) Project Term Sheet**
>
> **Convertible Loan Stock ("CLS")**
>
> …
>
> **Project Owner:** [Midas].
>
> **Project Sponsors:** Mr [Wang Jianguo] and Mr [Tan Chong Whatt].

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23 1PBAEIC at p 36, para 16.

24 1DBAEIC at p 9, para 30.

25 8AB at p 344; 1DBAEIC at pp 9 to 10; 1PBAEIC at p 38, para 17.

26 8AB at pp 344 to 346.

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> **Potential Investors:** [the first defendant] and co-investors.
>
> **Form of Investment/ Amount:** Convertible Loan Stock of USD equivalent of RM 50 Million.
>
> …
>
> **Bridging Bank Loan:** RM 50 million to bridge finance part of acquisition cost of the [Mall].
>
> …
>
> **Form of Documentation:** a) Investment Agreement
>
> b) CLS certificates
>
> c) Personal Guarantees of the Project Sponsors
>
> d) Security Agent/ Trustee Agreement
>
> e) Charge over shares of Project Owner
>
> …

The parties proceeded to discuss the details of the Chinamall Project with reference to the Term Sheet. At the conclusion of this meeting, the plaintiff expressed to the second defendant his interest in investing the sum of US$1.6m in the Chinamall Project.[27]

14 As a peripheral point relating to the Term Sheet, there was a separate undisclosed term sheet ("the Undisclosed Term Sheet") that had been entered into by Mr Tan Chong Whatt, Mr Wang Jianguo and the second defendant on behalf of the first defendant. The material parts of the Undisclosed Term Sheet are identical to the Term Sheet, save that it included a "Service Fee" clause.[28] This clause provided that the defendants stood to earn an "[a]rranger fee" of

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27 1PBAEIC at p 42, paras 20 to 21; 1DBAEIC at pp 9 to 10, paras 30 to 33.

28 PCS at para 7.

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3.5% of the total amount of funding raised for the Chinamall Project, payable upon successful completion of the project.[29]

15 On 25 November 2013, the second defendant sent the plaintiff and Ms Tiolani an email enclosing, *inter alia*, the following unsigned draft documents that he described as "legal documentation" (which I refer to collectively as the "Chinamall Project Draft Documentation"):[30]

(a) an unexecuted copy of the investment agreement between the first defendant, Midas, Mr Tan Chong Whatt and Mr Wang Jianguo, pertaining to the Chinamall Project ("the Investment Agreement");

(b) Schedule 1 of the Investment Agreement, which comprised:

(i) the form of the Note Certificate to be issued to noteholders of convertible loan notes pursuant to the Investment Agreement; and

(ii) the accompanying terms and conditions to these convertible loan notes;

(c) Schedule 2 of the Investment Agreement, which comprised the form of the Request for Issue;

(d) Schedule 3 of the Investment Agreement, which comprised the form of the guarantee accompanying the agreement;

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29 8AB at p 348.

30 1AB at pp 118 to 198; 1PBAEIC at p 43, para 23; 1DBAEIC at pp 10 to 14, paras 34 to 40; PCS at para 9.

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(e) Schedule 4 of the Investment Agreement, which comprised the form of the share charge; and

(f) Schedule 5 of the Investment Agreement, which comprised the management accounts pertaining to the Investment Agreement.

I will elaborate shortly on the specifics of the Chinamall Project Draft Documentation (see [20] below).

16 The plaintiff accepts that he was provided with these documents *via* the said email.[31] He however claims that he did not understand the email and its contents until much later, when he instructed his current lawyers from Bih Li & Lee LLP.[32] He claimed that at that point in time, he simply "follow[ed] [the second defendant's] guidance… [b]ecause [the second defendant was] [his] agent".[33] Nevertheless, and despite this purported lack of understanding on the plaintiff's part, the parties proceeded to take further steps towards effecting the plaintiff's investment in the Chinamall Project.

17 On 27 November 2013, the second defendant emailed Ms Tiolani clarifying the currency that the plaintiff would be using for his investment (US dollars, and not Singapore dollars). In this email, the second defendant also requested for remittance of the investment sum from the plaintiff amounting to US$1.6m, and provided the details of the designated bank account to which the sum ought to be transferred.[34] This email appears to have been sent pursuant to

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31 NEs, 14 July 2020, page 45, lines 8 to 11.

32 NEs, 14 July 2020, page 45, lines 12 to 16.

33 NEs, 14 July 2020, page 45, lines 19 to 22.

34 1PBAEIC at p 60, para 39.

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a telephone conversation between the plaintiff and the second defendant that took place earlier the same day.[35] According to the defendants, in this phone call, the plaintiff informed that "he had reviewed the Chinamall Project Documentation and had no comments or issues on the same", and confirmed that "he was agreeable to subscribe for a Convertible Loan Note in the amount of US$1.6million".

The plaintiff's investment in the Chinamall Project

18 The next day, 28 November 2013, the plaintiff made his investment in the Chinamall Project. That day, the plaintiff arranged for the sum of US$1.6m (henceforth, "the Investment Sum") to be transferred to the designated bank account (as *per* the second defendant's email dated 27 November 2013).[36] The Investment Agreement, the accompanying guarantee and the share charge were also executed on the same day. The Investment Sum was successfully remitted the next day, 29 November 2013.[37]. Soft copies of the executed documentation were also emailed by the second defendant to Ms Tiolani on 29 November 2013.[38] Midas accordingly issued the plaintiff's convertible loan note for the sum of US$1.6m ("the Convertible Loan Note"). The Note Certificate issued to this effect was as *per* the form in Schedule 1 of the Investment Agreement, and subject to the same terms and conditions ("the CLN T&Cs"; see [15(b)] above). The second defendant emailed a soft copy of the Convertible Loan Note to Ms

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35 1DBAEIC at p 14, para 42.

36 1PBAEIC at pp 60 to 61.

37 1PBAEIC at p 61, para 42; 1DBAEIC at p 15, para 44(a).

38 1DBAEIC at p 15, para 44(c).

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Tiolani on 28 November 2013.[39] The hard copy original of the Convertible Loan Note was delivered to the plaintiff in or around early December 2013.

19 In addition to the plaintiff, there were 12 other investors who made similar investments (of various amounts) in the Chinamall Project. The total value of all the investments was S$9.5m and US$4.94m.[40] The plaintiff claims he was not aware, at the time of the making of his investment, that there were other investors of this nature.[41]

20 The material parts of the executed documents mentioned at [18] above are identical to the Chinamall Project *Draft* Documentation that was sent to the plaintiff on 25 November 2013. I reiterate below the salient portions of the relevant documents, which I refer to collectively as the "Investment Documents":

(a) The Investment Agreement was dated 28 November 2013 and was between the first defendant as "Agent", Midas as "Borrower", and Mr Tan Chong Whatt and Mr Wang Jianguo as "Guarantors".[42] The Investment Agreement was subject to the terms and conditions of the Convertible Loan Note.[43]

(b) The Form of Guarantee was dated 28 November 2013 and was executed by Mr Tan Chong Whatt and Mr Wang Jianguo ("the

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39 1DBAEIC at p 15, para 44(b); 1PBAEIC at p 60, para 40.

40 1PBAEIC at p 61, para 44.

41 1PBAEIC at p 62, para 44.

42 1AB at pp 241 to 259.

43 PCS at para 12; 1AB at pp 206 to 240.

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Guarantee").[44] Therein, they jointly and severally guaranteed to the first defendant and the noteholders under the Investment Agreement "prompt payment when due, of all present and future obligations and liabilities of all kinds of the Borrower to the Agent and the Noteholders arising out of the Agreement and under the terms and conditions of the Notes".

(c) The Form of Share Charge was dated 28 November 2013 and was executed by Mr Tan Chong Whatt and Mr Wang Jianguo ("the Share Charge"). It charged in favour of the first defendant:[45]

(i) all Mr Tan Chong Whatt's and Mr Wang Jianguo's ordinary shares in the capital of Midas held by each of them (including all such other shares in Midas as may be acquired by each of them from time to time) (the "charged securities"); and

(ii) all rights, title and interest attaching to or benefits and proceeds arising from or in respect of any of the charged securities.

These were charged as a continuing security for the payment and discharge of any and all sums which were or at any time would become due from them or from Midas to the first defendant and the investors, and for the observance and performance by Mr Tan Chong Whatt and Mr Wang Jianguo of their obligations under the Investment Agreement.[46] I refer to the Share Charge and the Guarantee collectively as "the Security Documents".

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44 1AB at pp 273 to 277.

45 PCS at para 13.

46 1AB at pp 260 to 272.

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(d) The Convertible Loan Note was dated 28 November 2013. It was issued by Midas as "Borrower" and certified the plaintiff as the registered holder of the Convertible Loan Note in the principal value of US$1.6m.[47]

(e) The CLN T&Cs applied to the Convertible Loan Note. These stipulated that the Convertible Loan Note would mature and had to be redeemed by Midas no later than 12 calendar months from the date of the Investment Agreement, *ie*, by 28 November 2014.[48] Upon redemption, the plaintiff would be paid the Investment Sum and interest/returns of 20% on the same.[49] The CLN T&Cs also referenced the Security Documents at cl 5.[50]

(f) Relevant also is the Form of Agency and Security Trust Deed as set out at Appendix D of the CLN T&Cs ("ASTD").[51] This document set out the terms of the agency relationship between the plaintiff and the defendants; I will set out its terms in a later part of this Judgment (see [120] below).

The changes to the terms of the plaintiff's investment

21 In the months that followed, the defendants made several proposed changes to the plaintiff's investment.

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47 PCS at para 12.

48 1AB at p 208, cl 6.

49 PCS at para 14(b).

50 1AB at p 208.

51 PCS at para 34(a); 1AB at p 162.

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The Proposed Conversion

22 On 11 February 2014, the second defendant sent an email to Ms Tiolani, informing that the structure of the plaintiff's investment had to be changed and converted to a *shareholder's loan* (the "Proposed Conversion"), wherein the plaintiff would become a shareholder of Midas and proceed to extend a shareholder loan to Midas.[52] This shareholder loan would be in place of the convertible loan note arrangement that had been agreed prior. The arrangement was proposed "in order to comply with [Malaysia's rules on] non-solicitation of investment".[53]

23 The Proposed Conversion, however, was never implemented, and the parties recognise this.[54] In other words, the plaintiff's investment was *never altered* along the lines of the Proposed Conversion. It is hence immaterial, and I will not canvass further details relating to the same. It suffices to note that there was constant correspondence between Ms Tiolani and the second defendant relating to the details of the Proposed Conversion between 3 March 2014 and 14 May 2014.[55]

The 26 July 2014 MOA and the 18 August 2014 Letter

24 On 26 July 2014, unbeknownst to the plaintiff, the first defendant (acting through the second defendant) entered into a Memorandum of Agreement with Mr Tan Chong Whatt and one Mr Wang Yingde for the purchase of shares in

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52 1AB at p 281.

53 1PBAEIC at p 71, para 47; PCS at para 18.

54 PCS at para 18.

55 1PBAEIC at pp 74 to 85, paras 51 to 71.

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Midas ("the 26 July 2014 MOA").[56] Following this, the first defendant issued a letter dated 18 August 2014 ("the 18 August 2014 Letter") to Midas, Mr Tang Chong Whatt and Mr Wang Jianguo stating, *inter alia*, that the defendants have terminated the Investment Agreement, and have fully discharged the Security Documents.[57]

25 These two documents were only made known to the plaintiff upon commencement of the present suit.[58] As will be made clear, these documents were integral parts of the eventual change to the structure of the plaintiff's investment in the Chinamall Project.

The Conversion

26 On 3 August 2014, the second defendant sent an email to Ms Tiolani, informing her that the structure of the plaintiff's investment would be altered.[59] The Investment Sum would be converted into a *shareholder's loan provided by the first defendant to Midas* (the "Conversion"). The plaintiff would then be investing in the Chinamall Project *through* the first defendant by way of a trust deed (the "Trust Deed"), wherein the first defendant would hold its shareholder loan amounting to the Investment Sum on trust for the plaintiff. The Conversion would *replace* the Convertible Loan Note.[60] This was to be the arrangement with respect to the other 12 investors in the Chinamall Project as well. The first defendant would then hold 80% of the shares in Midas, and hold its shareholder

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56 4AB at pp 275 to 279.

57 4AB at p 348.

58 PCS at paras 20 and 21.

59 4AB at p 280.

60 1PBAEIC at p 88, para 79; 4AB at p 280.

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loan to Midas on trust for the respective investors to the extent of their investment sums that were previously structured as convertible loan notes.[61]

27 Ms Tiolani sent the second defendant queries relating to the Conversion in an email dated 4 August 2014. The next day, 5 August 2014, the second defendant replied and confirmed that the Conversion involved a change in the structure of the plaintiff's investment to the effect described in the previous paragraph.[62]

28 The plaintiff's evidence is at this point, "[w]hat [he] could understand was that the nature of [his] investment in the Chinamall Project had fundamentally changed", and that under the Conversion, "[his] investment would be by way of a trust deed to be entered into between [the first defendant] and [himself]". He also gave evidence that "[n]evertheless, [he] was not troubled by the change in the form / structure of [his] investment", because he trusted the second defendant to "act in [his] best interest". He did not want to "micro-manage" his investment, "so long as… [he] received [his] Investment Sum and Return by 28 November 2014".[63]

29 The second defendant's evidence is that the Conversion was partly motivated by concerns over compliance with Malaysia's legislative restrictions on moneylending and/or fundraising transactions;[64] it is unclear whether this was conveyed to the plaintiff. Further, it is the second defendant's evidence that at or around this time, the Chinamall Project was experiencing delays and Midas

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61 1PBAEIC at p 85, para 76; PCS at para 19.

62 4AB at p 333.

63 1PBAEIC at p 91, para 81.

64 1DBAEIC at pp 24 and 25, paras 68 to 74.

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was facing financial difficulties – I will elaborate more on this in the course of this Judgment (see [201] and [202] below).

30 On or about 3 September 2014, the second defendant sent Ms Tiolani the Trust Deed, which was dated 31 August 2014.[65] The parties to the Trust Deed, as indicated on the instrument, were the plaintiff and the first defendant; the Trust Deed states, *inter alia*, as follows:[66]

(a) the first defendant was the legal owner of a US$1.6m shareholder loan to Midas; and

(b) the first defendant held the said loan and all interest accrued or to accrue on the same on trust for the plaintiff.

31 Attached to the Trust Deed sent to the plaintiff was a key document – a letter dated 30 June 2014 from the first defendant to Midas (the "OT Letter").[67] This was the first time the OT Letter was brought to the plaintiff's attention (*ie*, in the second defendant's email dated 3 September 2014).[68] The OT Letter provided that the first defendant would provide shareholder loans to Midas in the aggregate sums of S$9.5m and US$4.94m on the following conditions:[69]

(a) The purpose of the loans was to finance the purchase of "Pandan Perdana Safari Lagoon Shopping Complex" in Ampang, Kuala Lumpur, Malaysia, *ie*, the Mall.

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65 5AB at p 43; PCS at para 22.

66 5AB at pp 7 and 8.

67 5AB at pp 15 to 18.

68 PCS at para 23.

69 5AB at p 15.

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(b) The status of the loans was stated as "[u]nsecured and subordinated".

(c) The final maturity date of the investment (by way of the loans) was "[u]ntil further notice from [Midas]".

(d) Repayment of the loans would be "at any time and in any amount as permitted by the project financing bank for the acquisition of [the Mall]".

(e) The applicable interest rate was 20% per annum on an uncompounded basis, payable after project completion. Revision to the interest rate shall be subject to agreement between the first defendant and Midas.

(f) The appendix to the OT Letter also stated the breakdown of the various loans provided by the 13 investors (including the plaintiff).[70] It also indicated that these "[r]emittances" to Midas were *on behalf of the first defendant* (which put the first defendant in the shoes of a loan holder or creditor).

32 Seen in context of the Trust Deed and the OT Letter, it is clear that the 26 July 2014 MOA and the 18 August 2014 Letter were steps taken by the defendants to implement the Conversion. The plaintiff was, of course, unaware as at 3 September 2014 (when he received the Trust Deed and the OT Letter) that such steps had in fact been taken.

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70 5AB at pp 17 to 18.

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33 Initially, the plaintiff did not sign and return the Trust Deed to the defendants.[71] This appeared to be because of his concern over the lack of security over his investment if the Conversion was to take effect.[72] This concern had two facets. First, the plaintiff "understood that the terms of the OT Letter… would seriously prejudice [his] investment", due to the "[u]nsecured and subordinated" nature of the loan extended to Midas.[73] He nevertheless, in these proceedings, adopts the position that he is not bound by the OT Letter, given that he is not a party to the OT Letter, and because the second defendant had issued it to Midas without his (the plaintiff's) consent, knowledge or approval. Second, Ms Tiolani pointed out to the plaintiff that the Trust Deed made no reference to the Security Documents,[74] which as mentioned formed the basis of the plaintiff's security in the Investment Agreement (see [20(b)] and [20(c)] above). The plaintiff was concerned as a result, as he understood the significance of the Security Documents, and stated that these were "important" to him.

34 In this regard, in an email dated 17 November 2014, the second defendant expressly stated that *no* collateral would be provided by Midas.[75] In this email, the second defendant also asserted that all the investors *except the plaintiff* had signed the relevant trust deeds. As a result, the plaintiff instructed Ms Tiolani to seek clarification from the second defendant regarding the

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71 PCS at para 26.

72 1PBAEIC at p 96, para 90.

73 1BAEIC at p 95, para 89.

74 1PBAEIC at p 96, para 90.

75 5AB at pp 173 to 174.

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Security Documents.[76] Thus, on 18 November 2014, Ms Tiolani sent the second defendant an email, wherein she highlighted that the Trust Deed made no mention of the Security Documents, and sought clarification in this regard.[77]

35 On 19 November 2014, the second defendant sent Ms Tiolani an email, wherein he explained, *inter alia*, that the Security Documents had "been voided, as *per* the spirit of our note certificate agreement since the majority investors (represented by One Tree, Wang Yingde and other investors behind us) have taken over the 80% shares to speed up our project".[78] In other words, the second defendant confirmed that the Security Documents no longer had effect and that the arrangement pursuant to the Trust Deed did not involve any security for the plaintiff's investment.

The execution of the Trust Deed

36 The plaintiff alleges that subsequently, there was a phone call between him and the second defendant on 20 November 2014.[79] The defendants do not admit that there was such a phone call.[80] For reasons that will be made clear, I am persuaded that the phone call occurred. In this phone call, the second defendant allegedly conveyed or expressed the following:[81]

(a) The second defendant confirmed what he had stated in the email dated 19 November 2014, specifically that the Security Documents were

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76 1PBAEIC at p 96, para 90.

77 5AB at p 173.

78 5AB at p 172.

79 SoC at para 34.

80 Defence at para 45.

81 1PBAEIC at p 100, para 98.

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voided when the Convertible Loan Note was changed to a shareholder's loan pursuant to the Conversion.

(b) The second defendant requested the plaintiff to sign the Trust Deed before the maturity date of the Convertible Loan Note, *ie*, 28 November 2014.

(c) The plaintiff was assured that the Mall was valuable and that it could be sold (and the investors paid back) if necessary.[82]

(d) The second defendant requested a three-month extension of time for repayment of the Investment Sum and the plaintiff's returns on his investment, *ie*, by 28 February 2015. The second defendant represented that the interest/return on the Investment Sum would continue to accrue at a rate of 20%, as *per* the CLN T&Cs, until the end of the period of extension.

37 Based on what the second defendant had represented in the alleged phone call on 20 November 2014, along with the other information on the Chinamall Project that had been conveyed to the plaintiff *via*, *inter alia*, the email correspondence and the Term Sheet, the plaintiff agreed to sign the Trust Deed.[83] Thus, on the same day, *ie*, 20 November 2014, Ms Tiolani emailed the second defendant informing him that the plaintiff had signed the Trust Deed. This email states, in material part:[84]

> [The plaintiff] has signed the Trust Deed, I will courier to you today.

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82 1PBAEIC at p 101, paras 98(c) and 100.

83 1PBAEIC at p 105, paras 103 and 104.

84 2PBAEIC at p 175.

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> As for the extend [*sic*], [the plaintiff] asked your help to send me letter with fix extension period (as phone with [the plaintiff], it is 3 months) and also the return interest will still carried forward as mentioned, until the loan is repay [*sic*].
>
> …

38 The plaintiff emphasised in his affidavit evidence that he signed only the Trust Deed and *not* the OT Letter, chiefly because he did not consider himself to be a party to the OT Letter (which had been executed without his knowledge), and because he was not satisfied with the terms in the OT Letter, namely the lack of a fixed repayment date for his investment.[85]

39 Despite the email sent by Ms Tiolani on 20 November 2014, the plaintiff did not receive confirmation on the extension of the maturity period from the second defendant.[86]

The collapse of the Chinamall Project and the liquidation of Midas

40 In 2015, things took a turn for the worse. As of 28 February 2015 (the date on which the plaintiff expected to see some returns given the second defendant's three-month extension request), the plaintiff had not received any payouts from his investment.

41 On 20 April 2015, the defendants emailed Ms Tiolani, informing her that Midas was experiencing difficulties paying its investors, because funds were required in matters pertaining to the Mall, including (a) renovation funds;

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85 1PBAEIC at pp 105 and 106, para 105.

86 PCS at para 30; 1PBAEIC at p 108, para 112.

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(b) funds to build a slip road from the nearby highway to the Mall; and (c) funds to acquire the remaining units in the Mall.[87]

42 On or around 30 September 2015, Badan Pengurusan Bersama Komplek Pandan Safari Lagoon ("the Midas Creditor") filed a winding up application against Midas in Malaysia on the ground of Midas' failure to make payment of the sum of RM1,269,347.03 for outstanding maintenance and services charges, quit rent and insurance premiums related to the Mall. The application succeeded, and on or around 4 December 2015, Midas was ordered to be wound up.[88]

43 The defendants attempted to challenge to winding up order and filed an appeal. Around March 2016, the first defendant and another investor in the Chinamall Project reached an agreement with the Midas Creditor. This agreement stipulated that in exchange for a payment of RM1.3m in settlement of the sum claimed by the Midas Creditor in its winding up petition, the Midas Creditor would agree to consent to the appeal to the winding up order.[89]

44 Despite these efforts that were targeted at addressing the very root of the winding up petition, the appeal to the winding up order was dismissed by the Malaysian Court of Appeal on or around 11 October 2016.[90] The liquidation of Midas thus proceeded, and a liquidator had been appointed to that effect.

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87 Statement of Claim, para 38.

88 7AB at pp 160 and 161; 1DBAEIC at p 37, para 97; Statement of Claim, para 39.

89 1DBAEIC at p 37, paras 99 and 100.

90 1DBAEIC at p 38, para 101; NEs, 16 July 2020, page 73, lines 6 to 11.

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45 Following this, the defendants were advised by their solicitors to apply to remove Midas' liquidator. The second defendant gave unchallenged evidence that the liquidator was attempting to sell the Mall for RM54m, and that the defendants were attempting to resist the liquidator's efforts.[91]

46 Thereafter, on or around 6 January 2017, the first defendant engaged Malaysian solicitors to assist in lodging a proof of debt with regard to the shareholder loan extended to Midas pursuant to the Conversion.[92] This proof of debt encompassed the value of the plaintiff's and other investors' investments in the Chinamall Project.[93] However, on 17 July 2017, Midas' liquidator rejected the proof of debt in its entirety.[94] The rejection was premised on, *inter alia*, grounds that the first defendant was not the party that extended the various loans to Midas – it was the investors (including the plaintiff) who directly remitted money to Midas, and accordingly the first defendant lacked *locus standi* to lodge a proof of debt of this nature.[95]

47 The defendants persisted and appealed against Midas' liquidator's rejection of their proof of debt.[96] The defendants grounded this appeal on the fact that Midas' liquidator was the vendor who sold properties to the defendants and had dealings with them. In rejecting the proof of debt, Midas' liquidator relied on "bare allegations",[97] and ignored, *inter alia*, the fact that the investors'

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91 NEs, 16 July 2020, page 73 line 15 to page 74 line 3.

92 Statement of Claim at para 39A; 7AB at p 239.

93 1DBAEIC at p 38, para 102; NEs, NEs, 16 July 2020, page 76, lines 10 to 21.

94 8AB at pp 36 to 38; 1DBAEIC at p 38, para 103.

95 NEs, 16 July 2020, page 77 line 8 to page 79 line 1.

96 NEs, 16 July 2020, page 80, lines 3 to 5.

97 NEs, 16 July 2020, page 79, lines 10 to 24.

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loans had been held by the first defendant pursuant to the Conversion. In other words, the defendants questioned the integrity of the liquidator.[98] This appeal was likewise dismissed.[99]

48 Shortly thereafter, on 16 August 2017, the plaintiff commenced proceedings against the defendants. To date, the plaintiff has not been repaid the Investment Sum or any returns on the said sum.[100]

The defendants' stake in the Chinamall Project

49 Apart from the arranger fee that the defendants stood to gain from the success of the Chinamall Project (see [14] above), they had also directly invested in the project and, in this sense, had skin in the game. In the course of the events detailed above, the defendants made significant investments in the Chinamall Project.[101] The second defendant invested a sum of approximately S$0.5m through the subscription of a convertible loan note issued by Midas under the Investment Agreement, which was eventually re-documented as an investment through a shareholder's loan. The investment was made in the name of the second defendant's wife. These payments were:

(a) a payment of S$150,000 made on 10 December 2013;

(b) a payment of S$174,995 made on 8 January 2014; and

(c) a payment of S$174,990 made on 18 February 2014.

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98 NEs, 16 July 2020, page 79, lines 15 to 18.

99 NEs, 16 July 2020, page 80, lines 16 to 17.

100 Statement of Claim at para 39B.

101 Defence at para 64B; 1DBAEIC at paras 94 to 95.

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50 The first defendant also injected RM5m as equity into Midas in order to expedite the Chinamall Project and secure the rights of all the investors. This payment was made sometime on or around 23 September 2014,[102] which coincided with the period during which Midas was facing financial difficulties according to the second defendant (see [29] above). Thereafter, on 4 November 2014, the first defendant invested a further sum of S$2.3m in Midas by way of a shareholder's loan.

51 Subsequently, as mentioned, sometime in or around March 2016, the first defendant also reached an agreement with the Midas Creditor to pay the sum of RM1.3m in settlement of the sum claimed in the winding up petition filed by the Midas Creditor against Midas. The first defendant paid one-third of the sum of RM1.3m on 4 March 2016.[103]

The parties' cases

52 I canvass the parties' cases in broad strokes at this juncture and will delve into the specifics at relevant points of this Judgment.

The plaintiff's case

53 The plaintiff's pleadings were lengthy and somewhat disorganised, with the various distinct claims appearing to overlap and segue into each other. Having perused the pleadings, I herein briefly set out what I understand to be the plaintiff's claims against the defendants.

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102 Defence at para 64B(b).

103 Defence at paras 64B(c) and (d).

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Relationship of agency and duties owed to the plaintiff

54 The plaintiff avers that there is an express or implied agreement between him and the first defendant, the terms of which are set out in the 19 November 2013 email and the Term Sheet ("the Agency Agreement").[104] To this effect, the plaintiff argues that the Agency Agreement, *not* the ASTD, governed the parties' agency relationship, *ie*, the plaintiff's position is that the ASTD is not binding.[105]

55 According to the plaintiff, the Agency Agreement contains the following *implied terms*:[106]

(a) the first defendant will act in accordance with the instructions of the plaintiff;

(b) the first defendant will use all reasonable skill, care, and diligence in carrying out its duties as agent of the plaintiff;

(c) the first defendant will provide the plaintiff with timely information and/or advice on all material aspects of the Chinamall Project;

(d) the first defendant will take all reasonable steps to protect the plaintiff's interest and/or investment in the Chinamall Project;

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104 SoC at para 45.

105 PCS at paras 34(a), 35 to 45.

106 SoC at para 46.

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(e) the first defendant will not put itself in a position where its duty to the plaintiff may conflict with its personal interests or with the interest of others to whom it also owed duties; and

(f) the first defendant will act in good faith and in the best interests of the plaintiff.

56 Further and in the alternative, the plaintiff avers that the defendants acted as agents for and on behalf of the plaintiff on any and all matters arising from and/or in connection with the Chinamall Project, including the first defendant's assessment of the Chinamall Project as set out in the email dated 19 November 2013 and the provision of the Term Sheet to the plaintiff.[107] The plaintiff reposed trust and confidence in the defendants as the plaintiff relied on the defendants to act for and on his behalf on any and all matters arising from and/or in connection with the Chinamall Project. The suggestion appears to be that the defendants were fiduciaries *vis-à-vis* the plaintiff.

57 Based on the foregoing, the plaintiff avers that the defendants acted as agents for and on behalf of the plaintiff,[108] and as a result owed the following duties to the plaintiff:

(a) A duty of care to:[109]

(i) act in accordance with the instructions of the plaintiff;

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107 SoC at para 47.

108 SoC at para 49.

109 SoC at para 48.

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(ii) use all reasonable skill, care, and diligence in carrying out its duties as agent of the plaintiff;

(iii) provide the plaintiff with timely information and/or advice on all material aspects of the Chinamall Project;

(iv) take all reasonable steps to protect the plaintiff's interest and/or investment in the Chinamall Project.

(b) Fiduciary duties.[110]

58 The duties enumerated above were simultaneously characterised as "duties as agent" by the plaintiff.[111] It is unclear what significance such characterisation added to the analysis, apart from applying a different name/label to the aforementioned duties – the plaintiff never fully explained its position. This also made it unclear whether the plaintiff was pursuing a tortious claim in this respect (as suggested by "duty of care"), a contractual claim for "duties as agent" under the Agency Agreement, or a mix of both. I elaborate on this below (see [92] onwards).

Breach of duties as agent, breach of fiduciary duties and/or negligence

59 The plaintiff argues that the first defendant breached its duties as agent of the plaintiff, and/or was negligent in failing to use all reasonable skill, care, and diligence in carrying out its duties as agent of the plaintiff.[112] Relevant details in this regard include the correspondence between the parties in the course of the plaintiff's investment in the Chinamall Project, and the various

110 SoC at para 49.

111 SoC at para 50.

112 SoC at para 50.

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documents and instruments the second defendant sent to the plaintiff. The plaintiff's overarching gripe appears to be that the defendants led the plaintiff to believe the Chinamall Project was a viable investment, which caused the plaintiff to make the said investment and consequently suffer a loss of the Investment Sum.

60 The plaintiff also argues that the first defendant breached the Agency Agreement, and that the defendants breached their fiduciary duties to the plaintiff.[113] Rolled up into this claim appears to be *further* allegations of "breaches of … duties as agent".[114] The overarching tenor of these claims largely mirror that mentioned in the preceding paragraph.

Claims in misrepresentation

61 The plaintiff argues that the defendants represented to the plaintiff, expressly or implicitly, during the phone call on 20 November 2014 that no alternative security was required for the plaintiff's investment in the Chinamall Project, because the Mall was a valuable mall that could be sold, and the shareholders paid back if necessary ("the First Representation").[115] According to the plaintiff, this constituted an actionable fraudulent misrepresentation by the defendant, and/or an actionable misrepresentation under the Misrepresentation Act.[116]

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113 SoC at para 51.

114 SoC at (G)(ii).

115 SoC at para 51, Particular (bv).

116 SoC at paras 51A to 51F.

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62 Further and/or alternatively, the plaintiff argues that the defendants represented during the 20 November 2014 phone call that the plaintiff's investment in the Chinamall Project was due to end/mature on 28 November 2014, and therefore the second defendant had sought an extension of three months to make repayment of the Investment Sum ("the Second Representation").[117] The plaintiff argues that this likewise was a fraudulent misrepresentation, and/or an actionable misrepresentation under the Misrepresentation Act, which induced the plaintiff to sign the Trust Deed.

63 The plaintiff's claim in misrepresentation is limited to these two representations. I clarified this during the trial with counsel for the plaintiff, who confirmed that this is the plaintiff's case.[118]

64 The plaintiff avers that it has suffered loss and damage due to the defendants' actions and representations.[119] These have been particularised at paragraphs 52–53 of the Statement of Claim (Amendment No 4) ("Statement of Claim"), which I will not reproduce here.

The defendants' case

The defendants' overarching argument

65 The defendants primarily emphasise that the plaintiff knowingly signed the Trust Deed, and that there accordingly was no unauthorised conversion of the form of the plaintiff's investment. The plaintiff was apprised of the relevant

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117 SoC at para 51G

118 NEs, 21 July 2020, page 202 line 20 to page 203 line 19.

119 SoC at paras 51G(e), 52A.

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information before he made each critical decision in the course of his investment, including, crucially, his execution of the Trust Deed.

66 As a result, the plaintiff is bound by the Trust Deed and the terms therein. This undergirds all aspects of the defendants' case, as evident from their written closing submissions. According to the defendants, as a direct consequence of this fact, the majority of the plaintiff's claims are untenable.

The specifics of the defendants' arguments

67 The defendants accept that the OT Letter was executed without the plaintiff's prior knowledge or approval.[120] They nonetheless stress that this is immaterial, because the OT Letter was made known to the plaintiff prior to his signing of the Trust Deed. The plaintiff "acknowledged and accepted" the Conversion by signing the Trust Deed.

68 The defendants appear prepared to accept that they were agents of the plaintiff, but argue that the relevant instrument governing this relationship is the ASTD, not the alleged Agency Agreement. The defendants' duties, if any, are confined to those stipulated in the ASTD. This is to the exclusion of any other common law duties. The defendants were also not the plaintiff's "personal advisors"; this is not contemplated in the ASTD.[121]

69 The defendants argue that, in any event, there was no breach of their duties as agents, principally because the plaintiff had "full knowledge of the terms of his investment … prior to having made the decision to invest"

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120 DCS at para 72.

121 DCS at para 69.

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[emphasis in original].[122] The same may be said as regards the plaintiff's consent to the changes to his investment (*via* the Conversion and his execution of the Trust Deed). This is the basis of the defendants' arguments against the plaintiff's claims in contract (the terms of the ASTD), tort (negligence) and equity (breaches of fiduciary duties).

70 On the plaintiff's misrepresentation claims, the defendants first dispute that they made the relevant representations. They then re-emphasise the point that the plaintiff had sight of the relevant contractual instruments, relying on the Court of Appeal's decision in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley Construction*"). According to the defendants, *Broadley Construction* stands for the proposition that a plaintiff would not ordinarily be held to be induced by a misrepresentation if the express contractual terms, read and signed, contradict or correct the representor's misrepresentation.[123] They also argue that the circumstances, specifically the plaintiff's informed consent to each relevant contractual instrument, show that the claims in misrepresentation are untenable on the element of reliance.

Issues

71 As may be seen from the preceding paragraphs, the plaintiff has pleaded its case in an imprecise fashion, with multiple factual and legal issues intertwined. The precise basis of each claim also appears unclear at times (see for example [58] above). I hence elaborate at this juncture on the structure of this Judgment and the main issues to focus on.

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122 DCS at para 86.

123 DCS at para 88.

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72 To the extent that the plaintiff has identified nine distinct issues (see [34] of the plaintiff's written closing submissions), I prefer not to adopt such an approach for considerations of clarity and precision. Instead, I identify four main issues arising that require sequential determination, as follows.

(a) **The Trust Deed:** Whether the plaintiff was bound by the Trust Deed, and whether this represented the *final form* of his investment in the Chinamall Project. This is, by and large, a factual question.

(b) **Changes to the plaintiff's investment:** Whether the established sequence of events show that the nature of the plaintiff's investment was materially altered without his knowledge or consent. This, likewise, is a factual question.

(c) **Relationship of agency:** What was the nature of the "agency" relationship between the parties, *ie*, (i) what instrument, if any, governed this relationship; and (ii) what duties flowed from such a relationship. This question is both legal and factual, *ie*, it requires a clarification on the law of agency, the law on what duties arise from such an agency relationship, and a discussion on how the facts of the present case fit into the existing legal framework.

(d) **The plaintiff's claims:** Based on the foregoing, what reliefs the plaintiff is entitled to according to the various heads of claim he pursues in the present suit. In other words, I will discuss under this issue how my findings on the three preceding issues feed into the various claims advanced by the plaintiff. Herein, questions of *breach* of the relevant duties pleaded by the plaintiff will be discussed, where relevant.

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To the extent that narrower lines of inquiry have been identified by the parties (*eg*, the plaintiff's nine identified issues), these may be subsumed under the four issues listed above. The former three issues iron out the key areas of factual and legal dispute between the parties. They also establish the important factual and legal premises, based on which the merits of the plaintiff's various claims (under the fourth issue) may be fruitfully discussed.

73 I explain briefly the rationale and thinking behind the sequence of issues as stated above.

(a) It must first be established what the plaintiff's investment in the Chinamall Project looked like at the end of his dealings with the defendants. This is the purpose of my discussion on the first issue, *ie*, the Trust Deed. By properly setting out what the investment arrangement was at the end of the protracted negotiations, as well as the nature of the circumstances preceding the Trust Deed, a clear picture will emerge as to what the plaintiff's ultimate position was with respect to the Chinamall Project.

(b) Having established the above, it may then be determined whether the thrust of the plaintiff's case, *ie*, that his investment was materially altered without his knowledge/consent, has been made out. This will be done by scrutinising the key investment events in totality. This is a factual question of whether the plaintiff knew and/or agreed that his investment would adopt the final form that it did, *ie*, the arrangement involving the Trust Deed. As will be made clear, I do not think that the plaintiff has properly characterised his case.

(c) By addressing the second issue (*ie*, the nub of the plaintiff's case or his case theory), there will be clarity on what exactly the plaintiff's

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substantive complaint in the present case is or ought to be. I turn then to set out the parameters of the *relationship* between the plaintiff and the defendants, *ie*, what the plaintiff describes as the "agency relationship".[124] In so doing, the scope of the duties owed by the defendants to the plaintiff will be made clear.

(d) Only then will I turn to address the plaintiff's claims concerning breach of the various alleged duties by the defendants. This will form the bulk of my substantive analysis.

This four-issue structure allows for, in my view, a clear and incisive resolution of the present dispute. It is with the above in mind that I turn to my analysis of the present case.

The Trust Deed

74 As noted, the Trust Deed is a key factual pillar that folds into the central thrust of the plaintiff's case, *ie*, that his investment was materially altered by the defendants without his consent/knowledge (see [5] above). We are concerned here with discerning what the plaintiff's investment in the Chinamall Project looked like at the end of the plaintiff's dealings with the defendants.

75 I have explained above that the plaintiff, after the alleged phone call with the second defendant on 20 November 2014, agreed to sign and did sign the Trust Deed (see [37] above). The Trust Deed accordingly bound the plaintiff. The plaintiff does not appear to contest this.

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124 See for example PCS at para 36.

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76 The effect of the arrangement as *per* the Trust Deed is this: the first defendant was the "legal owner of a US$1.6 million shareholder loan to Midas", and it held "the said loan and all interest accrued… on the same on trust for [the plaintiff]".[125] There are a few important points arising from this:

(a) The first defendant did not hold *the Investment Sum* on trust for the plaintiff. The Investment Sum was not even shown to be in the first defendant's possession at the material time. Counsel for the defendants clarified, and counsel for the plaintiff did not dispute, that the Investment Sum had been in Midas' hands, and remained in Midas' possession throughout the course of the plaintiff's investment.[126] In other words, the Investment Sum is not trust property that was held by the first defendant.

(b) The *chose in action*, *ie*, the right to bring an action against Midas if Midas defaulted on timely repayment of the loan was what was held on trust for the plaintiff. This resulted from the arrangement between the parties and was the manner in which the trust was structured.

(c) Logically, should Midas repay the full extent of the Investment Sum that the plaintiff had transferred, that chose in action would lapse and the loan sum would be held on trust by the first defendant. Conversely, should Midas default on the repayment, any damages resulting from the enforcement of the chose in action would be held on trust by the first defendant for the plaintiff.

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125 PCS at para 22.

126 NEs, 14 July 2020, page 70 line 23 to page 71 line 20.

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77 Another aspect of the Trust Deed is pertinent. Clause 10 of the Trust Deed is an "Entire Deed" clause, which states:[127]

> **10 ENTIRE DEED**
>
> This Deed constitutes the entire and only deed between the Parties relating to the subject matter herein contained and all prior negotiations, representations, agreements and understandings are superseded hereby. No agreements altering or supplementing the terms hereof may be made except by written mutual agreement and duly signed by the Parties.

Clause 10 thus had the effect of immediate revocation of all prior contractual instruments between the parties, upon the plaintiff's execution of the Trust Deed.

78 The plaintiff contends that he "never knew" and therefore "could not have agreed" to the Trust Deed.[128] This is the heart of his case theory that his investment was materially altered without his consent or knowledge. I do not see how this can be so.

Whether the terms of the plaintiff's investment were altered without his consent and/or knowledge

79 Neither party seems to dispute the fact that the nature of the plaintiff's investment did change materially over time. Preliminarily, the Proposed Conversion never took effect; this is undisputed.[129] It is therefore irrelevant and immaterial. I highlighted this to counsel in the course of the trial, and there was no meaningful reply by the plaintiff.[130]

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127 5AB at p 12.

128 NEs, 14 July 2020, page 75, lines 5 to 6.

129 DCS at para 61; PCS at para 18.

130 NEs, 14 July 2020, page 68, lines 1 to 4.

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80 Instead, the relevant instrument to scrutinise is the Trust Deed. In my view, it cannot be said that the Conversion was effected without the plaintiff's consent or knowledge. First and foremost, the plaintiff *signed the Trust Deed*. I have canvassed this in the previous section of this Judgment. In so doing, the plaintiff *agreed* to the change in the nature of his investment in the Chinamall Project; it cannot conceivably be then said that he did not *consent* to the change in investment structure.

81 Importantly, the plaintiff is also not making a case of *non est factum*. This is the argument one would expect when allegations are made to the effect that the investment one had entered into was not what one envisioned. This is an argument that one could not have consented to an agreement because one was incapable of knowing/understanding the contents of the agreement. The point has not been pleaded and I accordingly do not consider it. It suffices for me to note that there is nothing in the record demonstrating that the high threshold required for *non est factum* to be made out would have been met on the facts (such facts typically pertaining to incapacity of some sort that renders the contracting party unable to understand the contents of the contract he/she is signing).

82 The more pertinent question (and indeed the crux of the issue), which I expressly raised to counsel during trial,[131] is whether there was *informed consent* obtained from the plaintiff.[132] In my view, there are three possible ways of construing this argument based on how the plaintiff has argued its case at trial, all of which are untenable.

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131 NEs, 14 July 2020, page 73 line 19 to page 74 line 3.

132 NEs, 14 July 2020, page 78 line 25 to page 79 line 10.

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83 First, the plaintiff cannot claim that he did not know that the nature of his investment was *in fact being changed* – he, after all, signed the Trust Deed. He accepted that he knew that there would be a "change in the form / structure of [his] investment in the Chinamall Project" by way of the Trust Deed.[133]

84 Second, the contention may be that the nature of the changes to the investment was different from what was represented to the plaintiff, *ie*, he did not have knowledge of how *exactly* his investment would be changed due to representations made by the defendants. In other words, the argument could be that the defendants misrepresented the nature of the changes to the plaintiff. This is a separate substantive question that is at the heart of the plaintiff's misrepresentation claims, which I address from [178] onwards below. In short, I am not satisfied that the alleged misrepresentations operated on the mind of the plaintiff to the extent of obscuring the true nature of the Trust Deed and the Conversion consequent to it.

85 There is a third and separate gloss to this argument: the plaintiff takes issue with the fact that the defendants kept him in the dark over several key changes to his investment, in particular the discharge of the Security Documents and the agreement to the OT Letter.[134] The issue then is whether the discharge of these documents without the plaintiff's knowledge meant that he did not or could not make an informed decision in agreeing to the Trust Deed.

86 In my view, this line of argument does not aid the plaintiff. It may appear, at first blush, that the plaintiff was "cornered" into signing the Trust

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133 1PBAEIC at p 91, para 81.

134 PCS at para 138.

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Deed, given that he was informed of the discharge of the relevant documents *ex post facto*. But several points are pertinent.

(a) First, if the plaintiff's real complaint is with respect to the unauthorised discharge of the Security Documents and Investment Agreement, it ought to be framed as a claim in repudiation or repudiatory breach. The plaintiff's claim not framed as such. The plaintiff took the discharge of the documents in his stride and subsequently agreed to the Trust Deed. He is not making a claim in unauthorised repudiation; his claim is that in leading him to accept the Trust Deed, the defendants acted in breach of duty and/or made misrepresentations to him.

(b) This feeds into the second critical point: it was open to the plaintiff to refuse to sign the Trust Deed and, as it were, nip the problem in the bud at that point. He was informed of the termination of the Security Documents *via* the OT Letter prior to signing the Trust Deed. The plaintiff could have withheld his signature and commenced an action in repudiation against the defendants and/or Midas. He did not. Despite knowing that the Security Documents were discharged, he agreed to the Trust Deed. There was informed consent.

(c) Third, the significance of the Trust Deed, specifically clause 10, is that the plaintiff *agreed* to the superseding of prior contractual agreements between the parties. Accordingly, even if the Security Documents were not discharged prior to the Trust Deed, the Trust Deed would have had that same effect. In substance, the plaintiff agreed to a discharge of the Security Documents.

(d) Fourth, even if the plaintiff's claim was for the defendants' repudiation of the relevant documents, I express doubts over the viability

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> of such a claim. As the plaintiff voluntarily entered into the Trust Deed and decided to proceed with the investment, it may be said that he waived any prior repudiatory breach of the Security Documents and Investment Agreement on the defendants' part. I say no more on this issue, given that it is not pleaded.

87 My findings on this issue inform the nature of the parties' "agency" relationship, as well as the extent to which the defendants may be said to have acted with due skill, care and diligence; I will elaborate below. What is apparent and important is that the plaintiff at all relevant points in time was *apprised of the changes to his investment* in the Chinamall Project, and made his own decisions that altered his legal position.

88 I turn then to address the third issue: the nature of the agency relationship between the parties. As alluded to earlier, there are two components to this discussion. The first pertains to the nature of the agency relationship between the parties, and what exactly this constituted. Herein, we are concerned with identifying the parameters of the parties' relationship and identifying the scope to which the defendants were allowed to act for or on behalf of the plaintiff, *ie*, the defendants' authority. The second pertains to the duties that arose as part of this agency relationship.

89 Before that, however, I highlight a significant problem in the present case: the lack of clarity and precision with which the terms "agent" and "duties of agent" have been used in the parties' various arguments. The plaintiff, in particular, has left it unclear whether "duties of agent" in the Statement of Claim pertains to contractual or tortious duties, and how these duties specifically arose. The structure of the pleadings also does not lend itself to an easy understanding of the agency issues at hand.

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90 Accordingly, in my view, it would be apt to briefly reiterate and clarify the law of agency in Singapore, specifically on how one should engage in an analysis of an *agent's duties*. This would be helpful, given that the court has not had a recent opportunity to clarify this matter. The bulk of contemporary case law has been primarily concerned with the issue of an agent's *authority*: see for example *Alphire Group Pte Ltd v Law Chau Loon and another matter* [2020] SGCA 50 ("*Alphire Group*"); *Goh Yng Yng Karen (executrix of the estate of Liew Khoon Fong (alias Liew Fong), deceased) v Goh Yong Chiang Kelvin* [2020] SGHC 195 ("*Liew Khoon Fong*"); *Blasco, Martinez Gemma v Ee Meng Yen Angela and another and another matter* [2020] SGHC 247 ("*Blasco Martinez*").

The law of agency and the duties of agents

91 The legal term "agent" is not homogenous or monolithic. "Agent", in its general sense, simply refers to a relationship, often undergirded by a contractual agreement, where one party is able to *act for* another party: see Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) ("*The Law of Agency*") at para 01.008. As a result of being able to act for his/her principal, and thereby influence his/her principal's position and interests, the law imposes various duties on agents. These duties arise for the protection of the principal, who often reposes trust and confidence in the agent. Different duties may arise, attendant to a relationship of agency, such as fiduciary duties, duties of skill and care, and any contractual duties stipulated in the agreement between agent and principal. In this sense, the law of agency involves and overlaps with several other overlapping areas of law such as contract, tort and equity.

92 Simply using the terms "agent", "relationship of agency" or "duties as agent", however, sheds little to no light on the *nuances* of the relationship

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between a specific agent and his or her principal. It goes without saying that different agents affect their principals' interests to different degrees. This depends on the extent of *authority* conferred upon the agent. Some agents are sufficiently empowered to, for example, contract for or on behalf of their principal. There are also agents with little, if any, authority to *make any decisions* for the principal, such as agents who are simply authorised to appear at meetings for the principal in order to satisfy *quorum* requirements. Within this latter category, is for instance, agents that merely advise on and facilitate transactions, with the principal retaining the ultimate say.

93 The *extent of authority* that an agent possesses is a question of fact that is discerned from any express agreement between the parties as well as "the parties' conduct and the surrounding circumstances": see the Court of Appeal's decision in *Alphire Group* at [7], citing with approval *The Law of Agency* at para 03.027. Only then can "the existence of the agent's authority and the *scope* of that authority" [emphasis in original] be determined: *Alphire Group* at [7]. In other words, agents and agency relationships exist across a spectrum. This must be borne in mind.

94 It is therefore unsurprising that each unique agency relationship will be accompanied by distinct sets of rights and obligations. It is not the case that every agent will owe, for example, fiduciary duties. In *principle*, the fact that fiduciary duties may be modified by the agency contract or even completely excluded would mean that situations of agency can and will involve agents that do not owe fiduciary duties: *The Law of Agency* at para 07.036, citing *Boardman v Phipps* [1967] 2 AC 46. In *general*, it may be said that the more *extensive* the agency relationship, *ie*, the greater an agent's authority or ability to affect the principal's interests, the more onerous the duties imposed upon the agent will

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be. This follows, as a matter of first principles, from the various areas of law that are engaged in the agency analysis.

95 From the perspective of contract law, this is simply a matter of holding parties to their bargain, as embodied by the contract of agency. This is trite and is rooted in the notion of *consensus ad idem*. The law will give effect to what the parties have expressly agreed on, nothing more and nothing less (save terms to be implied in fact or in law). If the agent agrees to owe the principal onerous duties, then the agent is so bound. If the principal fails to stipulate in the contract of agency the relevant duties that it wishes to impose on the agent, it cannot later cavil.

96 In the context of tort law, this is a question of the extent of the duty of care that arises on the facts. For instance, in the area of negligence, this is broadly construed based on the *proximity* between agent and principal. Trite factors in this inquiry include control, knowledge, reliance and assumption of responsibility: see the Court of Appeal's seminal decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*").

97 The existence and contours of an agent's tortious duties are also shaped by the *specific* context in which they arise, for example:

(a) Where solicitors act as agents for individuals in property transactions: *Tan & Au LLP v Goh Teh Lee* [2012] 4 SLR 1 ("*Goh Teh Lee*") and *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751.

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(b) Where agents give advice to, and act for principals, in stockbroking transactions: *OCBC Securities Pte Ltd v Yeo Siew Huan* [1998] 1 SLR(R) 481 ("*OCBC Securities*").

(c) Where auditors act as agents for businesses in the sense that they conducted audits on behalf of the relevant businesses: *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 ("*JSI Shipping*").

(d) Where duties are alleged to have arisen *vis-à-vis* individuals that may be characterised as independent contractors and involve questions of vicarious liabilities and non-delegable duties. In these more contentious areas, the concept of agency may instead be invoked as a *justification* or *legal test* that shapes the extent of the duties: see for instance the observations in Yoong, "Challenges in the Evolution of the Doctrine of Non-delegable Duty" (2018) 25 Tort L Rev 143 at pp 162–163.

98 Also relevant are the principles on the interface between contractual and tortious duties and how these interact. The relevant questions are whether, and to what extent, any contractual instrument curtails or expands on the common law tortious duties, and whether similar duties can coexist in both contract and tort. This is relevant to my discussion below on the defendants' argument that the existence of the *contractual* agency relationship precludes common law *tortious* duties from arising on the defendants' part (see [169]–[173] below).

99 Viewed from the lens of equity or the law on fiduciaries, this is a question of the extent of the agent's position of ascendancy over the principal and authority to act on behalf of the principal. This is the cornerstone of all

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fiduciary relationships, in recognition of the fact that authority of this nature is often reposed in the agent in trust and confidence. Where an agent is able to unilaterally and significantly influence his/her principal's position or interests and has been conferred such powers in trust and confidence, extensive fiduciary duties may arise. On the other hand, where the agent has limited authority and discretion, the agent will owe few, if any, fiduciary duties.

100 In particular, case law has clarified that just because an agent may be considered a fiduciary in a limited manner (specifically, for matters in which he or she is allowed to exercise judgment or discretion to affect certain interests of the principal), this does not mean that *every* duty the agent owes to the principal is a fiduciary duty. This is clear from the seminal decision of *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 at p 16. Therein, Millett LJ stated:

> Despite the warning given by Fletcher Moulton L.J. in *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that ***not every breach of duty by a fiduciary is a breach of fiduciary duty***. …
>
> [emphasis added in bold italics]

Millett LJ's observation on the "unthinking resort to verbal formulae" is apt when one considers the looseness with which the term "agent" has been used by parties in the present suit. One must define with clarity the exact contours of each agency relationship and the attendant duties that arise.

101 The same observation has been made locally. Judith Prakash J (as she then was) observed in *Nagase Singapore Pte Ltd v Ching Kai Huat and others*

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[2007] 3 SLR(R) 265 at [28] that "care had to be taken not to equate the duty of good faith and loyalty owed by every employee with a fiduciary obligation" (citing *Nottingham University v Fishel* [2000] IRLR 471 with approval). The same logic extends to contractual agents, who may not be "employees" in the strict sense, but are nonetheless employed by their principals to engage in a certain course of action.

102 Agency stands at the intersection of these various other areas of law but does not displace the fundamental principles that undergird each. Defining a particular agency relationship hence depends on an application of the rules established within these different areas of law.

103 As for the *evidential approach* to questions of agency, any express agreement or implied agreement (as evinced by conduct) between the parties will be relevant; I have alluded to this at [92] above in referencing the Court of Appeal's decision in *Alphire Group* ([90] *supra*). It is important in every case to identify and establish the existence and terms of any contractual instruments entered into by parties. Relevant also will be to scrutinise the conduct of the parties in the course of the relationship of agency, and how they have acted in transactions involving the principal. Specifically, one must focus on transactions in which the agent was able to exercise the authority conferred by the principal. Only then can one reach a conclusion on the degree to which an agent is able to affect the principal's interests, and consequently the duties that are to be imposed on the agent.

104 Where the allegations pertaining to an agent's authority are unclear, it will not be easy to distil the duties that arise from the agency relationship. I use the plaintiff's pleadings as an illustration. The Statement of Claim is somewhat

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confusing and does not properly engage with the nuances present in situations of agency. I use the following aspects of the pleadings to illustrate:

(a) On the one hand, the plaintiff avers that, according to the alleged Agency Agreement between the parties, the first defendant "will act in accordance with the instructions of the [plaintiff]".[135] Alongside this, the plaintiff avers that the first defendant will provide the plaintiff with "timely information and/or advice". These collectively suggest that the plaintiff retained the final say on all material aspects of his investment, and the first defendant acted simply as an advisor.

(b) On the other hand, the plaintiff avers that "the [plaintiff] reposed trust and confidence in the [defendants] as the [plaintiff] relied on the [defendants] to act for and on his behalf on any and all matters arising from… the Chinamall Project".[136] This averment is somewhat different, and suggests that the defendants had significant discretion in making important decisions on the plaintiff's behalf.

105 From the above, it is unclear what the plaintiff's case is. Is it that the defendants were substantially empowered to *execute instruments/legally binding documents "on his behalf"* (which is suggested by [104(b)] above)? Or is it that the defendants played merely an *advisory role* and acted as a "mere conduit", and the plaintiff retained the final say in all material matters (which is suggested by [104(a)] above)? Or is it, perhaps, an amalgamation of both scenarios pleaded? These two positions are not readily reconcilable – the former involves a far more extensive degree of powers conferred on the agent.

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135 SoC at para 46.

136 SoC at para 47.

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106 This is highly significant – depending on the manner in which the agency relationship is characterised by the plaintiff, the nature of the attendant duties alleged to arise will also vastly differ. For example, several fiduciary duties may arise if the defendants possessed significant latitude and discretion to *unilaterally* affect the plaintiff's interest, *ie*, if the defendants could create legal relations on behalf of the plaintiff. However, these duties may not exist (or at least be more confined) if the relationship can be more properly recognised as one of an advisor and advisee.

A broad framework for analysing the duties of agents

107 Based on the foregoing, I set out a general three-step framework that may be adopted in cases involving alleged breaches of the duties of agents. To be clear, this framework does not involve the espousal of any new law. It is a suggested manner of synthesising the various relevant areas of law, as they currently exist, that often arise in the agency analysis. It is also to aid with the identification and understanding of the veiled issues of fact and law that often lurk beneath the façade of the parties' cases. The purpose of the framework is to clearly identify an agent's duties in any given case and to allow for a neat and comprehensive resolution of disputes involving duties of agents.

The first step: Discerning the agent's authority

108 The first step is to identify all the relevant contractual instruments and any other relevant conduct by the parties, in order to establish the true scope of the agent's authority. "Scope" comes in two senses: the extent of the agent's authority (*ie*, the matters in which the agent was allowed to act for the principal and the degree of autonomy the agent possessed) and the duration that this authority subsisted for.

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109 It is important to be comprehensive in this exercise, and to examine *all of the parties' dealings* in relation to the transaction or transactions in dispute. Of foremost importance will be the agency agreement, if any. Herein may lie questions relating to the formation of contracts. Contemporaneous conduct will also shed valuable light. The evidential points raised in *Alphire Group* ([90] *supra*), as reproduced at [92] above, are pertinent. Relevant also are the analyses in cases such as *Liew Khoon Fong* ([90] *supra*) and *Blasco Martinez* ([90] *supra*). These demonstrate how the court has generally undertaken this exercise.

110 The *temporal scope* of the relevant instruments and the parties' conduct is also of utmost importance, given that this directly affects the duration of the agency relationship (which, self-evidently, may survive the discharge of a contract or may even exist without a contract). The question to ask is "when and for how long did the individual or entity act as agent for the principal?" This question is answered by examining the instances where the agent exercised his or her authority, as well as any conduct of the principal demonstrating that the principal regarded the agent as possessing the relevant authority. The general idea is to discern a *course of conduct*. The end result of the first step is that one will be able to clearly discern the *extent of the agent's authority* and the *duration for which the agent's authority persisted*.

The second step: Identifying the agent's duties

111 The second step is to identify, based on the agent's authority, the duties owed by the agent. The key areas of law that will typically be relevant are contract, tort and equity and trusts, as canvassed above. This is of course not an exhaustive list. A key limiting factor, at the risk of stating the obvious, would be the parties' pleadings and how they have framed their case. If a party pleads an agency claim in contract and not in tort or equity, that party is so bound.

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112 At this step, the different areas of law ought to be analysed *separately* as a starting point, with reference to the agent's authority as defined in the first step. I have suggested above, in broad terms, how the analysis under each area of law may be conducted (see [95]–[101] above). Then, there remains to consider how these different areas of law overlap or segue into each other. The usual suspects in this inquiry are contractual exclusion clauses and various forms of estoppel. The question is whether the duties that arise in one area of law are circumscribed, modified or negated due to the existence of the obligations or duties arising from another area of law.

113 Critical under the second step is also to bear in mind the relevant timeframe within which the agent's authority subsisted, and the provenance of such authority, as determined under the first step. This directly impacts the nature of the duties that bind the agent at any given time. To illustrate, a contractual agency agreement may for some reason be terminated in the course of the parties' dealings. When the contract concludes, its terms no longer bind the parties; express contractual obligations are extinguished. If, however, the agent continues to act for the principal in the same capacity as that stipulated under their now-discharged contract, two questions arise. One, has a new implied contract arisen? Two, if no implied contract has arisen, is the agent nonetheless still bound by duties under common law (tort) and equity, given that the agent still possessed authority and continued acting for the principal? The distinction between these two permutations may not always be clear; but attaining an answer to the underlying question of the duration of the agency relationship is essential. All turns on the particular facts of the case at hand.

114 Having clearly established the existence and scope of the agent's duties, we may then turn to the third step.

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The third step: Identifying breaches of the respective duties

115 This third and final step hinges on an application of the rules on breach that exist in the various relevant areas of law. I will not endeavour to go through each area of law at this juncture. Instead, I offer some observations on common problems that arise in the agency context where there are multiple parallel claims made by a plaintiff, and propose solutions to these problems.

116 First, it is crucial to keep the analyses of the various breaches distinct. The different breaches may well involve the same act or acts by the agent. But to lump them together (as the plaintiff has done in the Statement of Claim) does not make for smooth analysis and resolution. To illustrate, negligence and the fiduciary obligation to act in the principal's best interests are quite distinct. One may act unreasonably carelessly but loyally and in what one believes to be in the principal's interests. On the other hand, one may act against the principal's interests but not be careless or negligent in the endeavour. Each question of breach is fact sensitive. More importantly, one act may have different dimensions: the motive, execution and outcome of a single act can be parsed and might lend themselves to different conclusions. Conflating claims and addressing them in bulk serves only to confuse.

117 Another important consideration is to ensure that there is no double recovery. The rule against double recovery is trite: see for instance *Chew Kong Huat and others v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167, citing *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 522, at [36]. It may often be the case that one set of actions by an agent results in a breach of both contractual and tortious duties. If so, that renders the agent liable under both contract and tort. But that does not mean that the agent pays twice for one wrong. The specific heads of loss (*eg*, expectation

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loss, reliance loss, loss of profits, injury to the person, pure economic loss or even psychiatric harm) must be identified with clarity, and *separately* with reference to each individual claim. These multiple heads of loss must then be construed against each other, and any overlap must be identified and accounted for. A plaintiff can only be compensated for the loss it actually suffered, and even then, not more than once.

118 With the framework as proposed, agency disputes involving multifaceted claims may be more neatly and efficiently resolved. I will adopt this framework in my analysis of the present case. Accordingly, I first discuss the key documents and instruments in this case that shed light on the true nature of the authority conferred and limitations imposed on the defendants. Only then will one be able to arrive at an accurate conclusion on the nature of the duties owed by the defendants to the plaintiff (and, subsequently, whether these duties were breached).

The nature of the agency relationship between the parties

The relevant instruments governing the agency relationship

119 The two main contractual instruments to be considered are the ASTD and the Agency Agreement alleged by the plaintiff. The Trust Deed is also relevant. To reiterate, the plaintiff's case in this respect is that the ASTD is not binding, and that the alleged Agency Agreement had arisen between the parties as *per* the terms stated in the 19 November 2013 email and the Term Sheet. The defendants' position is that the ASTD was binding until it was discharged by the Trust Deed.

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The ASTD

120 The ASTD is, as apparent on the face of the document, a contractual document that purports to govern the relationship of agency between the parties.[137] It states, *inter alia*, as follows:

> Form of Agency and Security Trustee Deed
>
> (referred to in Clause 11.1(b) of the Terms and Conditions)
>
> **THIS AGENCY AND SECURITY TRUSTEE DEED**… is made on the [ ] day of [ ] 2013.
>
> BETWEEN:
>
> (1) [The first defendant]… as the agent (the "Agent");
>
> AND
>
> (2) [The first defendant]… as the security trustee (the "Security Trustee");
>
> AND
>
> (3) THE INDIVIDUALS AND COMPANIES whose names are set out in Schedule 1 (List of Noteholders) (collectively, the "Noteholders" and each a "Noteholder"),
>
> …
>
> WHEREAS:
>
> (A) The Agent and the Security Trustee proposes to enter into an Investment Agreement (the "Agreement") with [Midas] (the "Borrower") and Messrs Tan Chong Whatt… and Wang Jianguo… for the issue of convertible loan notes (the "Notes") in aggregate principal amount of up to S$20,000,000.
>
> …
>
> "Majority Noteholders" means one or more of the Noteholders who, in aggregate holds not less than 51% of the aggregate principal amount of the Notes.
>
> …

137 1AB at p 162.

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4. GENERAL POWERS AND OBLIGATIONS

4.1. The Agent and the Security Trustee (as the case may be) shall:-

(a) upon receipt of any notices and documents from the Borrower concerning the Notes held by a Noteholder, promptly notify and forward the same to such affected Noteholder;

(b) promptly notify and forward to the Noteholders details of any other communications, notices and documents received by it from the Borrower in relation to the Agreement, and all the transactions and documents contemplated thereunder;

(c) promptly notify the Noteholders of any fact, circumstance or development which may affect the rights, interest or entitlements of the Noteholders or any of them; and

(d) subject to the other provisions of the Agreement, and all the documents contemplated thereunder, act in accordance with any instructions in writing from the Majority Noteholders.

4.2. The Agent and the Security Trustee shall be entitled to:-

(a) unless otherwise specified in the Agreement … refrain from exercising any right, power or discretion vested in them under any of the Agreement … until they have received instructions from the Majority Noteholders as to whether (and, if it is to be, the way in which) it is to be exercised and shall in all cases be fully protected when acting, or (if so instructed) refraining from acting, in accordance with instructions from the Majority Noteholders;

(b) refrain from doing anything which would or might in its opinion be contrary to any law of any relevant jurisdiction … and do anything which is, in its opinion, necessary to comply with any such law or directive;

(c) refrain from taking any step (or further step) to protect or enforce the rights of any Noteholder under the Agreement, and all the transactions and documents contemplated thereunder, until it has been indemnified (or received confirmation that it will be so indemnified) and/or secured to its reasonable satisfaction against any and all costs, losses, expenses or liabilities … except to the extent that they are sustained or incurred as a result of the negligence or wilful conduct of the Agent

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> and the Security Trustee or any of its personnel or agents; and
>
> (d) without prejudice to the generality of the foregoing, the Agent and the Security Trustee shall:-
>
> …
>
> (ii) execute and deliver on the Noteholders' behalf any and all such other documents or instruments as the Noteholders may specifically approve in writing relating to the Agreement …
>
> …
>
> (iv) have only those duties, obligations and responsibilities expressly specified in the Agreement …
>
> …
>
> 4.4. With respect to its own participation as a Noteholder, the Agent or the Security Trustee (as the case may be) shall have the same rights, liabilities and powers as any other Noteholder under the Agreement, and all the transactions and documents contemplated thereunder, as though it were not also acting as agent or security trustee for the Noteholders.
>
> …

121 This document was not signed and was instead appended to the CLN T&Cs, which in turn applied to the Convertible Loan Note that was issued to the plaintiff upon the execution of the Investment Agreement. The question that arises in this regard is whether the ASTD was binding despite the absence of the plaintiff's signature on the ASTD. The plaintiff argues that the lack of signature is fatal to the ASTD's status as a legally binding document. The defendants submit that signature was a mere formality and did not preclude the ASTD from having legally binding effect.[138] The argument is effectively that there was acceptance of the ASTD by conduct.

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138 DCS at paras 43 to 55.

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(1) Formation of the ASTD

122 I agree with the defendants. The law is clear that acceptance of an offer need not assume the form of a signature. In *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63, the Court of Appeal noted that (at [47]):

> 47 Of course, the existence of offer and ***acceptance*** may be ***implied from conduct***. The implication of contracts in the absence of direct evidence of an offer or an acceptance is permissible, because the parties' conduct may demonstrate *consensus ad idem* …
>
> [emphasis added in bold italics]

The thrust of the inquiry is whether the offeree's conduct evinces *consensus ad idem* and an intention by the offeree to be bound: see also the Court of Appeal's decision in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [68], citing M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at p 48, and Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 2-017.

123 It has been evident even in the plaintiff's conduct in these proceedings that the plaintiff acted on the basis that there was a relationship of agency. This much is clear from the manner in which the plaintiff has argued its case, *ie*, that the defendants were his agents. It is also consistent with the manner in which, after executing the Investment Documents, the plaintiff constantly corresponded with the defendants and received a consistent stream of advice from them on all matters related to the Chinamall Project. The ASTD pertained to exactly that. It is an instrument that, for all intents and purposes, was designed to govern the agency relationship that arose between the parties in the course of their dealings over the Chinamall Project. This is apparent from the terms of the

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ASTD, as reproduced at [120] above. It is also material that the ASTD was appended to the CLN T&Cs, which suggests a *composite* contractual structure involving the Investment Agreement, the Convertible Loan Note, the CLN T&Cs and the ASTD. There is no evidence that these four instruments were ever meant to be construed separately.

124 It is arbitrary to refer to a separate alleged *oral agreement* (*ie*, the Agency Agreement) as governing the agency relationship, when there is an express document (the ASTD) to this effect. It is rather inconceivable in my view that the parties would have agreed to govern their relationship using uncertain, amorphous and unwritten terms in some alleged oral agreement when a clear written document designed precisely to govern the said relationship exists.

125 The various points that the defendants raise in written closing submissions are also relevant:[139]

(a) The plaintiff was provided with the ASTD as early as 25 November 2013, along with the Chinamall Project Draft Documentation. He did not protest then or at any time thereafter, until the commencement of the present suit.

(b) The plaintiff subscribed for the Convertible Loan Note, which was governed by the CLN T&Cs. Clause 11.1 of the CLN T&Cs obliges the plaintiff to execute the ASTD.[140]

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139 DCS at paras 44 to 48.

140 1AB at p 215.

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(c) The plaintiff's contemporaneous conduct after subscribing for the Convertible Loan Note is consistent with him knowing that he was obliged to execute the ASTD.

126 It is also relevant that the defendants have given evidence that a similar contractual document governed the agency relationship as regards the plaintiff's investment in the Yang Kee Deal (see [10] above). In this deal, as mentioned, the defendants likewise acted as the plaintiff's agents. The plaintiff has not rebutted the evidence suggesting that the arrangement with respect to the Chinamall Project by and large mirrored that parties' arrangement for the Yang Kee Deal, *ie*, that the defendants were the middlemen who facilitated the plaintiff's investment and the agents who kept the plaintiff apprised of the status of his investment. It is also reasonable to infer that it was the success of the Yang Kee Deal, and the plaintiff's satisfaction with the defendants' involvement in the same, that led him to agreeing to the defendants acting on his behalf, in a similar if not identical capacity, in respect of the investment in the Chinamall Project. The entire course of dealing between the parties paints a clear and logical picture.

127 To be clear, the defendants are not relying on the Yang Kee Deal as similar fact evidence and are not engaging in reasoning by propensity. In other words, they are not arguing that just because the plaintiff entered into a similar instrument in the Yang Kee Deal, he must have entered into the ASTD. The defendants simply point to the Yang Kee Deal to demonstrate a course of dealing that informs the court of the plaintiff's state of mind during the course of his investment in the Chinamall Project. The Yang Kee Deal is relevant, and in fact pertinent, because it demonstrates the manner in which the plaintiff and the defendants have conducted their contractual dealings. It is also, in any event,

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not the only piece of evidence the defendants rely on in proving that the plaintiff entered into the ASTD.

128 Finally, it bears mention that the plaintiff relies heavily on the Term Sheet in his arguments against the defendants. By his own case, the Term Sheet is relevant and pertinent. The Term Sheet was provided to the plaintiff at an early juncture, on or about 21 November 2013. Crucially, the Term Sheet states that the "Form of Documentation" for the investment in the Chinamall Project would involve "d) Security Agent/ Trustee Agreement", *ie*, the ASTD (see [13] above). The Term Sheet also alludes to the *composite contractual structure* I have mentioned at [123] above. These fortify my conclusion that the plaintiff's entire course of conduct is consistent with him knowing of the existence of the ASTD and acting on the basis of this agreement.

129 It is hence my view that the plaintiff had, by way of his conduct, accepted the ASTD. The ASTD and its terms governed the relationship of agency between the parties.

(2) Discharge of the ASTD

130 Another question that arises is whether, and if so when, the ASTD was discharged by virtue of the discharge of the Investment Agreement. I note that the plaintiff does not raise this point, given that he advances the case that the ASTD was never binding in the first place. It is nevertheless a point that warrants consideration for completeness.

131 In my view, the ASTD was discharged alongside the Investment Agreement *due to the operation of the Trust Deed*. The defendants note in the Defence that clause 10 of the Trust Deed is an entire agreement clause that purports to supersede "all prior negotiations, representations, agreements and

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understandings".[141] This term is rather clear on its face. The plaintiff agreed to this term by signing the Trust Deed. Accordingly, the contractual duties owed by the defendants to the plaintiff in the ASTD ceased to exist on 20 November 2014 when the Trust Deed was executed. That is of course not to say that *all* duties ceased to be owed by the defendants to the plaintiff upon discharge of the ASTD; I elaborate on this in the section on "The duties owed by the defendants" at [144] onwards.

132 Critically, there is also no evidence of new terms being negotiated in relation to the relationship of agency. While the plaintiff alleges the existence of the Agency Agreement, the evidence in this regard is scant.

The alleged "Agency Agreement"

133 As noted, the plaintiff avers that there exists an express or implied Agency Agreement between the plaintiff and the first defendant.[142] But aside from pleading the terms to be implied into this agreement (for which the plaintiff could provide no contemporaneous evidence), the plaintiff could offer few, if any, details on the specifics of the agreement, and certainly no evidence demonstrating its formation.

134 The timing of formation of the alleged Agency Agreement was never canvassed clearly in the plaintiff's case. The suggestion is that there was offer and acceptance when the plaintiff "agreed to the 1st Defendant's offer for it to act as… agent", pursuant to the 19 November 2013 email and the Term Sheet. However, as mentioned, the Term Sheet clearly references the ASTD (see [128]

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141 Defence at para 54A(b).

142 SoC at para 45.

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above). I do not believe that there was an offer made by the defendants that was accepted at that juncture. The offer and acceptance only arose when the Investment Agreement was executed, and the Convertible Loan Note was issued.

135 Accordingly, and in the light of my discussion on the significance of the ASTD and the parties' conduct pursuant to it, I do not accept that there was a separate oral agreement in the form of the Agency Agreement as pleaded by the plaintiff.

Other relevant instruments and the parties' conduct

136 As earlier alluded to, the Trust Deed is also relevant in defining the agency relationship between the parties, given that it created the investment structure as set out at [74]–[75] above, and resulted in the superseding of the ASTD (see [131] above). On its face, the Trust Deed would suggest that the first defendant stood not just as agent in the sense explained in the preceding paragraphs, but also, at the very least, as *bare trustee vis-à-vis* the plaintiff, *ie*, a trustee that held the *US$1.6m loan* (a chose in action, or a putative one at the very least) on trust for the plaintiff.

137 *However, this is not the plaintiff's case*. The plaintiff's case hinges entirely on the Agency Agreement. The plaintiff has *not* pleaded that any trust relationship arose in respect of the Trust Deed. As explained below, this impacts the analysis on the relevant duties that arose on the part of the defendants.

138 I also highlight at this point that even after the discharge of the ASTD, the defendants continued acting for the plaintiff in the Chinamall Project. The defendants continued to liaise with the relevant stakeholders and maintained constant correspondence with the plaintiff. Relevant examples of this include:

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(a) on 27 November 2014, when the second defendant clarified the issue of the accrual of interest after the initial maturity date of the investment;[143]

(b) on 28 November 2014, when the second defendant provided updates on the Mall and the Chinamall Project;[144] and

(c) on 20 April 2015, when the defendants explained that Midas was unable to repay its investors at that juncture because funds were still required to renovate the Mall, build a slip road leading to the Mall, and acquire the remaining units in the Mall.[145]

139 These show that the defendants maintained the same manner of dealing with the plaintiff, and that their advisor-advisee relationship did not significantly change even after the discharge of the ASTD. Such conduct has the consequence that the defendants remained bound by certain duties, given that they continued acting for the plaintiff as, in a loose sense, "gratuitous" agents. I elaborate in the next section on what exactly these subsisting duties were.

Conclusion: the scope of the defendants' authority to act for the plaintiff

140 From the relevant instruments and conduct scrutinised, it may be said that the defendants' authority was primarily limited to dispensing advice to the plaintiff and providing timely information on the status of his investment in the

143 1PBAEIC at p 107, para 109.

144 1PBAEIC at p 109, para 113.

145 Statement of Claim at para 38.

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Chinamall Project. This much is clear from the terms of the ASTD. The defendants continued to do so even after the discharge of the ASTD, and the plaintiff was content for the defendants to possess such authority at that point in time. In other words, the defendants possessed the authority, throughout the parties' dealings, to determine what advice and information they would provide to the plaintiff, and when this advice and information would be provided.

141 The defendants' authority also extended to being able to contract on or behalf of the plaintiff, but *only in limited circumstances*. The defendants stand by the position, with which I agree, that the first defendant was "empowered under the terms of the ASTD to bind all the Noteholders to a certain course of action as long as it had the consent of the Majority".[146] This is pursuant to clause 4.2(a) of the ASTD (see [120] above). The first defendant was accordingly "contractually empowered to bind the [p]laintiff to a change in the structure of the investments as long as it had the consent of the Majority". This authority subsisted during the duration of the ASTD, and there is no evidence that it survived the ASTD's discharge (*ie*, the defendants did not contract on behalf of the plaintiff and there is no evidence that the plaintiff would have consented to them doing so).

142 This is consistent with clause 4.2(d)(ii) of the ASTD (see [120] above) that absent any decision from the majority noteholders, the defendants required the plaintiff's "approv[al] in writing" before they could execute and deliver any documents related to the investment. This clause makes it clear that outside of the situation contemplated under clause 4.2(a), the defendants retained no

146 DCS at paras 65 and 66.

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residual discretion and authority to act unilaterally and to execute documents or contract on behalf of the plaintiff.

143 Having set out the scope of the defendants' authority, I turn now to examine the duties they owed to the plaintiff.

The duties owed by the defendants

Fiduciary duties

144 As mentioned, the facts pertaining to the Trust Deed would ordinarily suggest that the first defendant may have stood as bare trustee *vis-à-vis* the plaintiff. If so, the first defendant may have then owed fiduciary duties in so far as this relationship of trust is concerned. However, the point has not been pleaded. The plaintiff's case on fiduciary duties arising hinges entirely on the alleged Agency Agreement and the defendants "acting as agent for and on behalf of the plaintiff".[147] As such, I will not engage in a trust analysis, and will not consider whether fiduciary duties arose on the part of the first defendant with reference to the Trust Deed. Instead, I confine my analysis to the Agency Agreement, the ASTD and the other facts pleaded by the plaintiff, and whether these were sufficient to give rise to fiduciary duties.

145 I noted earlier that the defendants were able to contract for and on behalf of the plaintiff in a narrow context, specifically where they have the consent of the majority of investors to do so. If the first defendant did exercise this power, such exercise would have to be scrutinised according to the principles laid down in the law on fiduciaries. However, the defendants make it clear that they never

147 SoC at para 49.

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exercised this power and are not relying on it to make their case.[148] I agree. It is clear from the facts canvassed earlier that the plaintiff still reserved the final say on each critical decision in the course of his dealings with the defendants. The plaintiff chose to make the investment in the Chinamall Project according to the terms of the Investment Agreement and was issued the Convertible Loan Note as a result. The plaintiff then agreed to the terms of the Trust Deed and signed that instrument. After the discharge of the ASTD, the defendants also did not contract for or on behalf of the plaintiff. All of these show that the defendants did not contract on behalf of the plaintiff at any point in time. In this respect, the issue of fiduciary duties does not arise.

146 That said, I accept that the defendants owed fiduciary duties in the context of dispensing advice. That was the nature of the agreement between the parties. The defendants were engaged by the plaintiff to advise the plaintiff on the various aspects of his investment, and were given the authority to, at their discretion, provide timely and accurate information. This much is clear from the terms of the ASTD, and from the correspondence exchanged between the second defendant and the plaintiff (*via* Ms Tiolani). The defendants accordingly had discretion and latitude in determining when to dispense advice, and what advice to dispense to the plaintiff. In this respect, they owed fiduciary duties to *provide advice loyally and in good faith, with the plaintiff's best interests in mind given the prevailing circumstances*. This was the extent of judgment and discretion that the defendants had to apply in performing their roles as agents of the plaintiff.

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148 DCS at para 66.

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147 These fiduciary duties extended to *the manner in which the defendants facilitated the execution of the Chinamall Project* whilst advising the plaintiff. In other words, the defendants had a fiduciary duty to ensure that the plaintiff's interests were generally looked after in the course of the Chinamall Project. While not the direct purport of the ASTD, this is a duty that necessarily must arise given the context. As is evident from how things transpired, the defendants, being the parties that directly contracted with Midas (under the Investment Agreement and subsequently in the 26 July 2014 MOA), were empowered to make key decisions that would affect the positions of the investors that they advised, including the plaintiff. A key example is how the defendants were able to discharge the Security Documents without the plaintiff's prior authorisation.

148 I do not accept the defendants' argument that because the ASTD does not expressly contemplate the defendants dispensing advice on the *merits* of the plaintiff's investment, the defendants are precluded from owing fiduciary duties to the plaintiff to look after his substantive interests.[149] As a matter of common sense, the defendants must have owed such duties, given that they stood in a position where they were able to control the type of information that reached the plaintiff, and were able to dispense advice to that effect. As a matter of fact, the advice dispensed by the second defendant did bear shades of *substantive advice on the merits of the investment*. For example, the second defendant made substantive comments on the "fast turnaround" nature of the project, and advised the plaintiff on the value of the Mall and its potential as security in the context of the First Representation (I will address shortly why I am persuaded that this representation was made; see [178]–[180] below). Having actually

149 Defendants' Reply Submissions at paras 102 to 104.

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dispensed such advice to the plaintiff, the defendants stood in a position of ascendancy over the plaintiff. Having taken the defendants' advice, the plaintiff clearly reposed trust and confidence in them. The defendants cannot now say that they were not obliged to act with the plaintiff's interests in mind.

149 The fundamental contours of the defendants' fiduciary duties may be discerned from the literature and jurisprudence. First, the defendants had to subordinate their personal interests to the plaintiff's in matters connected to the dispensing of advice to the plaintiff (see *The Law of Agency* at para 07.031). The defendants would also have been expected to perform their advisory tasks on the best terms available to the plaintiff in the circumstances (*The Law of Agency* at para 07.032). The defendants also must not place themselves in a position where their duty to the plaintiff might conflict with their personal interests (*The Law of Agency* at para 07.042, citing *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109).

150 Crucially, the scope of these duties was modified by the terms of the ASTD. As noted earlier, fiduciary duties can be contractually altered (see [94] above). The defendants point to two such modifications in closing submissions.[150]

151 First, the ASTD at clause 4.2(a) (see [120] above) permits the first defendant to act on the instructions of majority noteholders. This in my view means that the defendants were in a position where they had to consider *the interests of the noteholders as a whole, and in turn the viability of the Chinamall*

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150 DCS at para 81.

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Project in its totality. The defendants were not obliged to prefer the plaintiff's interests over the interests of the collective. The plaintiff's "best interests" must be viewed in this light; they do not supersede the defendants' discretion to act in what they believed to be the best interests of the *collective*. This much was conceded by the plaintiff in cross-examination.[151] In this sense, there was a *multi-partite* relationship that the defendants had to manage. This is an extremely important point that informs several of my findings below.

152 Second, the ASTD at clause 4.4 (see [120] above) permits the first defendant to exercise rights as a noteholder as though it was not an agent. The defendants' argument is that this allows the first defendant to "prefer its own interests over those of the [p]laintiff or other Noteholders".[152] In my view, this argument proves too much. I do not accept that clause 4.4 allows the defendants' interests to wholly supersede the interests of the noteholders. That would defeat the very purpose of the agency arrangement and the defendants' facilitative and advisory role in the investment. I accept, at best, that the defendants were allowed to construe their interests *alongside* the interests of the investors, with a view to making the investment in the Chinamall Project profitable for all. After all, the defendants stood to gain if the investments bore fruit (in terms of commissions and also the direct investments the defendants themselves made in the Chinamall Project). The focus is whether the defendants acted to further *all the stakeholders' interests*, by striving for the success of the Chinamall Project.

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151 NEs, 14 July 2020, page 110, lines 20 to 25.

152 DCS at para 81(b).

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153 I add that the discharge of the ASTD had no bearing on the existence of fiduciary duties owed by the defendants. While the fiduciary duties, as evident from my analysis, arose primarily from the defendants' advisory role *vis-à-vis* the plaintiff, which in turn was circumscribed by limitations set out in the ASTD, the defendants did not cease their provision of updates and advice to the plaintiff after the termination of the ASTD. There was substantive correspondence exchanged thereafter, as mentioned at [138] above. As a result, the defendants still stood in a position of ascendancy *vis-à-vis* the plaintiff and could exercise their discretion in dispensing advice to the plaintiff. The defendants accordingly remained bound by certain fiduciary duties as I have delineated above throughout the course of their dealings with the plaintiff.

154 I also consider the *modifications* imposed by the ASTD to the defendants' fiduciary duties to have persisted even after the discharge of the ASTD. These modifications pertain primarily to the defendants having to look after the *collective's* interests (*ie*, all investors in the Chinamall Project), instead of preferring one investor's interests over another's. After the Conversion and the consequent discharge of the ASTD, the investments in the Chinamall Project very much retained the same complexion and remained a multi-party endeavour. It still involved multiple investors, including the plaintiff and the defendants. The understanding of the parties as set out in the ASTD never changed; all that changed was the formal discharge of a contractual document (the ASTD). In other words, the trust and confidence reposed in the defendants by the plaintiff, as influenced by the contours of the Trust Deed which the plaintiff signed, was *in the context of an arrangement involving multiple investors*. Accordingly, I am of the view that the defendants retained the discretion to act in what they believed to be the best interests of the *collective*, and in so far as they acted to further the success of the Chinamall Project in a *bona fide* manner, they would

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not have breached their fiduciary duties, the nature of which I have set out above.

Contractual duties as agent

155 Based on the plaintiff's pleadings, the alleged "duties as agent" comprise the following contractual duties:

(a) a duty to act in accordance with the plaintiff's instructions;

(b) duties of reasonable skill, care and diligence;

(c) a duty to provide timely information and advice;

(d) a duty to take all reasonable steps to protect the plaintiff's interest and/or investment in the Chinamall Project;

(e) a duty of no-conflict; and

(f) a duty of good faith to act in the best interests of the plaintiff.

156 The plaintiff's case is that these terms are to be *implied into the Agency Agreement*. A problem with this argument is that I have found that the alleged Agency Agreement does not exist; instead, I have found the relevant contractual instrument between the parties to be the ASTD (prior to its discharge). Accordingly, to construe the plaintiff's pleadings very strictly, there is no longer any Agency Agreement for the pleaded terms to be implied into.

157 That said, I consider the essence of the plaintiff's argument to be that the relevant pleaded terms should be implied into any *contractual instrument* governing the parties' agency relationship. This would be the ASTD, and the question then is whether the plaintiff's pleaded terms may be implied into the

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ASTD. The implication of terms, in any case, involves an application of *law* and an exercise performed by the court; in so far as the *facts* that would give rise to such implication have been pleaded (which they have), the court can consider whether the relevant terms may be implied into the ASTD instead of the Agency Agreement.

158 There is no need to imply the terms reproduced at [155(a)] and [155(c)] above. These terms have been in substance encapsulated in the terms of the ASTD, as reproduced at [120] above (specifically clauses 4.1 and 4.2(d)(ii)). There is also no need to imply the terms reproduced at [155(e)] and [155(f)]. These arise as fiduciary duties by operation of equity, as explained at [146] above.

159 There is no material difference between the terms stated at [155(b)] and [155(d)]. These are, in substance, obligations of reasonable skill, care and diligence that the defendants must observe in dispensing advice and providing timely updates to the plaintiff. Such a term is not contained in the ASTD expressly. In my view, such a term ought to be implied into the ASTD. This has been recognised as a *general* duty of agents and may exist expressly or impliedly in contract (see *The Law of Agency* at para 07.013).

160 I note the existence of clause 4.2(d)(iv) of the ASTD, which appears to be an entire agreement clause (see [120] above). This clause, however, does not preclude the implication of terms necessary for business efficacy, which are *intrinsic* to the contract, but exclude only terms *extrinsic* to the contract. This distinction between intrinsic and extrinsic implied terms was considered by the High Court in *Singapore Rifle Association v Singapore Shooting Association and others* [2019] SGHC 13 ("*Singapore Rifle Association*"). In *Singapore Rifle*

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Association, Pang JC (as he then was) considered an entire agreement clause, which reads (at [132]):

> **15. Entire Agreement**
>
> This Agreement constitutes the entire agreement between the Parties with respect to the matters dealt with in this Agreement and supersedes and cancels in all respects all previous agreements and undertakings, if any, between the Parties, whether written or oral. Each Party acknowledges that, in entering into this Agreement, it does not do so on the basis of, and does not rely on, any representation, warranty or other provision except as expressly provided herein, and all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law.

161 The court noted the distinction between intrinsic implied terms and extrinsic implied terms, citing at [139] the English Court of Appeal's decision in *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1, and the Court of Appeal's decision in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*"). Based on these authorities, Pang JC opined (at [140]):

> 140 The following principles may be derived from the foregoing cases:
>
> (a) Terms implied in order to give business efficacy to an agreement are intrinsic to the agreement.
>
> (b) They would therefore not be precluded by an entire agreement clause which merely excludes matters extrinsic to the written agreement.
>
> (c) Nevertheless, since the effect of an entire agreement clause ultimately turns on the proper construction of the actual words used in the clause, it may still be possible for intrinsic implied terms to be excluded if there are clear and unambiguous words which expressly and specifically exclude such implied terms.

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162 The court in *Singapore Rifle Association* also expressly cited portions of the Court of Appeal's decision in *Ng Giap Hon*, and reproduced the following material parts of that Judgment (at [136]):

> 136 The Court of Appeal then went on to make the following observations (at [31]–[32]):
>
> > However, we would also pause to observe that, even if there is no reference to implied terms in an entire agreement clause, it is arguable that the presence of such a clause in a contract would not, as a matter of general principle, exclude the implication of terms into that contract for several reasons. First, an implied term, by its very nature (as an implied term), would not, *ex hypothesi*, have been in the contemplation of the contracting parties to begin with when they entered into the contract. Secondly, ***if a term were implied on, so to speak, a "broader" basis "in law" (as opposed to on a "narrower" basis "in fact"), it would follow, a fortiori, that such a term would not have been in the contemplation of the parties for, as we shall see below (at [38]), a term which is implied "in law" (unlike a term which is implied "in fact") is not premised on the presumed intention of the contracting parties as such***. Thirdly, it is clearly established law that a term cannot be implied if it is *inconsistent with* an *express* term of the contract concerned. This principle is, of course, both logical as well as commonsensical. Finally, as pointed out by Nigel Teare QC (sitting as a deputy judge of the English High Court) in *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2004] 1 All ER (Comm) 435 at [27]:
> >
> > > ***It [is] … arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by [an] entire agreement clause*** because it could be said that such a term is to be found in the document or documents forming part of the contract. [emphasis added]
> >
> > That having been said, we are *not* prepared to state that an entire agreement clause can never exclude the implication of terms into a contract. However, ***for an entire agreement clause to have this effect, it would need to express such effect in clear and unambiguous language***.
>
> [emphasis in italics in original; emphasis added in bold italics]

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163 Here, the term encapsulating the duty of reasonable skill, care and diligence is a term to be implied based on business efficacy and of necessity. It is, as *per* the observations in *The Law of Agency* (at para 07.013), a general duty of agents that is to be implied into agreements of this sort. This stands to reason, given that agents are expected to act with due care in acting for their principals. This is required for business efficacy, given that absent such a term, agents may carelessly or recklessly prejudice their principals' interests by rendering haphazard and blasé advice, which would render the agency agreement absurd and unworkable. It is also by no means an overly onerous duty, as it comports with pre-existing notions of duty of care under the common law. To this extent, such a term of reasonable skill, care and diligence may be rightly recognised as a term to be implied in *law* and not in fact, *ie*, it applies to all contracts of this species.

164 Pursuant to the framework espoused in *Singapore Rifle Association* at [140], there is also no express and specific language excluding a term of this nature. I acknowledge that clause 4.2(d)(iv) of the ASTD states that the defendants "have only those duties, obligations and responsibilities expressly specified in the Agreement", and that on one interpretation, this is to the exclusion of *all* other duties. However, I echo Pang JC's sentiments in *Singapore Rifle Association*, and the Court of Appeal's views in *Ng Giap Hon*: in particular, the duty of reasonable skill, care and diligence is a term implied in *law*. In my view, there are countervailing considerations when considering terms to be implied in law, which militate against a strict and inflexible operation of the foundational principle of consent in contract law. These terms are implied to provide essential and necessary appendages to contracts that do not expressly contain them. Accordingly, absent very *specific and unambiguous* language that *expressly excludes* terms implied in law as a category, I do not

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accept that such terms are excluded by operation of clause 4.2(d)(iv). I accordingly imply the duty of reasonable skill, care and diligence into the ASTD.

165 The express terms in the ASTD and the implied term of reasonable skill, care and diligence subsisted as *contractual obligations* on the defendants' part until the termination of the ASTD, *ie*, on 20 November 2014 when the Trust Deed was executed. This is the relevant timeframe in which I will consider the alleged contractual breaches committed by the defendants.

166 There also remains to consider whether similar "duties as agent" concurrently arose at common law, *ie*, tortious duties.

Duty of care under the law on negligence

167 An issue with the plaintiff's case on negligence is that the particulars relating to the specifics of the duty of care, the standard of care, the breach of duty, and issues of causation/remoteness have not been set out clearly. What the plaintiff *has* pleaded is that such a duty of care exists, and the plaintiff has also referenced the instances of behaviour of the defendants that he regards as negligent.

168 Importantly, the defendants do not seem to take issue with the apparent lack of clarity in the plaintiff's pleadings. They appear to be willing to lock horns with the plaintiff on this issue, and instead contend, as a primary position, that there is no common law duty of care *over and above* the contractual duties set out in the ASTD.[153] The defendants anchor their argument in the fact that

153 DCS at pp 26 and 27, paras 80 to 83.

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"[n]othing in the ASTD requires [the first defendant] to place [the plaintiff's] interest over [the other investors]".[154] They argue, on this basis, that the second defendant is not obliged to look after the plaintiff's interest "over and above those of the other Noteholders".[155]

169 I do not accept the reasoning behind the defendants' argument on their duty of care. The argument is that there is to be equality of treatment in the contractual context as between all investors in the Chinamall Project. Such equality of treatment, however, does not mean that there ceases to be duties owed by the defendants to the plaintiff (or, for that matter, to the other investors) in common law. I cannot see how the absence of common law duties follows as a logical conclusion from the mere fact of equality of treatment of investors under contractual obligations. In some circumstances, a contract may, subject to the restrictions stipulated in the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed), expressly exclude liability for negligence (see also *Ng Giap Hon* at [32]). But the ASTD does not exclude such tortious liability. Clause 4.2(d)(iv) of the ASTD, for reasons similar to those provided at [164] above, does not specifically exclude liability for negligence. There is simply nothing in the ASTD that negates the defendants' common law duty of care to the plaintiff.

170 Relevant also is clause 4.2(c) of the ASTD, which states that the defendants may refrain from acting in the interests of the investors until they (the defendants) have been indemnified, *except to the extent that losses arise as a result of "negligence or wilful conduct"* by the defendants (see [120] above). This term, construed in context, shows that the defendants' liability for

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154 DCS at p 26, para 81.

155 DCS at p 27, para 82.

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negligence was contemplated and *not* excluded. The defendants remained responsible for any losses occasioned by their own negligence.

171 It is indeed clear that agents standing in the shoes of the defendants owe a duty of care to their clients, such as the plaintiff, to act reasonably and to render advice diligently. I have alluded to this earlier: *The Law of Agency* describes the duty of skill and care as a general duty that exists on the part of agents (see [159] above). I have also explained why the imposition of such a duty is necessary and sound in the context of agents who act in an advisory capacity (see [163] above). It is thus unnecessary to engage in a detailed analysis using the *Spandeck* ([96] *supra*) framework: it is quite clear that agents such as the defendants are sufficiently proximate *vis-à-vis* their principals, and consequently do, and should, owe their principals a duty of care to act with due skill, care and diligence.

172 Liability of this sort may often concurrently lie in *both* contract and tort, subject to the trite limitations to double recovery (*The Law of Agency* at para 07.013, citing *Forsikringsaktieselskapet Vesta v Butcher* [1988] 3 WLR 565 ("*Forsikringsaktieselskapet Vesta*")). I emphasise the observations of the English Court of Appeal in *Forsikringsaktieselskapet Vesta* (at p 571):

> I start by pointing out that Vesta pleaded its claim against the brokers in contract and tort. This is but a recognition of what I regard as ***a clearly established principle*** that ***where under the general law a person owes a duty to another to exercise reasonable care and skill in some activity, a breach of that duty gives rise to a claim in tort notwithstanding the fact that the activity is the subject matter of a contract between them***. In such a case the breach of duty will also be a breach of contract. …
>
> [emphasis added in bold italics]

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173 That such common law tortious liability coexists with contractual liability under documents under the ASTD is unobjectionable in principle. Contract law compensates one for what one was promised; tort law seeks to compensate for the harm to the individual. These principles coexist. The only unprincipled outcome the law seeks to prevent is *double recovery*, and that is a matter to be dealt with when addressing the issues of loss and quantum, *not* liability. There is thus no basis to argue that the defendants did not owe the plaintiff a duty of care to act reasonably and diligently in their dealings.

174 The defendants' duty of care under common law arose when they began advising the plaintiff on the Chinamall Project (in November 2013), and subsisted throughout the entirety of their dealings, even during the insolvency of Midas. The ASTD did nothing to negate this duty, and its discharge certainly had no effect on the duty. More importantly, as explained, the defendants continued acting for the plaintiff even after the discharge of the ASTD. They were thus obliged, in so doing, to act with due care.

175 Having set out the attendant duties that arose from the agency relationship between the parties, I turn now to analyse the plaintiff's claims in detail.

My decision on the plaintiff's various claims

176 I note the lack of organisation in the plaintiff's written closing submissions. The plaintiff has levelled multiple disjointed factual allegations and reproduced facts (albeit relevant) in large bulk without necessarily drawing the link between these facts and the relevant claims in the Statement of Claim. It also appears, as pointed out by the defendants in their written reply submissions, that the plaintiff has not focussed much on his contractual claims,

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although it is admittedly unclear whether these claims have been jettisoned entirely, given the extent and nature of the factual allegations levelled in the plaintiff's closing submissions. As such, in my analysis, I will closely track the claims made by the plaintiff in the Statement of Claim and structure my analysis accordingly.

The misrepresentation claims

177 As mentioned, the plaintiff's claims in this regard are twofold: he brings an action in (a) common law fraudulent misrepresentation; and (b) statutory misrepresentation under the Misrepresentation Act.

Whether the relevant representations were made

178 As a preliminary matter, I am of the view that the second defendant did make the relevant representations, as alleged by the plaintiff, during a phone call on 20 November 2014 (see [36], [61] and [62] above). This phone call must have occurred. In context, it is clear that the plaintiff had concerns over the status of his investment, namely the lack of security as suggested by the absence of any reference to the Security Documents in the Trust Deed. This is why the plaintiff implored Ms Tiolani to contact the defendants over this issue on 18 November 2014 *via* email. Following this, and after the alleged phone call on 20 November 2014, the plaintiff agreed to sign the Trust Deed. Ms Tiolani then informed the second defendant of such in her email dated 20 November 2014.

179 As a matter of logic and prudence, something must have happened after 18 November 2014, when the plaintiff voiced his concerns over the lack of security in the Conversion, and 20 November 2014, when the plaintiff, as *per*

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his unrefuted evidence, agreed to sign the Trust Deed.[156] There must have been assurance in some way, shape or form provided to the plaintiff. Otherwise, the plaintiff would not have proceeded with the Trust Deed arrangement. The only evidence of such assurance is the plaintiff's evidence that a phone call occurred to the effect canvassed earlier (see [36] above). Indeed, Ms Tiolani's email dated 20 November 2014, which is reproduced at [37] above, refers to such a phone call, thereby strongly suggesting that the phone call did occur; the defendants have not explained how this email reconciles with their denial of the said phone call being made.

180 Thus, on balance, I am persuaded that the said phone call did occur on 20 November 2014. I am also persuaded as to the plaintiff's account on the contents of the phone call, specifically that the second defendant made, as a form of assurance, the two representations pleaded by the plaintiff (see [61] and [62] above).

181 However, the plaintiff's claim for misrepresentation is defective on multiple counts. I address first an obvious and fatal flaw to the plaintiff's claims under both the First and Second Representations: they are both statements pertaining to *future* events.

Whether the relevant representations implied a factum or faciendum

182 The seminal pronouncement in Singapore on the requirements of an *actionable misrepresentation* remains the Court of Appeal's decision in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Raffles Town Club*"). Specifically, the court noted at [21], citing Andrew

156 1PBAEIC at p 105, para 103.

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Phang's *Law of Contract (Second Singapore and Malaysian Edition)* (1998) as follows:

> 21 … A representation… relates to some existing fact or some past event. It implies a *factum*, not a *faciendum*, and ***since it contains no element of futurity it must be distinguished from a statement of intention***. An affirmation of the truth of a fact is different from a promise to do something *in futuro*, and produces different legal consequences. This distinction is of practical importance. …
>
> [emphasis added in bold italics]

183 The Court of Appeal's pronouncement on this point of law has been reiterated on numerous occasions: see for example *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [93], and more recently, *Zuraimi bin Mohamed Dahlan and another v Zulkarnine B Hafiz and another* [2020] SGHC 219 at [51]–[52]. There is a crucial distinction between actionable misrepresentations and a *future promise or statement of intention*. A claim involving the latter (future promises or statements of intention) should manifest as a claim in, for example, breach of contract, and not misrepresentation. The critical question to be asked would be whether the statement of intention or the alleged future promise amounts to a binding, enforceable agreement. But what is clear from the authorities is that such statements involving a "*faciendum*" and not a "*factum*" cannot constitute an actionable misrepresentation. Only false statements as to present fact can constitute the subject matter of a misrepresentation claim.

184 Here, both representations clearly involve statements of intention or statements pertaining to future events:

(a) The First Representation is that the Mall is a valuable mall that *can be sold*, and the shareholders paid back if necessary. This was a prospective statement. The commercial considerations undergirding the

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exchange in which the First Representation was purportedly made are important. This was not simply a statement on the value of the Mall and whether it was a liquid asset (which, in any event, would not have been a false statement; see [190] below). In context, this was a statement of assurance that *at some point of time in the future, should the need arise (if, say, the Chinamall Project did not come to fruition), the Mall can be liquidated, and the proceeds used to repay the plaintiff and other investors*. In any event, this statement cannot be said to be false because any valuable asset can always be sold; it is always a question of the sale price offered. If the sale price is lowered enough to be sufficiently attractive, some buyer will step forward to take advantage of the low price so as to make a profit subsequently.

(b) The Second Representation was a request for a three-month extension on the maturity date. This, however, is again a predictive statement that clearly pertains to an event in the future. It was a request that conveyed, somewhat impliedly, that with sufficient time, the plaintiff *might* be able to obtain returns on his investment. It is therefore a statement contemplating a possible or probable future event, and not a present certainty. This statement did not, and could by no means, convert the plaintiff's commercial investment, which had inherent risks of failure, into a guaranteed return when given a three-month time extension.

Thus, in context, these representations constituted nothing more than statements on future events. They did not constitute false statements as to a *present state of affairs* at the time of their making; the plaintiff has not demonstrated this.

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185 Nor did these representations constitute legally binding *terms* as between the defendants and the plaintiff. If the plaintiff wanted to ensure that he would have security for his investment in the form of the Mall (*ie*, the subject matter of the First Representation), he ought to have negotiated with the defendants and stipulated this as *a term* in the Trust Deed, or demanded that the defendants include such terms in their agreement with Midas. The plaintiff did not do so.

186 As for the Second Representation, the defendants rightly point out in written closing submissions that the plaintiff's evidence is that he signed the Trust Deed on 20 November 2014, immediately after the phone call with the second defendant. At this point in time, there was no agreed fixed maturity date on the investment.[157] This is why, in Ms Tiolani's email sent the same day, she requested the new maturity date to be stipulated in writing by the defendants (see [37] above). The second defendant did not offer any assurance in response. Accordingly, at the time of the signing of the Trust Deed and even thereafter, the new 28 February 2015 "maturity date" was not a legally binding term. If the plaintiff had insisted on the parties agreeing to such a term, and if the parties did agree as such, the plaintiff would have then been able to pursue a cause of action in breach of contract. But the plaintiff failed to negotiate for such a term at the time of contract, and he cannot now rely on it.

187 There were also other courses of action available to the plaintiff. Apart from the possibility of insisting on concrete terms being added to the Trust Deed, the plaintiff could have refused to sign the Trust Deed, and thereafter commenced an action claiming that Midas and/or the defendants repudiated the

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157 DCS at p 34, paras 111 and 112.

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Investment Agreement and/or Convertible Loan Note to the plaintiff's detriment. He chose not to do so. I have alluded to this point earlier. The plaintiff chose to take into account the prospective statements made by the plaintiff in the 20 November 2014 phone call, which were *not* legally binding statements, and thereafter signed the Trust Deed. He made these decisions because he wished to persist with his investment, and obtain significant returns from, *inter alia*, the 20% interest rate. The plaintiff made these decisions in his capacity as an investor and businessman; he was no babe in the woods. The plaintiff's failure to reserve his *legal* position has precluded him of a contractual claim, and this is of his own doing.

188 My analysis above has the consequence that the plaintiff's claims under both common law fraudulent misrepresentation and the Misrepresentation Act are untenable. For completeness, I make several important observations on the second defendant's behaviour and whether it was fraudulent in nature, since this forms the essence of the plaintiff's allegations.

Whether the second defendant acted fraudulently

189 In my view, there is insufficient evidence that the second defendant fraudulently made the two pleaded representations. In other words, I do not accept that the second defendant knew that the facts represented in the statements he made were false at the time of making, and despite this proceeded to make the relevant representations.

190 As regards the First Representation, there is no evidence that the Mall was *not* a valuable asset. The undisputed evidence is that the Mall was recently

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(in the course of the Chinamall Project) transacted for at least RM100m.[158] There is also no reason to believe that the Mall could not have been eventually sold as a valuable asset, in satisfaction of the debts owed by Midas to the first defendant and/or the investors – the plaintiff has not offered evidence demonstrating this, and, as mentioned, the Mall had in fact been transacted recently, *ie*, when Midas purchased the Mall.

191 As for the Second Representation, I am of the view that the second defendant acted in a *bona fide* fashion when he made this statement on 20 November 2014. He would have been aware of the impending investment maturity date (28 November 2014).[159] He was caught in the middle, trying to salvage the situation for all the investors and to ensure that Midas did not face a fatal insolvency situation at that point in time. He accordingly *requested* a three-month extension. The second defendant was not acting fraudulently, but was simply trying to achieve a win-win situation for all involved. This much is clear from the following exchange in cross-examination:[160]

> Q: I beg to differ that your interests and the plaintiff's interests were aligned. But, Mr Yeo, in your evidence that you have given to this court, you have stated many times that the investors were all only interested in one thing: when do they get back their investments and the interest; correct? You have said that many times.
>
> A: Yes, but having --
>
> Q: So, to them --
>
> A: Having a final maturity date doesn't mean they are going to -- guaranteed can get payment. CHN is not a bank.

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158 1PBAEIC at p 102, para 101(a).

159 DCS at p 12, para 31.

160 NEs, 21 July 2020, page 45, lines 3 to 23; DCS at p 12, para 32.

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> Q: Yes. So had the maturity date not been changed, if on that date they were not repaid, they could have sued Midas, do you agree with me?
>
> A: Yes.
>
> Q: And then your investments, your shareholdings in the company, would go down the drain. It's as simple as that. Do you agree?
>
> A: Everybody's money will go down [the] drain.

192 The second defendant's evidence is persuasive, and I found him to be a credible witness. Counsel for the plaintiff has not been able to identify, with any precision, why the second defendant should be regarded as having acted in his own interests to the exclusion of the plaintiff's (or for that matter, the interests of all the investors). The second defendant was trying to make good the Chinamall Project for the benefit of all investors and himself. It bears reiterating that the defendants had skin in the game as well; they had invested sums into the Chinamall Project and in Midas for the purpose of keeping the Chinamall Project afloat (see [49]–[50] above). It was in everybody's interests for the project to succeed. With this context in mind, I am persuaded that the second defendant had simply conveyed to the plaintiff what was, to him, reasonable in the circumstances. He was providing an opinion on what was, in his view, a realistic subsequent maturity date for the investment, *ie*, a time frame in which the Chinamall Project could possibly have been made good.

193 This may at first blush appear to run against the grain of what was stated in the OT Letter (no fixed maturity date; see [31(c)] above). But two points are relevant. First, on the plaintiff's case, the second defendant *requested* an extension of three months and did not make any firm promise that the investment would surely mature and come good in three months. Second, it would have been clear to the plaintiff in the circumstances that the second defendant was not making any firm implied promise that the plaintiff's

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investment would *definitely* come good in three months. The OT Letter had been produced to the plaintiff. The plaintiff would have seen the lack of a fixed maturity date. This is exactly why he implored Ms Tiolani to obtain the second defendant's confirmation on an alternative (the three-month timeframe). He knew that the Second Representation was not binding. It thus would have been clear to all involved that at best, the second defendant was conveying a rough and ready estimate of when the plaintiff would see returns on his investment if he (the plaintiff) opted to give Midas time to reverse its fortunes with respect to the Chinamall Project. I am accordingly unpersuaded that the second defendant made the Second Representation fraudulently.

194 With my discussion as stated above, there is no need to discuss in detail the other ancillary issues relating to *inter alia* the issue of reliance on the relevant representations. I simply note that the defendants have correctly raised *Broadley Construction* ([70] *supra*) – the plaintiff had sight of the relevant investment contractual instruments, and his conduct as discussed above reveals that none of the alleged misrepresentations were operative on his mind. Specifically, the plaintiff knew that the relevant representations were *not* binding terms; I have explained this at [185], [186] and [193] above. *Despite* the lack of binding terms as a form of assurance/security, and despite the representations clearly being prospective statements that could by no means guarantee the success of the Chinamall Project, the plaintiff decided that the investment was worth the risk. In my view, these circumstances show that the plaintiff followed through with the signing of the Trust Deed *based on his own commercial judgment*. The plaintiff thus cannot be said to have relied on the alleged misrepresentations.

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195 On the several bases indicated above, the plaintiff's claims under both common law fraudulent misrepresentation and statutory misrepresentation under the Misrepresentation Act must fail.

Breach of fiduciary duties

196 As noted earlier, while the agency relationship at present lent itself to the defendants being able to unilaterally bind the plaintiff and change the nature of his investment in the Chinamall Project upon consent of the majority, the defendants did not exercise this power (see [145] and [145] above). I thus confine my discussion on fiduciary duties to the defendants' acts of dispensing advice to the plaintiff.

197 I will consider each of the alleged instances of breach, as pleaded in the Statement of Claim, in turn. These may be broadly grouped into three categories.

(a) The first category of alleged breaches pertains to the defendants' acts of making several key decisions in relation to the Chinamall Project without the plaintiff's prior consent.

(b) The second category of alleged breaches pertains to the manner in which the defendants dispensed *advice* to the plaintiff.

(c) The third "category" is the plaintiff's claim that the second defendant stood in a position of conflict of interest.

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The defendants' key decisions in the Chinamall Project

198 The plaintiff claims that the defendants acted against the plaintiff's interests and/or "without any proper or valid reason". The relevant events evincing this are:

(a) the Proposed Conversion;

(b) the Conversion;

(c) the discharge of the Security Documents;

(d) the failure to procure alternative security; and

(e) the execution of the OT Letter.

The plaintiff also levels several other allegations such as the first defendant's purchase of shares in Midas *via* the 26 July 2014 MOA being a breach of fiduciary duty,[161] but these do not feature in the Statement of Claim. I will not consider these points on breach of fiduciary duty in so far as they have not been pleaded.

199 The Proposed Conversion may be given short shrift. I have already explained that it is irrelevant given that it was not implemented (see [79] above). The plaintiff has no persuasive response. The plaintiff also has been unable to dispute that he was provided with updates on the Proposed Conversion.[162] Likewise, the claim premised on the Conversion holds no water. As explained earlier, the plaintiff *accepted* the Conversion and gave *informed consent* when

161 PCS at para 57.

162 DCS at para 60.

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he signed the Trust Deed. By extension, the plaintiff's arguments on the 26 July 2014 MOA are irrelevant.[163] The plaintiff was not provided with the 26 July 2014 MOA, but was provided with all the relevant information contained therein *via* the Trust Deed, the OT Letter and the correspondence exchanged in late-2014. The non-disclosure of the 26 July 2014 MOA therefore did not change the parties' positions; the plaintiff, regardless, gave his informed consent in signing the Trust Deed.

200 The discharge of the Security Documents requires greater scrutiny. The defendants do not dispute that they discharged the Security Documents without the plaintiff's prior consent and only informed the plaintiff of this subsequently, in their correspondence pertaining to the Conversion.[164] Their case is that the second defendant did so in the interests of all the investors.[165]

201 The second defendant gave evidence that he and the first defendant were caught in a difficult position. There was a real risk that the Tans would pull the brakes on the Chinamall Project. Mr Wang Jianguo, who was the purported driving force behind the Chinamall Project, was away in China.[166] In his absence, the Tans took over. The Tans were unhappy that their salaries had been cut (which was a decision taken in the light of the financial difficulties that Midas found itself in during the Chinamall Project).[167] As a result, the Tans "showed up at [the second defendant's] apartment" and informed him that he had to sign the 18 August 2014 letter (which would discharge the Security

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163 PCS at paras 51 to 61.

164 NEs, 21 July 2020, page 59, lines 12 to 15.

165 DCS at para 63.

166 NEs, 21 July 2020, page 11, lines 8 to 18.

167 NEs, 21 July 2020, page 60, lines 12 to 25.

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Documents). The Tans informed the second defendant that if he did not do so, he would be "on [his] own".[168] The second defendant acceded to the Tans' demand because he "needed [the] Tans to run [Midas]".[169] The first defendant also put up an indemnity for Mr Tan Chong Whatt, indemnifying him in the event that the investors commenced a personal action against him.[170]

202 On balance, I accept the second defendant's testimony. His evidence paints a logical picture. First and foremost, the second defendant's evidence was consistent throughout trial, and I found him to be a credible witness. Further, his story adds up, and in my view, there is no other way to explain why the second defendant did what he did. All of the investors in the Chinamall Project, the plaintiff and the defendants included, were facing a perilous situation. If the Tans pulled the plug at that juncture (which eventually materialised with the insolvency event that Midas faced), everybody stood to lose their investments. Midas was not performing well financially: it was "lagging behind" in terms of the Chinamall Project milestones,[171] and was performing poorly to the extent that all Midas' directors were not receiving any salary.[172] Conceivably, even if all involved decided to call it quits at that point and call on the Guarantee and the Share Charge, there was no assurance that these would have been of value. The best outcome, in the defendants' view, was to achieve success in the Chinamall Project, and they needed "everybody to work collectively together"

168 NEs, 21 July 2020, page 55, lines 1 to 10.

169 NEs, 21 July 2020, page 60, line 12.

170 NEs, 21 July 2020, page 59, lines 17 to 23.

171 NEs, 21 July 2020, page 10 line 23 to page 11 line 1.

172 NEs, 21 July 2020, page 60, lines 15 to 25.

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in order to attain such success and so that "everybody can get paid".[173] This required the cooperation of the Tans, who were issuing threats at that point.

203 There was also no reason for the defendants to believe that the Chinamall Project was wholly unviable at that point. The defendants still had the commitment of all their investors, the Mall presented a valuable asset, and the Chinamall Project was well and truly underway. The hurdle proved to be the Tans. The second defendant acted as he thought necessary to surmount this hurdle. In so doing, he had the interests of the collective, *ie*, all investors, in mind, and acted in a *bona fide* manner.

204 It must be recognised that the discharge of the Security Documents prejudiced the defendants in the same way that it did the other investors including the plaintiff. It was not a case that the discharge of the Security Documents afforded the defendants an extraneous benefit whilst depriving the investors of their security. The defendants, too, were investors and had skin in the game. They, too, gave up security. In fact, as pointed out, the first defendant was placed in an even worse position as it had put up, to its own detriment, an indemnity in favour of Mr Tan Chong Whatt. The benefit derived from the defendants acceding to the Tans' request was a benefit enjoyed by *all*: the continued cooperation of the Tans in the Chinamall Project, which was necessary for the success of the project. The plaintiff has not shown that the Chinamall Project could have proceeded absent the cooperation of the Tans.

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173 NEs, 21 July 2020, page 60, lines 16 to 18.

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205 I disagree with the plaintiff's characterisation of the second defendant's explanations as an "afterthought".[174] As mentioned, I found the second defendant to be a credible witness at trial. The plaintiff further argues that the facts pertaining to the difficulties with the Tans that the second defendant faced were not pleaded. In a strict sense, the plaintiff might be correct, in that these facts were not specifically stated in the defendants' pleadings. However, I am of the view that the essence of the defendants' case has been sufficiently encapsulated in the Defence; the defendants have pleaded that they acted in the collective interest, specifically that:

> 39. In any event, the Defendants aver in this respect that:
>
> > (a) At the material time and under the relevant circumstances in Malaysia, notwithstanding that it had no duty to do so *per se* to the Noteholders, the 1st Defendant had acted reasonably and in accordance with the best interests of all the Noteholders in arranging for the re-documentation of the Aggregate Investment Sum…
>
> …
>
> 64B. In any event, the Defendants aver that their collective investment in CHN and/or the Chinamall Project far exceeded that of the Plaintiff. …
>
> …
>
> 64C. Accordingly, the Defendants aver that, as fellow investors in CHN and/or the Chinamall Project, their interests and objectives were at all material times aligned with those of the Plaintiff. The 1st Defendant is also taking steps to enforce the Shareholder's Loan Agreement and/or to recover the Shareholder's Loans on behalf of the Noteholders …

206 The above excerpts are broad enough, in my view, to encompass specific facts such as those raised by the second defendant at trial. A party cannot be expected to plead every single fact in detail. This would render the pleadings

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174 PCS at para 143.

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unwieldy and unreadable. The details of the parties' cases often surface in their affidavit evidence and in-court testimony. This is unobjectionable. The "underlying consideration of the law of pleadings", as stated recently by the Court of Appeal in *Fan Ren Ray and others v Toh Fong Peng and others* [2020] SGCA 117 ("*Fan Ren Ray*"), is "to prevent surprises arising at trial" (at [12]). While the court is generally "precluded from deciding on a matter that the parties themselves have decided not to put into issue" (which, in any event, is not the case here given that I find the defendants' pleadings to be sufficient), a departure from this rule is permitted "where no prejudice is caused to the other party in the trial" (*Fan Ren Ray* at [12]). In this respect, and importantly, the plaintiff had the opportunity to, and did, cross-examine the second defendant on his evidence. The plaintiff has therefore not been prejudiced by the mere fact that the minutiae of the defendants' case was not expressly stated in the Defence.

207 There is a separate issue, of course, of whether the second defendant ought to have been candid with the plaintiff about his difficulties with the Tans. I address this in the next section (see [218] below).

208 The next aspect of the plaintiff's claim is the defendants' failure to provide or procure alternative security for the plaintiff. Several points are fatal to the plaintiff's claim. First, the issue of alternative security was in fact raised between the parties: see the parties' correspondence as detailed at [26]–[39] above. After this correspondence, the plaintiff decided to go ahead with the Conversion. It cannot then be said that the defendants did not act in the plaintiff's best interests, given that they had understood and addressed the plaintiff's concerns.

209 The plaintiff then points to the First Representation and argues that this shows that the defendants did not adequately look out for his interests. My

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analysis in this respect closely mirrors my discussion on the plaintiff's misrepresentation claims, which I will not repeat here. In short, I find that the second defendant made the First Representation in a *bona fide* fashion. He did not act fraudulently and had no reason to believe that the Mall would not serve as valuable security. The plaintiff's failure to negotiate and obtain further security in the course of the Conversion is of his own doing. If the plaintiff was dissatisfied, he ought not to have signed the Trust Deed. I accordingly consider there to be no breach of fiduciary duty by the defendants in this respect; even if there had been a breach due to their failure to procure further security, that breach would have been waived by the plaintiff *via* his acceptance of the Trust Deed in the prevailing circumstances.

210 Finally, as regards the OT Letter, the defendants accept that the "initial decision to do away with the maturity date was made without the [p]laintiff's prior knowledge".[175] They however point out that this was eventually raised to the plaintiff prior to the plaintiff having signed the Trust Deed.

211 In my view, a key point is that the decision taken by the defendants to do away with the initial maturity date was a commercially sound one in the circumstances, and one done *bona fide* with the collective investors' interests at heart. The second defendant gave unrefuted evidence that the Chinamall Project was not meeting its milestones and therefore a potential event of default might have arisen (*ie*, the investors would not have obtained returns on the promised maturity date). If that occurred, and any one of the investors decided to call on

175 DCS at para 72.

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the default, the entire project would be put in jeopardy and "[e]verybody's money will go down [the] drain".[176]

212 This is a somewhat difficult point, because in acting as they did, the defendants rendered the investments open-ended. All of the investors were in a position where they were contractually entitled to returns on a fixed date, and they were then suddenly placed in a drastically different position. This, on its face, appears to be against the interests of the investors. *However*, I believe that the second defendant acted honestly, for reasons which mirror my analysis on the discharge of the Security Documents above. The defendants stood to incur the same detriment as the other investors, and they acted as they did because they genuinely believed it to be in the interests of the collective (which were aligned) in the long-term. Everybody wanted to see the Chinamall Project succeed. Accordingly, the defendants acted in good faith and their conscience was not affected; I see no breach in these circumstances.

213 Alternatively, and if I am wrong on the question of breach, I nonetheless find that in agreeing to the Trust Deed *after* being notified of the OT Letter, the plaintiff waived the defendants' breach of duty. The defendants correctly point out that if the plaintiff was in fact under the impression that he was entitled to call on his investment on 28 November 2014, there would be correspondence to this effect. However, there is no evidence of such correspondence. This shows that the plaintiff knew he gave up his contractual entitlement to the initial maturity date and accepted the state of affairs created by the OT Letter. The plaintiff made concessions to this effect during trial.[177] Accordingly, the

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176 NEs, 21 July 2020, page 45, line 23.

177 NEs, 15 July 2020, page 81, lines 13 to 20.

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defendants' breach, if any, was waived. In these circumstances, the plaintiff's claim is unsustainable.

Rendering advice to the plaintiff

214 This category of alleged breaches pertains to the manner in which the defendants dispensed *advice* to the plaintiff, and primarily concerns paragraphs 51(biii) and (bv) of the Statement of Claim. The specific claims the plaintiff makes in this regard overlap: these are that the defendants failed to advise the plaintiff to procure alternative security, and instead advised the plaintiff that no alternative security was required (apart from the Mall). I address these together.

215 It cannot be said that the defendants were in breach of their duty to act loyally and in the plaintiff's best interests simply because they did not advise the plaintiff to procure further security. It must be asked: what other security could the plaintiff and the other investors obtain in those circumstances? The defendants identified the Mall as potential security. The plaintiff was aware of this, as he was informed as such during the 20 November 2014 phone call. In so acting, the defendants were rendering advice to the best of their ability and in good faith. It is difficult to see what more the defendants could have offered given the prevailing circumstances, including *inter alia* the Tans' intransigent position and Midas' ailing financial health.

216 More importantly, the plaintiff, as a businessman, was sufficiently aware of his predicament and there was no need for the defendants to dispense more advice than they did. I stress again that the plaintiff did not insist that the Mall be contractually stipulated as security. The plaintiff was clearly aware of the significance of such a contractual stipulation, seeing how he was concerned by the lack of reference to the Security Documents in the Trust Deed. The plaintiff

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did not insist on the contractual stipulation and that was his doing. There was no further need for the defendants to dispense him any more advice in this regard; he is an experienced businessman who knows better, and the defendants were aware of this.

217 In other words, the fact that the plaintiff reposed trust and confidence in the defendants to dispense good and accurate advice to him does not obviate the need for him, where clearly sensible, to think for himself and make his own decisions where necessary. Equity and the law on fiduciaries protect principals like the plaintiff in circumstances where they are vulnerable, but equity is not paternalistic and will not intervene when a party clearly has the capacity and opportunity to take steps to preserve its own position. The plaintiff could have but did not reserve his own position. In these circumstances, I do not accept that the defendants had breached their fiduciary duties to act loyally and in the plaintiff's best interests.

218 There is a separate critical point. Paragraph 51(b) of the Statement of Claim (the unilateral discharge of the Security Documents), which falls under the first category of alleged breaches, is also partly relevant on the issue of advice. The question is whether the defendants' failure to *timeously disclose the true circumstances of the Tans' behaviour and the 18 August 2014 Letter, and to advise the plaintiff on the same*, constituted a breach of their fiduciary duties. Put another way, the question is whether it would have been in the plaintiff's best interests for the defendants to have simply placed the full picture before him and let him make his own decisions at that point as to whether he wished to proceed with the investment.

219 This presents a difficult issue given that it has to do with the extent to which equity permits the fiduciary (agent) to determine what would be a

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"better" course of action for the principal. Indeed, there is a compelling argument to be made that fiduciaries in the shoes of the defendants ought to be obliged to act at all times with *full candour* and present *all* relevant information to the principal, even if such information appears to be minutiae at first glance.

220 On the unique facts of the present case, I am persuaded that in withholding from the plaintiff the information on the Tans' conduct and the 18 August 2014 Letter (or for that matter, the 26 July 2014 MOA), the defendants did not act in breach of their duty to act loyally and in the investors' best interests. This is because the defendants were attempting to balance the interests of all the investors they advised, *as a whole* (noting that these interests were for all and intents and purposes aligned; all the investors wished to make a profit out of the Chinamall Project). The defendants feared an "outlier" situation where, despite the agreement of all the other investors, one investor would decide to withhold consent and call an event of default on 28 November 2014. If that happened, there would have likely been little to no chance of *anybody* recovering their principal investment sum, let alone any profits. The best possible outcome, in the defendants' view and as evinced by their conduct, was for the investors to collectively see the project through and ride out the storm together. That was the best, if not the only, chance of all parties involved achieving a positive outcome. The defendants thus decided that to withhold the information on the Tans' conduct and the 18 August 2014 Letter/26 July 2014 MOA would be in the collective's best interests.

221 I emphasise, also, that while the defendants may have been somewhat economical with the truth in the limited sense indicated above, they did not convey falsehoods. The reasons they *did* provide for the Proposed Conversion and the Conversion (such as compliance with Malaysia's legislative provisions)

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were valid; the plaintiff has not shown that the defendants were dishonest in this regard.

222 In the light of the foregoing circumstances, I do not accept that the defendants breached their duty to act loyally and in the investors' interests. I stress that my observations on this particular issue are limited to the unique facts of the present case, as informed by the multipartite relationship formed between Midas, the defendants, the plaintiff and the other investors. Importantly, the plaintiff was aware of this arrangement, *ie*, that there were more than a dozen investors involved, when he agreed to the Trust Deed. He was thus cognisant of the collective interests at stake. This unique factual matrix, in my view, resolves in favour of the defendants.

Conflict of interest

223 I now consider the plaintiff's argument that the defendants were in a position of conflict by virtue of the second director being a director in Midas. The plaintiff's own position is that the second defendant's appointment as a director of the Midas was "solely for the purposes of safeguarding the interest of the investors of the Chinamall Project".[178] It was a role intended for the second defendant to have *oversight*, and for him to monitor "all financial corporate governance matters of Midas".[179]

224 This premise is critical. In my view, it puts paid to the plaintiff's contention that the second defendant was in a position of conflict. By the plaintiff's own admission, the appointment of the second defendant as a director

178 PCS at para 10.

179 PCS at para 10.

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of Midas was *aligned with the investors' interests*. I accordingly do not see how this can in any sense be described as a position where the second defendant was conflicted. In acting (as he was obliged to) in the best interests of Midas and ensuring that Midas remained a going concern in order to successfully execute the Chinamall Project, the second defendant would have been acting in the investors' interests. It must be borne in mind that Midas was always intended to be a *special purpose vehicle* to be used for the purpose of the Chinamall Project (see [9] above). Midas' interests were thus fully aligned with the investors' interests. I can see no conflict.

225 The plaintiff has not shed any further light on this or shown how its claim can be viable. The plaintiff, in written closing submissions, reproduces a lengthy excerpt from *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109, without elaborating further.[180] This does not aid his case on conflict of interest. The case simply restates the rule that a fiduciary cannot place himself in a position where there is a possibility of conflict, which is trite and undisputed.

226 To my mind, the only scenario where a possibility of conflict would have arisen was if Midas decided to pull the plug on the Chinamall Project, to the detriment of the investors, *and* the second defendant was aware of and on board with this. But in so far as the collective understanding all along was to see the Chinamall Project through to fruition, there was no *possibility* of conflict on the second defendant's part.

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180 PCS at para 104.

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227 When Midas did eventually capitulate, this was unbeknownst to the defendants. The second defendant has given unchallenged evidence that the Tans surreptitiously took over control of Midas prior to the winding up of Midas.[181] This prevented the intended oversight by the second defendant. Mr Tan Chong Whatt then admitted the RM1.3m debt which landed Midas in liquidation without the board's consent.[182] When the second defendant discovered this, Midas was in the deep. The second defendant then made extensive efforts to make good a bad predicament, and attempted to remedy the situation *in the interests of Midas and the investors* – I have canvassed this in detail at [42]–[47] above. All the evidence suggests that the second defendant acted in a *bona fide* manner throughout. His conscience was never affected. He acted at all times for the benefit of the investors and to keep Midas afloat – these were consonant objectives that did not require the second defendant to place one side's interests over the other.

228 For completeness, I also do not consider that the defendants stood in conflict in the sense that they acted for their own interests to the exclusion of the plaintiff's. The defendants were not trying to rescue the Chinamall Investment for their own sake. They did so for all involved. This is the second defendant's consistent evidence. It is also telling that even when Midas was in deep water, the defendants continued injecting *personal* funds into the Chinamall Project and/or Midas with the hope of resuscitating the project, at their *own* expense (see [50]–[51] above). This was *after* the investors had already made their respective investments, and after the defendants were made aware of the difficulties Midas was facing. Relevant also is the indemnity

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181 NEs, 16 July 2020, page 41, lines 13 to 25.

182 NEs, 16 July 2020, page 35 line 18 to page 36 line 3.

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extended by the first defendant to Mr Tan Chong Whatt. This is demonstrative of good faith on the defendants' part. As a consequence of the sums the defendants injected in the Chinamall Project and their attempt to salvage Midas, the second defendant lost almost all of his life savings.

229 I accordingly reject the plaintiff's claim that the second defendant stood in a position of conflict. This contention is wholly without merit.

Breach of contractual duties as agent

230 This claim, as clarified, is primarily contractual. The tortious aspect of the plaintiff's claims is considered under the section on "Negligence" below, from [242] onwards. The plaintiff's contractual claim for breach of duties as agent is rooted in the alleged Agency Agreement. For reasons provided earlier, the Agency Agreement is not the relevant contractual document to scrutinise – instead, it is the ASTD. In scrutinising the defendants' conduct, the relevant timeframe to consider is from the execution of the Investment Documents (28 November 2013) up to the date of discharge of the ASTD (20 November 2014). The relevant ASTD terms include:

(a) the implied duty of reasonable skill, care and diligence; and

(b) the sub-provisions of clause 4.1 of the ASTD, which are in essence notification obligations and duties to provide the plaintiff timely information and advice (see [120] above).

Reasonable skill, care and diligence

231 The particulars of the defendants' alleged breach of their duty of reasonable skill, care and diligence are found in the same portions of the Statement of Claim that concern the alleged breaches of fiduciary duty (see

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[197] and [198] above). Relevant, also, is paragraph 50 of the Statement of Claim, wherein the plaintiff highlights, *inter alia*:

> (a) the defendants' conduct in sending the 19 November 2013 email, providing the Term Sheet and making several representations on the nature of the investment in the Chinamall Project;
>
> (b) the fact that the Term Sheet's provisions and the defendants' representations differed from the actual terms of the Investment Agreement.

The plaintiff describes the above as the defendants' failure to "confirm the true nature of the Chinamall Project before advising the [p]laintiff on the same".[183]

232 I have explained that the defendants at all times acted in a *bona fide* manner and in the interests of the investors as a whole. This may be evinced from how the defendants constantly endeavoured to find a workable solution for the Chinamall Project and took steps to that effect. Of course, acting loyally and *bona fide* may not always be readily equated to having acted *with due diligence*. The inquiries are different; the key question for the latter is whether, in doing as they did, the defendants acted as a reasonable agent in the defendants' shoes would have (see *The Law of Agency* at para 07.014 citing McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). This, inevitably, is a fact-sensitive inquiry (*The Law of Agency* at para 07.014).

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183 Statement of Claim at para 50(c).

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233 The observations in *The Law of Agency* at paragraph 07.015 are pertinent: not every error of judgment by an agent will be considered negligent. There can be no guarantee that absolutely no mistakes will be made by the agent; there may also well exist more than one reasonable view on an issue or a decision to be made. Just because the agent makes a decision that eventually turns out to be to the detriment of the principal does not mean the agent was negligent (*The Law of Agency* at paragraph 07.015 citing *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634). The standard of care is whether the agent made an error that *no reasonably competent member of the profession would have made* (*Goh Teh Lee* ([97(a)] *supra*) at [67]). The courts have also emphasised the need to be slow to approach such matters with the benefit of hindsight (see *JSI Shipping* ([97(c)] *supra*) at [69]).

234 The nature of the particular industry or market that the agent and principal are dealing in is also relevant; in particular, a more volatile commercial endeavour will affect the standard of care that the agent is held to. The observations of Lee Seiu Kin JC (as he then was) in *OCBC Securities* ([97(b)] *supra*) at [40] are relevant. The court there noted that industries like the stock market are "well known to be unpredictable and any recommendation or advice therefore carries the inherent risk that it may be wrong". Lee JC also observed, correctly in my view, that "[t]he fact that a recommendation turns out to be wrong does not mean it was negligent when it was given" (at [40]). While the present case does not involve the stock market *per se*, the reasoning in *OCBC Securities* applies *mutatis mutandis*, in that the parties here were involved in a commercial investment that bore an inherent element of risk.

235 With the above in mind, I do not consider that the defendants acted without reasonable skill, care and diligence. I explain with reference to the chronology of events.

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(a) When the defendants provided the initial information on the Chinamall Project *via* email and the Term Sheet, they simply provided whatever information was available to them at the time. The Investment Agreement turned out to have different terms. But the defendants provided the draft Investment Agreement to the plaintiff *prior* to his making of the investment. The plaintiff would thus have known of the difference in terms; he is not pleading *non est factum*. It cannot be then said that the defendants dispensed information and advice negligently.

(b) The Proposed Conversion is irrelevant, given that it was not executed. In any event, it is clear that the defendants simply conveyed the information they had to the plaintiff. The plaintiff has not shown how the defendants' conduct could be described as negligent in any sense.

(c) When it came to the Conversion, relevant aspects of the defendants' conduct include the 20 November 2014 phone call with the plaintiff. In advising the plaintiff to follow through with the investment and providing verbal assurance on the value of the Mall, the defendants did not act negligently. The second defendant, in his judgment, gave advice that he thought would allow the plaintiff's (and other investors') investment to succeed. I do not find such conduct to be conduct that no other reasonable advisor in the second defendant's shoes would have adopted.

(d) As regards all the events stated above, the defendants surely knew that there was an element of risk involved, and that their advice could by no means warrant or ensure the success of the plaintiff's investment. But the plaintiff must have known this too. The Chinamall Project was a commercial investment that offered 20% *per* annum

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returns with a shorter-than-average maturity date. There had to be catches and risks in some way, shape or form. This adds an important and distinct complexion to the defendants' advice, which reinforces my views in the preceding sub-paragraphs. With the prevalent risks in mind, I do not see how the defendants' conduct and advice could be considered so wholly unreasonable such that no other investment agent in their shoes would have acted the same way. The plaintiff has not proven this.

(e) As regards the non-disclosures or late disclosures relating to the 26 July 2014 MOA, the 18 August 2014 Letter, the OT Letter and the discharge of the Security Documents, I have explained earlier that the defendants acted as they did because they genuinely believed it to be the best course of action for all involved. They acted deliberately, not carelessly or negligently. I found the second defendant's testimony in this regard credible, and his evidence cogent. Importantly, I also do not consider these to be decisions that no other agent in the defendants' shoes would have reasonably made.

Timely advice and information

236 As regard this set of obligations, as encompassed in clause 4.1 of the ASTD, I find that the defendants may have been in breach. Specifically, clause 4.1(c) of the ASTD states that the defendants must "promptly notify the Noteholders of any fact, circumstance or development which may affect the rights, interest or entitlements of the Noteholders or any of them".

237 The late disclosures of the OT Letter and the information on the discharge of the Security Documents are immaterial because they were disclosed before the plaintiff signed the Trust Deed. I am satisfied, on a commercially sensible construction of clause 4.1(c), that this key fact precludes

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liability on the defendants' part. The defendants' disclosure of the OT Letter and discharge of the Security Documents, while not "prompt" in an absolute sense, was *sufficiently prompt* and achieved the purpose of clause 4.1(c), which in my view is to ensure that the investors could make informed decisions on their investment.

238 However, the defendants' non-disclosure of the 26 July 2014 MOA and the 18 August 2014 Letter fell foul of the obligations under clause 4.1 of the ASTD. The 26 July 2014 MOA and the 18 August 2014 Letter clearly fall under "any fact, circumstance or development which may affect the rights, interest or entitlements [of the investors]". These documents went to the very basis of the investments and the security that protected the investments. The defendants ought to have disclosed these documents to the plaintiff.

239 That said, I find that these were *technical breaches* that did not cause the plaintiff loss. Similar information, which encapsulated the essence of the 26 July 2014 MOA and the 18 August 2014 Letter, had been disclosed in the Trust Deed, the OT Letter and the correspondence pursuant to these documents. By virtue of the disclosure of these documents, the plaintiff was equipped with sufficient information to make an informed decision, and did make an informed decision, in signing the Trust Deed.

240 It may be asked, "would the plaintiff had acted differently if the 26 July 2014 MOA and the 18 August 2014 Letter, and the circumstances surrounding these documents, had been disclosed before the plaintiff signed the Trust Deed?" Put another way, if the plaintiff had been apprised of the difficulty that the second defendant experienced with the Tans, would he have chosen to exit the investment early? The evidence adduced by the parties on this specific point is scant. In my view, the plaintiff would not have acted differently. By his own

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case, the plaintiff trusted the defendants' judgment calls. He did not want to be bothered by trivial details and focussed only on the key aspects of the investment, such as the presence of security. This is why he asked Ms Tiolani to follow up on the issue of security, and was satisfied enough, in his own judgment, to proceed to sign the Trust Deed once the First Representation was made. He trusted the defendants' judgment for all other matters. Thus, in the hypothetical scenario where the defendants did disclose the 26 July 2014 MOA, the 18 August 2014 Letter and the trouble with the Tans, I am persuaded that, on a balance of probabilities, the plaintiff would have still proceeded with his investment.

241 Accordingly, even if the defendants fully complied with clause 4.1(c) of the ASTD, and disclosed the relevant information and documents, the plaintiff would not have been in any better position. There is accordingly no loss occasioned by the defendants' failure to provide timely information in this respect. I thus dismiss this aspect of the plaintiff's claim as well.

Negligence

242 I have explained why the defendants owed a duty of care to the plaintiff to act with reasonable skill, care and diligence in their dealings (see [167]–[173] above). But that is not the end of the inquiry. The critical question that follows is whether, by rendering the advice that they did and taking the various steps in the course of the Chinamall Project, the defendants breached their duty of care.

243 My analysis in this regard mirrors largely my discussion above on the contractual duty of reasonable skill, diligence and care, for self-evident reasons. The principles espoused in case law and in *The Law of Agency*, as reproduced at [232]–[234] above, apply with equal force to common law negligence and

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contractual duties of skill, care and diligence. The factors in the tortious and contractual inquiries are cut from the same cloth. I accordingly do not consider that the defendants breached their duty of care by virtue of the events transpiring between 28 November 2013 and 20 November 2014.

244 I also do not accept that the defendants breached their duties thereafter. Far from it, the defendants went over and above the call of duty. When the Chinamall Project was taking a turn for the worse, the defendants continued to liaise with the plaintiff, and attempted to salvage the situation. They did not pack their bags and abandon the investors. They liaised with all parties involved, and spared no expense when Midas was at the end of the road and facing a winding up order (see [42]–[47] above). They also injected their personal funds into Midas and the Chinamall Project when the tides had already turned unfavourably.

245 For these reasons, I reject the plaintiff's claim in negligence.

Dishonest assistance by the second defendant

246 Given that I have found against the plaintiff on all the aforementioned issues, in particular the issue of fiduciary duties, there is strictly speaking no need to consider whether the second defendant dishonestly assisted the first defendant's various alleged breaches. The doctrine of dishonest assistance is premised on the defaulting party *assisting in a primary wrong*, typically a breach of fiduciary duty. But as explained in the preceding paragraphs, there is no primary wrong on the first defendant's part to begin with.

247 In any event, the element of dishonesty in dishonest assistance would not be made out. For the reasons provided earlier, I do not believe that the second defendant's conscience was affected in any way during his course of

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dealing with the plaintiff. He acted at all times in the investors' collective best interests and towards the successful completion of the Chinamall Project.

Conclusion

248 I emphasise in closing that I have found the defendants to be credible and honest parties in their involvement in the Chinamall Project. This is based on my assessment of the second defendant at trial. In my view, the defendants acted in a *bona fide* manner throughout, and were never in cahoots with Midas and its associates. The defendants put their money where their mouths were by making direct investments in the Chinamall Project. They acted, at all times, with the purpose of seeing the project to fruition. Even when the situation appeared bleak upon the winding up order being made against Midas, the defendants spared no expense and attempted to redeem what looked to be a lost cause, albeit to no avail. They also acted, at all times, with the skill, care and diligence expected of agents in their trade.

249 This case is unfortunate in that there was an ostensible wrongdoing perpetrated, and consequent losses occasioned, by *inter alia* Midas' liquidator and the Tans; but the defendants cannot be held accountable for a wrong they did not commit. One must also recognise that investments such as the Chinamall Project inevitably involve risk; indeed, the high promised returns of about 20% interest *per* annum were a tell-tale sign of a corresponding risk. The plaintiff gambled, and it did not pay off. Whilst I sympathise with the plaintiff's position in the light of the financial loss he has suffered, the defendants are not at fault; they, too, suffered loss that was not insignificant.

250 I therefore dismiss the plaintiff's claims in their entirety. Unless the parties wish to be heard on costs, I order costs against the plaintiff in favour of

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the defendants to be taxed if not agreed. If the parties wish to be heard, they are to (a) inform the court of this intention within seven days from the date of this Judgment and work with the registry in determining a suitable hearing date; and (b) file, within 14 days from the date of this Judgment, succinct written submissions on costs limited to 15 pages each (inclusive of any relevant annexes).

Chan Seng Onn
Judge of the High Court

Lee Hwee Khiam Anthony and Huineng Clement Chen (Bih Li & Lee LLP) for the plaintiff;
Siraj Omar *SC*, Allister Brendan Tan, Teng Po Yew, Joelle Tan (Drew & Napier LLC) for the defendants.

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