IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 72

Civil Appeal No 196 of 2019

Between

(1) How Weng Fan
(2) How Weng Fan (Personal representative of the estate of Danny Loh Chong Meng, deceased, in his personal capacity and trading as FM Solutions & Integrated Services)
(3) FM Solutions & Services Pte Ltd

… *Appellants*

And

Sengkang Town Council

… *Respondent*

Civil Appeal No 197 of 2019

Between

(1) How Weng Fan
(2) How Weng Fan (Personal representative of the estate of Danny Loh Chong Meng, deceased, in his personal capacity and trading as FM Solutions & Integrated Services)
(3) FM Solutions & Services Pte Ltd

… *Appellants*

And

Aljunied-Hougang Town Council

… *Respondent*

Civil Appeal No 198 of 2019

Between

(1) Sylvia Lim Swee Lian
(2) Low Thia Khiang
(3) Pritam Singh
(4) Chua Zhi Hon
(5) Kenneth Foo Seck Guan

… *Appellants*

And

Sengkang Town Council

… *Respondent*

Civil Appeal No 199 of 2019

Between

(1) Sylvia Lim Swee Lian
(2) Low Thia Khiang
(3) Pritam Singh
(4) Chua Zhi Hon
(5) Kenneth Foo Seck Guan

… *Appellants*

And

Aljunied-Hougang Town Council

… *Respondent*

Civil Appeal No 200 of 2019

Between

Sengkang Town Council

… *Appellant*

And

(1) Sylvia Lim Swee Lian
(2) Low Thia Khiang
(3) How Weng Fan
(4) How Weng Fan (Personal representative of the estate of Danny Loh Chong Meng, deceased, in his personal capacity and trading as FM Solutions & Integrated Services)

… *Respondents*

In the matter of Suit Nos 668 and 716 of 2017

Between

Aljunied-Hougang Town Council

… *Plaintiff in Suit No 668 of 2017*

Pasir Ris-Punggol Town Council

… *Plaintiff in Suit No 716 of 2017*

And

(1) Sylvia Lim Swee Lian
(2) Low Thia Khiang
(3) Pritam Singh
(4) Chua Zhi Hon
(5) Kenneth Foo Seck Guan
(6) How Weng Fan

(7) How Weng Fan (Personal representative of the estate of Danny Loh Chong Meng, deceased, in his personal capacity and trading as FM Solutions & Integrated Services)
(8) FM Solutions & Services Pte Ltd

… *Defendants*

JUDGMENT

[Equity — Fiduciary relationships — Duties]
[Equity — Fiduciary relationships — When arising]
[Trusts — Accessory liability]
[Trusts — Recipient liability]
[Tort — Negligence — Duty of care]
[Tort — Breach of statutory duty — Duties imposed by statute]
[Statutory Interpretation — Construction of statute]

How Weng Fan and others
v
Sengkang Town Council and other appeals

[2022] SGCA 72

Court of Appeal — Civil Appeals Nos 196, 197, 198, 199 and 200 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Tay Yong Kwang JCA and Woo Bih Li JAD
25 February 2021

9 November 2022 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 These appeals raise the important question of whether a public servant exercising statutory duties under public law is also subject to duties under private law (specifically, fiduciary and equitable duties). It is alleged and was found in the court below that fiduciary and equitable duties are owed and were breached by the members (both elected and appointed) and senior employees of Aljunied-Hougang Town Council ("AHTC") and entities associated with the latter from 2011 to 2015. Within this period, AHTC was reconstituted as Aljunied-Hougang-Punggol East Town Council ("AHPETC") from 22 February 2013 to 30 September 2015 to include the Single Member Constituency ("SMC") of Punggol East ("Punggol East SMC"). On 1 October 2015, AHPETC was reconstituted as AHTC while Punggol East SMC was

reconstituted to come under Pasir Ris-Punggol Town Council ("PRPTC"). With effect from 1 December 2015, all the properties, assets and liabilities in respect of Punggol East SMC were transferred to PRPTC. On 28 October 2020, all the assets and liabilities of PRPTC were transferred to Sengkang Town Council ("STC"), and it is on this basis that STC replaced PRPTC as a party in these appeals. We will elaborate on these developments later.

2 Town Councils were established as a feature of local administration and housing estate management in 1989. Since then, they have come to perform an integral and essential public role for their residents. Town Councils are charged with the responsibility to control, manage, maintain and improve the common property of our public housing estates. Town Councils, being creatures of statute, are unique public bodies corporate incorporated pursuant to the Town Councils Act (Cap 329A, 2000 Rev Ed) (the "TCA"). A host of subsidiary legislation has also been enacted under the TCA, chief amongst which and relevant for present purposes is the Town Councils Financial Rules (Cap 329A, R 1, 1998 Rev Ed) (the "TCFR"). The TCA, supplemented by the TCFR, collectively provide the legislative framework for the financial management of Town Councils.

3 Before the present suits were filed, this court had occasion to address a number of related issues that arose out of the same underlying factual context in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 ("*AG v AHPETC*"). We held there that, if a Town Council fails to act in accordance with the applicable principles and guidelines set out in the TCA and TCFR, the Housing and Development Board ("HDB") may apply for relief under s 21(2) of the TCA to compel the Town Council to perform the duties arising under the TCA and/or the TCFR that it had failed to carry out. In *AG v AHPETC*, it was not disputed that there were various breaches of these

duties. However, it was unclear whether all the potential breaches had been uncovered and whether those that had been uncovered remained unresolved. We therefore ordered the then-constituted AHPETC to, among other things, appoint an accountant to assist in identifying any remaining breaches and to advise on the steps that should be taken in order to remedy the breaches that remained outstanding.

4 *AG v AHPETC* thus concerned the question of how a Town Council, as a *public body*, may be compelled by a *statutory mechanism* to carry out its *statutory duties*. However, as a Town Council is a body corporate run by individual persons, the question facing this court is whether the Town Council's members and senior employees can be made *personally liable* for the Town Council's breaches of its *statutory duties* under the TCA and the TCFR. This was the question that was raised before the High Court judge (the "Judge"). In *Aljunied-Hougang Town Council and another v Lim Swee Lian Sylvia and others and another suit* [2019] SGHC 241 (the "Judgment"), the Judge found several current and former Town Council members liable for various breaches of fiduciary duties and equitable duties of skill and care owed to AHTC between 2011 and 2015 (including when it was reconstituted as AHPETC from 22 February 2013 to 30 September 2015).

5 It is undisputed that there were a number of accounting and governance lapses, which were the focus in *AG v AHPETC*, constituting breaches of the TCA and the TCFR by the relevant Town Council. But the present appeals raise a *distinct* legal question: are the members and senior employees of a Town Council subject to *fiduciary, equitable and/or tortious* duties when they act on behalf of a Town Council to carry out the *statutory* duties that are imposed on it by the TCA and TCFR? A fiduciary obligation is an *equitable* and *exacting* duty. As a result, fiduciary duties are not readily imposed. The imposition of

fiduciary duties on public officers exercising statutory duties gives rise to a range of interrelated issues, including the question of whether the Town Council's members and senior employees are subject to any other private legal duties (such as tortious duties), and the proper interpretation and effect of a statutory immunity clause affording public officers protection from personal liability (in this case, s 52 of the TCA). This case thus presents us with the opportunity to clarify the law in this area where public and private law intersect. We will consider these issues in this judgment.

6 Given the number of issues involved in the present judgment, it is helpful to set out a table of contents for reference:

The parties and persons involved

The plaintiffs

7 The Judge heard HC/S 668/2017 ("Suit 668") and HC/S 716/2017 ("Suit 716") (collectively, the "Suits") together. The Suits were not consolidated but were ordered to be tried together at the same time. The trial was bifurcated and the Judgment was concerned only with the liability of the defendants. The plaintiff in Suit 668 was AHTC while the plaintiff in Suit 716 was originally PRPTC (later replaced by STC for the purposes of the present appeals).

8 The plaintiffs have evolved in the course of the time covered by the events leading to the Suits. It will therefore be helpful for us to trace their development.

9 On 7 May 2011, the 2011 General Elections (the "2011 GE") took place. Prior to the 2011 GE, Aljunied Town Council ("ATC") and Hougang Town Council ("HTC") were managed by Town Council members from the People's Action Party ("PAP") and the Workers' Party ("WP") respectively. In the 2011 GE, candidates from the WP were elected to the electoral division of the Aljunied Group Representation Constituency ("GRC"), as well as to the Hougang SMC as Members of Parliament ("MPs"). This was the first time in Singapore's history that a political party other than the ruling PAP had been elected as MPs for a GRC. The candidates elected were:

(a) for Aljunied GRC, Mr Low Thia Khiang ("Mr Low"), Ms Sylvia Lim ("Ms Lim"), Mr Chen Show Mao ("Mr Chen"), Mr Pritam Singh ("Mr Singh") and Mr Muhamad Faisal bin Abdul Manap ("Mr Faisal"); and

(b) for Hougang SMC, Mr Yaw Shin Leong ("Mr Yaw").

10 On 27 May 2011, pursuant to the Town Councils (Declaration of Towns) Order 2011 (S 263/2011), ATC and HTC merged to form AHTC. On 26 May 2012, a by-election for Hougang SMC was held and Mr Yaw was replaced by Mr Png Eng Huat ("Mr Png"), also from the WP. On 26 January 2013, another candidate from the WP, Ms Lee Li Lian, was elected as the MP for the constituency of Punggol East SMC in a by-election. With effect from 22 February 2013, AHTC was reconstituted as AHPETC to include Punggol East SMC, pursuant to the Town Councils (Declaration of Towns) (Amendment) Order 2013 (S 97/2013).

11 On 11 September 2015, following the 2015 General Elections (the "2015 GE"), the candidate from the PAP, Mr Charles Chong, was elected in place of Ms Lee Li Lian as the MP for the constituency of Punggol East SMC. Consequently, on 1 October 2015, AHPETC was yet again reconstituted as AHTC while the Punggol East SMC was reconstituted as part of PRPTC, pursuant to the Town Councils (Declaration of Towns) Order 2015 (S 577/2015). Pursuant to this Order, AHPETC also transferred all the property, assets and liabilities in respect of Punggol East SMC to PRPTC with effect from 1 December 2015. As a result, any rights or causes of action that related to the transferred undertaking of Punggol East SMC could be enforced by or against PRPTC. It was on this basis that PRPTC commenced Suit 716. However, as we have mentioned and will elaborate later, all the assets and liabilities of PRPTC were transferred to STC on 28 October 2020. A tabular representation of the changes over the years may be depicted as follows:

27 May 2011 to 21 February 2013	22 February 2013 to 30 September 2015	1 October 2015 to date
AHTC	AHPETC	AHTC and PRPTC (and then STC)

12 In this judgment, for ease of reference, we shall refer to AHTC, AHPETC, PRPTC and STC from 27 May 2011 simply as "AHTC" unless there is a reason to distinguish between any of these parties. We will refer to AHTC and PRPTC/STC collectively as the "Plaintiffs".

The defendants

13 Section 8(1) of the TCA provides that a Town Council shall consist of both *elected* members and *appointed* members. An elected member is defined under s 2(1) of the TCA as an MP for any constituency comprised within the town for which the Town Council is established; in other words, an elected MP becomes a member of the Town Council by virtue of his or her election to Parliament. One of these elected members is then appointed and designated as Chairman of the Town Council. By contrast, an appointed member is defined in s 2(1) of the TCA as a person who has been appointed by the Chairman of the Town Council. Section 8(3) of the TCA requires that each Town Council should have a minimum of six appointed members.

14 The Plaintiffs commenced the Suits against several of AHTC's former and current Town Council members (both elected and appointed), as well as against some of its senior employees and entities associated with the latter. They were as follows:

Elected members

(a) Ms Lim, the first defendant in the Suits, was an elected member and was appointed Chairman from June 2011 to August 2015, and subsequently continued as Vice-Chairman from October 2015 onwards.

(b) Mr Low, the second defendant in the Suits, was an elected member and was appointed as Vice-Chairman from June 2011 to July 2012.

(c) Mr Singh, the third defendant in the Suits, was an elected member and was appointed as Vice-Chairman from August 2012 to August 2015. The first to third defendants were re-elected in the 2015 GE that was held on 11 September 2015, and Mr Singh subsequently took over as Chairman from October 2015 onwards.

Appointed members

(d) Mr Chua Zhi Hon ("Mr Chua") and Mr Kenneth Foo Seck Guan ("Mr Foo"), the fourth and fifth defendants in the Suits respectively, were both appointed as Town Council members on 27 May 2011. Mr Chua subsequently stepped down as a Town Council member on 1 December 2016.

Senior employees

(e) Ms How Weng Fan ("Ms How"), the sixth defendant in the Suits, was the Deputy Secretary from 9 June 2011 to 14 July 2015, and also its General Manager from 1 August 2011 to 14 July 2015. In addition, Ms How was previously HTC's Estate Manager, General Manager, and Secretary from 1991 to 2011. Ms How was married to Mr Danny Loh Chong Meng ("Mr Loh"). Following Mr Loh's demise on 27 June 2015, Ms How has been the personal representative of his estate.

(f) Mr Loh, the seventh defendant in the Suits, was Secretary from 1 August 2011 to 31 May 2015. Mr Loh was also the sole proprietor of FM Solutions & Integrated Services ("FMSI"), which was registered on 4 August 2004 and subsequently ceased trading on 4 August 2015.

FM Solutions & Services Pte Ltd

(g) FM Solutions & Services Pte Ltd ("FMSS"), the eighth defendant in the Suits, was incorporated on 15 May 2011 with Mr Loh as its sole director and shareholder. Ms How was appointed a director of FMSS on 16 June 2011. After a shareholder restructuring on 17 June 2011, Mr Loh and Ms How held 50% and 20% of the shares in FMSS respectively, while three other shareholders each held 10% of the shares in FMSS. They were Mr Yeo Soon Fei ("Mr Yeo"), Mr Vincent Koh ("Mr Koh"), and Mr Chng Jong Ling ("Mr Chng"). The shareholdings of FMSS changed over time, and by 8 May 2013, one Mr Lieow Chong Sern ("Mr Lieow") came to hold 10% of the shares in FMSS as well. All these persons were employees in AHTC at the material time, as outlined below along with some of the aforementioned changes in shareholdings:

(i) Mr Yeo was Operations Manager from 1 August 2011 to July 2012 and was Deputy General Manager thereafter until 14 July 2015.

(ii) Mr Koh was Deputy General Manager from 1 August 2011 to 30 June 2012 and served in the same capacity from 4 May 2015 onwards. He also served concurrently as Secretary of AHTC from 1 June 2015 onwards. Mr Koh, however, ceased to be a shareholder of FMSS on 23 July 2012.

(iii) Mr Chng was Finance Manager from 1 August 2011 to 8 December 2011. Mr Chng ceased to be a shareholder of FMSS on 21 February 2013.

(iv) Mr Lieow was Property Manager from 1 August 2011 to July 2012 and thereafter served as AHTC's Deputy General Manager up until 14 July 2015.

15 In addition, Ms Lim, Mr Singh, Mr Chua and Mr Foo were also part of the Tenders and Contracts Committee of AHTC (the "Tenders Committee"). The Tenders Committee was responsible for vetting the terms of tenders called by AHTC, evaluating any tenders received and deciding on the award of tenders. Mr Singh was the Chairman of the Tenders Committee.

16 We use the term "Town Councillors" to refer collectively to the first to fifth defendants in the Suits, meaning both the elected members (Ms Lim, Mr Low and Mr Singh) and appointed members (Mr Chua and Mr Foo) of AHTC. We shall refer to Ms How and Mr Loh collectively as the "Employees".

Where appropriate, we shall refer to the Town Councillors, the Employees and FMSS collectively as the "Defendants".

Dramatis personae

17 To summarise, the parties who were involved in this matter are as follows:

(a) The plaintiff in Suit 668 and respondent in CA/CA 197/2019 ("CA 197") and CA/CA 199/2019 ("CA 199") is AHTC.

(b) After replacing PRPTC, which was the plaintiff in Suit 716, STC is now the respondent in CA/CA 196/2019 ("CA 196") and CA/CA 198/2019 ("CA 198"), and the appellant in CA/CA 200/2019 ("CA 200").

(c) The first to third defendants in the Suits – Ms Lim, Mr Low, and Mr Singh respectively – were the elected members of AHTC. The fourth and fifth defendants in the Suits – Mr Chua and Mr Foo – were appointed members of AHTC. The first to fifth defendants are the appellants in CA 198 and CA 199. Ms Lim and Mr Low are also the first and second respondents in CA 200.

(d) The sixth and seventh defendants in the Suits – Ms How and Mr Loh – were senior employees of AHTC. As Mr Loh was deceased at the time of the commencement of the Suits, he was represented in these proceedings by his wife, Ms How, as the personal representative of his estate. The eighth defendant in the Suits is FMSS. The sixth to eighth defendants are the appellants in CA 196 and CA 197, and the sixth and seventh defendants are also the third and fourth respondents in CA 200.

For ease of reference, we provide a table outlining the parties involved in the Suits below as well as respective appeals in the Annex appended at the end of this judgment.

18 We will outline the scope of the respective appeals at [109] below.

The claims in the Suits

19 In this section, we set out a very brief overview of the factual background. We shall set out our detailed analysis of the correspondence and evidence later in the judgment as it becomes relevant.

20 The Plaintiffs commenced the Suits, which broadly centred on three main areas of contention:

(a) The first set of claims concerns the award of four contracts for Managing Agent ("MA") and Essential Maintenance Service Unit ("EMSU") services to FMSS (collectively, the "Contracts").

(b) The second set of claims concerns the process by which payments were approved and made to FMSS and Mr Loh (trading as FMSI), as well as specific payments made to FMSS under the Contracts.

(c) The third set of claims concerns the award of contracts to various third-party contractors.

Pleadings: Duties owed

21 The Plaintiffs pleaded that the following duties were owed to AHTC.

(a) The Town Councillors were fiduciaries of AHTC and each of them owed, among others, the following fiduciary duties to AHTC:

(i) a duty of loyalty and fidelity;

(ii) a duty to act honestly and in good faith in the best interests of AHTC and for proper purposes at all material times, and not for any personal, collateral or other improper purpose;

(iii) a duty to avoid placing oneself in a position where there was a conflict, or potential conflict, between one's loyalty and duty to AHTC, on one hand, and one's personal interest or the interest of a third party, on the other hand;

(iv) a duty to declare to AHTC if one held any office or possessed any property which placed oneself in a position of actual or potential conflict of interest between one's duties owed to AHTC and one's personal interests and/or duties owed to third parties;

(v) a duty not to make a profit from one's appointment other than through the legitimate emoluments payable to the Town Councillor; and

(vi) the duty to diligently exercise reasonable care and skill in the exercise of their powers and in the discharge of their responsibilities.

(b) AHTC pleaded that Mr Loh and Ms How were fiduciaries of AHTC as they were, respectively, the Secretary and Deputy Secretary of AHTC, and that they each owed the same fiduciary duties to AHTC as the Town Councillors (see [21(a)] above).

(c) AHTC pleaded that the Town Councillors and the Employees "each owed concomitant duties of care to AHTC under the common law

tort of negligence". PRPTC pleaded that they owed "[d]uties of care and skill in tort".

(d) PRPTC also pleaded that the Town Councillors owed the following statutory duties arising from the TCA and the TCFR:

(i) the duty to do all things necessary to ensure that all payments out of AHTC's and later AHPETC's moneys were correctly made and properly authorised and that adequate control was maintained over the assets of, or in custody of, AHTC and later AHPETC and over the expenditure incurred by AHTC and later AHPETC;

(ii) the duty to look into past payments made to third parties to ascertain whether they had been properly made or were duly authorised and, if not, to take steps to recover such payments; and

(iii) the duty to comply with the provisions of the TCA and TCFR.

(e) AHTC pleaded that the following "expressions in the statutes set out duties and obligations consistent with those undertaken by fiduciaries":

(i) s 15 of the TCA, which obliges a Town Councillor to disclose the nature of his interest at a meeting of the Town Council;

(ii) r 42 of the TCFR, which prohibits lending to "any member, officer or employee of the Town Council"; and

(iii) r 74(19A) of the TCFR, which prohibits the acceptance of the non-lowest priced tender if a Town Councillor has "any interest in the supplier of the stores, services or works in respect of which the acceptance of such tender or the waiver is sought".

Claims regarding the award of the MA and the EMSU contracts

The Contracts

22 MA services involve the management of a Town Council and include a wide range of services such as the supervision of contractors, responding and attending to residents' queries and transactions, and liaising with authorities for renewal of licences. The EMSU is a 24-hour service provided by Town Councils to attend to residents' maintenance and emergency requests.

23 The Contracts comprise two contracts for MA services and two contracts for EMSU services:

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

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

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

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

24 In addition to the Contracts, Mr Loh, trading as FMSI, also provided EMSU services to HTC (and subsequently AHTC) under a contract that was in

place from 15 October 2007 to 14 October 2014 (the "FMSI EMSU Contract"). The FMSI EMSU Contract was entered into by HTC prior to the 2011 GE, and was subsequently assigned to AHTC following the amalgamation of HTC and ATC (see [10] above). Thereafter, services were rendered pursuant to the FMSI EMSU Contract for residents of the Hougang precinct, which was under the management of AHTC.

25 Prior to the Contracts, MA and EMSU services for ATC (and briefly for AHTC after the 2011 GE) were provided by CPG Facilities Management Pte Ltd ("CPG") and EM Services Pte Ltd ("EM Services"). The details of these contracts were as follows:

(a) CPG provided MA services to ATC (or AHTC, as the case may be) under a contract dated 8 June 2010 covering the period that commenced on 1 August 2010 and that was, at the material time, due to expire on 31 July 2013, with an option exercisable at the sole discretion of AHTC to extend the contract for a further period of three years (the "CPG MA Contract").

(b) CPG also provided EMSU services to ATC (or AHTC, as the case may be), with the exception of the Kaki Bukit precinct and the estates covered by the FMSI EMSU Contract. The EMSU services for the Kaki Bukit precinct were provided by EM Services under a separate contract. Both CPG's and EM Services' contracts for the EMSU services were due to expire on 30 September 2011.

26 These contracts form an important backdrop to AHTC's subsequent decision to award the contracts for the provision of MA and EMSU services to FMSS. Of particular note here is Mr Jeffrey Chua, who was CPG's Managing Director and its key representative dealing with AHTC at the material time. Mr

Jeffrey Chua had previously served as ATC's Secretary and General Manager. After the 2011 GE, he served as AHTC's General Manager from May 2011 to August 2011, and as AHTC's Secretary from June 2011 to July 2011.

The waiver of tender for the first contract for MA services

27 The first act sought to be impugned by the Plaintiffs concerns AHTC's waiver of the requirement to call tenders for the first contracts for the provision of MA and EMSU services to AHTC, resulting in the award of the First MA Contract and the First EMSU Contract to FMSS. The tender for the contract for MA services was waived under the following circumstances.

28 On 9 May 2011, two days after the 2011 GE, the Ministry of National Development ("MND") wrote to all newly elected MPs, informing them that the TCA provided that the "reconstituted Town Councils [would] assume responsibility for the new areas under their charge with effect from 1 August 2011". For present purposes, this meant that the soon-to-be constituted, WP-led AHTC had to be operational by 1 August 2011. On the same day, Mr Low e-mailed Ms Lim, Mr Singh, Mr Faisal and Mr Chen (and copying Mr Yaw and Ms How), following a discussion they had the same morning, setting out their plans to merge HTC with ATC; to "appoint [a] managing agent to manage the town instead of self management"; and noting that Ms Lim had been chosen among the elected members to be Chairman of AHTC (the "9 May 2011 E-mail").

29 On 13 May 2011, one "T T Tan", who claimed to have some access to CPG's plans with respect to the management of the reconstituted Town Council, wrote to Mr Low, conveying his belief that CPG allegedly intended to cease providing to the reconstituted Town Council the services which it had until then been providing to ATC.

30 On 15 May 2011, Mr Loh incorporated FMSS. On 27 May 2011, AHTC was gazetted (see [10] above).

31 On 30 May 2011, an informal meeting took place, at which the elected members of AHTC, Ms How, and representatives from CPG comprising Mr Jeffrey Chua, then-Secretary of ATC, his personal assistant Ms Pan Wanjing, and the Deputy General Manager of ATC, Mr Seng Joo How, were present (the "30 May 2011 Meeting"). This was a critical meeting and it is undisputed that at this meeting, the CPG representatives orally confirmed that CPG did not wish to serve as MA for AHTC and sought to be released from the CPG MA Contract. This was in advance of the contractual expiry date of 31 July 2013 under the CPG MA Contract (see [2525(a)] above). The Judge found that the correspondence from 9 May 2011 to 30 May 2011 between the Town Councillors and Ms How showed that the Town Councillors had decided early on to replace CPG with FMSS as the MA for AHTC, even though CPG only formally communicated its withdrawal from the CPG MA Contract at the 30 May 2011 Meeting. We will examine the correspondence in detail below.

32 On 2 June 2011, Ms Lim, Mr Low and Mr Faisal met Mr Loh. Mr Loh made a presentation, on behalf of FMSS, relating to the provision of MA and EMSU services to AHTC.

33 The first AHTC meeting was held on 9 June 2011 (the "First Town Council Meeting"). It was attended by all the elected members of AHTC, along with Ms How, Mr Chua, Mr Foo and several representatives from CPG, including Mr Jeffrey Chua. The meeting minutes recorded the following:

(a) In respect of MA services, Mr Jeffrey Chua reported that CPG would facilitate a handover by 1 August 2011 and the parties would sign a deed of mutual release and termination on the same date.

(b) In respect of EMSU services, Mr Jeffrey Chua informed that CPG would provide the services for AHTC up to the end of the contract on 30 September 2011. For the Kaki Bukit precinct, EM Services would continue to provide the services until 30 September 2011.

34 On 15 June 2011, Mr Loh, in his capacity as Managing Director of FMSS, wrote to Ms Lim attaching a draft letter of intent for the appointment of FMSS as the MA for AHTC (the "LOI"). The LOI stated that:

(a) FMSS would "take-over the management of the former [ATC] on 15 July 2011 at the prevailing [MA's] fees and fees structure as per the existing [MA] contract between [ATC] and [CPG] made on 8 June 2010".

(b) FMSS would also "take-over all the existing staff of the former [HTC] at their existing salary and terms of appointment on 15 [July] 2011 for preparation of takeover".

(c) FMSS's "scope of work for [AHTC] shall follow the specifications stipulated under the [MA's] contract of the former [ATC]".

(d) FMSS's "appointment shall be for a period of one year with effect from 15 July 2011 to enable the Town Council to call for a tender of the [MA] contract".

35 The terms in the LOI broadly tracked the proposed terms that were canvassed in the course of Mr Loh's presentation on 2 June 2011 (see [32] above). On 6 July 2011, Ms Lim e-mailed the rest of the elected members, attaching a copy of the LOI and intimating her intention to sign the same.

36 The LOI was signed on behalf of AHTC by Ms Lim on 8 July 2011 and Mr Yaw on 18 July 2011. This was the basis of the First MA Contract. On 3 August 2011, the day before the rescheduled second AHTC meeting (the "Second Town Council Meeting"), Ms Lim forwarded to Mr Low and Mr Yaw a draft report and recommendation to be presented at the meeting (the "MA Appointment Report"). The MA Appointment Report sought AHTC's approval (a) to waive the calling of a tender for MA services from 15 July 2011 to 14 July 2012 in view of the urgent need to secure the services and the manifest necessity to do so in the public interest, and (b) to appoint FMSS as the MA for AHTC from 15 July 2011 to 14 July 2012. Ms Lim also copied Mr Loh and Ms How in that e-mail and sought their "comments on whether it will pass the auditors' eyes – esp re waiver of tender". Both Mr Yaw and Mr Low responded, commenting on the need to disclose the fact that Ms How and Mr Loh were married.

37 The Second Town Council Meeting was held on 4 August 2011. All the elected members, save for Mr Faisal, were present as were Mr Foo, Ms How and Mr Loh. Ms How and Mr Loh were present as representatives of FMSS. At this meeting, Mr Loh made a presentation on behalf of FMSS, as to its proposal for the provision of MA services to AHTC. After the presentation, Mr Loh and Ms How were excused from the meeting to facilitate a discussion amongst the members of AHTC. The minutes recorded the following:

(a) AHTC's members noted that CPG "had indicated their desire to be released from the agreement as soon as practicable". They further noted that, "*[g]iven the tight time frame* and urgency, there was no time to call any tender for [MA] services which would take several weeks away from critical preparation time", so that "[i]t was in the public interest that the calling of a tender be waived" [emphasis added].

(b) Ms Lim had consulted the elected members and signed the LOI earlier in June 2011 "to facilitate preparation works".

(c) The "Council was then requested to waive the calling of a tender for [MA] services and to make the official appointment of [FMSS] for a one year period commencing 15 July 2011, after which a tender would be called".

(d) Ms Lim informed that she had appointed Mr Loh as Secretary of AHTC with effect from 1 August 2011 and sought AHTC's ratification of this appointment.

(e) After this discussion, Mr Loh and Ms How were invited back into the meeting and were informed of AHTC's decision to award the First MA Contract to FMSS as well as to waive the calling of a tender for the MA services for a period of one year.

(f) Mr Loh declared to the meeting that he was the Managing Director of FMSS and that Ms How was a Director/General Manager of FMSS. The meeting "noted the … declaration of interest" and "agreed to ratify the appointment of Mr Danny Loh as the Secretary". Mr Loh thus took over this position from Mr Jeffrey Chua. Ms How, who had

already been appointed as Deputy Secretary of AHTC (with effect from 8 June 2011), remained in the same appointment.

38 On 5 August 2011, AHTC released a media statement announcing the appointment of FMSS as the MA as well as AHTC's decision to waive the tender for the initial period (the "Media Statement"). The decision not to call a tender for MA services was explained on the basis of the "urgency of the timelines …, and the overriding concern that Town Council services *should not be disrupted to the detriment" of the residents* [emphasis added], and that there was "insufficient time" to do so. The Media Statement also stated that "[n]o Workers' Party member has any interest in FMSS", and that "AHTC [did] not incur additional MA fees from appointing FMSS as FMSS has agreed to assume the scope of works and pricing of the former MA [for ATC]".

39 On 11 August 2011, AHTC and CPG entered into a deed of mutual release with effect from 1 August 2011, which stated that "*both parties* [were] desirous to be released and discharged from the further performance" of the CPG MA Contract and that "they ha[d] *mutually agreed* to release and discharge each other" from further performance of the same [emphasis added]. At this point in time, CPG was still the contractor for the provision of EMSU services to AHTC (with the exception of the Kaki Bukit precinct (see [33(b)] above)), as the existing contract was only due to expire on 30 September 2011.

The waiver of tender for the first contract for EMSU services

40 On 26 August 2011, Ms How, as General Manager of AHTC, wrote to:

(a) Mr Jeffrey Chua to request an extension of CPG's existing contract to provide EMSU services to AHTC that was set to expire on

30 September 2011 "for another 6 months for the period 1 October 2011 to 31 March 2012 on the same terms and conditions"; and

(b) EM Services, the provider of EMSU services for the Kaki Bukit precinct (see [25(b)] above), seeking an extension of the contract for provision of EMSU services for the same period up to 31 March 2012. On 7 September 2011, EM Services declined the request and indicated that the contract would therefore end on 30 September 2011.

41 On 8 September 2011, the third AHTC meeting was held (the "Third Town Council Meeting") with all the Town Councillors, except Mr Singh, present. Mr Loh and Ms How were also in attendance as representatives of FMSS, along with Mr Koh and Mr Chng. At the meeting, FMSS reported that the incumbent EMSU service providers, CPG and EM Services, had contracts that would be expiring on 30 September 2011 (see [25(b)] above). The minutes of the meeting recorded the following:

(a) CPG "had indicated interest to renew for a further period of 6 months" but had yet to confirm officially "in writing on the proposed extension despite several reminders". EM Services was not agreeable to the proposed extension.

(b) The meeting noted "the lack of EMSU service providers in the market that would be willing to prov*ide their services to [AHTC]*" and that they therefore needed to consider FMSS's proposal to also "provide the EMSU services *in case [CPG] decided not to extend*" [emphasis added].

(c) In view of the short time frame and anticipating difficulties with securing the continuation of the incumbent EMSU service providers, the

meeting thus decided to appoint a committee comprising Ms Lim, Mr Chen, Mr Faisal and Mr Anthony Teo (the "EMSU Committee") as required under r 76(4) of the TCFR to enable AHTC to consider a proposal from FMSS.

42 On 14 September 2011, following a telephone conversation on the same morning, Mr Jeffrey Chua, in response to Ms How's e-mail (see [40(a)] above), confirmed that CPG was *not* willing to extend the contract beyond its expiry on 30 September 2011. He stated in that correspondence that it would "*not be appropriate* for [them] to continue providing the EMSU services to your Town Council when the current extended contract ends on 30 Sept 2011" [emphasis added] and informed Ms How that AHTC "may wish to explore other avenues to render these services to [its] residents".

43 On 16 September 2011, Ms Lim conveyed these developments to the other elected members of AHTC and stated her belief that CPG "ha[d] been 'spoken to' about not helping [them] and ha[d] made a business decision". Thus, Ms Lim stated that they "*must make immediate provision* to have continuity of EMSU services beyond 30 Sep for all Divs in Aljunied GRC" [emphasis added].

44 The first meeting of the EMSU Committee, formed at the Third Town Council Meeting (see [4141(c)] above), was held on 18 September 2011 (the "EMSU Meeting").

(a) At that meeting, the EMSU Committee compared the EMSU contracts of some of the existing providers of EMSU services in the market, which included CPG and EM Services.

(b) The EMSU Committee also considered that there were some advantages in awarding the MA contract and the EMSU contract at the

same time and for the same period, such as "having a clean decision and not feeling obliged to award the MA contract to the existing EMSU contractor".

(c) The EMSU Committee determined that it was necessary to come to an interim solution. It therefore recommended that the EMSU contract be awarded to FMSS for an initial period of nine months from 1 October 2011 to 30 June 2012. In the EMSU Committee's view, tenders for the subsequent MA and EMSU contracts could then subsequently "be called at about the same time".

(d) As the existing EMSU contracts were due to expire on 30 September 2011, Ms Lim stated that it would be imperative for AHTC to "make certain decisions by email circulation now, as our next AHTC meeting is only on 13 Oct which is too late".

45 Accordingly, Ms Lim e-mailed all the elected and appointed members of AHTC (including the Town Councillors) on the same day stating that both CPG and EM Services had confirmed that they were unwilling to extend their respective contracts for EMSU services beyond 30 September 2011. Ms Lim described CPG's decision on 14 September 2011 to reject AHTC's request as a "surprise" and one that was "contrary to the verbal agreement that they were willing to extend for 6 months till March 2012" (see [41(a)] above). She further stated that as EMSU was a critical service for the residents, a waiver of tender for EMSU services was required by reason of the urgency. She sought AHTC's approval on two matters: (a) first, to waive the tender for EMSU services from 1 October 2011 to 30 June 2012; and (b) second, to award the contract for EMSU services to FMSS for the same period, following which an open tender would be called. This was unanimously approved by the Town Councillors by

e-mail circulation. The First EMSU Contract was consequently awarded to FMSS.

Award of the Second MA Contract and the Second EMSU Contract

46 The Second MA Contract and the Second EMSU Contract were awarded pursuant to open tenders, but the Plaintiffs nevertheless challenge the awards of these contracts arising from tenders for which FMSS was the *sole* bidder. The circumstances surrounding the award of these contracts were as follows.

47 Another AHTC meeting was held on 8 March 2012. By this time, FMSS's provision of services under the First MA Contract and the First EMSU Contract was due to expire within a few months on 14 July 2012 and 30 June 2012 respectively. Open tenders for the provision of these services were to be called soon. The meeting decided to appoint a committee to vet and approve the documents for both the MA and EMSU tenders. This committee comprised the same members making up the Tenders Committee referred to above at [15] and so for ease of reference, we shall also refer to it also as the Tenders Committee.

48 The next AHTC meeting was held on 12 April 2012. The meeting noted that the Tenders Committee had since met twice and vetted the tender documents and specifications adopted by ATC previously for the appointment of MA and EMSU services. These tender documents would be used for the calling of tenders the next day. The minutes of the meeting also noted that the representatives of FMSS, including Mr Loh and Ms How, had been excused from the meeting during the deliberation on matters pertaining to the tenders. After they were invited back to the meeting, they were informed that AHTC would call for quotations to appoint a firm to audit the process of appointment of the MA.

49 On 13 April 2012, a tender notice for the provision of MA and EMSU services to AHTC, each for a term of three years, was published in The Straits Times. The notice stated that both tenders would close on 4 May 2012.

50 By the time the tenders closed on 4 May 2012, FMSS had submitted a bid for both contracts to provide MA services and EMSU services. In respect of the contract for MA services, three sets of tender documents had been collected (by FMSS, EM Services and CBM Pte Ltd) but only FMSS had submitted a tender. In respect of the contract for EMSU services, two sets of tender documents had been collected but only FMSS had submitted a tender.

51 The next AHTC meeting was held on 10 May 2012. The meeting minutes recorded that by the time of the tender deadline, FMSS had submitted the sole bid for provision of MA and EMSU services to AHTC. In addition, the minutes of the meeting recorded that the Tenders Committee had "appointed M/s RSM Ethos at [a fee of] $6,000 as the firm to audit the process of the appointment of the Managing Agent".

52 On 19 June 2012, Ms Lim e-mailed Ms How and Mr Loh, as FMSS's representatives, asking that they attend a meeting scheduled for 21 June 2012 with the Tenders Committee and be prepared to address questions that the Tenders Committee was likely to raise as to the difference between the pricing under the initial contracts and the pricing proposed in their tender. On the same day, Mr Loh replied to Ms Lim, revising his calculations on FMSS's rates. The revised calculations showed FMSS's proposed rates for 2012 to have increased from $5.96 per equivalent dwelling unit ("EDU") in 2010 to $7.00 per EDU in 2012, representing a 17.28% increase in MA fees.

53 On 21 June 2012, the Tenders Committee convened a meeting to evaluate FMSS's tenders for the provision of MA and EMSU services to AHTC. The Tenders Committee noted that FMSS was the sole tenderer for both sets of services:

> (a) In respect of the tender for MA services, the Tenders Committee observed that compared with the prices tendered in 2010 by CPG, as the former MA for ATC, the rates tendered by FMSS "represented an increase of 17.3% when averaged out over the respective 3-year contract periods" and "expressed concern about the marked increase and its impact on the AHTC". The Tenders Committee thus asked FMSS for justification. In response, Mr Loh showed presentation slides to explain FMSS's pricing strategy and pointed to other costs which FMSS had to bear, including (i) lift testing fees; (ii) additional number of offices requiring more administrative staff; (iii) additional staffing for technicians and the contracts department; and (iv) that as FMSS's business was focused on town management for AHTC, it did not have the same economies of scale as others who may have several towns to manage or have other business arms. Ms How also added that provision of information technology maintenance services was done by FMSS in-house at no extra cost, which provided savings of more than $30,000 per month. Concerned about the impact of the proposed prices on AHTC's bottom-line, and in particular whether the residents' service and conservancy charges would have to be raised, the Tenders Committee asked for a possible three-year projection. Ms How responded that the budget for FY2012 showed a surplus of over $100,000, and that it was "not possible to accurate[ly] project for the next 3 years due to the unpredictable external environment, changing manpower policies and rising costs". The minutes of meeting also reflected that whereas

> FMSS's tender for the Second MA Contract specified project management fees at a rate of 3.5% for the first two years and 4% for the third year, Mr Loh indicated that FMSS was willing to hold the rates at 3.5% for all three years.
>
> (b) In respect of the tender for EMSU services, the Tenders Committee evaluated the price tendered, and noted that compared with the current price being paid by AHTC to FMSS for EMSU services under the First EMSU Contract, there was a proposed increase of 8.5%. The Tenders Committee asked FMSS for its justification. The minutes of meeting recorded that, in response, Mr Loh highlighted that the "price (unit rates) were fixed for the 3 year period (2012 to 2015), with no allowance for annual increases in between" and indicated that "cost and salary increases were expected, especially in the current inflationary environment … and tight manpower situation".

The Tenders Committee subsequently closed the meeting and deferred deliberations to a later date.

54 On 21 July 2012, the Tenders Committee reconvened to evaluate FMSS's tender for the contract to provide MA services. The Tenders Committee asked FMSS to elaborate on why it was not pricing in any reduction in rate for larger projects. In response, Mr Loh stated that different companies had different pricing strategies and since FMSS focused on managing only one town, it did not enjoy the economies of scale in project management enjoyed by other companies.

55 A further AHTC meeting was held on 2 August 2012. The meeting discussed FMSS's tenders for the contracts to provide MA and EMSU services

to AHTC, at which point FMSS's representatives left the meeting. The members of the meeting considered tender evaluation reports submitted by the Tenders Committee and accepted the Tenders Committee's recommendations to award FMSS the Second MA Contract and the Second EMSU Contract at the tendered prices.

56 On 3 and 7 August 2012 respectively, Ms Lim sent letters of acceptance to FMSS, communicating AHTC's acceptance of FMSS's tender for the contract to provide MA services for the period from 15 July 2012 to 14 July 2015, and AHTC's acceptance of FMSS's tender for the contract to provide EMSU services for the period from 1 July 2012 to 30 June 2015. The Second MA Contract and the Second EMSU Contract were awarded to FMSS on those respective dates.

The pleaded breaches

57 The Plaintiffs pleaded that the following breaches of duties occurred arising from the award of the First MA Contract and the First EMSU Contract without tender.

58 They emphasise in their pleadings that r 74(1) of the TCFR provides that "tenders shall be invited for the execution of works or for any single item of stores or services estimated to cost more than $70,000", "[u]nless waived" under r 74(17) of the TCFR. Rules 74(17) and 74(18) provide that:

> **Procedure for tenders**
>
> **74.**— … (17) Tenders may be waived by the Town Council or the chairman as authorised within the limits of his financial authority to incur expenditure where —
>
> > (*a*) the supply of goods or services is known to be only within the capacity of a sole agent or a specialist contractor;

> (*b*) *the urgency of the requirement makes it necessary*; or
>
> (*c*) *it is manifestly necessary in the public interest to do so.*
>
> (18) Waiver of tenders under paragraph (17)(*b*) or (*c*) shall only be used *under very special circumstances and must be fully justified.*
>
> [emphasis added]

59 The Plaintiffs pleaded that there was no urgency to waive the tenders for the first contracts to provide MA and EMSU services, and that such waivers were not fully justified in any event. Consequently, PRPTC pleaded that the Town Councillors and Employees acted in breach of their fiduciary duties, duty of care and skill *qua* fiduciary, and/or their tortious duty of care and skill to AHTC, and also their duties owed under the TCA and the TCFR outlined above at [21]. AHTC made similar claims, except that, regarding the tortious duties, AHTC only made claims against Ms Lim and Mr Low – pleading that Ms Lim and Mr Low breached their duties of care to AHTC by awarding the contracts without tender.

60 As for the Second MA Contract and Second EMSU Contract, these were awarded to FMSS after a tender that was invited by AHTC on 13 April 2012, which was prior to the expiry of the First MA Contract on 14 July 2012. FMSS was the sole tenderer for both contracts. PRPTC pleaded that the Town Councillors and Employees breached the same duties outlined at [21] above by "causing and/or procuring and/or authorising and/or permitting AHTC to enter into" the Second MA Contract and Second EMSU Contract "in the circumstances set out" above where the waiver of tender for the First MA Contract and First EMSU Contract were not justified, and FMSS was the sole tenderer for both the Second MA Contract and the Second EMSU Contract. The *specific reason* as to why this constitutes a breach in relation to the Second MA

Contract and the Second EMSU Contract is not clearly stated in PRPTC's pleadings, though PRPTC developed this in its submissions at the trial below by submitting that the breach arose because the reasons and motives which drove the Town Councillors and the Employees to waive tenders and appoint FMSS under the First MA Contract and First EMSU Contract made FMSS's appointment under the Second MA Contract and Second EMSU Contract a *fait accompli*. It was contended that because the Town Councillors and the Employees had manipulated events in 2011 to oust CPG and install FMSS, it was a foregone conclusion that no other company would take the tender for the Second MA Contract and Second EMSU Contract seriously. Although PRPTC's case was run in this way in its closing submissions at trial, however, PRPTC's case was not explicitly pleaded in these terms.

61 AHTC was even less precise in its pleadings regarding the breaches flowing from the Second MA Contract and the Second EMSU Contract, as AHTC did not make any distinction between the first and second MA and EMSU Contracts. Rather, AHTC pleaded that Ms Lim and Mr Low's entry into and/or authorisation and approval of, or acquiescence in, *all* the MA and EMSU Contracts constituted breaches of their fiduciary duties, without specifying whether there were any differences between the contracts, despite the fact that no tenders were called for the First MA Contract and First EMSU Contract, whereas a tender *was* held for the Second MA Contract and the Second EMSU Contract. In any event, the Judge held that no breaches arose from the Second MA Contract and the Second EMSU Contract, and AHTC and STC have not appealed against this aspect of the Judge's decision.

62 AHTC also pleaded that the Contracts and/or the FMSI EMSU Contract and/or the system set up by the Town Councillors and Employees (the "System") were so tainted by conflicts of interest and/or so contrary to the best

interests of AHTC as to render them incapable of approval by a Town Councillor acting consistently with his or her fiduciary obligations of loyalty and fidelity. Ms Lim's and Mr Low's entry into and/or authorisation and approval of, or acquiescence in, the Contracts and/or the FMSI EMSU Contract and/or the System accordingly constituted breaches of their fiduciary duties as set out above at [21].

Pleaded breaches regarding improper payments made to FMSS and FMSI

63 Next, the Plaintiffs claim that there were various improper payments made to FMSS and FMSI, pursuant to the Contracts as well as the FMSI EMSU Contract. These covered four main areas, namely, (a) the "control failures" in the process that was implemented for AHTC to approve payments to FMSS and FMSI; (b) two particular invoices paid pursuant to the LOI issued to FMSS; (c) the payment of project management fees to FMSS; and (d) a series of other miscellaneous improper payments made to FMSS. Only the first and the last of these are the subject of the present appeals.

64 Regarding the "control failures" in the payment process, the essence of the Plaintiffs' claim here concerns the System set up by the Town Councillors and Employees, under which payments to FMSS for the MA or EMSU Contracts and FMSI would be authorised or made by people in positions of conflict of interest, that is to say, persons who had an interest in FMSS but *concurrently* held positions in AHTC. While there was a standing instruction put in place at the Third Town Council Meeting on 8 September 2011 that required these payments to FMSS to be co-signed by the Chairman (Ms Lim) or Vice-Chairman (Mr Low or Mr Singh) of AHTC (the "Standing Instruction"), this was not a sufficient safeguard, because there was no

independent verification as to whether the works had been adequately carried out prior to payment being authorised.

65 The Plaintiffs' pleadings are not consistent on this issue, and AHTC's pleadings at least appear to us to be narrower than PRPTC's pleadings:

(a) AHTC pleaded that, by awarding the First MA Contract and the Second MA Contract to FMSS and/or by appointing FMSS as the MA of AHTC, Ms Lim and Mr Low had "set up and/or allowed" the System, which was flawed and "which ha[d] effectively enabled [Mr] Loh and [Ms] How to be responsible for certifying work done, approving payments and/or signing cheques to FMSS/FMSI, to benefit themselves from the very same payments".

(b) AHTC pleaded that "the System is inherently flawed" and that "no Town Councillor could have reasonably approved the System, without being in breach of his or her duties". This pleading is a general and loose statement that does not plead any specific breaches by the Town Councillors in relation to the alleged "control failures" in the System, particularly when contrasted with the next pleading by AHTC that we come to immediately below at [65(c)].

(c) AHTC pleaded that Ms Lim and Mr Low's "entry into and/or authorisation and approval of, or acquiescence in, the Contracts and/or the FMSI EMSU Contract and/or the System constituted breaches of their fiduciary duties" [emphasis added]. Ms Lim and Mr Low also breached their fiduciary duties by "[f]ailing to maintain sufficient control over the expenses and payments of AHTC" through the "control failures" in the System.

(d) Critically, regarding the duties of skill and care (whether in equity or in tort), AHTC only pleaded that the Employees "breached their duty of care and skill *qua* fiduciary and/or duty of care and skill in tort to AHTC" by causing AHTC to make payments to FMSS under the flawed System, in the circumstances set out at [418]–[426] below; and/or by failing to disclose to AHTC and/or rectify the flaws in the System and/or the aforementioned breaches of duties. This pleading was a new pleading introduced by an amendment application by AHTC post-trial, HC/SUM 2050/2020 ("SUM 2050"), that was allowed by the Judge (see [110] below). However, AHTC did not explicitly plead that the Town Councillors breached any tortious duties in relation to the "control failures" that allegedly permeated the System. The Judge similarly observed in his oral judgment in SUM 2050 (the "Oral Judgment") that AHTC did not plead that Mr Singh, Mr Chua and Mr Foo were involved in setting up the System:

> It is clear what has *not* been pleaded in Suit 668 is that [Mr Singh, Mr Chua and Mr Foo] had 'approved' and/or 'authorised' the Payment System and the payments that were made thereunder. The allegations in this regard are levelled against [Ms Lim, Mr Low, and the Employees] only. ***There is no allegation that [Mr Singh, Mr Chua and Mr Foo] were involved in setting up the Payment System and processing payments thereunder. ...*** [emphasis in original in italics; emphasis added in bold italics]

66 We agree with the Judge that AHTC did plead that Ms Lim and Mr Low were involved in setting up the System, as highlighted above at [65(a)]. But, there is also no explicit pleading that Ms Lim and Mr Low committed any breaches of *tortious* duties by *implementing* the System. As for the pleading above at [65(b)] that "no Town Councillor could have reasonably approved the System, without being in breach of his or her duties" (which, as we have noted, only makes a loose and general reference to "Town Councillor"), the fact is that

AHTC did not even plead that three of the five Town Councillors – Mr Singh, Mr Chua and Mr Foo – were involved in the setting up of the System. This seems to us to bolster the conclusion that this pleading is a general statement, rather than a statement meant to plead that *all* the Town Councillors breached their duties by instituting the System. On the whole, as it stands, it seems to us that AHTC did not plead that the Town Councillors breached any tortious duties in relation to the "control failures" in the System. We will return to this point below at [455].

67 PRPTC pleaded that all the Town Councillors and Employees committed breaches in relation to the "control failures" in the System. Specifically, PRPTC pleaded that the Town Councillors and Employees breached their duties owed to AHTC between 15 July 2011 and 24 January 2013 by causing AHTC to pay a total of $2,689,434.15 to FMSS pursuant to the Contracts "in circumstances where there was no meaningful oversight by AHTC over those payments and/or where AHTC's funds were exposed to risks of erroneous and/or improper and/or unauthorised payments to FMSS and/or the risk of misappropriation".

68 AHTC also pleaded that Ms Lim and Mr Low further breached their fiduciary duties by waiving the need to get quotations for certain transactions without obtaining the necessary authorisation of the AHTC Chairman; approving and/or acquiescing in the award of contracts pursuant to quotations/tenders which were not the lowest quotations/tenders received, without proper justification and/or evaluation; and failing to maintain sufficient control over the expenses and payments of AHTC.

69 In addition, AHTC pleaded that Ms Lim was an authorised cheque signatory under r 33 of the TCFR for the duration of her appointment as

Chairman of AHTC. AHTC pleaded that Ms Lim "breached her duty of care and skill *qua* fiduciary and/or duty of care and skill in tort to AHTC by failing to conduct proper checks before signing off on cheques in favour of FMSS".

70 It is evident that the foregoing alleged breach stems from AHTC's duty under s 35(*c*) of the then-TCA (which has since been amended by the Town Councils (Amendment) Act 2017 (Act 17 of 2017) with effect from 1 May 2017 and has become ss 35(2)(*c*) and 35(2)(*d*) of the TCA which are in largely similar terms), though the sub-section was neither pleaded nor cited by the Plaintiffs. At the material time, s 35(*c*) provided:

> **Accounts**
>
> **35**. A Town Council shall —
>
> …
>
> (c) *do all things necessary to ensure that all payments out of its moneys are correctly made and properly authorised* and that *adequate control is maintained* over the assets of, or in custody of, the Town Council and over the expenditure incurred by the Town Council.
>
> [emphasis added]

71 Furthermore, under the TCFR, Heads of Department are responsible for the accuracy of vouchers rendered by them or under their authority (r 54); they are to certify that the vouchers are accurate (r 56(3)) and that the services specified therein have been duly performed (r 56(4)(*a*)); and there must also be a certification on the voucher that the payments are in accordance with the terms of the agreement and that the work was properly done (r 61(1)).

Claims regarding the award of miscellaneous contracts to third-party contractors

72 Through the Tenders Committee, several contracts were awarded to third-party contractors. These acts were challenged by the Plaintiffs on the basis that the contracts were awarded at prices significantly higher than those offered by existing contactors or by other contractors who submitted lower bids. We highlight only the third-party contractors that are relevant to these appeals. These contractors were: (a) LST Architects; (b) Red-Power Electrical Engineering Pte Ltd ("Red-Power"); and (c) Titan Facilities Management Pte Ltd ("Titan") and J Keart Alliances Pte Ltd ("J Keart"), the last two of which we deal with together. We summarise the circumstances leading up to the appointments of these third-party contractors below. We note, however, that it is not suggested that there was any relationship between any of the Defendants on the one hand, and any of these third-party contractors on the other.

LST Architects

73 On 31 August 2012, AHTC invited tenders for the appointment of architectural consultants to a panel of consultants (the "Panel of Consultants"). The appointment was to be for a period of three years, for the provision of consultancy services at pre-agreed rates that would be based on the value of the awarded project. AHTC received tenders from LST Architects and Design Metabolists. The tender evaluation report recorded that, for projects valued between $0.5m and $3.66m, LST Architects' prices were lower, whereas Design Metabolists' prices were lower for projects under $0.5m or above $3.66m.

74 On 20 September 2012, a Property Officer of AHTC gave LST Architects and Design Metabolists a performance assessment score of 42 and

41 respectively, suggesting that they were broadly even in terms of performance.

75 On 7 November 2012, the Tenders Committee decided that both tenderers, LST Architects and Design Metabolists, be appointed to the Panel of Consultants. LST Architects and Design Metabolists subsequently entered into agreements with AHTC for the contract period 1 December 2012 to 30 November 2015.

Red-Power

76 Sometime in April 2012, AHTC called for a tender for the maintenance of transfer and booster pumps, automatic refuse chute flushing system and roller shutters. At the material time, AHTC had existing contracts with Digo Corporation Pte Ltd ("Digo") and Terminal 9 Pte Ltd ("Terminal 9") for the provision of such services. These were due to expire soon, though they were extendable at AHTC's option for a maximum of one and two years respectively, at the same rates.

77 On 11 June 2012, AHTC awarded a term contract for the maintenance of transfer and booster pumps, automatic refuse chute flushing system and roller shutters to Red-Power for a period of three years.

78 In addition, Punggol East SMC had a separate contract with EM Services for the same services, which contract could not be extended after its expiry on 31 March 2015. When this expired, AHTC (by then constituted as AHPETC) had in place the contract with Red-Power mentioned in the preceding paragraph, as well as a separate contract with Tong Lee Engineering Works Pte Ltd ("Tong Lee") which covered different precincts of AHTC. It would appear that Tong Lee was not obliged to extend their coverage to include Punggol-East.

79 On 12 December 2014, AHTC sent a letter to Red-Power to confirm that Punggol East would be added to AHTC's existing term contract with Red-Power at the same rates, terms and conditions, with effect from 1 April 2015.

Titan and J Keart

80 In addition, AHTC had contracts for conservancy and cleaning works with Titan and for the servicing and maintenance of fire protection systems with J Keart. Both these contracts were scheduled to expire on 31 March 2015, and contained an option, at AHTC's discretion, to extend them for a further 12 months on the same terms and rates. Instead, AHTC decided to call for fresh tenders for the provision of conservancy and cleaning works, and for the servicing and maintenance of fire protection systems.

81 AHTC received three bids for the provision of conservancy and cleaning works, and a new contract for these works was awarded to the lowest bidder, Titan, for the period 1 April 2015 to 31 March 2018. Similarly, three bids were received for the maintenance of fire protection systems, and a new contract was awarded to the lowest bidder, J Keart, for a period of three years. In other words, new contracts for the same services were awarded to the existing contractors despite the possibility of the existing contracts being extended. It was not disputed that the new contracts entered into with Titan and J Keart were at higher rates than the existing contracts with the same contractors, which could have been extended for a further year. The Plaintiffs challenge the propriety of awarding these new contracts to Titan and J Keart instead of extending the existing contracts at lower rates for at least a year.

Pleaded breaches

82 All the foregoing tenders were called pursuant to r 74(1) of the TCFR (see [58] above). PRPTC highlighted in their pleadings that r 74(13) of the TCFR provides that:

> Tenders received shall be placed before the Town Council, the chairman, or any committee appointed by the Town Council for the purpose, who shall, except as provided under paragraph (15), accept the lowest tender meeting specifications within their respective financial authority under rule 34(1).

83 PRPTC further pleaded that r 74(15) of the TCFR provides that "[t]he Town Council or the chairman, within the financial limit authorised by the Town Council, may for reasons to be disclosed with the acceptance, accept a tender which is not the lowest tender", and r 74(16) provides that "[t]he circumstances and reasons for not accepting the lowest tender which meets the specifications fully or very substantially must be fully justified and shall be recorded and open to scrutiny by the auditor".

84 AHTC pleaded that it had breached r 74(1)) of the TCFR for ten construction projects by failing to invite a tender in respect of each project and/or by failing to accept the lowest tender for each project. AHTC also pleaded that it had breached rr 74(15) and 74(16) of the TCFR when it appointed LST Architects and Design Metabolists to the Panel of Consultants and by awarding contracts for ten projects to LST Architects without calling for a separate tender for each project; and, in respect of seven out of the ten construction projects, awarding the contracts to LST Architects despite Design Metabolists being the lower-priced contractor. Critically, AHTC pleaded that Ms Lim, Mr Singh, Mr Chua and Mr Foo, who were members of the Tenders Committee, breached their duty of care and skill *qua* fiduciary and/or duty of

care and skill in tort to AHTC by causing AHTC to commit the foregoing acts and breaches.

85 Separately, on the basis of the duties under the TCFR as just highlighted above at [82]–[83], PRPTC pleaded that the Town Councillors and Employees breached their duties owed to AHTC by:

(a) causing AHTC to award a contract for the provision of various maintenance services to Red-Power for the period from 1 July 2012 to 30 June 2015 (see [477] below);

(b) causing AHTC to award seven projects to LST Architects instead of Design Metabolists in or around 2012, which caused AHTC to pay $2,794,560 in excess fees, in breach of rr 74(13), 74(15) and 74(16) of the TCFR (see [469] below); and

(c) causing AHTC to award contracts to LST Architects, Red-Power, Titan and J Keart – after various contracts for maintenance services with EM Services, Clean Solutions Pte Ltd, Titan and J Keart expired on 31 March 2015 – without inviting new tenders or exercising options to extend the existing contracts that would have been cheaper.

Summary of claims

86 As Town Councils are creatures of statute, it is important to correctly situate the statutory context and powers relevant to the impugned acts. The claims brought against the Town Councillors and the Employees as just outlined, and the respective duties under the TCA and the TCFR which they stem from or concern, can be summarised as follows:

S/No	Claim	TCA or TCFR duty
1.	Waiver of tender for the contracts for the provision of MA and EMSU services to AHTC	Rules 74(17) and 74(18) of the TCFR
2.	Failure to put in place a process that ensured payments were correctly made to FMSS and FMSI	Section 35(*c*) of the TCA as it then provided (now ss 35(2)(*c*) and 35(2)(*d*) of the TCA)
3.	Payments to FMSS and FMSI that were unsupported by certifications of services performed	Rules 56(3), 56(4) and 61(1) of the TCFR; s 35(*c*) of the then-TCA
4.	Award of contracts to third-party contractors	Rules 74(1), 74(13), 74(15) and 74(16) of the TCFR

The Auditor-General's Report

87 On 10 February 2014, AHPETC submitted to Parliament its audited financial statements for the financial year ending 31 March 2013. On 13 February 2014, the auditing firm engaged by AHPETC, Foo Kon Tan Grant Thornton LLP, submitted an auditor's report dated 4 February 2014 to the Auditor-General. The report contained a disclaimer of opinion stating that the auditors were "not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion", and consequently that they "[did] not express an opinion on the Statement of Financial Position of [AHPETC] as at 31 March 2013 and the income and expenditure statement, statement of comprehensive income, statement of changes in funds and statement of cash flows for the year then ended". This disclaimer of opinion was based on 13 grounds of concern, which included non-compliance with the TCFR provisions governing the transfer of sinking funds, as well as the lack of details supporting project management service fees paid to a party related to AHTC.

88 On 19 February 2014, the Deputy Prime Minister, upon the request of the Minister for National Development, exercised his powers under s 4(4) of the Audit Act (Cap 17, 1999 Rev Ed) (the "Audit Act") and directed the Auditor-General to undertake an audit of AHPETC's financial statements and to examine, among other things, whether all reasonable steps had been taken by AHPETC to ensure compliance with provisions of written law relating to the collection, custody and payment of AHPETC's moneys. The Auditor-General in turn appointed PricewaterhouseCoopers Consulting Pte Ltd ("PwC") to undertake an audit of selected aspects of AHPETC's financial statements. PwC acted on behalf of and under the authority of the Auditor-General in this regard.

89 Just under a year later, on 6 February 2015, the Auditor-General's Office ("AGO") issued its final report, which incorporated PwC's findings (the "AGO Report"). The AGO Report found that "AHPETC had several lapses in governance and compliance with the [TCA] and [TCFR]" and that "[u]nless the weaknesses are addressed, there can be no assurance that AHPETC's financial statements are accurate and reliable and that public funds are properly spent, accounted for and managed". In all, it identified at least 115 areas of non-compliance and areas in which AHPETC was potentially not compliant with s 35(*c*) of the then-TCA, which required a Town Council to do all things necessary to ensure that any payment out of its moneys was correctly made and properly authorised and that adequate control was maintained over the assets belonging to, or in the custody of, the Town Council and over the expenditure incurred by the Town Council. In particular, the AGO Report identified the major lapses to include the following:

(a) AHPETC's failure to make quarterly sinking fund transfers within the specified timeframe in accordance with r 4(2B) of the TCFR;

(b) inadequate oversight of related party transactions involving ownership interests of key officers;

(c) a lack of a system to monitor arrears of conservancy and service charges accurately;

(d) poor internal controls that would risk the loss of valuables, incurring unnecessary expenditure and the making of payments wrongly for goods and services; and

(e) the absence of any proper system to ensure that documents were safeguarded and proper accounts and records were kept as required under the TCA.

AG v AHPETC

90 On 20 March 2015, the MND commenced HC/OS 250/2015 ("OS 250") against AHPETC seeking, among other things, declaratory relief and remedies in respect of the accounting and governance lapses in the running of AHPETC, including the appointment of independent accountants to establish the extent of non-compliance and to oversee remedial measures. On 27 May 2015, the High Court dismissed OS 250 and the MND appealed. Before the appeal was heard, the HDB applied to be joined as a party to the proceedings. The question was which, if any, party (whether the HDB or the MND) had standing to make an application under s 21(2) of the TCA seeking to compel AHPETC's performance of its duties and obligations under the TCA and the TCFR. Such a course was necessitated by the various lapses in its governance and potential breaches under s 35(*c*) of the TCA that had been uncovered in the AGO Report.

91 On 27 November 2015, this court delivered its judgment in *AG v AHPETC*, allowing the appeal in part. This was the precursor to the Suits below.

We allowed the HDB's application to be joined as a party to the proceedings and found that *only* the HDB had the requisite standing, under s 21(2) of the TCA, to seek relief. On the appropriate remedies to be granted, we held that while the court was empowered to make orders that were effective to compel AHPETC to perform the duties in question that had been breached, it was not for the court to step into the shoes of AHPETC or to substitute its own decisions for those of AHPETC as to *how* the various requirements and duties were to be carried out. In the circumstances, we made the following orders (*AG v AHPETC* at [131]):

> …
>
> (a) AHPETC shall make all outstanding sinking fund transfer(s) within a period of three months from the date of this order or such other time as the Court of Appeal may permit upon application being made to it. Within that time, AHPETC must decide whether to accept the grants-in-aid made by the Minister [of National Development] or to take such other measures as it may determine, such as to raise the conservancy and service charges and/or to liquidate its investments (if any) in order to put itself in a position to make the required transfer(s).
>
> (b) AHPETC must take steps to comply with s 35(*c*) of the TCA.
>
> (c) To this end, AHPETC shall:
>
> (i) appoint accountant(s) to
>
> (A) assist in identifying the outstanding non-compliances with s 35(c) of the TCA and
>
> (B) advise on the steps that must be taken to remedy those outstanding non-compliances;
>
> (ii) require the accountant(s) to produce monthly progress reports until the accountant(s) is or are reasonably satisfied that AHPETC is fully compliant with s 35(*c*) of the TCA;
>
> (iii) ensure that the monthly progress reports, which are to be submitted to the HDB, which in turn may make these publicly available on the first day of every month (starting on 1 January 2016), provide sufficient details of

> (A) the outstanding non-compliances with s 35(*c*) of the TCA, and
>
> (B) the steps that AHPETC is taking to remedy those outstanding non-compliances.
>
> (c) … [T]he terms of reference of the accountant(s) who is/are appointed should extend to establishing whether any past payments made by AHPETC were improper and ought therefore to be recovered.
>
> (d) To ensure transparency and efficacy in the execution of these duties, the identity and, if necessary, the terms of reference of the accountant(s) to be so appointed shall be subject to the consent of the HDB, which consent shall not be unreasonably withheld and in respect of which there shall be liberty to apply.

The KPMG Reports

92 On 1 March 2016, following our decision in *AG v AHPETC*, AHPETC (now re-constituted as AHTC) appointed KPMG LLP ("KPMG") as its independent accountant. KPMG subsequently issued a series of monthly reports (collectively, the "KPMG Reports") from April 2017 until February 2018. The KPMG Reports were aimed at (a) identifying all outstanding instances of non-compliance with s 35(*c*) of the TCA, advising on the necessary steps that had to be taken in order to remedy these instances of non-compliance and reporting each month on the progress that had been made in this regard; and (b) identifying any improper payments that had been made between 27 May 2011 and 27 November 2015 and that ought to be recovered. The first three KPMG Reports, dated 15 April 2016, 13 May 2016 and 15 June 2016, addressed actions that had been taken by AHTC since the issuance of the AGO Report and identified a further 71 instances of non-compliance with the statutory requirements, in addition to the 115 instances that had earlier been identified.

93 The fourth KPMG Report dated 20 July 2016 considered these 186 instances of non-compliance to reflect "control failures" that were "pervasive,

cutting across the key areas of governance, financial control, financial reporting, procurement and records management over the course of five years". It concluded that these "control failures" "collectively constitute[d] a failure in the control environment, the remediation of which [would] require that the Town Councillors engage to reset the tone at the top of AHTC, emphasizing competence and accountability".

94 KPMG also released a "Report on Improper Payments" dated 31 October 2016 (the "KPMG Payments Report"), which specifically identified whether a given payment made by AHTC was improper and whether such payments ought to be recovered and if so, in what quantum. The KPMG Payments Report identified four key areas that demonstrated "flawed governance in relation to FMSS and FMSI", namely: (a) the presence of a serious conflict of interest in that AHTC had appointed FMSS and FMSI as its MA and EMSU service providers whilst concurrently employing their shareholders in key managerial and operational positions; (b) these persons had important functions in AHTC's payment approval processes and were in effect given power to approve payments to themselves; (c) AHTC did not have protocols or processes in place to assess independently and objectively the service levels of the work done by FMSS and FMSI; and (d) AHTC's financials operated in a highly deficient environment, involving pervasive "control failures", in particular a lack of discipline in financial operations and record-keeping. The KPMG Payments Report stated that these areas collectively demonstrated the pervasive "control failures" in AHTC that had "exposed public funds to improper use and application" such that "[i]mproper payments were made to FMSS and FMSI in a control environment in which meaningful oversight by the Town Councillors was absent". To this end, the KPMG Payments Report placed particular emphasis on the relationship between AHTC on the one hand, and FMSS and FMSI on the other hand, considering that the

latter's appointment "introduced a personal profit motive for the Conflicted Persons, who would be, in effect, approving payments to themselves". The term "Conflicted Persons" was defined in the KPMG Payments Report as "[i]ndividuals having direct ownership interests in FMSS and/or FMSI concurrently holding management positions in the Town Council". Specifically, this was a reference to Mr Loh, Ms How, Mr Yeo, Mr Koh, Mr Chng and Mr Lieow (see [14(g)] above).

95 The KPMG Payments Report described one of the aspects of the "control failures" as stemming from a "failure to address serious conflicts of interest, which involved an unacceptably high degree of abdication of control to the Conflicted Persons" and "an absence of meaningful oversight by the Town Councillors over FMSS's running of the Town Council's management function". The KPMG Payments Report also stated that the involvement of the Conflicted Persons in the payment process gave rise to the "potential for influence being exercised by such individuals over the decisions and judgements of the Chairman or Vice-Chairman including, for instance, the ability of the Chairman or Vice-Chairman of the Town Council to perform meaningful review of the documentation presented to them being compromised". All the payments to FMSS and FMSI, totalling $33,717,535, were "co-signed by Conflicted Persons or FMSS employees". The KPMG Payments Report concluded that such relinquishment of financial responsibility by the Town Councillors to the Conflicted Persons, in a control environment without meaningful oversight, "exposed public funds to risks of erroneous payments, overpayments, payments for which services had not been sufficiently verified and payments without proper authority, as well as the potential for actual misappropriation or civil or criminal breach of trust".

96 Apart from highlighting instances of detectable payments that were deemed improper, the KPMG Payments Report also emphasised that it remained a real and reasonable prospect "that there are further instances of improper payments to FMSS or FMSI in respect of which detection by an independent review is not readily achievable" because:

> … [t]he failure of the control environment that stem from this flawed governance has the potential to conceal and hinder the detection and identification of all instances of improper payment; and to impair the ability to assess how much of such improper payments ought to be recovered. This is because it can only be the management team running the Town Council's operations that can truly determine the extent of a loss suffered by the Town Council, and pursue the recovery of that loss.

97 Pursuant to a consent Order of Court dated 17 February 2017, AHTC appointed an independent panel (the "Independent Panel") to act as AHTC's agent under s 32(2) of the TCA. The Independent Panel was tasked with directing any further steps to be taken in the aftermath of the KPMG Payments Report. As this might extend to possible claims against the Defendants, it was thought that the establishment of the Independent Panel would obviate any potential conflicts of interest.

98 The Independent Panel directed the commencement of Suit 668 in the name of AHTC on 21 July 2017. On 3 August 2017, PRPTC commenced Suit 716. The Independent Panel did not direct PRPTC's conduct of Suit 716.

Decision below

99 The trial was heard over a number of tranches from 5 October 2018 to 9 April 2019. The Judge delivered his Judgment on 11 October 2019. For ease of reference, we reproduce the summary table in the Judgment setting out the Judge's findings (see the Judgment at [447]), noting that this deals also with some claims that failed below and are not pursued in these appeals:

<table>
<tr><th rowspan="2">S/N</th><th rowspan="2">Claim</th><th colspan="7">Liability of:</th></tr>
<tr><th>Ms Sylvia Lim</th><th>Mr Low Thia Khiang</th><th>Mr Pritam Singh</th><th>Mr David Chua</th><th>Mr Kenneth Foo</th><th>Ms How Weng Fan</th><th>Mr Danny Loh</th></tr>
<tr><td colspan="9">Waiver of tender and appointment of FMSS as MA and EMSU provider</td></tr>
<tr><td>1</td><td>First MA Contract</td><td colspan="2">Breach of fiduciary duties</td><td colspan="3">Breach of duties of skill and care</td><td>Breach of fiduciary duties</td><td>No breach</td></tr>
<tr><td>2</td><td>First EMSU Contract</td><td colspan="2">Breach of fiduciary duties</td><td colspan="3">Breach of duties of skill and care</td><td colspan="2">Breach of fiduciary duties</td></tr>
<tr><td>3</td><td>Second MA and EMSU Contracts</td><td colspan="7">No independent or continuing breach, but possible consequential loss</td></tr>
<tr><td colspan="9">Payments to FMSS</td></tr>
<tr><td>4</td><td>“Control failures”</td><td colspan="7">Breach of duties of skill and care</td></tr>
<tr><td>5</td><td>Invoice for $106,559 dated 30 June 2011 and invoice for $166,591 dated 31 July 2011</td><td colspan="7">No breach</td></tr>
<tr><td>6</td><td>Payment of project management fees</td><td colspan="7">No breach</td></tr>
<tr><td>7</td><td>Miscellaneous improper payments to FMSS</td><td colspan="7">Breach of duties of skill and care, except re. payments for overtime claims</td></tr>
</table>

<table>
<tr><td colspan="8">Improper award of contracts to third parties</td></tr>
<tr><td>8</td><td>LST Architects</td><td>Breach of duties of skill and care</td><td>No breach</td><td>Breach of duties of skill and care</td><td>No breach</td><td>Breach of duties of skill and care</td><td>No breach</td></tr>
<tr><td>9</td><td>Red-Power</td><td>Breach of duties of skill and care, except re. inclusion of Punggol-East</td><td>No breach</td><td colspan="3">Breach of duties of skill and care, except re. inclusion of Punggol-East</td><td>No breach</td></tr>
<tr><td>10</td><td>Rentokil</td><td colspan="6">No breach</td></tr>
<tr><td>11</td><td>Titan and J Keart</td><td>Breach of duties of skill and care</td><td>No breach</td><td colspan="3">Breach of duties of skill and care</td><td>No breach</td></tr>
<tr><td colspan="8">Improper payments to third parties</td></tr>
<tr><td>12</td><td>12 invoices without supporting documents</td><td colspan="5">No breach</td><td>Not claimed</td></tr>
<tr><td>13</td><td>56 invoices without Head of Department signature</td><td colspan="5">No breach</td><td>Not claimed</td></tr>
</table>

We point out, as the Judge did at [447] of the Judgment, that this table does *not* include any secondary liability on the part of the Employees and FMSS for dishonest assistance or knowing receipt. In this regard, the Judge found the Employees additionally liable for dishonest assistance in respect of the award of the First MA Contract and the First EMSU Contract, and FMSS liable for

both dishonest assistance and knowing receipt with regard to the First MA Contract and the First EMSU Contract (see the Judgment at [449]).

100 The Judge found that the Town Councillors owed fiduciary duties to AHTC by virtue of being Town Council members (see the Judgment at [192]–[183], [212], [216] and [218]–[219]). The Judge also found that the Employees owed fiduciary duties to AHTC by virtue of being senior executives and members of the top management of AHTC, and performed roles in which they were vested with a high degree of trust, confidence and autonomy (see the Judgment at [228]–[229], [232]–[233] and [235]–[237]).

101 As for the award of the First MA Contract to FMSS without holding an open tender, the Judge found that the waiver of tender and subsequent appointment of FMSS was not a contingency plan as contended by the Town Councillors, but a preconceived plan that the elected members had already decided upon (at the very latest) shortly after the 2011 GE and which they subsequently proceeded to carry out and implement (see the Judgment at [261]–[262] and [268]). That inevitably meant that the waiver of tender was not justified (see the Judgment at [269]). In any case, the Judge found that there was no urgency or public interest that warranted the waiver of tender (see the Judgment at [279]). The Judge considered that the elected members had devised this preconceived plan to appoint FMSS as the new MA so that they could remove the "PAP-affiliated" CPG (see the Judgment at [283]–[284] and [288]). This also enabled them to retain and hire the existing staff at HTC who were loyal to the WP as employees of FMSS (see the Judgment at [285]–[288]). The Judge accordingly found that (see the Judgment at [293]–[298], [300], [304]–[311] and [455]–[458]):

(a) Ms Lim and Mr Low breached their fiduciary duties to AHTC in failing to act in AHTC's best interests and in acting for extraneous purposes.

(b) Mr Singh, Mr Chua, and Mr Foo breached their equitable duties of skill and care to AHTC, as they ought to have inquired further into the circumstances surrounding the waiver of the requirement for a tender, given that they were privy to information that ought to have raised red flags in their minds as to the propriety of FMSS's appointment in view of the requirements of the TCFR.

(c) Ms How's extensive involvement in the award of the First MA Contract to FMSS meant that she too breached her fiduciary duties to AHTC. Ms How was also liable for having dishonestly assisted Mr Low and Ms Lim's breach of fiduciary duties with regard to the First MA Contract and the First EMSU Contract.

(d) However, Mr Loh was not liable for any breach regarding the First MA Contract as he was only appointed as Secretary of AHTC from 1 August 2011 (see [37(d)] above), and the First MA Contract was entered into before that date. He was however found liable for dishonest assistance.

102 As for the award of the First EMSU Contract to FMSS without the calling of a tender, the Judge found that the Town Councillors and the Employees did not call for a tender because this would have derailed their plan to appoint FMSS as MA and subsequently also to provide EMSU services (see the Judgment at [325] and [330]). Since the award of the First EMSU Contract was linked to the award of the First MA Contract, the basis of liability of the Town Councillors and the Employees in this instance was the same as that for

the First MA Contract, save that Mr Loh was, in this instance, in breach of his fiduciary duties to AHTC when he previously was not (see [101(d)] above), because those would have arisen by the time of the award of the First EMSU Contract (see the Judgment at [334]). On the issue of the appropriate remedy in respect of the breaches related to these contracts, the Judge held that, because the First MA Contract and the First EMSU Contract were entered into in breach of fiduciary duties, the Plaintiffs were entitled to seek the remedy of rescission in respect of these contracts (see the Judgment at [614]). In addition, the First MA Contract and the First EMSU Contract were also voidable on the basis of public law illegality (see the Judgment at [627]).

103 As for the award of the Second MA Contract and the Second EMSU Contract to FMSS, which was done pursuant to a calling of open tenders, the Judge held that there were no independent or continuing breaches of duties (see the Judgment at [337]–[338]). However, any loss caused to AHTC from the award of these contracts could be recoverable as consequential losses flowing from the breaches in relation to the award of the First MA Contract and the First EMSU Contract because FMSS's re-appointment in 2012 was the natural consequence of its earlier appointment in 2011 and consequent incumbency (see the Judgment at [338]–[340]). The Plaintiffs have not brought appeals against this aspect of the Judge's decision.

104 As for the improper payments to FMSS and FMSI, the Judge found that the involvement of Conflicted Persons in the approval process for payments to FMSS and FMSI created an inherent risk of overpayment in the absence of safeguards (see the Judgment at [347]). The Standing Instruction (see [64] above) was not a sufficient safeguard because there was no system in place to ensure that each cheque that was presented for signature had been duly and independently verified (see the Judgment at [348]–[349], [352] and [354]).

These "control failures" were systemic and represented a breach of the equitable duties of skill and care owed by the Town Councillors and the Employees (see the Judgment at [356]–[357] and [361]).

105 As for the award of contracts to third-party contractors, the Judge found the award of contracts to LST Architects to be a breach of the equitable duties of skill and care of those Town Councillors who were responsible for making this decision, namely, Ms Lim, Mr Singh and Mr Foo (see the Judgment at [397]–[399], [403] and [405]). The award of the contract to Red-Power when there was an option to extend the existing contracts with Digo and Terminal 9 for a further 12 and 24 months was also a breach of the equitable duties of skill and care of Ms Lim, Mr Singh, Mr Foo and Mr Chua, all of whom were members of the Tenders Committee (see the Judgment at [410]–[412]). The award of new contracts to Titan and J Keart when there were options to extend the existing contracts with both contractors for a term of 12 months was similarly a breach of the equitable duties of skill and care of the members of the Tenders Committee (see the Judgment at [421]–[422]).

106 The Judge found that the Employees and FMSS dishonestly assisted Mr Low and Ms Lim in breach of their fiduciary duties with regard to the award of the First MA Contract and the First EMSU Contract (see the Judgment [456]–[457]). FMSS was also liable for knowing receipt of the payments that were made to it under the First MA Contract and the First EMSU Contract (see the Judgment at [458]).

107 Both the Town Councillors as well as the Employees also sought to rely on s 52 of the TCA on the basis that this afforded them immunity from liability. The Judge interpreted s 52 as protecting a Town Council's members and employees from personal liability in relation to claims by third parties only, and

not from liability from claims by the Town Council itself, and so he held that it did not apply in the present case (see the Judgment at [494]–[510]).

108 Finally, as to the Plaintiffs' claim that the Defendants' breaches had resulted in them incurring expenses in investigating those breaches, the Judge deemed it preferable to consider the claim for investigation expenses as giving rise to equitable compensation because such expenses represented a loss flowing from breaches of fiduciary duties and the equitable duties of skill and care (see the Judgment at [639]). The Judge thus allowed the Plaintiffs to pursue their claims for investigation expenses against the Town Councillors and the Employees in the form of equitable compensation, if they so choose, and to lead the necessary evidence at the assessment stage of the trial (see the Judgment at [640]).

Procedural history leading to the present appeals

The present appeals

109 CA 196 and CA 197 are appeals brought by Ms How (in her own capacity, and as personal representative of Mr Loh's estate) and by FMSS against the Plaintiffs in respect of the Judge's findings on their respective liabilities. CA 198 and CA 199 are the Town Councillors' appeals against PRPTC and AHTC in respect of the Judge's findings on their respective liabilities. CA 200 is PRPTC's appeal against the Judge's findings on the remedies available to it, namely that (a) PRPTC is not entitled to equitable compensation in the form of substitutive compensation (the "First Issue in CA 200"); and (b) PRPTC bore the burden to demonstrate but for causation to ascertain the loss recoverable in the form of equitable compensation arising from the Town Councillors' and the Employees' breach of fiduciary duties (the "Second Issue in CA 200").

AHTC's application to amend its Statement of Claim

110 On 18 May 2020, more than six months after delivery of the Judgment, AHTC filed SUM 2050 seeking to amend its statement of claim in Suit 668 (see [65(d)] above), though it did not make an application to amend or supplement the Judgment or for the court to consider whether the trial could and ought to be re-opened. On 20 August 2020, the Judge delivered his decision in SUM 2050 by way of the Oral Judgment (see [65(d)] above) in which he allowed SUM 2050 in part, and specifically only in respect of proposed amendments that were merely *clarificatory* and did not introduce new causes of action. In brief, the permitted amendments related to two broad areas:

> (a) The first set of amendments concerned assertions that Ms Lim and Mr Low breached their equitable duties of skill and care by failing to exercise proper scrutiny in causing AHTC to award the First EMSU Contract to FMSS without calling for an open tender, thereby entitling AHTC to equitable compensation or, in the alternative, damages. The Judge considered that the thrust of AHTC's pleadings in its statement of claim in Suit 668 was that Ms Lim and Mr Low had breached their fiduciary duties by causing AHTC to award, among other things, the First EMSU Contract to FMSS "in circumstances which breached inter alia their equitable duty of care and skill", which "already includes the cause of action" in the proposed amendment (see the Oral Judgment at [44]). Hence, he concluded that the amendments did not introduce a new cause of action, the "gravamen" of the amendments having already been pleaded in AHTC's statement of claim and thus "[did] not do more than make clear the real controversy between the parties which the Judgment has addressed", in particular, the findings he made in the Judgment at ([334] and [441]) (see the Oral Judgment at [45]–[46]). In addition, the

Judge observed that no amendment to the Judgment would be necessary since the amendments "[d]id not change the substance of the pleadings on which the Judgment was given" (see the Oral Judgment at [46]).

(b) The second set of amendments related to claims that the Employees breached their equitable duties of care and skill owed to AHTC by approving payments under the System and failing to rectify the flaws in the System. There was also a claim for damages as an alternative relief for such breaches. The Judge considered that these amendments did not introduce a new cause of action as they had already been pleaded and "merely make clear the reliefs available in respect of [the Employees'] breach of their equitable duty of care and skill" (see the Oral Judgment at [65]). He noted that he had found in the Judgment (at [444]) that the Employees were liable for breaches of their equitable duty of care and skill in respect of improper payments made to FMSS and FMSI under the System, and that they had also directly addressed allegations relating to the payment system in their closing submissions.

111 No appeal has been filed against the Judge's decision in respect of SUM 2050.

STC is substituted for PRPTC

112 On 10 July 2020, following the General Election held that year, a slate of WP candidates was elected to the newly-created electoral division of Sengkang GRC. Subsequently, on 30 July 2020, the town of Sengkang was declared, comprising the constituency of Sengkang, and STC was established, pursuant to the Town Councils (Declaration) Order 2020 (No S 641/2020) (the "2020 Order").

113 On 6 November 2020, STC applied by way of CA/SUM 120/2020, CA/SUM 121/2020, and CA/SUM 122/2020 to substitute PRPTC as the proper party to the appeals in CA 196, CA 198 and CA 200 respectively. This followed the transfer of assets and liabilities from PRPTC to STC pursuant to the 2020 Order, which stipulated that 28 October 2020 would be the effective date when (a) all assets and liabilities held by PRPTC as at 27 October 2020 relating to the area of the former PRPTC comprised in the constituency of Sengkang would be transferred to STC; and (b) all legal proceedings relating to those assets or liabilities started before 28 October 2020 by or against PRPTC and pending immediately before that date would be deemed to be proceedings taken by or against STC.

114 On 8 December 2020, we granted the application for substitution. From this point of the judgment, unless otherwise indicated, we employ the term "STC" to refer to "PRPTC" and all its prior iterations.

STC withdraws CA 200 in part

115 On 16 February 2021, counsel for STC from Tan Kok Quan Partnership ("TKQP") informed us that her client intended to withdraw its appeal in respect of the First Issue in CA 200 concerning the Plaintiffs' entitlement to equitable compensation in the form of substitutive compensation (see [109] above). In respect of the Second Issue in CA 200, namely, whether the Plaintiffs would have to prove but for causation before they could obtain recovery in the form of reparative compensation (see [109] above), TKQP stated that, in the light of this court's decision in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Winsta*"), which clarified the law on causation in relation to breaches of non-custodial duties owed by fiduciaries, it proposed that the parties to CA 200 adopt the "hybrid approach" as set out in

Winsta (at [240]), under which the legal burden of showing that the loss would have been sustained by the Plaintiffs even if the Town Councillors and the Employees had not breached their duties falls on the Town Councillors and the Employees. On 19 February 2021, counsel for both the Town Councillors and the Employees confirmed that they too would adopt the "hybrid approach" in respect of the Second Issue in CA 200. They also reserved their rights to seek costs from STC in CA 200. In other words, all parties to CA 200 are in agreement that *Winsta* is applicable and that the "hybrid approach" would apply so as to supersede the Judge's decision that the Plaintiffs bore the burden of showing but for causation to ascertain the loss recoverable in the form of equitable compensation.

The parties' arguments on appeal

116 Before us, the Town Councillors generally repeat the arguments they made below. As a general starting point, they argue that the Parliamentary intention behind the TCA was for Town Councils and elected MPs to have as much latitude as possible in running their estates. The Judge erred in substituting his own decisions for those of the Town Councillors, effectively second-guessing their decisions. A Town Council is a creature of the TCA, and the Town Councillors and the Employees argue that they do not owe AHTC any fiduciary duties because fiduciary law has no relevant role to play in the specific context of the public law duties that are engaged in this case. As a necessary corollary of this, should the Town Councillors and the Employees be held not to owe fiduciary duties, the claims against the Employees and FMSS for dishonest assistance and knowing receipt would also fail.

117 In respect of the failure to call tenders for the first contracts for the provision of MA and EMSU services to AHTC and the subsequent award of the

First MA Contract and the First EMSU Contract to FMSS, the Town Councillors argue that the Judge erred in adopting interpretations of the documentary evidence that did not account for other documents and witness testimony. The Town Councillors' case is that the WP MPs had prepared a contingency plan in the event that critical service providers of AHTC (including CPG and Action Information Management Pte Ltd ("AIM"), which licensed the Town Council Management System ("TCMS") computer software to ATC) were unwilling to continue to provide services to AHTC. Their case is that they wanted FMSS "to be set up as soon as possible to provide an alternative to CPG, particularly if CPG decided to pull out of the [CPG MA Contract]". This concern crystallised when CPG indicated that it was indeed unwilling to continue performing the CPG MA Contract and when AIM unilaterally terminated the TCMS contract. The Town Councillors waived the tender for the first contract for MA services and appointed FMSS as MA for one year to ensure that essential services to residents were not interrupted. The appointment of FMSS under the First EMSU Contract and the appointments of third-party contractors were also in the interests of the residents and were properly done under the TCFR. In any event, AHTC did not suffer any loss as a result of the appointments and payments made.

118 The Town Councillors also repeat their submissions below that s 52 of the TCA affords immunity to Town Council members even against claims brought by the Town Council.

119 The Employees likewise submit that they were not fiduciaries of AHTC. In the alternative, Ms How contends that she did not breach her fiduciary duties in respect of the waiver of tender for the first contracts for the provision of MA and EMSU services to AHTC because she was not involved in the decisions to waive the calling of tenders and to appoint FMSS. Mr Loh similarly did not

breach his fiduciary duties in respect of the first contract for EMSU services because he was not involved in that waiver. They further submit that neither of them breached their equitable duties of skill and care in respect of the process by which payments were made by AHTC to FMSS and FMSI under the System.

120 The Employees also dispute the Judge's findings that they dishonestly assisted Ms Lim's and Mr Low's breach of fiduciary duties, and the finding that FMSS was liable for knowing receipt of the payments received under the First MA Contract and the First EMSU Contract. They also submit that in any event, by virtue of s 52 of the TCA, they are both immune from liability and further, that the claims for the breach of equitable duties of skill and care in relation to four invoices are also time-barred.

121 In response, the Plaintiffs seek to uphold the Judge's findings that the Town Councillors owed fiduciary and equitable duties to AHTC and breached them. They also seek to uphold the Judge's decision that s 52 of the TCA does not apply in this case.

Issues in the present appeals

122 The present appeals raise fundamental questions of law and many questions of fact. These require careful examination with due appreciation of the realities faced by all the relevant actors at the material time. The following questions of law are raised in these appeals:

(a) Do the Town Councillors and the Employees owe fiduciary duties to AHTC?

(b) Do the Town Councillors and the Employees owe equitable duties of skill and care to AHTC?

(c) Do the Town Councillors and the Employees owe a tortious duty of care at common law to AHTC?

(d) What is the proper interpretation and scope of s 52 of the TCA?

123 If s 52 of the TCA applies to the Plaintiffs' claims, the overarching question will be whether the Town Councillors' and the Employees' actions were carried out in good faith. The specific factual questions which go towards answering this overarching question are as follows:

(a) Regarding the waiver of tender for the first contracts for MA and EMSU services and the award of the First MA Contract and the First EMSU Contract to FMSS:

(i) Was the waiver of tender and the appointment of FMSS for the First MA Contract and the First EMSU Contract a preconceived plan that the Town Councillors and Employees intended from the outset following the 2011 GE to put into effect, or was it a contingency plan that took shape in good faith as events developed and unfolded?

(ii) Were the Town Councillors and Employees seeking to appoint FMSS as the new MA of AHTC because they wanted to displace those who they perceived to be loyal to or affiliated with the PAP?

(iii) Had the Town Councillors and Employees acted in the way they did because they were improperly motivated by the desire to retain and hire staff from HTC because of their loyalty to the WP?

(b) As for the improper payments made to FMSS and FMSI as a result of the "control failures", were the control measures put in place and instituted by the Town Councillors and the Employees done in good faith, even if such measures were ultimately found to be inadequate?

(c) Was the award of contracts by AHTC to LST Architects, Red-Power, Titan and J Keart done in good faith?

124 If s 52 of the TCA does not apply to this case, and if the Town Councillors and the Employees owe any private law obligations to AHTC as the Judge had found (including fiduciary duties, equitable duties of skill and care, or the common law duty of care in tort), the question then arises as to whether the foregoing acts amount to breaches of such duties. We shall address each of the legal issues in turn before analysing the evidence.

Whether the Town Councillors and Employees owed fiduciary duties to AHTC

125 We begin with the central question in these appeals, which is whether the Town Councillors and the Employees owed fiduciary duties to AHTC. The crux of the issue is whether such public officers, who undoubtedly have *public* functions and duties, *additionally* owe *private* legal obligations. To answer this question, we begin by setting out two important considerations: (a) first, the existing taxonomy of private legal duties that are imposed upon public statutory bodies and public officers; and (b) second, the important distinction between public law and private law duties.

A taxonomy of duties and liabilities in the context of public law functions

126 The taxonomy of private legal duties that are imposed upon public statutory bodies or public officers may be approached from three conceptually

distinct (but, in some instances, factually overlapping) tortious causes of action: (a) the tort of negligence; (b) the tort of breach of statutory duty; and (c) the tort of misfeasance in public duty.

The tort of negligence

127 The first potential tortious cause of action that may lie against a public body or public officer is a claim in the tort of negligence. This requires it be shown, (a) first, that the defendant owes the plaintiff a duty of care; (b) second, that the defendant has breached that duty of care; (c) and third, that the defendant's breach of duty caused the plaintiff damage.

128 The test for the imposition of a duty of care is that established by this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). There is first a threshold requirement of factual foreseeability of damage before a two-stage test is applied (*Spandeck* at [115]). The first stage requires sufficient legal proximity, which is determined by the closeness of the parties' relationship, having regard to such factors as the defendant's assumption of responsibility and the plaintiff's actual reliance upon the defendant. Where there is both factual foreseeability and legal proximity, there would be a *prima facie* duty of care. The second stage entails weighing policy considerations to determine whether the *prima facie* duty should be negated or limited (*Spandeck* at [83]). We refer to this framework in this judgment as the "*Spandeck* test".

129 The nub of the Plaintiffs' claim in tort is that the tort of *negligence* (not the separate tort of breach of statutory duty) has been committed *because statutory duties (under the TCA and the TCFR) have been breached* (see [86] above). This raises the question of when it would be permissible to impose a concomitant duty of care at common law on the basis of a statutory duty. In *Tan*

Juay Pah v Kimly Construction Pte Ltd and others [2012] 2 SLR 549 ("*Tan Juay Pah*") (at [52]), we held that the existence of the common law duty of care is dependent on the fulfilment of the *Spandeck* test.

(a) Under the first stage of the *Spandeck* test that is concerned with legal proximity, the existence of a statutory duty is one of the many factors taken into consideration (*Tan Juay Pah* at [53]). However, the mere presence of a statutory duty "does not *ipso facto* impose a concomitant duty of care at common law", though it may "form the backdrop to and inform the existence (or lack thereof) of a common law duty of care" (see *Tan Juay Pah* at [51], citing *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [21]–[22]; see also *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 at [37]; *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ("*Grace Electrical Engineering*") at [56]; *The Subsidiary Management Corporation No. 01 – Strata Title Plan No. 4355 v Janaed and another and another appeal* [2022] SGHC(A) 26 at [32]). For instance, the statutory duty might possibly be relevant in informing the court of the standard of care expected of the defendant (see *Grace Electrical Engineering* at [56]).

(b) Under the second stage of the *Spandeck* test that considers public policy, one important policy consideration is that the imposition of the alleged common law duty of care should not be inconsistent with the statutory scheme in question and the statutory duties owed under that scheme (see *Tan Juay Pah* at [53]).

130 In addition, the following general principles set out in *Tan Juay Pah* (at [54]) are relevant in considering whether a statutory duty gives rise to a concomitant duty of care at common law:

(a) First, each statute has to be considered contextually; formulas are not helpful in this context.

(b) Second, the mere existence of a statutory remedy or sanction for the breach of a statutory duty is not decisive on the question of whether there is a "private right of action for *such breach*" [emphasis added]. It is not entirely clear to us whether the court in *Tan Juay Pah* was speaking in relation to a private right of action for breach of statutory duty or a claim in negligence. But it is not necessary for us to resolve this in the present case because it will clearly be relevant to at least ensure that the imposition of a general duty of care is not inconsistent with the statutory context (see also [230]–[232] below).

(c) Third, the plaintiff must show that Parliament, in imposing the statutory duty on an officer or an entity to protect the members of a class, intended those members to have a private right of action to remedy a breach of that duty. If the statute's objective is to protect the public in general, "*exceptionally clear language* will be required before an intention to confer a private remedy for a breach of statutory duty can be established" [emphasis added].

(d) Fourth, the Parliamentary intention behind the enactment of the underlying statutory scheme is relevant at the second limb of the *Spandeck* test, not the first. This means that, in the context of the tort of negligence, Parliamentary intention is not a threshold ingredient to establish a duty of care; Parliament need *not* positively intend that a

> concomitant common law duty of care should exist. This may be contrasted with the tort of breach of statutory duty, where it must be demonstrated that by necessary implication Parliament *positively intended* to provide for a right of civil action to enforce the statutory duty (see [134] below). We will say more about this later in this judgment, but at this stage, we make just two observations. First, the Plaintiffs in the Suits are the very same entities which the Town Councillors were seeking to serve under the TCA and the TCFR. Our comments and analysis are confined to this situation, and we do not in this judgment form a view on whether such a duty exists or can be enforced by a private individual such as a resident of the Town. Second, when applying the *Spandeck* test in this context, at the second stage in particular, it will be relevant to also consider the extent to which a potential defendant may be afforded immunity from liability under s 52 of the TCA.

The tort of breach of statutory duty

131 The second potential tortious cause of action that may lie against a public body or public officer is a claim in the tort of breach of statutory duty. This was not pleaded by the Plaintiffs in this case. Hence, we make just some limited observations. First, we begin by observing that, while the tort of negligence is concerned with the negligent performance of an act, the tort of breach of statutory duty is concerned with allowing a private plaintiff to bring an action against a public body or officer charged with a statutory duty in order to indirectly enforce the performance of that duty by way of an action for damages arising from a breach of that duty.

132 Second, the tort of breach of statutory duty is an independent cause of action that is distinct from the tort of negligence (see *Animal Concerns* at [24]). Unlike the tort of negligence, a breach of statutory duty is tethered specifically to the relevant statute. It is not the case that every breach of a statutory duty will sound in damages pursuant to a private law claim.

133 Third, the tort of breach of statutory duty is not constituted just by the "careless performance of a statutory duty" (see *Animal Concerns* at [21]).

134 The elements of the tort of breach of statutory duty have not been definitively laid out in Singapore. Nevertheless, it suffices for present purposes for us to note that there are at least two important elements that have been established in our jurisprudence. First, it has been observed by this court in *Animal Concerns* (at [24]), citing the House of Lords' decision in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (at 407 and 412), that the key question as to whether a breach of statutory duty will sound in damages pursuant to a private law claim is whether, based on a construction of the statute in general and the particular provision, Parliament *intended* to provide for a right of civil action to enforce the statutory duty. Second, as Judith Prakash J (as she then was) held in *Loh Luan Choo Betsy (alias Loh Baby) (administratrix of the estate of Lim Him Long) and others v Foo Wah Jek* [2005] 1 SLR(R) 64 (at [25]), endorsing the approach of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (at 731), a breach of a statutory duty does not in itself give rise to a private law cause of action for damages. It is only when the construction of the statute in question establishes "that the statutory duty was imposed for the protection of a *limited class of the public* and that Parliament intended to confer on members of that class a private right of action for breach of the duty" that such a cause of action will arise [emphasis added]

(see also Gary Chan and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 09.011).

The tort of misfeasance in public duty

135 The third potential tortious cause of action that may lie against a public body or public officer is a claim in the tort of misfeasance in public duty. The requirements for this tort were set out in *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52 (at [138]): (a) the act must be done maliciously or with the knowledge that it is *ultra vires* the powers of the public body; (b) it is foreseeable that the act would cause damage to the plaintiffs; and (c) the act actually does cause damage to the plaintiffs. This, however, is again not a cause of action that the Plaintiffs have pleaded.

Summary of the discussion

136 What follows from the foregoing discussion is that the law currently recognises at least three causes of action that may lie *in tort* against errant public bodies or public officers. However, the law regulates the availability of such a cause of action either by imposing a requirement that points to a legislative intent to confer such a private right of action (see [134] above) or by requiring proof of some specific fault-based conduct (see [133] and [135] above), or at the very least, requiring that the imposition of a general duty of care not be inconsistent with the surrounding statutory context (see [130(d)] above). Thus, for instance, if a statute's objective is to protect the public in general, "*exceptionally clear language*" in that statute is required before a court may infer that Parliament intended to confer a private right of action in the tort of negligence for the breach of a statutory duty (see [130(c)] above). If this is true for a claim in the tort of negligence arising out of the purported breach of a

statutory duty, then this suggests that this court should be *even* more cautious in imposing onerous *fiduciary* duties on a public officer executing a statutory duty. The latter is squarely the question before us in this case, because the alleged breaches of fiduciary duties by the Town Councillors and the Employees largely stem from their conduct in execution of their statutory duties under the TCA and the TCFR (see [86] above). This was also the point made by Sir Robert Megarry VC in *Tito and others v Waddell and others (No 2)* [1977] 1 Ch 106 ("*Tito*") (at 230), as we explain below at [166(c)].

The distinction between public law and private law duties

137 It can be seen from the summary above at [21] that the duties alleged by the Plaintiffs in this case are variously pleaded as fiduciary duties, equitable duties of skill and care and common law duties of care. But what underlies most of these duties is the allegation that the acts complained of constituted violations of various provisions of the TCA and the related subsidiary legislation like the TCFR (as summarised at [86] above). The real question, thus, is whether the Town Councillors and the Employees can be made liable in this way in a private law action for what, in essence, are alleged breaches of public law duties. This requires us to consider the important distinction between public law and private law duties. The starting point of this analysis is the House of Lords' decision in *Swain and another v The Law Society* [1983] AC 598 ("*Swain*"), which we find instructive. *Swain* concerned s 37 of the Solicitors Act 1974 (c 47) (UK) under which the Law Society of England and Wales was empowered to make rules requiring solicitors to maintain professional indemnity insurance with authorised insurers. Specifically, s 37(2) specified that, "for the purpose of providing such indemnity", such rules could, among other things, "authorise or require the Society to take out and maintain insurance with authorised insurers".

138 In the exercise of those public powers, the Law Society, acting in the discharge of a public duty in the interest of all solicitors, negotiated and secured compulsory indemnity insurance cover to indemnify solicitors against loss from claims that might be brought against them for professional negligence. The Law Society entered into a contract with specified insurers in November 1975 and later passed the Solicitors' Indemnity Rules 1975, which provided for the Law Society to maintain with authorised insurers a "master policy" and required solicitors to pay the premiums prescribed under that policy and to produce a certificate of insurance issued under the master policy when applying for a practising certificate each year. A specified firm was engaged to act as the sole broker under the scheme and all claims were required to be submitted to that firm. The firm agreed that, in return for being appointed as the sole broker, it would share with the Law Society the commission it received from the insurers. The respondents, who were two practising solicitors, objected to the scheme and contended that the Law Society was obliged to account to them for the share of the commission it received from the brokers under the master policy indemnity scheme then in-force to the extent it arose from the indemnity insurance the respondents had obtained in accordance with the Solicitors' Indemnity Rules 1975.

139 The question in *Swain* was whether the Law Society was accountable to solicitors for the money that it received under the commission-sharing arrangement, which it had entered into in the exercise of its powers and duties under s 37 of the Solicitors Act 1974 (see *Swain* at 607 and 613). The House of Lords unanimously rejected the respondents' claim. The main reasons for the House of Lords' decision can be found in the judgments of Lord Diplock and Lord Brightman (with whom the other Law Lords, Lord Fraser, Lord Scarman and Lord Roskill, agreed):

(a) Lord Diplock held that it was "essential" to bear in mind that, in performing its various functions, the Law Society "acts in two distinct capacities": a "private capacity" and a "public capacity as the authority upon whom … various statutory duties are imposed and powers conferred by the Solicitors Act 1974" (see *Swain* at 607–608). When acting in its private capacity, the Law Society "is subject to private law alone" whereas "it is quite otherwise" when the Law Society is acting in its public capacity (see *Swain* at 608). Lord Diplock explained (*Swain* at 608):

> … The Council [in whom management of the Society is vested] in exercising its powers under the Act to make rules and regulations and the Society in discharging functions vested in it by the Act or by such rules or regulations *are acting in a public capacity and what they do in that capacity is governed by public law*; and *although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers.* [emphasis added]

(b) Lord Brightman held that it "flow[ed] from section 37 and the rules made thereunder, of which the form of master policy and the form of insurance certificate [were] an integral part" that the insurance scheme was "statutory" (see *Swain* at 618; see also *Swain* at 608 and 611–612 *per* Lord Diplock). In exercising its powers under s 37, the Law Society was "performing *a public duty*" for the benefit of solicitors and their clients because the insurance scheme was "not only for the protection of the [premium-paying] solicitor … but also … to secure that the solicitor is financially able to compensate his client" [emphasis added]. According to Lord Brightman, this "fundamental" point had "important consequences" because (*Swain* at 618):

> … *the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached.* If a public duty is breached, there is the remedy of judicial review. *There is no remedy in breach of trust or equitable account.* The latter remedies are available, and available *only, when a private trust has been created* … The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense. [emphasis added]

(c) As such, the *source* of the rights and duties under the provisions of the certificate of insurance attached to the master policy was not *contract*, but *statute*. As Lord Diplock explained (*Swain* at 611–612):

> *[b]ut for the statutory powers* conferred upon the council and the [Law] Society and the way that they chose to exercise those statutory powers, *the master policy could not confer upon solicitors and former solicitors any rights in private law* to demand insurance cover against professional liability from the insurers who underwrote the master policy. [emphasis added]

(d) By entering into the master policy contract, the Law Society had not placed itself in a fiduciary position in relation to the premium-payers so as to constitute itself trustee of the master policy contract. According to Lord Brightman, this was so for the following reasons. There was nothing in the wording of s 37 which made it obligatory on the Law Society to assume the role of trustee for the benefit of premium-paying solicitors or anyone else (see *Swain* at 620). The text of the master policy contract did not express or imply a trust, and nor was it necessary to imply a trust to secure the commercial viability of the indemnity scheme (see *Swain* at 621).

(e) Therefore, the source of the mutual rights and obligations of insurers and solicitors under the master policy contract was "*statutory*

only". As Lord Diplock held, these rights and obligations (see *Swain* at 612–613):

> do not depend on private law concepts either of agency or of constructive trusteeship of promises and so *do not attract the principles of accountability of agent* to his principal or trustee to his *cestui qui* trust … that follow in private law from the existence of such relationships. [emphasis added]

The Law Society was therefore not liable to account for the commissions it had received.

140 *Swain* stands for some important principles:

(a) A public body may act in both a private capacity and a public capacity. It is important to be mindful of the capacity in which it is acting because the consequences of its actions may be quite different.

(b) Whether a public body is acting in a private or public capacity is to be determined by scrutinising the entire circumstances and the source of the power being exercised by the public body. To put it simply, the question is whether the public body is exercising a power that is rooted in public law (as where it arises from a statute and is for a public purpose) or private law (as where it arises out of a private contract and does not entail the exercise of a statutory power for a public purpose).

(c) If the public body is acting in a private capacity, private law governs the relationship between that body and those persons who stood to be affected by its actions in that capacity, and private law remedies may be sought. Equally, public law remedies may not typically be available.

(d) If the public body is acting in a public capacity, public law governs the relationship between that body and those persons who stood to be affected by its actions in that capacity, and public law remedies can be sought, but typically *not* private law remedies.

141 The foregoing principles in *Swain* were highlighted and emphasised by this court in *AG v AHPETC* at [125]–[127]. A public body or officer may act in a private capacity or in a public capacity, depending on the circumstances. When a public authority acts, it does not invariably follow that the public authority is exercising a *public law (or statutory) power*. And, as we have noted, the capacity in which it is acting will often affect the sort of remedies that can lie against it. This underpins the observation in *Swain* that the "[Law] Society acting in its private capacity can do anything that a natural person could lawfully do, with all the consequences that flow in private law from doing it" (at 608 *per* Lord Diplock).

142 The distinction between private law duties and public law duties is also well-established in our law. In *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 ("*Linda Lai*"), the plaintiff sought judicial review, a public law remedy, against the Public Service Commission in respect of certain decisions that had been made in connection with the termination of her employment contract with the Ministry of Law. This was rejected by this court as an impermissible attempt to invoke public law remedies in the context of a contractual relationship that was governed by the law of contract and which gave rise to associated private law remedies (see *Linda Lai* at [40]–[41] and [44]). In short, the dispute concerned *contractual* rights rather than the exercise of any public powers or duties, as the Public Service Commission was acting in its capacity as the plaintiff's employer rather than as a public body, and exercised powers pursuant to the terms of the plaintiff's employment contract

rather than statutory powers. The court held in the circumstances that any possible recourse lay solely in the realm of private law. *Linda Lai* illustrates the point that a public body can act in a private capacity in relation to a given party, and this specific relationship – including the remedies for any breaches that arise out of such a relationship – would be exclusively governed by private law.

143 *Linda Lai* also shows that a public body *can be liable* in private law. This would be so if the public body has entered into a legal relationship that is governed by private law and assumed private legal duties under that relationship. In *Linda Lai*, the legal relationship between the Public Service Commission and the plaintiff was the latter's employment contract with the Ministry of Law. Therefore, the fact that the defendant is a public body or officer does not in and of itself mean that no private law claims may ever lie against such a public body or officer. This much is also borne out to some extent by the possible existence of a right of private action in the tort of negligence, the tort of breach of statutory duty and the tort of misfeasance in public duty, as highlighted above at [127]–[135].

144 A public body will, however, often act in a public capacity and context in circumstances where its actions are governed purely by public law. In *AG v AHPETC*, this court held that the entire relationship between the MND and AHPETC arises out of the TCA and "can only be analysed by reference to the TCA" (at [123]). We noted that the MND could not "fundamentally alter the very basis of the relationship from one founded in and regulated by statute to one in trust, agency or any other private law concept". Simply put, it is not "appropriate … to *add such private law overlays* to the statutory relationship between the Minister and the Town Councils … [and] there is nothing at all in the TCA to suggest otherwise" [emphasis added].

145 This much is uncontroversial, but it highlights the need for particular care to be exercised when considering whether and, if so, what private law remedies may be imposed in the context of the alleged misdeeds of a public body or public officer. This is even more the case where one is considering the superimposition of even more onerous *fiduciary* duties, in the context of a public officer discharging public law duties. In our judgment, and with respect, the Judge erred in failing to pay adequate heed to this distinction between private law and public law duties in arriving at his conclusion that the Town Councillors and the Employees owed fiduciary duties to AHTC. We turn to examine the Judge's reasoning in detail.

Was the Judge correct to find that the Town Councillors and the Employees owed fiduciary duties to AHTC?

146 In our respectful view, the basis on which the Judge found that the Town Councillors and the Employees were subject to fiduciary duties does not withstand close scrutiny. It bears reiterating that the alleged breaches of fiduciary duties in this case all stem from *statutory* duties imposed under the TCA and the TCFR (see [86] above). The Judge's analysis effectively entailed starting with various statutory duties – such as the duty to fully justify a waiver of tender under r 74(18) of the TCFR – and then re-characterising them as fiduciary duties or duties for which at least some of the Town Councillors and the Employees were answerable as fiduciaries, in a way that elided the distinction between private law and public law duties. We address each of the Judge's reasons for imposing fiduciary duties on the Town Councillors and Employees in turn.

The Town Council as a body corporate

147 We first address the analogy that the Judge drew between Town Councils and Management Corporations under the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed), which we refer to for convenience as "MCSTs". The Judge relied on the fact that Town Councils, like MCSTs, are corporate bodies (under s 5 of the TCA) and held that this imported the panoply of common law duties that applies to corporate bodies (see the Judgment at [192]–[194]). Section 5 of the TCA reads:

> **Incorporation**
>
> **5.** A Town Council shall be a *body corporate* with perpetual succession by the name 'The Town Council' with the addition of the name of the particular Town and may be sued and sued in the corporate name of that Town Council.
>
> [emphasis added]

148 The Judge reasoned that, while the nature of a "body corporate" is not defined by the TCA, it is "established by general principles of private law", so the "private law in relation to corporations therefore informs the nature and character of those of the Town Council's relationships which have a ready analogue in the law of corporations" (see the Judgment at [192]). The Judge found that this led to the conclusion that Town Councillors owe their Town Council fiduciary duties (see the Judgment at [193] and [212]).

149 With respect, the Judge erred in his analysis in this respect. A body corporate is merely an abstract legal entity that exists and is clothed with *separate legal personality*. This confers on it the status of a juridical personality distinct from that of its members (see *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 29 *per* Lord Halsbury LC). There is no basis for saying that the establishment of a separate legal personality and the right to sue and be sued necessarily or logically entails the imposition of an identical or even a similar

set of rights and duties applicable to all corporate bodies. Put simply, the mere fact that Town Councils are corporate bodies does not in and of itself mean that its members and employees owe *fiduciary* duties to the Town Council.

150 The Judge further reasoned that Town Councillors hold a position analogous to that of directors of a company, and of council members of an MCST. He concluded, based on the relationship that Town Councillors, directors and council members have with the respective entities that they serve, that as far as the existence of the fiduciary relationship is concerned, there was "no principled distinction between a company and its directors, an MCST and its council members, and a Town Council and its town councillors" (see the Judgment at [216] and [219]).

151 With respect, this is an incorrect analogy. MCSTs are quintessentially *private* entities concerned with the private property rights of subsidiary proprietors (see *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [9]). Similarly, companies are *private* bodies exercising *private* functions, with individuals or organisations acting in their private capacity as shareholders, and directors appointed to act for the company's *private* purposes. As such, the complexity of the interplay between public and private law duties simply does not present itself in the same way with MCSTs and companies as it does with Town Councils.

152 The Judge also omitted to consider that the cases concerning MCSTs which he referred to involved very different sets of circumstances and issues. We have already noted that MCSTs are situated in a *private* context. Beyond this, the case law that has developed the ambit of the fiduciary duties owed by council members of an MCST to the MCST typically concerned the conflict of interest that they were faced with. This generally arose from the fact that these

council members were also members of a sales committee charged with developing the terms and conditions for an *en bloc* sale of the entire strata development. As owners of units in the development, these members invariably had *personal* interests in the proposed *en bloc* sale, and this potentially conflicted with their duty owed to *all* the subsidiary proprietors of the development, including those who were opposed to the *en bloc* sale. This is an archetypal situation where the law imposes fiduciary duties on the conflicted persons who are acting in the disposal of property that is also owned by others, including some who might be opposed to the disposal. The MCST cases are thus of limited assistance. In those cases, fiduciary duties are readily imposed on these MCST members because they are acting as *agents* of all the subsidiary proprietors in the disposal of property, and therefore are subject to the fiduciary duties that arise out of the agency role (see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*") at [104]–[110]). These differences were unfortunately not adequately pointed out to the Judge and he therefore erred in relying on the series of MCST cases to justify the imposition of fiduciary duties on the Town Councillors and the Employees. The two contexts are fundamentally different.

The Judge's analysis of the case law on the imposition of private law duties on public officers

153 This leads to the next point, which is the way the Judge dealt with the interplay between public law and private law duties.

154 In *AG v AHPETC*, this court stated that, where the relationship between the applicant and the body corporate was one that arose out of statute, their mutual rights and obligations could not ordinarily be determined based on private law concepts (at [124]). We also noted in *AG v AHPETC* at [125], the

distinction between private and public law duties that was drawn by the House of Lords in *Swain*. However, the Judge considered that the House of Lords in *Swain* did not intend to draw a strict dichotomy between private law and public law powers. In coming to that view, he drew strength from the fact that in *Swain*, the House of Lords seemed to recognise that the Law Society could take on private law duties in the exercise of public law powers (see the Judgment at [180]).

155 While that much is undoubtedly true, what the Judge failed to consider was the need to have regard to the nature of the duty that had allegedly been breached and whether it was amenable to private law remedies. The question in *Swain* was whether, in placing the insurance, the Law Society was acting pursuant to a *public duty* to make provision for indemnity insurance applicable to its members or whether it was acting under a *private agency* where it was acting for a specific group of law firms such that it could be made to account to them through a private law remedy (see *Swain* at 608 *per* Lord Diplock). As emphasised above at [139(a)], Lord Diplock observed that when the Law Society is acting in a public capacity, "what they do in that capacity is governed by public law" (*Swain* at 608).

156 This is a crucial point. As Lord Diplock stated, the Law Society acting in its private capacity is subject to private law alone, but "[i]t is quite otherwise" when the Law Society is acting in its public capacity, and although the legal consequences of the Law Society acting in its public capacity may create rights enforceable in private law, they are not necessarily the same as those that would flow in private law from doing a similar act, otherwise than in the exercise of statutory powers (see *Swain* at 608). The respondent solicitors in *Swain* sought an account of a share of the brokerage commission that the Law Society had received on the basis that the Law Society was acting as an agent and was thus

bound to account for it to its principal. The House of Lords disagreed because the Law Society *was acting in the discharge of its public law functions* in placing the insurance and, in that capacity, it was not subject to private law duties and liabilities. This distinction between the exercise of public law and private law duties and the rights and/or liabilities they respectively give rise to is clearly established in our law as well, as we have emphasised above at [142]–[144]. While *Swain* recognises that the exercise by a public body of its public law functions may *also* create rights enforceable in private law, that is not necessarily so, and, it is necessary in each case to examine which is applicable, and as we have said above at [138]–[144], this depends on a number of factors. *Swain* does not stand for the broad proposition, which the Judge has relied on, that public law duties can always be overlaid with private law liabilities and remedies. In fact, it supports the contrary position.

157 The Judge also relied on another decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357 ("*Porter*"). The Judge, relying on the judgment of Lord Bingham of Cornhill (at [19(2)] and [19(4)]), considered that *Porter* stood for the proposition that there is a "pre-existing liability at common law for misconduct by the elected leaders of local authorities", and it "support[ed] the existence of duties of an equitable character owed by municipal councillors to their municipal council, even though the precise character of such duties was not made clear" [emphasis in original omitted] (see the Judgment at [198] and [204]). *Porter* was also cited by the Judge to demonstrate that the political context of Town Councils did not militate against imposing fiduciary obligations on its Town Council members (see the Judgment at [218]–[219]).

158 In our respectful judgment, the Judge erred in his reading of *Porter*. *Porter* concerned a specific *statutory provision* under which a public officer personally could be held liable for misconduct. Section 20(1) of the Local

Government Finance Act 1982 (c 32) (UK) ("LGFA") empowered a public auditor to certify the losses caused to a city council by the wilful misconduct of a councillor and, where that was done, the losses would be *chargeable to the councillor personally* (see *Porter* at [69]). In other words, under s 20(1) of the LGFA, if the wilful misconduct of a councillor was found to have caused loss to a local authority, the councillor would be liable to make good such loss to the council (see *Porter* at [19(4)] *per* Lord Bingham). In as much as this concerned wilful misconduct, the right of action under s 20(1) of the LGFA seems to us to resemble, if not overlap with, the tort of misfeasance in public duty, which as we have noted above at [135], is a situation where a private law action will exceptionally lie for breach of a public duty.

159 The question facing the House of Lords in *Porter* was whether the auditor was right to certify under s 20(1) of the LGFA that Dame Shirley Porter and Mr David Weeks – the leader and deputy leader of the Westminster City Council at the time – had, by wilful misconduct, jointly and severally caused loss to the council, which they were to be personally held liable to make good (see *Porter* at [34] and [146]–[148]). Therefore, *Porter* was concerned with the *narrow* question of whether the actions of Dame Shirley Porter and Mr David Weeks amounted to "wilful misconduct" under s 20(1) of the LGFA so as to render them liable *under that statutory provision*. That analysis did not entail the imposition of any private law duties. It was, rather, a specific statutory remedy imposed under the LGFA. *Porter* does not therefore stand for the broad proposition that private law remedies may be imposed for what in essence are alleged breaches of public law duties. *Porter* was not concerned with and did not examine the extent to which private law duties may be imposed over statutory and public law duties.

160 The Judge recognised that the liability of Dame Porter and Mr Weeks in *Porter* had been "expressly provided for" under s 20 of the LGFA, but he considered that that provision reflected a "pre-existing liability at common law for misconduct by the elected leaders of local authorities" (see the Judgment at [197]–[198]). In coming to that view, the Judge relied upon Lord Bingham's judgment in *Porter* (at [19(4)]). Lord Bingham had considered that, even before the introduction of s 20(1) of the LGFA and its predecessor statutory provisions, the law on the personal liability of a councillor to make good loss caused to a local authority by his wilful misconduct "had been declared in clear terms". Lord Bingham said "[o]ne such statement" may be found in *Attorney General v Wilson* (1840) Cr & Ph 1 ("*Wilson*") (at 23–27), in which Lord Cottenham LC said:

> [t]he true way of viewing this is to consider the members of the governing body of the corporation *as its agents*, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property … This was not only a breach of trust and a violation of duty towards the corporation but an act of spoliation against all the inhabitants of Leeds liable to the borough rate… [emphasis added]

161 In our respectful view, Lord Bingham's judgment is limited to s 20(1) of the LGFA and it does not stand for the *general* proposition that private law remedies can be imposed for what are in essence alleged breaches of public law duties. Also, a closer look at the facts of *Wilson* will demonstrate why that case does not lend support to any such general proposition. That was a case where the members of the governing body of the municipal corporation of Leeds had misappropriated funds belonging to the corporation. In so far as it was a clear case of dishonest misappropriation of public property, it is clearly distinct from the present case. Further, on no account could that case be said to concern the performance of any sort of a public duty. Rather, as emphasised in the extract

in the previous paragraph that we have reproduced from Lord Bingham's judgment in *Porter*, the essence of the decision in *Wilson* was that the members of the governing body had acted as the corporation's *agents* in disposing of those funds belonging to the corporation (at 22–23). In the present case, it is undisputed that there was *no agency relationship* between AHTC and the Town Councillors and Employees in the ordinary performance of their duties, as the Judge himself noted (see the Judgment at [203]).

162 Further, the facts of *Porter* should also be noted. *Porter* entailed the misuse of council assets (namely, council flats that were sold) to advance *purely partisan political purposes*, contrary to legal advice that this was impermissible. Specifically, Dame Shirley Porter and her deputy leader, Mr David Weeks, exercised powers under s 32 of the Housing Act 1985 (c 68) (UK) to sell a significant number of housing units belonging to the Westminster City Council in eight wards, on the assumption that, as *homeowners*, the purchasers would be more likely to vote for the Conservative Party (as compared to how it was thought they would likely vote if they were council *tenants*). As we have already noted, this comes close to, if not actually amounting to misfeasance in public duty and does not apply in the present context, which concerns the improper performance of public duties.

163 Finally, we turn to the Judge's reliance on the decision in *Tito*. The Judge referred to a passage from *Tito* (at 235):

> … The categories of fiduciary obligation are not closed, and I see no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature. The question, however, is not what statute could do, but what this statute has done.
>
> I can see that if statute created some relationship essentially different from a trust or agency or partnership or the like, but carrying with it the elements which give rise to some fiduciary relationship, then a fiduciary relationship there would be. On

> the other hand, when the statutory obligation is said to constitute a trust, or else to be so closely similar to a trust as to carry with it the same or a similar fiduciary obligation, then it seems to me that the considerations which negative a true trust will almost certainly negative the alleged fiduciary obligation. …

164 The Judge correctly considered that the passage from *Tito* which we have cited does not rule out the possibility of statutory powers and duties co-existing with private law obligations, and that whether they should, is a matter to be decided in the context and circumstances of the statutory power or duty in question. The Judge also noted that *Swain*, *Tito*, and *AG v AHPETC*) "all rightly counsel against … the shoehorning of private law concepts into public law relationships even where the analysis does not fit the circumstances" (see the Judgment at [185]). We have already considered *Swain* and referred to our judgment in *AG v AHPETC*.

165 *Tito* concerned the question of whether the Crown had acted in breach of a trust or fiduciary duties when royalty moneys were withheld from the Banabans in the island of Banaba. Under the Mining Ordinance of 1928 of the Gilbert and Ellice Islands Colony, the resident commissioner was empowered to take possession of land on the island, making it Crown land, and lease it to the holder of a Crown licence to mine for phosphate in return for compensation for the land and a royalty for minerals. Section 6(2) of the Ordinance provided that such compensation or royalty paid to the resident commissioner "shall … be held by him in *trust* on behalf of the former owner or owners if a native or natives of the colony subject to such directions as the Secretary of State may from time to time give" [emphasis added] (see *Tito* at 162–165).

166 In that context, Sir Robert Megarry VC, sitting in the English High Court, rejected the Banabans' claim and held that *the Ordinance* did not create

any trust to which the Crown was subject, despite the use of the term "trust" in the Ordinance. In this regard, Megarry VC made a few noteworthy points:

(a) The first point made by Megarry VC concerned the effect of using the word "trust" *in the Ordinance*. Megarry VC held that, even where the word "trust" was used, one would have to examine whether, in the circumstances of the case, a sufficient intention to create a "true" trust is manifested (see *Tito* at 211); "[o]ne cannot seize upon the word 'trust' and say that this shows that there must therefore be a true trust" (*Tito* at 227).

(b) Second, Megarry VC explained the different forms of "trust" that a government body might be subject to. Megarry VC distinguished between trust "in the higher sense" which describes governmental relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown, which is not enforceable in the courts, and the "true" juridical and justiciable trust, which is so enforceable (see *Tito* at 216 and 225). Megarry VC explained that, despite the use of the word "trust" in the Ordinance, the Ordinance did not create a trust, and the Crown was thus not subject to any trust or fiduciary duties in relation to the royalty moneys held pursuant to s 6(2) of the Ordinance (*Tito* at 228):

> … In their context, the provisions of section 6(2) and section 7 of the Ordinance of 1928, despite the use of the words 'in trust', are far more consonant with a governmental obligation than a true trust or fiduciary duty enforceable in the courts. The resident commissioner for the time being, in his official capacity, was to receive the moneys, and, subject to the directions of the Secretary of State, he was under a governmental obligation to use the moneys for those named. The Ordinance gave ample authority to the resident commissioner for him to expend the money only in this manner, and to resist any claim that it should be

> diverted to other uses: and no doubt that Ordinance imposed on him a duty to apply the money in this way. But in my judgment, *in this respect the Ordinance operated only in the sphere of government, and not by way of imposing any justiciable true trust or fiduciary obligation*. I do not think that a statutory duty to administer money in a particular way can be said necessarily or even probably to impose a fiduciary obligation upon the person subjected to the duty. *Many statutory duties exist without giving rise to any fiduciary obligation*, and *before such an obligation can arise I think that there must be something to show that the imposition of such an obligation was a matter of intention or implication*. [emphasis added]

(c) Third, and importantly, Megarry VC explained that it would be "remarkable" that the imposition of a statutory duty leads to the imposition of fiduciary duties (*Tito* at 230):

> … I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes a duty relating to property, the person on whom the duty is imposed were thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed. … [emphasis added]

167 In fact, it will be seen that the thrust of Megarry VC's judgment in *Tito*, cautions *against* the imposition of onerous fiduciary obligations on public officers who are performing statutory duties, because statutory duties cannot easily be elided with private law duties, much less the even more onerous fiduciary duties. Furthermore, *Tito* concerned a statutory provision which *explicitly* used the term "trust" to describe the public officer's duty to hold property. *Even in that context*, Megarry VC held that no trust had been created or could be enforced in the private law sense. The same caution applies with

even greater force in the present case because there is no such language in the text of the TCA or the TCFR to suggest any imposition of a trust or fiduciary duties. To the extent the Judge thought *Tito* supported his conclusion, we respectfully disagree.

Should fiduciary duties be imposed as a matter of principle?

168 Having concluded that the Judge erred in the reasoning he relied on to hold that the Town Councillors and Employees owed fiduciary duties to AHTC, we turn to consider this as a matter of first principles. In our judgment, there are a number of reasons why fiduciary duties should *not* be imposed on the Town Councillors and the Employees.

Characteristics of a fiduciary relationship

169 The principal reason why the Town Councillors and the Employees did not owe fiduciary duties to AHTC is that the relationship between a Town Council and its members and employees does not bear the characteristics of a fiduciary relationship.

170 First, as observed by Lord Brightman in *Swain* (at 618) and endorsed by this court in *AG v AHPETC* at [126], the duty imposed on a party affixed with a statutory power for public purposes "is not accurately described as fiduciary because *there is no beneficiary in the equitable sense*" [emphasis added]. The classic exposition of what a fiduciary is can be found in the judgment of Millett LJ (as he then was) in *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") (at 18):

> *A fiduciary is someone who has* ***undertaken to act*** *for or on behalf of another in a* ***particular matter*** *in* ***circumstances which give rise to a relationship of trust and confidence****.* The distinguishing obligation of a fiduciary is the *obligation of loyalty*. The principal is entitled to the single-minded loyalty of

> his fiduciary. This core liability has several facets. A fiduciary must *act in good faith*; he *must not make a profit out of his trust*; he *must not place himself in a position where his duty and his interest may conflict*; he *may not act for his own benefit or the benefit of a third person without the informed consent of his principal*. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, *he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary*. [emphasis added in italics and bold italics]

171 There are a few important principles to be extracted from Millett LJ's classic judgment. First, as explained by Paul Finn in *Fiduciary Obligations* (The Law Book Company, 1977) and cited by Millett LJ in *Mothew*, a person is not subject to fiduciary obligations because he is a fiduciary; it is *because* he is subject to them that he is a fiduciary. In essence, "the label 'fiduciary' is a *conclusion* which is reached only once it is determined that particular duties are owed" (see *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [193], citing James Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 316) [emphasis added]. This was also the position taken by this court in *Tan Yok Koon* (at [205]), where we observed that the reason why express trustees owe fiduciary duties is not that the fiduciary duties arise from the trustee-beneficiary relationship *per se*. Instead, the fiduciary duties arise "from the *voluntary undertaking* to the settlor to manage the trust property not for the trustee's own benefit *but for the benefit of the beneficiaries*" [emphasis added].

172 Second, fiduciary duties are onerous, and the core duty of a fiduciary is to act with undivided loyalty to the principal or beneficiary (see our decision in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [135]). To put it another way, "the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another

person" (*Tan Yok Koon* at [192]). The other facets of fiduciary duties listed by Millett LJ in *Mothew* flow from this fundamental duty of loyalty. These facets of fiduciary duties have now come to be known as the "no-profit rule", which proscribes the fiduciary from making a profit out of his fiduciary position, and the "no-conflict rule", which includes two different aspects that proscribes two different types of conflicts. The first proscribes the fiduciary from putting himself in a position where his own interests and his duty to his principal are in conflict (see, for instance, *Ho Yew Kong* at [135]; *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic International*") at [53]). The second prohibits the fiduciary from acting in a situation where there is a conflict between his duties owed to more than one principal.

173 Third, fiduciary duties are "voluntarily undertaken". This means that (*Tan Yok Koon* at [194]):

> … the fiduciary undertaking is voluntary in the sense that it arises *as a consequence of the fiduciary's conduct*, and is not imposed by law independently of the fiduciary's intentions. This is not to state that the fiduciary must be subjectively willing to undertake those obligations; the undertaking arises where the fiduciary *voluntarily places himself in a position* where the law can ***objectively*** impute an intention on his or her part to undertake those obligations. [emphasis in original in italics and bold italics]

174 Therefore, fiduciary duties should only be imposed if the characteristic expectation of *undivided loyalty* has been either explicitly or implicitly *voluntarily* undertaken by the fiduciary, and courts have to scrutinise the specific facts and context of each case to ascertain whether or not a fiduciary duty ought to be imposed on the trustee concerned (see *Tan Yok Koon* at [210]). This is well-established *even* in the commercial context. Thus, for instance, employees are not automatically fiduciaries to their employer, as care must be taken not to "equate the duty of good faith and loyalty owed by every employee

with a fiduciary obligation" (*Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 at [28]).

175 There are certain established classes of relationships where there is a strong but rebuttable presumption that fiduciary duties are owed. These include the relationship of a trustee-beneficiary, director-company, solicitor-client, and between partners (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [43]). It is clear that the categories of fiduciary relationships are not closed, and fiduciary duties may be owed even if the relationship between the parties does not fall within one of the established categories, provided that the circumstances justify the imposition of such duties (see *Turf Club* at [43]). The critical point to note here is that all these established classes of fiduciaries share the commonality that the fiduciary has "undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" (see *Turf Club* at [42]).

176 The significance of the imposition of fiduciary duties, as opposed to other duties owed in private or public law, is that a breach of fiduciary duties attracts the "generous" fiduciary remedies that are not merely aimed at vindicating property rights but at vindicating the *fiduciary duty* so as to exact loyalty from the fiduciary. This follows because fiduciary duties are proscriptive and prophylactic in nature (see *Tan Yok Koon* at [192]). This is entirely distinct from the remedies available in other areas of private law, which are generally compensatory in nature (see, for instance, *Turf Club* at [123], where we held that "the general aim of damages for breach of contract is to compensate"). Millett LJ had explained this in *Mothew* as follows (at 16):

> … 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*. … [emphasis added]

177 For this reason, Lord Millett has said, in "Bribes and Secret Commissions Again" (2012) 71(3) CLJ 583 (at 600), albeit in a different context, that:

> … equity is not concerned to give the principal a proprietary interest; it is concerned to *prevent the fiduciary from retaining any benefit from his abuse of the trust and confidence placed in him*. The *remedy is disgorgement*, not restitution, and it *requires disgorgement in full*. It does not matter that this may involve giving his principal a windfall (and the Court will not enquire whether it will do so); better the principal receive a windfall than that the fiduciary retain the profit. [emphasis added]

178 The examples of the more "generous" fiduciary remedies are manifold. For instance, we have held in *Winsta* at [240] that, once the principal is able to prove on a balance of probabilities that the fiduciary has breached his or her non-custodial fiduciary duty and that loss has been sustained, a rebuttable presumption arises that the loss would not have been sustained by the principal had the fiduciary not breached his or her fiduciary duty, and the legal burden of proof lies on the *fiduciary* to rebut this presumption. This is to give "legal effect to the stringent duties placed on fiduciaries and the corresponding *need to deter fiduciaries from breaching their duties*" [emphasis added] (*Winsta* at [240]). Such a presumption does not exist in most other areas of private law. For example, in claims for damages in contract or tort, it is fundamental that a plaintiff must prove his damage (see *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [27]). Similarly, where there is a custodial breach of fiduciary duty and falsification of the account is being sought, we also observed in *Winsta* at [115] that causation would only appear in the analysis in a limited sense, as the court does not need to determine whether the loss would still have occurred in the absence of the fiduciary's

breach of duty. Another example of the "generous" fiduciary remedies recognised in the common law is the fact that a fiduciary who receives a bribe from a third party holds that bribe on constructive trust for the principal (see, for example, *Sumitumo Bank Ltd v Thahir Kartika Ratna and others and another matter* [1992] 3 SLR(R) 637 at [241]–[243], affirmed by this court in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [56]–[57], and the decision of the UK Supreme Court in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2015] AC 250), even though the principal would not have had a prior proprietary interest in the bribe before the fiduciary obtained it. Similarly, where a fiduciary earns secret profits or commissions from his position without the informed consent of his principal, the fiduciary may be held to account for these profits, even if the earning of these secret profits did not compromise the performance of the fiduciary's duties.

179 In the present case, the relationship between the Town Councillors and the Employees with AHTC is not one that is rightly characterised as fiduciary in nature. The key fact militating against the imposition of fiduciary duties in this case is the fact that the Town Councillors and the Employees were executing *statutory duties* under *public law*. This is evident from the summary of the claims brought by the Plaintiffs and from how they have pleaded their respective cases as summarised above at [21], [57]–[71] and [82]–[86]. Consequently, it is both unprincipled and inappropriate to "convert" these statutory duties existing under public law into fiduciary duties existing under private law. To do so would completely erode the distinction between public law and private law. This was the very point emphasised by Megarry VC in *Tito* (at 230). This distinction is critical not merely in name but also in practice, because the recognition of these statutory duties as a *fiduciary* duty would provide the "principal" with the generous fiduciary remedies for what is in

substance a breach of a public statutory duty. A striking example of the attempt by AHTC to "convert" statutory duties into fiduciary duties can be seen from its pleadings when it asserted that s 15 of the TCA and rr 42 and 74(19A) "set out duties and obligations consistent with those undertaken by fiduciaries" (see [21(e)] above). The duties may be similar or consistent with certain fiduciary duties; but that does not change their character from a statutory duty into a fiduciary one.

180 The position of the Town Councillors and the Employees is also distinct from that of a company's directors. A director owes his company certain duties under the Companies Act 1967 (2020 Rev Ed) (the "Companies Act") which mirror the director's fiduciary duties. These include the duty under s 157(1) of the Companies Act to act "honestly"; and the duty under s 157(1) to "use reasonable diligence in the discharge of the duties of his or her office". However, these statutory duties merely *enshrine* the director's corresponding fiduciary duties recognised at common law (see *Ho Yew Kong* at [134]; *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Scintronix*") at [42]). A director also owes other duties to his company under the Companies Act which buttress – and are thus *distinct* from – the fiduciary duties he owes: these duties include the duty under s 156 to disclose potential conflicts of interest, which buttresses the no-conflict rule; and the duty under s 157(2) to "not make improper use of his or her position as an officer or agent of the company or any information acquired by virtue of his or her position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the company", which buttresses the no-profit rule.

181 The fact that the nature of a fiduciary relationship is generally unsuited to the public law context was also recognised by the Supreme Court of Canada

in *Alberta v Elder Advocates of Alberta Society* [2011] RC.S 261 ("*Alberta*"). In brief, that case involved a class action proceeding commenced by more than 12,000 residents of the province of Alberta's long-term care facilities alleging that the province had artificially increased charges for accommodation and meals in order to subsidise medical expenses that, by statute, the province was required to bear. The plaintiffs alleged that the province and the nine Regional Health Authorities that administered and operated the province's health care regime had failed to ensure that accommodation charges were used exclusively for that purpose. As a consequence of this, the plaintiffs claimed that they were paying excessive amounts for their meals and accommodation, which enabled the province to fund a portion of the medical costs, for which it was statutorily responsible. Among other things, the plaintiffs claimed that the State had acted in breach of fiduciary duty. The province applied to strike out this claim on the basis that the pleading did not disclose a supportable cause of action. The court agreed and struck out the plea of the alleged breach of fiduciary duty.

182 We note at the outset that the facts in *Alberta* are quite different from the present case. First, the conduct giving rise to the alleged breach in *Alberta* did not arise from the performance of a statutory duty, unlike in the present case. Second, the alleged fiduciary relationship in *Alberta* was between the government and members of the public, while the in the present case it is between a public agency (the Town Council) and the individual actors working for that agency (the Town Councillors and the Employees). Nonetheless we think the principles laid down and applied in that case are instructive.

183 McLachlin CJ, delivering the judgment of the Supreme Court of Canada, held that there was no basis to allege that the State owed the plaintiffs any fiduciary duties. The Supreme Court of Canada made some salient observations on the nature of fiduciary duties and why the "special nature of the

governmental context impacts on the requirements of a fiduciary relationship" (*Alberta* at [41]):

> (a) First, "the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion." This is because the "duty is one of utmost loyalty to the beneficiary" and imposing such a burden on the government "is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance". Consequently, "the circumstances in which this will occur are *few*", and the government's "broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be *rare*" [emphasis added] (*Alberta* at [42]–[44]).
>
> (b) If the fiduciary undertaking to act in the beneficiary's or principal's best interest is alleged to flow from a statute, "the language in the legislation must *clearly support it*", and the "mere grant to a public authority of discretionary power to affect a person's interest does not suffice" (*Alberta* at [45]).
>
> (c) If the alleged undertaking arises by implication from the relationship between the parties, the content of the obligation owed by the government will vary depending on the nature of the relationship, and should be determined by focusing on analogous cases. "Generally speaking, a *strong correspondence* with one of the traditional categories of fiduciary relationship — trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child — is a *precondition* to finding an implied

fiduciary duty on the government" [emphasis added] (*Alberta* at [46]–[47]).

(d) A "general obligation to the public or sectors of the public cannot meet the requirement of an undertaking" (*Alberta* at [48]).

(e) Where the alleged fiduciary is the government, "it may be difficult to establish the second requirement of a defined person or class of persons vulnerable to the fiduciary's exercise of discretionary power", because the government, "as a general rule, must act in the interest of all citizens" (*Alberta* at [49]). This principle applies to the present case at least to some degree, even though the alleged beneficiary is a body corporate (AHTC) and not an undefined group of individuals (members of the public), because the Town Councillors and the Employees act for the Town Council *in order to serve the Town Council's constituents* (see further at [198] and [203] below). In making any decisions for the Town Council, the Town Councillors and Employees would have to consider the wide variety of interests that the Town Council's constituents may have.

(f) Finally, it may be difficult to establish the requirement that the government power at issue "affects a legal or significant practical interest, where the alleged fiduciary is the government" because it is "not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security". The interest affected "must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement", such as "interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person" (*Alberta* at [51]). Moreover, the "degree of control

> exerted by the government over the interest in question must be equivalent or analogous to *direct administration of that interest* before a fiduciary relationship can be said to arise", and the "type of legal control over an interest that arises from the ordinary exercise of statutory powers does not suffice". Otherwise, "fiduciary obligations would arise in most day to day government functions making general action for the public good difficult or almost impossible" (*Alberta* at [53]).

184 The foregoing general principles are sound and we find them persuasive. It follows that the "special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (*Alberta* at [37]). If this applies even when the public body is not exercising specific statutory duties, then it seems to us that it would arguably apply with *even greater force* if the public actor is executing specific statutory functions, because the statutory context will generally govern exclusively, as we have already explained at [140(d)] above.

185 This was also noted by the court in *Alberta* when McLachlin CJ observed that the legal interest at issue in that case – the right to chronic care and the right to be assessed a reasonable fee for the receipt of care – flowed "exclusively from statute" (at [61]). In this regard, the court referred to Sharpe JA's statement in another case, *Gorecki v Canada (Attorney General)* (2006) 208 O.A.C 368 at [6], in which it was observed that the "relationship between the Crown and the appellant flows entirely from the terms of the [Canada Pension Plan] …. [t]he only duty that the [Canada Pension Plan] imposes on the Crown or that the Crown assumes is the public law duty to fulfil the statutory terms of the [Canada Pension Plan]. This *cannot* be the source of a fiduciary duty owed to the appellant" [emphasis added]. In our view, these observations are broadly consistent with the distinction between public law duties and private

law duties, and stress the exceptionality of fiduciary obligations in a public law context and even more so where the source of an alleged fiduciary duty is founded on a statutory duty, as we have already highlighted at [141] and [179] above.

186 The relationship between a Town Council and its members and senior employees does *not* bear the nature and characteristics of a fiduciary relationship. For this reason, it would be inappropriate and unprincipled to find that the Town Councillors and the Employees owed fiduciary duties to AHTC.

Separation of powers

187 There is a second difficulty. The imposition of fiduciary duties may undermine the doctrine of separation of powers, in requiring the court to analyse difficult questions of "fiduciary" breach *in the context of the exercise of public powers*. We can illustrate the point in the context of this case. One of the key factual issues concerns the allegedly "unjustified" waiver of tender for the first contracts for the provision of MA and EMSU services to AHTC. Under r 74(17) of the TCFR, the Town Council or its Chairman has the power to waive the calling of a tender in the circumstances specified in that rule. Put simply, whether the calling of a tender should be waived is a decision for the Town Council (constituted by its elected and appointed members) or its Chairman, provided that that power is exercised within the limits of rr 74(17) and 74(18) of the TCFR. If this is transposed to a fiduciary context, as the Judge analysed it, the question becomes whether the waiver of tender is *in the best interests* of AHTC. However, what is or is not in the best interests of AHTC is, in substance, a political or a policy question. The Town Councillors submit that the waiver of tender was done to ensure the appointment of an MA company that would serve a WP-led Town Council competently and loyally. This, the Town Councillors

submit, would serve the interests of AHTC and its residents. The Judge did not accept this factual narrative but, leaving to one side the factual question of why the need for a tender was waived, one can see the difficulty of having a *court* pronounce on the validity of what was quintessentially a political judgment call by the Town Councillors in determining whether the waiver of tender was "justified". We will return to the factual question later, but note that the Judge found that the waiver of tender was not justified because its "real objective" was to enable AHTC to retain the existing staff at HTC. This prompts the question: *why would that not be "in the interests of" AHTC, even if that were the case*? If the Town Councillors believed in good faith that the staff at HTC would provide a better and more reliable quality of service for the Town Council of a GRC that was led by a political party other than the PAP for the first time, and if they believed that none of the existing MA service providers in the market, which they perceived to be not supportive of the WP, would be willing to provide such service, there would be no appropriate *legal* basis for a court to find the contrary. Otherwise, the court would be making what is essentially a *political or policy-laden* conclusion that it would not be in the "best interests" of AHTC and its residents for AHTC to engage an MA services provider that was supportive of the WP.

188 Indeed, even in the commercial context, courts generally defer to business judgments when assessing whether a director has breached his fiduciary duties owed to a company (see, for example, *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 at [16]–[17]).

189 It is well-established in administrative law that decisions of the Executive branch are only judicially reviewable on limited and largely procedural grounds. The underlying premise is that the Executive has wide discretion in exercising its powers. As explained below at [205]–[209], there are

already explicit, although tightly drawn, means and remedies spelt out in the TCA and the TCFR to ensure compliance by a Town Council and its members and officers with the TCA and the TCFR. Beyond this, the basis on which to seek judicial review of a Town Council member's or officer's actions is confined to the narrow grounds recognised in administrative law, such as jurisdictional errors of law, irrationality, the consideration of irrelevant considerations and improper purposes. It would undermine these established principles of administrative law to allow a Town Council to pursue a private law claim based on fiduciary principles against its members and employees seeking remedies which would entail a court reviewing the substance of the decisions and actions of those running the Town Council. The doctrine of separation of powers cautions against the imposition of fiduciary duties on the Town Councillors and the Employees in the present case.

Parliamentary intention

190 Next, we consider the Parliamentary debates on the Town Councils, which the Plaintiffs relied upon. They both contend that there is clear evidence in the Parliamentary debates to show that Parliament intended that members, employees and officers of a Town Council owe fiduciary duties to the Town Council.

191 In our judgment, none of the Parliamentary debates concerning the Town Councils Bill (Bill No 9/1988) (the "Town Councils Bill") indicated that a Town Council's members and employees would owe fiduciary or equitable duties to it. The first point which the Plaintiffs have not appreciated is that whatever views may have been expressed by the Honourable Members of Parliament as to what they thought was the nature of the duties and responsibilities of the members and employees of a Town Council, these are not

probative of the position *at law*, which is a matter to be determined in these appeals. The issue at hand is not the interpretation of a statutory provision, as to which, extraneous material such as Parliamentary debates may, in accordance with the established principles of statutory interpretation, be relevant to guide the court's purposive interpretation of the statutory provision (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [54]). The legal question in this case is whether certain individuals owe fiduciary duties *as a matter of the principles of equity, which are determined by the courts*, and not established by a statute such as the TCA. The answer to this question should therefore be determined by the application of case law and in particular the principles of fiduciary law. This is to be considered by examining the nature of the relationship between Town Councils and their members and employees, and analysing this in line with the established principles of fiduciary law to determine whether that relationship bears such hallmarks of a fiduciary relationship.

192 We have already explained above at [169]–[186] that the relationship between a Town Council and its members and senior employees in the execution of their statutory duties under public law does not bear the nature and character of a fiduciary relationship. In any event, having considered all the relevant Parliamentary debates on the issue, we do not accept the Plaintiffs' submissions that Parliament in fact intended that a Town Council's members and employees be subject to fiduciary duties.

193 One of the key Parliamentary speeches they relied upon is the speech by the then-Minister for National Development, Mr S Dhanabalan, at the Second Reading of the Town Councils Bill in 1988. There, he stated that the staffing of a Town Council is a "commercial decision" and that Town Councils "must be free to negotiate and agree on commercial terms". On this basis, the Plaintiffs

contend in these appeals that, because Parliament envisioned the relationship between a Town Council and its members or its employees to be a "commercial one", "such a relationship was always intended to be governed by private law".

194 With respect, we disagree. We say this for several reasons. First, it is well-established that the existence of a private or "commercial" relationship does not in and of itself give rise to fiduciary duties. The Town Council may well enter into a commercial arrangement with its staff or even its MA by entering into a contract which can be sued upon. None of this explains how the Town Councillors or the Employees are therefore subject to fiduciary duties. Second, and more importantly, the context in which Minister S Dhanabalan's comments were made is key. It bears setting out the Minister's speech in its full context (*Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at cols 442–444):

> There was also a fear or concern expressed by the Member for Bo Wen and by others that the Town Councils may not be given adequate staff. It is up to the Town Councils to employ their staff. Of course, if they go to the HDB company and ask the HDB company to provide the staff or the service, then they have to negotiate with the HDB company, what they have to pay and what kind of people they will get. But this is, in fact, one of the tests of the management of the Town Councils. *How they go about getting the right staff and what kind of salaries or terms they pay. This must be the responsibility of the Town Council.* HDB has a pool which it will put into the HDB company. *HDB will be prepared to negotiate with every Town Council, but whether HDB is, in fact, given the job or some other manager is given the job, will have to be something that the Town Council and HDB or the manager to decide and come to terms. It is a commercial decision and they must be free to negotiate and agree on commercial terms.* [emphasis added]

195 It will be apparent from a fair reading of the Minister's speech that his comments were made in response to concerns regarding the *staffing* of Town Councils and, in particular, whether the HDB might provide staffing resources to Town Councils. The Minister was seeking to underscore the fact that a Town

Council would enjoy much latitude in determining how it would source suitable staff. That is why the Minister also stated that Town Councils "must be free to negotiate and agree on commercial terms". As we have already noted, it cannot reasonably be inferred from this that Parliament implicitly intended that a Town Council's members and employees be subject to fiduciary duties. Little else was said or pointed to in the Parliamentary debates to suggest that a Town Council's members and employees owe it fiduciary duties.

196 In our judgment, it is reasonably clear from the Parliamentary debates at the time the Town Councils Bill was first introduced in 1988 that Parliament intended that Town Councils should serve both a *public* and *political* function. Specifically, it was contemplated under the TCA and the subsidiary legislation enacted thereunder that Town Councils would entail elected politicians taking on a greater role in managing estate and municipal governance. This had hitherto been the preserve of the HDB. The Town Council in this capacity therefore plays an important public function, and, among other things, receives grants-in-aid from the Government to be applied towards this end.

197 At the same time, the Town Council also serves a political function. As the court highlighted in *AG v AHPETC* (at [50]), following a comprehensive review of the Parliamentary debates, the Town Council scheme was "seen as a political measure that would deepen the connection between Members of Parliament (especially in their capacity as town councillors) … and the residents they were elected to serve in their constituency". In this vein, quite apart from the legal mechanisms explained below at [205] and [208], this innately political dimension of the Town Council scheme also meant that the ultimate check against errant or ineffective Town Council members was thought to be at the ballot box. This is evident from Minister S Dhanabalan's speech at the Second

Reading of the Town Councils Bill in 1988 (*Singapore Parliamentary Debates: Official Report* (28 June 1988) vol 51 cols 443 to 444):

> When the Town Councils are set up, the whole idea is to rest the responsibility of the management of the funds as well as the estate with the Town Council. If a Town is mismanaged and HDB as the lessor finds that it has to move in, then there are provisions in the law for HDB to move in. But there is no question of the Government coming in to bail the Town Council out, in the sense that if funds are mis-spent, or if there is mismanagement, or people have lent to Town Councils and these borrowings have been mis-spent and the lender cannot recover, that the Government will come in and make good. If the Government is going to stand here as a safety net, then that will only encourage more mismanagement.
>
> *The whole idea of this exercise is for people to be careful in the choice of their MPs as well as in the choice of the Councillors*, in the sense that if the MP is good, he could choose good, honest, competent Councillors to help him. *It is important that people realize that they have to live with the consequences of their choice.* If they elect an MP who choose a bunch of crooks to help him and together they run through the coffers in no time and leave the constituents in the lurch, well, they have to take the consequences. *The Government is not going to come in and say, 'We will take over now and make good all the losses.'* At the time when the HDB comes in, of course, whatever they collect from that point on will be used to manage the constituency, to provide the services in the constituency. *And what has been mis-spent in the past, well, it is a loss.* I think the responsibility and the onus must be very clear, and very clearly laid on the Chairman as well as on the Town Council as a whole. I think that is an important principle we should not deviate from. If the Government holds out that this is an experiment, if you make a mess of it, we are going to come in and pick up the pieces, then I think we are not going to start off this whole project on the right basis. We should make the responsibility very clear.
>
> [emphasis added]

198 It is noteworthy from the foregoing extract that the intention was for errant Town Council members to face *political* consequences. This shows that the context informing the Town Council scheme, and the core nature of the relationship between a Town Council and its members and employees and ultimately, the Town Council's constituents, is political, and it bolsters our view

above (at [186]) that the relationship between a Town Council and its members and employees is not aptly characterised as one of a fiduciary nature.

199 The Plaintiffs also cite Parliamentary debates that took place in 2015, well *after* the passage of the TCA and *after* the matters giving rise to these proceedings had occurred. In debating the Motion on the AGO Report on the audit of AHPETC referred to above at [89], several MPs made references to "fiduciary duties". An illustrative example is the speech by the Minister for Law, Mr K Shanmugam (*Singapore Parliamentary Debates, Official Report* 12 February 2015) vol 93):

> The conflict of interest is apparent, real and serious. No Town Councillor who knew of this structure could have approved this structure lawfully. It is not capable of being approved in law. It is unlawful. *And it would have been a serious breach of fiduciary duties for any Town Councillor to have approved this process.* [emphasis added]

200 During the Second Reading of the Town Councils (Amendment) Bill (No 9/2017), the then-Senior Minister of State for National Development, Mr Desmond Lee, in explaining one of the amendments to expand the scope of the penalty provision under s 33(6B) of the former iteration of the TCA, also alluded to "fiduciary duties" (*Singapore Parliamentary Debates*, *Official Report* (10 March 2017) vol 94):

> We all recognise and accept that Town Councils and their key decision makers have to act honestly and responsibly. This is reflected in section 33(6B) of the current Town Councils Act where key decision-makers in the Town Council, namely, the Chairman and Secretary, are held equally liable for the offence committed by the Town Council, if the offence was committed with their consent or connivance.
>
> This Bill extends the existing treatment and penalties to the new offence provisions, so as to hold culpable parties accountable. *This sets the tone for the leadership of Town Councils and underscores the point that there would be stern consequences for key decision-makers who abet poor governance or fail in their fiduciary duties.*

> …
>
> Members also sought clarification on the code of governance. MND will introduce this code of governance in consultation with Town Councils. *Amongst other objectives, the code promulgates greater transparency and accountability in Town Councils' decision-making by setting out principles of good governance and highlighting best practices that can guide the Town Councils in executing their fiduciary responsibilities and improve accountability and disclosure.* This code is likely to take some reference from provisions in the code of governance for charities and institutions of public character and the code of corporate governance for companies, and may cover the principles and mechanisms to ensure independent decision-making and manage potential conflicts of interest. Practices that ensure robust risk management and well-documented internal controls, systems and policies to protect stakeholders' interest and to safeguard Town Councils' assets.
>
> [emphasis added]

201 After the Judgment was delivered, a Motion was raised in Parliament discussing the governance of AHTC. On 5 November 2019, several Members of Parliament spoke, addressing the breaches of the Town Councillors' and the Employees' "fiduciary duties".

202 The speeches that were made *after* the commencement of the Suits were not pressed with great vigour by the Plaintiffs before us, and, in our judgment, rightly so. These speeches coming well after the passage of the TCA are of no real value in shedding light on the Parliamentary intention that pertained to the duties of a Town Council's officers and employees at the time the TCA was passed. The Plaintiffs suggest that these speeches are *reiterative* of prior Parliamentary intent. However, this is not persuasive given how little light is shed on this question in the Parliamentary debates that took place at the time of the TCA, well before the Suits.

203 As such, while Parliamentary intention is not dispositive of the issue, we consider that (a) the Parliamentary debates during the introduction of the Town

Councils Bill were silent and equivocal on the question of whether a Town Council's members and its senior employees owe it fiduciary duties, but that (b) it is clear that the nature of the relationship between a Town Council and its members and employees was conceived as largely *political* because of the impact that the performance of their duties would have on their constituents. This makes it inescapable that the members of a Town Council would and indeed should have regard to the wishes and interests of their constituents in general in the carriage and execution of their statutory duties and it supports our conclusion at [186] above that the nature of the relationship between a Town Council and its members and employees is not aptly seen as a fiduciary one.

Is there a lacuna in the law?

204 The Plaintiffs also submit that it would be necessary to impose fiduciary duties on the Town Councillors and Employees as there would otherwise be a lacuna in the means by which to enforce the duties owed by a Town Council under the TCA and the TCFR. With respect, we disagree.

205 First and foremost, we do not accept that there are no mechanisms to enforce the duties of a Town Council under the TCA and TCFR. In this regard, a key provision is s 21 of the TCA, which stipulates:

> **Duties of Town Council**
>
> **21.**—(1) A Town Council shall, for the purposes of the residential and commercial property in the housing estates of the Board within the Town —
>
> (*a*) control, manage and administer the common property of the residential and commercial property for the benefit of the residents of those estates;
>
> (*b*) properly maintain and keep in a state of good and serviceable repair the common property of the residential and commercial property;

> (*c*) contribute such sum towards the premiums to be paid by the Board for the insurance of the common property of the residential and commercial property against damage by fire as the Minister may, by notice in writing to the Town Council, determine;
>
> (*d*) where necessary, renew or replace any fixtures or fittings comprised in the common property of the residential and commercial property;
>
> (*e*) provide essential maintenance and lift rescue services to the residents of the residential and commercial property;
>
> (*ea*) properly maintain and keep in a good and serviceable repair (including landscaping of) the facilities within the Town that is outside the common property of the residential and commercial property in the housing estates of the Board within the Town, where the facilities are erected, installed or planted by the Town Council with the approval of the Minister and the consent of the owner of the property on which the facilities are erected, installed or planted;
>
> (*f*) *comply with the provisions of this Act and the rules made thereunder*; and
>
> (*g*) comply with any notice or order served on it by any competent, public or statutory authority requiring the abatement of any nuisance on the common property of the residential and commercial property or ordering repairs or other work to be done in respect of the common property.
>
> (2) Where a requirement or duty is imposed on a Town Council by this section, *the [HDB] or any person for whose benefit, or for the benefit of whose flat that requirement or duty is imposed on the Town Council, may apply to the High Court for an order compelling the Town Council to carry out the requirement or perform the duty, as the case may be.*
>
> (3) On an application being made under subsection (2), the High Court may make such order as it thinks proper.
>
> [emphasis added]

206 Section 21 sets out a wide-ranging list of duties incumbent on the Town Council, including, in particular, s 21(1)(*f*) that mandates the Town Council's compliance with *all* obligations under the TCA and the rules made thereunder.

A key provision pertaining to the enforcement of s 21 of the TCA is s 21(2), which provides a statutory avenue for the HDB (or any person for whose benefit a duty under the TCA is imposed on the Town Council) to apply to the High Court to compel a Town Council to perform that duty under the TCA.

207 In *AG v AHPETC*, this court held (at [75]) that the TCA allows the HDB to apply for relief under s 21(2) without having to prove that it was a specifically intended beneficiary of the duty in question. This court further observed (at [83]) that, if the moneys disbursed by way of the grants-in-aid by the MND were not properly applied by the Town Council in the carrying out of its functions, residents and flat owners who are adversely affected can also apply under s 21(2) to compel the Town Council to do so. As such, s 21(2) clearly provides a mechanism by which all the duties under the TCA and the TCFR can be enforced.

208 The TCA also contains other provisions which expressly impose both criminal and civil liability on the Town Council or its members and officers for a range of misfeasance. We highlight a few examples:

> (a) Under s 33(6) of the TCA, a Town Council is prohibited from disbursing any moneys from the Town Council's sinking fund or from the "Town Council Fund" (which s 33(1) of the TCA states is constituted by "funds for improvements to and the management and maintenance of residential property and of commercial property"), except in prescribed circumstances. Section 33(6A) of the TCA states that any Town Council which contravenes s 33(6) shall be guilty of a criminal offence and shall be liable on conviction to a fine not exceeding $5,000. Section 33(8) of the TCA also states that all payments to and out of the Town Council

Fund shall be made to and by the Town Council Secretary "*who shall be responsible therefor* to the Town Council" [emphasis added].

(b) Under s 38(1) of the TCA, the accounts of a Town Council shall be audited by the Auditor-General or such other auditor as may be appointed annually by the Town Council with the approval of the Minister for National Development after the Minister has consulted the Auditor-General. Under s 38(9) of the TCA, the auditor may require any person to furnish information necessary for the discharge of his auditing functions, and failure to comply with such direction without any reasonable cause is an offence, which is punishable with a fine under s 38(10) of the TCA.

(c) Under r 21(1) of the TCFR, all collections of money received by authorised officers of the Town Council must be deposited as soon as possible in the safe or vault provided for the purpose, or paid into a bank account of the Town Council, and "negligence in this respect *will place the entire responsibility for any loss upon the officer concerned*" [emphasis added].

(d) Rule 56 of the TCFR governs "[u]nauthorised disbursements". Under r 56(1) of the TCFR, any officer "allowing or directing any disbursement without proper authority *shall be responsible* for the amount" [emphasis added]. Rule 56(2) provides that, should any wrongful payment be made in consequence of an incorrect certification on a voucher, "the certifying officer *shall be responsible* for the wrongful payment" [emphasis added].

(e) Under r 91(2) of the TCFR, any officer found to be responsible for a shortfall in the Town Council's cash balance "may be *required to make good the loss*" [emphasis added].

(f) Critically, under rr 104(1) and 104(2) of the TCFR, "[i]f any loss is due to the *negligence or fault* of any officer or Committee authorised by the Town Council, that officer or Committee *may be liable … to be surcharged* with all or any part of the loss" [emphasis added], though the amount to be surcharged shall not exceed the actual cash or replacement value of the loss.

209 As such, there are clear provisions under the TCA and TCFR which impose criminal and civil liability on the Town Council and the Town Council's officers for any breach of the Town Council's duties under the TCA and TCFR. And aside from these two broad types of recourse as set out above at [205]–[208], judicial review remains an available remedy in suitable circumstances. Thus, there are statutory mechanisms in place to secure compliance with the duties imposed under the TCA and the TCFR. Town Councils are also subject to public audit under s 4(1) of the Audit Act and s 38(1) of the TCA (see [208(b)] above), and this was *exactly* what happened in the present case, as we have set out above at [87]–[91]. The availability of such statutorily-prescribed means of recourse militates against the imposition of fiduciary duties in order to secure compliance with these obligations.

210 In any event, *even if* there were insufficient means to enforce the performance of the duties under the TCA and the TCFR, the imposition of fiduciary duties would *not* be the solution to plug this purported gap. Leaving aside the quite fundamental point that the court ought not to operate as a "mini-legislature", the imposition of fiduciary duties would completely overlook the

statutory context of these duties and erode the important distinction between the *statutory* duties of a Town Councillor or an employee of a Town Council and the unique nature of a *fiduciary* obligation.

Summary of applicable principles

211 In summary, the following principles are, in our judgment, applicable to the present case in determining whether the Town Councillors and the Employees owed fiduciary duties to AHTC.

(a) The Plaintiffs' claims against the Town Councillors and Employees stem from breaches of statutory duties arising under the TCA and the TCFR (see [86] above).

(b) There is a fundamental distinction between public law duties, which generally stem from legislation, and private law duties, which generally stem from a party's assumption of a private duty in relation to another private party. While it is possible for a public officer to be subject to private law duties (see [143] above), a court must carefully consider whether it is appropriate in the given circumstances to overlay private law duties over statutory duties such that an impugned act stemming from a breach of a statutory duty could also give rise to a concomitant breach of a private legal duty (see [145] above).

(c) In this case, a Town Council's relationship with its members and senior employees is not properly characterised as fiduciary in nature. This is because the Town Councillors and the Employees were executing statutory duties under public law. To impose fiduciary duties would effectively "convert" these public duties into fiduciary ones that attract the more generous remedies available under fiduciary law

without regard to the true nature of the underlying relationship, and this impermissibly erodes the distinction between public and private law.

(d) The potential danger of undermining the doctrine of separation of powers also weighs against the imposition of fiduciary duties on the Town Councillors and the Employees (see [187]–[189] above).

(e) The Parliamentary debates during the introduction of the Town Councils Bill, while not determinative, show that the nature of the relationship between a Town Council and its members and employees was conceived primarily in political terms having regard to the impact of the execution of the duties in question upon the constituents of the Town Council. This bolsters the conclusion that the nature of the relationship between a Town Council and its members and employees is not accurately described as a fiduciary one (see [203] above).

(f) The statute itself already prescribes various remedies that are available to secure compliance with the obligations arising under the TCA and the TCFR (see [208]–[209] above).

212 Therefore, in our judgment, the Judge erred in finding that the Town Councillors and the Employees owed fiduciary duties to AHTC. There is no principled basis on which fiduciary duties ought to be superimposed over and above the statutory duties which the Town Councillors and the Employees were subject to.

Whether the Town Councillors and Employees owed equitable duties of skill and care to a Town Council

213 We turn to the Judge's finding that the Town Councillors and Employees owed equitable duties of skill and care to AHTC. The Judge only relied on the

decision of the English Court of Appeal in *Mothew*, which stands for the position in English law that the duty of care owed by a fiduciary to his principal or beneficiary is an *equitable* duty rather than a classic fiduciary duty. This is because the equitable duty of care is "not a duty that stems from the requirements of trust and confidence imposed on a fiduciary" (*Mothew* at 17 *per* Millett LJ, endorsing *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 at 158). Millett LJ expressed the equitable duty of skill and care as follows (16–17):

> … 'not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.'
>
> *It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties.* If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty. *The common law and equity each developed the duty of care, but they did so independently of each other and the standard of care required is not always the same. But they influenced each other, and today the substance of the resulting obligations is more significant than their particular historic origin.* In *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145, 205 Lord Browne-Wilkinson said:
>
> > '*The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others.* Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold.'

> I respectfully agree …
>
> [emphasis added]

214 Millett LJ further explained in *Mothew* (at 17) that:

> [a]lthough the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference.

215 Relying on the foregoing paragraphs of Millett LJ's judgment, the Judge held that (a) the equitable duty of skill and care comes in tandem with and as a result of the finding of a fiduciary relationship, though it is not a fiduciary duty; (b) it is equivalent to the duty of care in the tort of negligence; and (c) the remedies for breach of this duty of skill and care are also measured on the same basis as those in tort, although they may be called "equitable compensation" in name. On this basis, the Judge considered that "there [was] no need … to consider separately any alleged breaches of the duty of care in tort, since in the present case such duties would mirror the defendants' equitable duty of skill and care (see the Judgment at [243]).

216 Millett LJ's decision in *Mothew* has to be read in its proper context. The question which Millet LJ was addressing was whether the duty of care owed by a fiduciary to a principal or beneficiary was correctly regarded as a fiduciary duty (see *Mothew* at 16). Millett LJ answered this in the negative, as highlighted above at [213]. Instead, Millett LJ held that a fiduciary's duty of care is an equitable one. Therefore, Millett LJ was not addressing the question that this court is confronted with, that is, whether the Town Councillors and Employees owe a duty of care to AHTC *in the first place*. As such, *Mothew* does not assist this court in determining whether a duty of care, much less an *equitable* duty of care, is owed by the Town Councillors and Employees.

217 The equitable duty of skill and care, on the Judge's analysis, comes in tandem with a fiduciary relationship. While AHTC did not specifically address this point in its Appellant's Case, STC accepted that equitable duties of skill and care are parasitic on the finding that the Town Councillors and Employees are fiduciaries. Since we have found that the Town Councillors and Employees are not fiduciaries of AHTC, it follows that we must also set aside the Judge's finding that the Town Councillors and Employees owed equitable duties of skill and care to AHTC.

218 In any event, we question whether there was a need for the Judge to employ the concept of the equitable duty of skill and care. In our jurisprudence, a fiduciary's duty of skill and care has been recognised to be based in common law, not equity (see *Ho Yew Kong* at [134]). In these circumstances, it is not clear to us why the Judge had to resort to the more contentious doctrine of equitable duties of skill and care in the public context of the Town Council, especially when the Judge appeared to accept that the Town Councillors and Employees owed a tortious duty of care to AHTC (see the Judgment at [243]). We accordingly turn to the tortious duty of care.

Whether the Town Councillors and Employees owed a tortious duty of care and skill to AHTC at common law

219 All the parties agree that, if the Town Councillors and Employees do not owe fiduciary or equitable duties to AHTC, the pleaded claims for breaches of the tortious duty of care and skill would remain available to the Plaintiffs (see [21(c)] above). The parties also agree that there would be no remaining claims against FMSS, since the claims against FMSS were for knowing receipt and dishonest assistance, which are predicated on breaches of fiduciary duties in this case (see for example, *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at [20] and [23]). As the primary focus of the

parties' further submissions was on the remaining claims of negligence, we shall deal with those first.

220 Both the Plaintiffs submit that the *Spandeck* test for the imposition of a tortious duty of care (see [128] above) is satisfied in respect of the Town Councillors as well as the Employees. In response, the Town Councillors and Employees submit that the language of the TCA and the TCFR does not suggest the existence of such an actionable duty of care on the part of the Town Councillors and Employees.

221 The claims against the Town Councillors and Employees in these appeals stem from the breaches of the duties arising under the TCA and TCFR, as summarised at [21], [57]–[71] and [82]–[86] above. The starting position in the analysis is that the TCA and the TCFR are the exclusive statutory framework governing the duties of the Town Councillors and Employees. The question in the circumstances is whether a common law duty of care can exist concurrently with the statutory duties imposed on the Town Councillors and Employees.

222 The principles set out in *Spandeck* have been outlined at [128]–[130] above. Essentially, to determine if a party owes a general duty of care, there are three requirements to be satisfied: there must first be factual foreseeability of damage, before a two-stage test of legal proximity and policy considerations is applied. The existence of the common law duty of care is dependent on the fulfilment of the *Spandeck* test even when there is a concomitant statutory duty that has allegedly been breached. The parties also do not dispute the applicability of the *Spandeck* test. Bearing in mind the principles outlined at [128]–[130] above, we agree that the *Spandeck* test is applicable in this case to determine whether the Town Councillors and Employees owed a tortious duty of care to AHTC.

223 As this court observed in *Spandeck* at [115], the preliminary requirement of factual foreseeability of damage "is likely to be fulfilled in most cases". We are satisfied that this requirement is satisfied in this case. It can hardly be doubted that the actions and/or omissions of the Town Councillors and the Employees in carrying out AHTC's duties under the TCA and the TCFR may cause harm or damage to AHTC. We now turn to consider the two-stage test of legal proximity and policy considerations in turn.

First stage of the* Spandeck *test

224 At the first stage of the *Spandeck* test, the question is whether there is a relationship of sufficient legal proximity between the parties concerned. Legal proximity refers to the "closeness and directness of the relationship between the parties" and encompasses physical, circumstantial and causal proximity, supported by the twin criteria of voluntary assumption of responsibility and reliance (*Spandeck* at [73], [77] and [81]). In other words, where A *voluntarily assumes responsibility* for his acts or omissions towards B, and B *relies* on this, it would be fair and just for the law to hold A liable for negligence in causing economic loss or physical damage to B (*Spandeck* at [81]).

225 As stated above at [129], the Plaintiffs claim that the Town Councillors and Employees are liable for the tort of *negligence*. They do not bring a claim under the separate tort of breach of statutory duty. Rather, the claim is that the Town Councillors' and Employees' negligent performance and conduct of AHTC's affairs resulted in AHTC *allegedly breaching various statutory duties* (under the TCA and the TCFR) and suffering loss. This raises the preliminary question of whether it would be appropriate to impose a common law duty of care on the Town Councillors and the Employees in the performance of their statutory duties. To put it another way: in addition to carrying out their statutory

duties, is there a duty on the Town Councillors and Employees to carry these out to a minimum standard, such that these duties are not performed negligently and such that they may be made to answer for such negligence by a claim for damages? The distinction can be illustrated to some degree by the facts of *Bux v Slough Metals Ltd* [1973] 1 WLR 1358, which concerned an employer's statutory duty to provide safety goggles. The employer did provide such goggles, thus fulfilling its statutory duty, but did not provide instructions for their proper use and so was held liable to a suit in negligence.

226 We are satisfied that a *prima facie* duty of care and skill arises in this case.

227 First, in our judgment, the Town Councillors and the Employees accepted and assumed their appointments as members (both elected and appointed) and senior employees of the Town Council, and with these appointments, they assumed responsibility for their acts in carrying out their respective duties under the TCA and the TCFR *for AHTC*. Second, there was also clearly reliance by AHTC on their acceptance of such responsibility. AHTC, being a body corporate, would necessarily have relied on the actions of the Town Councillors and the Employees.

228 As such, there is a *prima facie* basis to find that there is sufficient legal proximity, and subject to the second stage of the *Spandeck* test, the Town Councillors and the Employees may be liable in negligence for causing loss to AHTC.

229 We also accept STC's formulation of the duty as one of care *and skill* (see [219] above).

Second stage of the* Spandeck *test

230 At the second stage of the *Spandeck* test, the statutory scheme and Parliamentary intention are examined to ascertain whether there are material policy considerations that negate or limit the *prima facie* duty of care and skill arising under the first stage. The imposition of the alleged common law duty of care should not be inconsistent with the relevant statutory scheme (see [129(b)] above).

231 We further add to this that, unlike the tort of breach of statutory duty, which is *chiefly* dependent on Parliamentary intent (see [134] above), Parliamentary intent is not the chief determining factor of whether a public officer or body owes a common law duty of care. To hold otherwise would be to conflate the common law duty of care in the tort of negligence with the tort of breach of statutory duty, which are distinct and independent torts (see *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [3] *per* Lord Steyn).

232 Consequently, when considering the tort of negligence in the specific context of a public body charged with statutory duties, the primary question is whether, in the light of the statutory scheme, such an action may be restricted or even excluded. At the second stage of the *Spandeck* test, Parliamentary intent is *relevant*, though not necessarily determinative. In our judgment, the better way to understand the interface is that a common law duty of care may arise from a concomitant breach of statutory duty *unless such a common law duty has been excluded, modified or limited by statute*. In the present case, s 52 of the then-TCA provided:

> **Protection from personal liability**
>
> **52**. No suit or other legal proceedings shall lie personally against any member, officer or employee of a Town Council or other person acting under the direction of a Town Council for anything which is in good faith done or intended to be done in the execution or purported execution of this Act or any other Act.

233 It strikes us as significant that s 52 is not a blanket statutory immunity clause that unconditionally immunises a Town Council's members, officers and employees from *all* personal liability. Section 52 only affords protection to a Town Council's members, officers and employees from being personally liable for their acts *if* they are acting in the execution (or purported execution) of the TCA and in *good faith*. This suggests that Parliament *did* contemplate that a private right of action may subsist against a Town Council's members, officers and employees for any actionable civil wrong committed by them while executing the duties under the TCA, if and to the extent that these actions were not done in good faith. We therefore conclude that there is nothing to suggest that Parliament intended that a Town Council's members, officers and employees should be free of a common law duty of care in the performance of their duties *subject to the limits set out in s 52*.

234 We finally turn to briefly consider the principle of the separation of powers. In our judgment, this doctrine does not pose insurmountable issues in relation to the tort of negligence. Unlike a claim for breach of fiduciary duties, which may require the court to consider highly political and policy-laden questions such as whether a Town Council's member or senior employee had acted in the "best interests" of the Town Council and its residents, the question of whether there has been negligence in the carrying out of a duty under the TCA or the TCFR is generally not political or policy-laden. To use the distinction drawn in English law between "operational" and "policy" questions

(see *Anns v Merton London Borough Council* [1978] AC 728 at 754 per Lord Wilberforce), the question of whether there has been a breach of a standard of care in the carrying out of the duties under the TCA or the TCFR is more of an "operational" rather than a "policy" question. It follows that we do not think the imposition of a common law duty of care on a Town Council's members and senior employees would offend the principle of the separation of powers.

235 The parties have not pointed us to any other policy reason why such a limited duty of care ought to be negated. As such, we hold that the Town Councillors and Employees did owe a common law duty of care and skill to AHTC in carrying out the respective TCA and TCFR duties claimed by the Plaintiffs, subject to any applicable limits arising on the proper interpretation of s 52 of the TCA.

Summary of applicable principles

236 In summary, we make the following findings in relation to the common law duty of care and skill:

(a) As the Plaintiffs' claims against the Town Councillors and Employees arise in connection with the allegedly negligent performance of the duties imposed by the TCA and the TCFR (see [211(a)] above), the statutory schemes under the TCA and the TCFR may be relevant at both stages of the *Spandeck* test to determine whether a common law duty of care arises, though Parliamentary intention behind the statutory scheme is only relevant at the second stage (see [127], [130(c)] and [230]–[233] above).

(b) The threshold requirement that there be factual foreseeability of damage is satisfied, as it is clear that the actions and/or omissions of the

Town Councillors and the Employees may cause harm or damage to AHTC (see [223] above).

(c) The requirement of legal proximity under the first stage of the *Spandeck* test is also satisfied, because the Town Councillors and Employees assumed responsibility for their acts when undertaking to carry out their respective duties under the TCA and the TCFR *for AHTC*, and such acts were relied upon by AHTC. As such, a *prima facie* duty of care and skill arises (see [227] and [228] above).

(d) At the second stage of the *Spandeck* test, there are no policy factors that negate the *prima facie* duty of care and skill.

(i) There is nothing in the text of the TCA or the TCFR, or in the Parliamentary material, to indicate that Parliament did not intend that a common law duty of care and skill should be owed to a Town Council by its members and senior employees in respect of their execution of the statutory duties under the TCA and TCFR for the Town Council, subject to the limits set out in s 52 (see [231]–[233] above).

(ii) The imposition of a duty of care and skill on the Town Council's members and senior employees would not offend the doctrine of separation of powers, as the issue of a breach of such a duty in the execution of the statutory duties under the TCA and TCFR would generally not be a political or policy-laden question (see [234] above).

(iii) While there is a fundamental distinction between public and private law duties, it is possible for a public officer to owe private law duties (see [143] above). Thus, the statutory context

> underlying the relationship between AHTC on the one hand and the Town Councillors and the Employees on the other hand does not prevent the imposition of a common law duty of care and skill owed by the latter to the former.

237 We accordingly hold that the Town Councillors and the Employees owed a common law duty of care and skill to AHTC to carry out their duties under the TCA and the TCFR in a non-negligent way. This, however, is not the end of the matter, because this is subject to the statutory immunity clause in s 52 of the TCA, the interpretation and effect of which is also disputed by the parties in these appeals. It is to this issue that we now turn.

What is the proper construction of s 52 of the TCA?

238 We begin with the proper interpretation of s 52 of the then-TCA. For ease of reference, we reproduce the text of s 52 here:

> **Protection from personal liability**
>
> **52**. No suit or other legal proceedings shall lie personally against any member, officer or employee of a Town Council or other person acting under the direction of a Town Council for anything which is *in good faith* done or intended to be *done in the execution or purported execution of this Act or any other Act.*
>
> [emphasis added]

239 It is clear from the text of s 52 of the TCA that there are two main elements that must be satisfied before a member, officer or employee of a Town Council or other person acting under the direction of a Town Council may invoke the provision and avoid personal liability:

> (a) first, he or she must have acted "in the execution or purported execution of [the TCA] or any other Act"; and

(b) second, such act must have been done or intended to be done "in good faith".

240 Before the Judge, the Town Councillors and Employees submitted that, even if they had breached their duties, they would be exempted from liability under s 52 of the TCA because they had acted in good faith in the execution of the TCA. On the other hand, both the Plaintiffs submitted that s 52 did not apply because s 52 only applied to suits brought by third parties, and not by the Town Council itself. The Plaintiffs also argued that the Town Councillors and Employees did not act in good faith.

241 The Judge agreed with the Plaintiffs. The Judge accepted that a possible interpretation of s 52 was that it provided for immunity in respect of all claims, regardless of who the claimant was, and regardless of whether the claim was brought against members, officers and employees of a Town Council. The only question was whether the claims related to acts or omissions done in good faith and in the execution or purported execution of any Act. The Judge referred to this as "the expansive reading" of s 52. However, the Judge held that, on a proper reading, s 52 only applied to claims brought by third parties, rather than claims brought by the Town Council itself (see the Judgment at [494] and [495]). Otherwise, s 52 would prevent the Town Council from enforcing terms of employment contracts and pursuing other claims in contract, tort or breach of fiduciary duties so long as the member, officer or employee acted in good faith in the performance of statutory duties. This would rewrite many such obligations, and Parliament could not have intended this in enacting s 52 of the TCA (see the Judgment at [498]). On appeal, the parties generally reiterate their positions below, as outlined at [120]–[121] and [239] above.

242 The parties' submissions and the Judge's findings raise the following issues as to the correct interpretation of s 52 of the TCA:

(a) Does s 52 apply to claims by a Town Council against its own members, employees and officers?

(b) What is the test for good faith?

(c) Which party bears the burden of proof in the context of s 52?

243 The three-step framework for statutory interpretation is well established. First, the court should ascertain the possible interpretations of the statutory provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole (see *Tan Cheng Bock* at [37(a)] and [38]). Second, the court should ascertain the legislative purpose of the statute. In ascertaining the legislative purpose, extraneous material may be a useful aid to interpretation, but primacy must be accorded to the text of the provision and its statutory context (see *Tan Cheng Bock* at [43]). Hence, extraneous material should not be used to give the provision a meaning which contradicts its express text except in very limited circumstances (see *Tan Cheng Bock* at [50]). Third, the court should compare the possible interpretations of the provision against the purpose of the statute and prefer the interpretation which furthers the purpose of the written text (see *Tan Cheng Bock* at [37(c)] and [54(c)]). We apply these principles and first turn to the main issue that is in dispute among the parties – whether s 52 applies to claims brought by the Town Council itself (as opposed to claims by third parties).

The legislative purpose of s 52 of the TCA

244 We have outlined the pertinent legislative materials that explain the general background to the Town Council scheme at [193] and [197] above. Some of the key points highlighted in these materials are that:

(a) The "intention is to give the Town Councils as much latitude as possible for them to manage their areas" and "to employ the kind of people who are necessary, to pay them the kind of fees that are necessary to get the work done", and "it is up to the Town Council to work out what is necessary" (*Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at col 442 (S Dhanabalan, Minister for National Development)).

(b) The "whole idea" of having Town Councils is "for people to be careful in the choice of their MPs as well as in the choice of the Councillors" because the voting public would have to "live with the consequences of their choice" (*Singapore Parliamentary Debates, Official Report* (29 June 1988) vol 51 at col 443 (S Dhanabalan, Minister for National Development)).

245 However, the legislative material is silent on the specific purpose of s 52. In *Tan Cheng Bock*, this court emphasised the following principles regarding the second step of the *Tan Cheng Bock* framework when determining the legislative purpose of a specific statutory provision:

(a) In formulating the legislative purpose of a provision, it is important to distinguish between the specific purpose underlying a particular provision and the general purpose or purposes underlying the

statute as a whole or the relevant part of the statute (see *Tan Cheng Bock* at [40]).

(b) In seeking to draw out the legislative purpose behind a provision, primacy should be accorded to the text of the provision and its statutory context over any extraneous material. The purpose of a provision should ordinarily be *gleaned from the text itself*. The court should first determine the ordinary meaning of the provision in its context, which might give sufficient indication of the objects and purposes of the written law, before evaluating whether consideration of extraneous material is necessary (see *Tan Cheng Bock* at [43] and [54(c)(ii)]).

(c) The situations in which the court might consider extraneous material are set out under ss 9A(2) and 9A(4) of the Interpretation Act 1965 (2020 Rev Ed) ("IA") (previously the Interpretation Act (Cap 1, 2002 Rev Ed)). These provisions state:

> **Purposive interpretation of written law and use of extrinsic materials**
>
> **9A.**— … (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
>
> (*a*) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
>
> (*b*) to ascertain the meaning of the provision when —
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into

> account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.
>
> …
>
> (4) In determining whether consideration should be given to any material in accordance with subsection (2), or in determining the weight to be given to any such material, regard must be had, in addition to any other relevant matters, to —
>
> > (*a*) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and
> >
> > (*b*) the need to avoid prolonging legal or other proceedings without compensating advantage.

(d) The court should consider the factors set out in ss 9A(2) and 9A(4) of the IA in deciding whether to consider extraneous material. In addition, the court should also consider (a) whether the material is clear and unequivocal; (b) whether it discloses the mischief aimed at or the legislative intention underlying the statutory provision; and (c) whether it is directed to the very point of statutory interpretation in dispute (see *Tan Cheng Bock* at [47] and [54(c)(iv)]).

246 Applying the foregoing principles to the present case, the purpose of s 52 of the TCA should first be gleaned from the text of that provision itself. That provision states very simply that "[n]o suit or other legal proceedings shall lie personally against" any member, officer or employee of a Town Council or any other person acting under the direction of a Town Council "for anything which is in good faith done or intended to be done in the execution or purported execution of this Act or any other Act". The ordinary meaning conveyed by the text of s 52 shows that its purpose is to protect individuals attempting to

discharge a public duty for a Town Council in good faith from personal liability for their actions.

247 There is no ambiguity in the text of s 52. The ordinary meaning conveyed by the text of s 52 also does not lead to a result that is manifestly absurd or unreasonable. Therefore, legislative material cannot be used to "ascertain" the meaning of s 52, in accordance with ss 9A(2)(*b*)(i) and 9A(2)(*b*)(ii) of the IA.

248 Applying s 9A(2)(*a*) of the IA, legislative material may be used to "confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision". There is nothing in the legislative material behind the TCA, as summarised at [244] above, that undermines or contradicts the ordinary meaning conveyed by the text of s 52. Therefore, the clear text of s 52 shows that the purpose of that provision is to protect any member, officer or employee of a Town Council or any other person acting under the direction of a Town Council from personal liability for any act which is in good faith done or intended to be done in the execution or purported execution of the TCA or any other Act.

249 Having set out the purpose of s 52, we now turn to the key issue in dispute in these appeals: whether s 52 applies only to claims brought by third parties or whether it also applies to claims brought by the Town Council, which is the situation in the present case.

Does s 52 apply to claims by the Town Council against its members or employees?

The Judge's reasoning

250 We first set out the Judge's decision. The Judge rejected what he termed the "expansive reading" of s 52 and held that s 52 applied only to claims brought by third parties, for the following reasons:

(a) The Judge found that the use of the term "personally" in s 52 of the TCA suggested that s 52 concerned liability to third parties, because it was only in that context that a distinction would have to be drawn between personal liability and the Town Council's institutional liability. Otherwise, the word "personally" would be surplusage, in that applying the expansive reading s 52 would have the same meaning with or without it (see the Judgment at [494]–[495]).

(b) Second, the Judge considered that reading s 52 as permitting claims brought by the Town Council would achieve an "unworkable and impracticable result" in that the Town Council would not be able to enforce contractual or tortious obligations owed to it by members, officers, employees, and contractors (see the Judgment at [497]–[498]).

(c) Third, the Judge noted that persons named under s 52 of the TCA would nonetheless be able to carry out their functions without hindrance so long as immunity was granted against suits brought by third parties (see the Judgment at [508]).

(d) Fourth, the Judge held that the narrower formulations of the court's discretionary power to grant company directors and trustees relief from personal liability (wholly or partly) under s 391 of the

Companies Act (Cap 50, 2006 Rev Ed) and s 60 of the Trustees Act (Cap 337, 2005 Rev Ed) justified caution in accepting the expansive reading (see the Judgment at [502]–[503]). The Judge reasoned that, because s 52 of the TCA conferred full immunity while s 391 of the Companies Act and s 60 of the Trustees Act only provided the court with a discretionary power to grant full or even partial relief, "caution" against accepting the expansive reading of s 52 of the TCA was justified.

(e) Fifth, the Judge held that the expansive reading of s 52 might even provide immunity against criminal prosecution (see the Judgment at [504]–[506]), and this seemed implausible.

(f) Finally, in considering the legislative purpose of s 52, the Judge found that "there is little material to work with" because "[t]here was no discussion in Parliament of s 52 TCA, and there is little in the structure or context of the TCA that sheds light on the purpose of s 52 beyond the words of the provision itself". The Judge reasoned that, "[n]evertheless, some observations may be made about the purpose of immunity provisions in general". In this regard, the Judge cited our observations in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [50] that statutory immunity clauses are "exceptional" and "commonly seek to protect persons carrying out public functions" on account of "the responsibilities that burden the exercise of such public functions and the desire not to hinder their discharge". The Judge reasoned that these two factors suggested that "the prospect of legal proceedings in question refers to claims brought by third parties, and not by the public body itself", as there was "no reason to suppose that the effective discharge of public duties requires the actions of those acting in a public capacity

to have no consequences whatsoever *vis-à-vis* the public body so long as they are undertaken in good faith" (see the Judgment at [507]–[508]).

The parties' submissions

251 As against this, the Town Councillors make the following submissions on s 52 of the TCA:

(a) First, it is principally, if not exclusively, only the Town Council that a Town Council member owes duties to. Concomitantly, it is only the Town Council that a Town Council member can be liable to and in respect of which the protection of s 52 is required.

(b) Second, there is nothing in the wording of s 52 that limits the personal liability of the affected individuals only to claims brought by third parties.

(c) Third, reading s 52 as conferring protection even from liability as against the Town Council would not interfere with the Town Council's freedom to contract on such terms as it sees fit, because the protection conferred by s 52 is only afforded to officers and employees who are "acting under the direction" of the Town Council and whose conduct pertains to the performance of statutory duties and was carried out in good faith. It does not affect the Town Council's rights against a contracting party, including a MA. If the MA's officers or the Town Council's employees are in breach of any duty which does not relate to the performance of *statutory* duties, s 52 would not apply.

(d) Section 391 of the Companies Act and s 60 of the Trustees Act give the court the discretion to grant partial relief from liability if the individual had acted "honestly and reasonably". Unlike these provisions,

s 52 provides "absolute immunity" under more stringent conditions – the individual must have acted in good faith and in the execution or purported execution of the TCA or any other Act.

(e) Contrary to the Judge's reasoning, s 52 would not provide immunity from criminal prosecution.

252 The Employees further submit that the Judge erred in his interpretation of the word "personally" in the text of s 52 (see [250(a)] above), in that the Judge's interpretation of the term runs contrary to the plain meaning of the text of s 52. The Employees submit that, if the Judge's interpretation of s 52 is allowed to stand, this would allow third parties indirectly to sue a Town Council's member, officer or employee by suing the Town Council as a principal that was vicariously liable for the actions of the Town Council's member, officer or employee, and the Town Council could then look to the offending member, officer or employee for contribution in whole or in part. Parliament could not have intended for s 52 to enable the Town Council's member, officer or employee to be personally liable in this way.

253 STC submits that the Town Councillors and Employees have not responded to all of the Judge's reasons for finding that s 52 should only apply to claims brought by third parties. The Plaintiffs defend the Judge's reasoning and submit that, accordingly, s 52 does not apply to the present case.

Our decision

254 In our judgment, and with respect, we disagree with the Judge's reasoning and finding that s 52 of the TCA cannot apply to claims brought by a Town Council against its own members, officers or employees. We deal with the Judge's reasons in turn.

255 First, as to the emphasis that the Judge placed on the word "personally" in the text of s 52 (see [250(a)] above), the Judge's view was that if this extended to claims by the Town Council, then the insertion of the word "personally" would not affect the meaning of the clause. Without the word "personally", s 52 would provide that "[n]o suit or other legal proceedings shall lie against *any member, officer or employee* of a Town Council or *other person* acting under the direction of a Town Council …" [emphasis added]. Ultimately, the text of s 52 shows that it is targeted at protecting an *individual* – a Town Council's member, officer or employee or any other person acting under the Town Council's direction – from liability. At one level, the Judge was not incorrect in his view that even in the absence of the word "personally", the section would seem to exclude liability for the individuals concerned. But with respect, it simply does not follow from this that the insertion of the word "personally", which is plainly directed at emphasising the fact that the liability that is being excluded is that of the individuals, could then have the effect of removing a significant part, if not the bulk, of the protection offered by the provision. In truth, most if not all the third-party actions would be directed against the Town Council rather than its agents and employees. If this was the real effect of adding the word "personally", which as we have noted is a word of emphasis, then it would counter-intuitively denude the provision of much, if not all, of its force. Further, the text simply does not support the conclusion that by the inclusion of this word, the opening words, "[n]o suit or other legal proceedings shall lie ..." had somehow been severely cut down in scope.

256 As we noted earlier, the plain text of s 52 of the TCA leaves little ambiguity. It draws no distinction between claims by third parties and claims by the Town Council itself against the persons named in s 52. The word "personally" in s 52 does nothing more than identify the scope of the section and it does not bear a significance beyond that. Indeed, s 52 on its face provides

that the persons named therein are entitled to a *general* immunity from *any* suit because it reads "*[n]o* suit or other legal proceedings shall lie personally" [emphasis added]. As such, far from entailing an impermissible "expansive" reading of s 52, applying s 52 to claims brought by the Town Council against its members and employees seems to us to simply reflect the plain and ordinary meaning of its text.

257 Second, we consider the Judge's reasoning that the expansive reading of s 52 would prevent a Town Council from enforcing contractual or tortious obligations owed to it by members, officers, employees, and contractors (see [250(b)] above). In our judgment, this concern is misplaced. As we have stated at [140] above, a public body may act in both a private capacity and a public capacity, depending on whether it is exercising a power that is based in public or private law. It is important to bear this crucial distinction in mind when scrutinising the effect of s 52 of the TCA. In this regard, since s 52 of the TCA only applies to acts done "in the execution or purported execution of [the TCA] or any other Act", s 52 would only apply where the action is based on the performance of statutory duties, rather than on a contract. This means that a contractual obligation stands to be assessed and enforced in the light of the terms of the contract. Therefore, the MA of a Town Council would be liable to be sued under a contract if it has breached any terms of the contract, even if the work done under the contract pertains to the carrying out of a public duty.

258 Third, we also do not share the Judge's view that the persons named under s 52 of the TCA would be able to carry out their functions without hindrance so long as immunity is granted against suits brought by third parties (see [250(c)] above). With respect, such a limited immunity would diminish the efficacy of s 52 considerably for the reasons we have already noted at [255] above. If the purpose of s 52 is to protect individuals attempting to discharge a

public duty in good faith from being harassed by civil lawsuits, then it makes little, if any, difference whether the lawsuit is brought by a third party or by the Town Council itself.

259 Fourth, any reliance on s 391 of the Companies Act and s 60 of the Trustees Act is misplaced because directors and trustees are typically not discharging any *public law* duties. Section 52 of the TCA seeks to protect individuals discharging public duties in good faith from being hindered by the threat and prospect of civil liability, and this consideration is not applicable at all to company directors and trustees discharging their *private* duties. A different legislative objective therefore informs the operation of the relief provisions under s 391 of the Companies Act and s 60 of the Trustees Act, and undue reliance should not be placed on those provisions.

260 Furthermore, those relief provisions do not operate in the same way as s 52 in at least two other respects:

(a) First, those provisions operate on the premise that the directors and trustees are *prima facie* liable, unless the court in its discretion grants relief (*Hytech Builders Pte Ltd v Tan Eng Leong and another* [1995] 1 SLR(R) 576 ("*Hytech Builders*") at [62]) where certain conditions are met and where the fairness of the case warrants this. Conversely, under s 52, no action can be brought against a Town Council's members, officers and employees as long as they act in good faith in the execution of their statutory duties. This is consistent with the private nature of directors' and trustees' duties, and the public nature of the duties of a Town Council's members and employees.

(b) Second, s 391 of the Companies Act only affords relief to directors against proceedings *brought by the company*. The section does

not apply at all to proceedings brought by third parties (*Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener)* [2013] 1 SLR 1428 ("*Daniel Long*") at [54]). The Judge may not have appreciated that this was the very opposite of how he thought s 52 of the TCA would apply.

261 Fifth, we agree with the Town Councillors that s 52 does not provide immunity against criminal prosecution. In our judgment, s 52 only applies "in the execution or purported execution of" the TCA or any other Act in good faith. For instance, if a Town Council's employee dishonestly misappropriates the Town Council's funds, thereby committing the offence of criminal breach of trust under s 405 of the Penal Code 1871 (2020 Rev Ed), it is clear that such an act of misappropriation would not have been done in the execution of the TCA or any other Act.

262 Furthermore, applying the *ejusdem generis* principle of statutory interpretation would lead to the conclusion that s 52 of the TCA does not apply to criminal proceedings. The *ejusdem generis* principle is a principle of statutory construction "whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character". This is determined by identifying the "genus" or common thread that runs through all the items in the list that includes the disputed term (*Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [105]–[121]). Section 52 states that no "suit*"* or "other legal proceedings" shall lie personally against a Town Council's member, officer or employee. The common thread between the term "suit" and the term "other legal proceedings" is that both terms refer to legal proceedings, while the more limited term "suit" refers to civil legal proceedings. Therefore, applying the *ejusdem generis* principle of statutory

interpretation, the term "or other legal proceedings" in s 52 should also refer to only *civil* legal proceedings, rather than criminal prosecutions. On this basis, there is no concern that s 52 would protect a Town Council's members, officers or employees from criminal prosecutions.

263 Finally, we disagree with the Judge's reasoning that there was "no reason to suppose that the effective discharge of public duties requires the actions of those acting in a public capacity to have no consequences whatsoever *vis-à-vis* the public body so long as they are undertaken in good faith" (see [250(f)] above). In our judgment, there is a compelling public interest in protecting those who discharge public duties in good faith from liability in the course of discharging those duties. As we observed in *Nagaenthran* at [50]:

> … [S]tatutory immunity clauses commonly seek to protect persons carrying out public functions. *It is on account of the responsibilities that burden the exercise of such public functions and the desire not to hinder their discharge that such immunity clauses are commonly justified.* Thus, as was noted in [*Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481], immunity from suit may be justified in order to safeguard the ability of prosecutors to exercise their prosecutorial discretion independently without fear of liability. Similarly, in the context of s 14(1) of the Government Proceedings Act … the High Court in [*Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal and others* [2016] 4 SLR 438] observed (at [51]) that the immunity granted to members of the SAF was justified by the need to ensure that they would not be burdened by the prospect of legal action when training, and ultimately to safeguard the effectiveness of the SAF's training as well as its operations. … [emphasis added]

264 We also agree with the observations made by Wallace JA in the British Columbia Court of Appeal's decision in *MacAlpine v H(T)* (1991) 57 BCLR (2d) 1 at 36:

> There are a number of cogent reasons why bodies exercising discretionary statutory duty have been granted immunity. Firstly, the decisions made by these bodies often involve the

> balancing of a number of divergent interests. Secondly, the court should not simply substitute its view for that of the authority and assign liability accordingly. Furthermore, the court may often lack the experience and expertise in a particular field necessary to make a discerning decision. Finally, to hold public authorities liable for their errors in judgment by way of a civil action may well impede the decision making process by discouraging public officers from experimenting with programs aimed at furthering social interests, such as rehabilitation.

265 The foregoing observations were made in the context of the issue of whether the Crown may claim, where its officials have breached the standard of care (under the tort of negligence), that the Crown is not liable because those officials acted in good faith in exercising their statutory discretion. In our judgment, these observations should also apply to s 52, as that provision similarly seeks to protect individuals attempting to discharge a public duty in good faith from personal liability.

266 For these reasons, we do not accept the Judge's rejection of the so-called "expansive" reading of s 52 of the TCA. The plain and ordinary meaning of s 52 shows that the provision applies equally to claims by the Town Council against its members, officers and employees, as it does to claims by third parties, and in line with this, the text of s 52 makes no distinction between these different types of claims. This interpretation is also not inconsistent with the legislative material in respect of the TCA, which is silent on the specific purpose of s 52 and does not raise any other considerations which point against the "expansive" reading of s 52. It is also in the public interest to protect individuals discharging public duties in good faith under the relevant legislation from the hindrance of personal liability so as not to deter them from stepping forward to do so. We therefore conclude that s 52 does apply to claims brought by the Town Council. We turn next to the second element of s 52 of the TCA: the element of good faith.

Test for good faith

The Judge's decision

267 The Judge, at [512] of the Judgment, cited our observations in *Ng Eng Ghee* at [132]–[133] regarding the requirement of "good faith" under s 84A(9)(*a*)(i) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed). That provision, as it was then worded, provided that:

> **Application for collective sale of parcel by majority of subsidiary proprietors who have made conditional sale and purchase agreement**
>
> **84A.**— … (9) The [Strata Titles] Board shall not approve an application made under subsection (1) —
>
> (*a*) if the Board is satisfied that —
>
> (i) the transaction is not in good faith after taking into account only the following factors:
>
> (A) the sale price for the lots and the common property in the strata title plan;
>
> (B) the method of distributing the proceeds of sale; and
>
> (C) the relationship of the purchaser to any of the subsidiary proprietors …

268 In *Ng Eng Ghee* at [132]–[133], we observed:

> 132 … **[T]he meaning of good faith is always contextual**. … [I]n [*Street v Derbyshire Unemployed Workers' Centre* [2004] 4 All ER 839] (at [41]), Auld LJ pragmatically acknowledged that:
>
> > **Shorn of context, the words 'in good faith' have a core meaning of honesty. *Introduce context, and it calls for further elaboration.*** … The term is to be found in many statutory and common law contexts, and *because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another*. [emphasis added]

> 133 In our view, the term **"good faith" under s 84A(9)(*a*)(i) must be read in the light of the [sale committee's] role as fiduciary agent** (at general law and, now, under s 84A(1A)), and whose power of sale is analogous to that of a trustee of a power of sale. Thus, in our view, **the duty of good faith under s 84A(9)(*a*)(i) requires the [sale committee] to discharge its statutory, contractual and equitable functions and duties faithfully and conscientiously**, and to hold an even hand between the consenting and the objecting owners in selling their properties collectively. *In particular, [a sale committee] must act as a prudent owner to obtain the best price reasonably obtainable for the entire development.* …
>
> [emphasis in original in italics; emphasis added by the Judge in bold]

269 The Judge reasoned that it was "unwise to attempt a full exegesis of the meaning of good faith" under s 52. On the other hand, the Judge considered that it was "hard to imagine a concept of good faith that [did] not require even a basic minimum degree of honesty and diligence". Thus, where the duty in question was a core fiduciary duty, good faith would "invariably require honesty coupled with the faithful and conscientious discharge of that duty". Consequently, a breach of fiduciary duty "that is anything other than innocent or perhaps negligent … cannot gain the protection of s 52" (see the Judgment at [515]). On this basis, the Judge found that Ms Lim, Mr Low, Ms How and Mr Loh's breaches of fiduciary duties fell outside of s 52.

The parties' submissions

270 The Town Councillors and Employees do not address in detail what the meaning of "good faith" should be under s 52 of the TCA. Instead, the Town Councillors and Employees focus their submissions on why they have acted in good faith. On the other hand, the Plaintiffs defend the Judge's finding that Ms Lim, Mr Low, Ms How and Mr Loh did not act honestly and, thus, did not act in good faith.

Possible interpretations of good faith

271 In accordance with the *Tan Cheng Bock* framework (see [243] above), we first consider the possible interpretations of "good faith" in s 52 of the TCA. To do so, we shall first outline some of the relevant cases that have interpreted the concept of good faith.

272 In the administrative law context, good faith requires that discretionary powers be exercised for their intended purpose, and not for an extraneous purpose (*Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*") at [149]). Conversely, a decision maker is said to have acted in "bad faith" when he "knowing[ly] use[s] a discretionary power for extraneous purposes (*ie*, for purposes other than those for which the decision maker was granted the power)" [emphasis in original omitted] (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Muhammad Ridzuan*") at [71]). "Bad faith" also connotes intentional wrongdoing, and includes cases where power is used for extraneous or improper purposes or when there is an abuse of power (*Axis Law Corp v Intellectual Property Office of Singapore* [2016] 4 SLR 554 ("*Axis Law Corp*") at [45]).

273 Turning to cases from other jurisdictions, in the House of Lords' decision of *Roberts v Hopwood* [1925] AC 578 at 603–604, Lord Sumner referred to an implied qualification of good faith in relation to statutory powers:

> That is a qualification drawn from the general legal doctrine, that persons who hold public office have a legal responsibility towards those whom they represent – not merely towards those who vote for them – to the discharge of which they must honestly apply their minds. *Bona fide* … cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is *bona fide* a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. *It must mean that they are giving their minds to the comprehension and their wills to the discharge*

> *of their duty towards that public, whose money and local business they administer.* [emphasis added]

274 We next consider some Australian cases, some of which were also referred to by the Judge (see the Judgment at [513]). In *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460 ("*Mid Density*"), the Federal Court of Australia considered a certificate issued by a municipal council under s 149 of the Environmental Planning and Assessment Act 1979 (NSW) and the council's reliance on the defence of good faith. In that context, good faith required more than honesty or "honest ineptitude". The council was held not to have acted in good faith where it had issued a certificate without making a real attempt to have recourse to the vital documentary information available to it, and where it had no proper system to deal with requests for that information. Indeed, on the facts, the council officer whose responsibility it was to deal with the request for information had "consciously ignored the very records which would have supplied it" (*Mid Density* at 469).

275 In *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 ("*Bankstown*"), the High Court of Australia considered an action in nuisance brought against a city council. The injunctive relief sought by the respondent entailed remedial works being done to prevent the land from being flooded. This involved a cost of at least $1.5m. Section 733(1) of the Local Government Act 1993 (NSW) provided that the city council did not incur any liability in respect of any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding, or in respect of anything done or omitted to be done in good faith. On the facts, the complaints of nuisance that had been made against the council had been vague and the nature of the nuisance was only clarified very late in the proceedings. The evidentiary burden on the council to establish good

faith was therefore lightened. But pertinently, the High Court of Australia observed that something more than negligence was necessary to take the council outside of the ambit of good faith because, unless negligence were present, there would be no liability that needed the protection afforded by s 733(1) in the first place. On the facts, the court held that there was no failure on the council's part that showed a want of good faith. On the contrary, the court noted "the presence of good faith as a positive attribute of the conduct of the council over a long period" (*Bankstown* at [51]–[52]).

276 We turn to consider the commercial context. In this setting, a potentially analogous concept to take reference from would be the concept of acting *bona fide*, which has been developed in the case law concerning a director's duty to act honestly and with reasonable diligence under s 157(1) of the Companies Act. In this context, the duty to act honestly requires the director to act *bona fide* to promote the interests of the company. The court, however, will be slow to interfere with the commercial decisions of directors which have been made honestly even if they prove to be financially detrimental. However, in considering whether a director has acted honestly, the court will consider whether an intelligent and honest person in the position of the director could reasonably have believed that the transactions were for the benefit of the company. Hence, a finding of *bona fides* would be difficult if the director took risks that no director could honestly believe to be taken in the interests of the company. The requirement of *bona fides* or honesty would also not be satisfied if the director has acted dishonestly, even if for the purported aim of maximising profits for the company (*Scintronix* at [38]–[39]).

277 The cases involving s 391 of the Companies Act also shed some light on the meaning of honesty in the commercial context. An errant director (or other person under s 391(3)) may be granted relief on a discretionary basis under

s 391(1) where: (a) he has acted honestly; (b) he has acted reasonably; and (c) having regard to the circumstances, he ought fairly to be excused from liability. The paramount consideration in the exercise of the court's discretion under s 391 is whether the person seeking relief has acted honestly and in good faith. Conduct characterised by surreptitiousness is incompatible with honesty (*Hytech Builders* at [63]). Honesty requires the person's conduct to be without moral turpitude, in other words, meaning (*Daniel Long* at [60], citing *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003):

> (a) without deceit or conscious impropriety;
>
> (b) without intent to gain an improper benefit or advantage; and
>
> (c) without carelessness or imprudence that negates the performance of the duty in question.

278 Past cases involving dishonesty have usually involved a deliberate lack of disclosure and calculated concealment of information (*Daniel Long* at [59], citing, among other cases, *Hytech Builders*). The test is an objective one (*Nordic International* at [88]), though the person's subjective state of mind may be relevant in so far as it "constitutes evidence from which a conclusion may be drawn about whether he acted honestly" (*Daniel Long* at [61]).

279 Turning to cases discussing whether a director has acted *reasonably*, the court has considered whether he has acted in the affairs of the company as he would have done in relation to his own affairs (*Daniel Long* at [64]). This was also the test applied in relation to the predecessor to s 60 of the Trustees Act (see *Chng Joo Tuan Neoh and Khoo Ee Lay v Khoo Tek Keong, Khoo Sian, and Cheah Inn Keong* [1932] SSLR 100 at 108).

280 From this survey of the cases from both the administrative law context and the commercial context, we derive the following principles:

(a) The acts in question must be done honestly and for proper purposes: *Phyllis Tan*, *Muhammad Ridzuan*, *Axis Law Corp*, and *Daniel Long*.

(b) The acts must be done with a basic degree of competence and diligence: *Mid Density*.

(c) The acts must be such that it could not be said that no reasonable person in that position could honestly believe it was an appropriate course of action: *Scintronix*.

(d) Mere negligence would generally not displace good faith (*Bankstown*), and dishonesty would generally involve deliberate conduct to deceive or to gain an improper benefit and advantage: *Daniel Long*.

How good faith should be interpreted

281 In our judgment, the foregoing summary of principles can guide us in assessing good faith for the purpose of s 52 of the TCA. While we agree with the Judge that it may not be possible to list exhaustively the factors that indicate an act that is done in good faith, we think the factors summarised at [280] above offer workable signposts to guide our assessment for present purposes. It also follows from what we have set out there that gross negligence may amount to bad faith if the negligence is such that a dishonest intention, an improper purpose or an utter lack of diligence can be inferred.

282 As noted above, we do not think that it is appropriate to regard mere negligence as amounting to a lack of good faith. We note that Parliament did not include the term "reasonableness" in s 52 of the TCA. This may be

contrasted with ss 157(1) and 391(1) of the Companies Act, which respectively provide:

> **As to the duty and liability of officers**
>
> **157**.—(1) A director must at all times act honestly *and use reasonable diligence* in the discharge of the duties of his or her office.
>
> …
>
> **Power to grant relief**
>
> **391**.—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies, it appears to the court before which the proceedings are taken that the person is or may be liable in respect thereof but that the person has acted honestly *and reasonably* and that, having regard to all the circumstances of the case including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from the person's liability on such terms as the court thinks fit.
>
> [emphasis added]

283 With this in mind, the inquiry into good faith should be a subjective one. Objective tools of analysis are relevant to the extent that they serve as counter-factuals to consider the credibility of a defendant's asserted subjective intentions. This approach is not novel and is not different from how courts ordinarily approach subjective tests (see for example, *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [36], in the context of a director's duty to act honestly, stating that "where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly" (citing *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 8.36)).

Burden of proof

284 We turn next to the question of where the burden of proof should lie when considering s 52 of the TCA.

285 In general, it is for a defendant to prove his defence. This flows from the normal principles of evidence law. Under ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) (now the Evidence Act 1893 (2020 Rev Ed)) ("EA"), the burden of proof is on the party asserting or relying on a particular fact to prove that fact. As it is the defendant that would typically rely on s 52 of the TCA, there is something to be said for the view that it should be for the defendant to prove that s 52 may be invoked.

286 However, s 52 imposes a statutory limitation on what rights can be asserted against those who may benefit from the provision. We return here to what we have said about the two elements that inhere in s 52. In our judgment, the burden of proof in respect of each of these elements falls on different parties. The structure of the provision points to the conclusion that no action can be brought in respect of anything done or intended to be done in the execution or purported execution of the TCA or any other statute. This limitation exists regardless of whether the point is raised by the defendant. A plaintiff will therefore have to show that the impugned acts are *not* in the execution or purported execution of the TCA or some other statutory function if it seeks to disable a defendant from relying upon the provision. In this case, the Plaintiffs do not contend that any of the impugned acts were not done in the execution or purported execution of the TCA or other statute.

287 Where the plaintiff does not allege or fails to establish that the impugned acts were not done in the execution of the TCA, then it may be taken that the acts were so done. But that does not end the inquiry because the limitation only

avails if the act in question has been done by the defendant in good faith. In our judgment, this element, which is directly concerned with the consideration of matters within the knowledge or contemplation of the defendant, is squarely caught by the principle contained in ss 103 and 105 of the EA and summarised at [285] above. Therefore, it should be for the defendant to prove good faith.

Summary of applicable principles

288 Following the discussion above, we set out a summary of the relevant legal principles. We add that the principles we have set out in respect of s 52 of the TCA would apply equally in respect of s 74 of the Town Councils Act 1988 (2020 Rev Ed), the version of the then-s 52 which is presently in force.

289 First, a Town Council's members, employees and officers *do not* owe the Town Council any fiduciary or equitable duties. We thus overturn the Judge's findings in this regard (see the summary at [211] above).

290 Second, the Town Councillors and Employees owed a common law duty of care and skill to AHTC in respect of the execution of their respective statutory duties under the TCA and the TCFR (see the summary at [236] above), subject to the limits of s 52 of the TCA.

291 Finally, s 52 of the TCA should be interpreted as follows:

> (a) Section 52 is satisfied when the defendant Town Council member, officer or employee (i) acts "in the execution or purported execution of [the TCA] or any other Act", and (ii) such act was done or intended to be done "in good faith". The burden of proof should be on the plaintiff to disprove the former requirement and on the defendant to prove the latter requirement.

(b) Good faith requires, among other things, that the disputed act be done honestly, for proper purposes and with a basic degree of competence and diligence.

(c) Section 52 applies to claims brought by the Town Council against its own members, employees and officers.

292 It follows from the applicable legal principles that, when a court is confronted with a claim against a Town Council's members and employees, as in the present case, the *first and foremost question* is whether the s 52 requirements are satisfied. If so, then that is the end of the matter, and there would strictly speaking be no necessity to go further. If, however, s 52 of the TCA is not satisfied, the court would then have to go on to assess whether the specific elements of the pleaded cause(s) of action are satisfied. We shall apply this approach in our analysis below.

Timeline of key events

293 Before delving into the analysis of the evidence in detail, we first set out in a table, the timeline of key events.

S/No	Date	Event
1.	7 May 2011	The 2011 GE is held.
2.	9 May 2011	Mr Low e-mails the other Town Councillors (copying Mr Yaw and Ms How) expressing concern that CPG intended to go into "inactive management" and that AHTC should appoint an MA instead of attempting to manage the Town Council (*ie*, AHTC) on its own.

S/No	Date	Event
3.	13 May 2011	Mr T T Tan e-mails Mr Low suggesting, among other things, that CPG intended to cease providing AHTC the services which it had until then been providing to ATC and to call for a tender.
4.	15 May 2011	Mr Loh incorporates FMSS, with himself as the sole shareholder and director.
5.	30 May 2011	An informal meeting is held between the Town Councillors and CPG, and CPG formally communicates its wish to not serve as MA for AHTC and seeks to be released from the CPG MA Contract.
6.	9 June 2011	The First Town Council Meeting is held.
7.	15 June 2011	Mr Loh (as Managing Director of FMSS) sends the LOI to Ms Lim.
8.	8 July 2011	Ms Lim signs the LOI.
9.	18 July 2011	Mr Yaw also signs the LOI. Ms Lim's and Mr Yaw's signing of the LOI effectively foreshadows the formal appointment of FMSS as the MA for AHTC.
10.	3 August 2011	Ms Lim sends the MA Appointment Report to Mr Low and Mr Yaw. The MA Appointment Report seeks the elected members' approval to waive the calling of a tender for MA services from 15 July 2011 to 14 July 2012 "in view of the urgency of the services and … necessity in the public interest" and to appoint FMSS as MA for that same period.

S/No	Date	Event
11.	4 August 2011	The Second Town Council Meeting is held. The elected and appointed members of AHTC present at the meeting unanimously agree to waive the calling of a tender for MA services for the abovementioned period, and to appoint FMSS as MA for that period. The meeting also awards the First MA Contract to FMSS.
12.	11 August 2011	AHTC and CPG sign the deed of mutual release, which was to take effect from 1 August 2011
13.	26 August 2011	Ms How (as General Manager of AHTC) sends a letter to (a) Mr Jeffrey Chua and (b) EM Services to state AHTC's wish to extend their respective contracts for EMSU services, both of which were scheduled to expire on 30 September 2011, until 31 March 2012.
14.	7 September 2011	EM Services declines to extend its contract for EMSU services beyond 30 September 2011.
15.	8 September 2011	The Third Town Council Meeting is held, and the Standing Instruction is instituted.
16.	14 September 2011	Mr Jeffrey Chua sends an e-mail to Ms How stating that CPG will not be extending its contract for EMSU services beyond 30 September 2011.
17.	18 September 2011	The EMSU Committee meets to compare the terms of the EMSU contracts of existing providers of EMSU services in the market. The EMSU Committee determines that it is necessary to come to an interim solution and recommends that a contract for EMSU services be awarded to FMSS for an initial period of nine months from 1 October 2011 onwards.

S/No	Date	Event
		Ms Lim e-mails the Town Councillors (as well as the other elected and appointed members of AHTC) stating that a waiver of tender for EMSU services is required. All AHTC members subsequently unanimously approve by e-mail circulation the waiver of tender and for FMSS to provide EMSU services for an interim period of nine months from 1 October 2011 onwards and the First EMSU Contract is awarded to FMSS.
18.	13 April 2012	AHTC places a tender notice for the provision of MA and EMSU services in The Straits Times in anticipation of the First MA Contract and the First EMSU Contract expiring on 14 July 2012 and 30 June 2012 respectively.
19.	4 May 2012	FMSS submits the sole bid for the second contracts for MA and EMSU services pursuant to AHTC's tender notice.
20.	3 August 2012	AHTC accepts FMSS's tender for the second contract for MA services and awards the Second MA Contract to FMSS for a three-year period starting from 15 July 2012.
21.	7 August 2012	AHTC accepts FMSS's tender for the second contract for EMSU services and awards the Second EMSU Contract for a three-year period starting from 1 July 2012.
22.	10 February 2014	AHPETC submits to Parliament its audited financial statements for the financial year ending 31 March 2013.
23.	13 February 2014	Foo Kon Tan Grant Thornton LLP submits an auditor's report to the Auditor-General, containing a disclaimer of opinion.
24.	6 February 2015	The AGO issues the AGO Report.

S/No	Date	Event
25.	20 March 2015	MND commences OS 250 against AHTC.
26.	27 May 2015	High Court dismisses OS 250.
27.	27 November 2015	Judgment in *AG v AHPETC* is handed down, allowing in part the appeal against the High Court's decision in OS 250.
28.	1 March 2016	Pursuant to the judgment in *AG v AHPETC*, AHTC appoints KPMG as its independent accountant.
29.	31 October 2016	KPMG releases the KPMG Payments Report, identifying improper payments made by AHTC to FMSS and FMSI.
30.	17 February 2017	The Independent Panel is appointed to act as AHTC's agent under s 32(2) of the TCA
31.	21 July 2017	The Independent Panel commences Suit 668 in AHTC's name.
32.	3 August 2017	PRPTC commences Suit 716.

Waiver of tender

294 The waiver of tender for the first contracts for the provision of MA and EMSU services to AHTC is, as the parties' counsel recognised at the hearing before us, at the heart of the present dispute. This is because the initial waiver of tender is what led to the subsequent events that eventually culminated in the present proceedings.

295 As noted above at [239], we must address two questions in order to determine, having regard to the immunity from personal liability afforded to the

Town Councillors and the Employees by s 52 of the TCA in respect of the claims in the Suits, whether any liability arises in this connection: (a) first, whether the Town Councillors and the Employees have acted "in the execution or purported execution" of the TCA; and (b) second, whether they have acted "in good faith". As to the first question, it was not disputed that the award of the First MA Contract and the First EMSU Contract to FMSS without calling for an open tender was an act done "in the execution or purported execution of" the TCA, as the requirements before a tender may be waived are prescribed by rr 74(17) and 74(18) of the TCFR (see [58] above). As to the second question, having reviewed the evidence and the parties' submissions, we find that the Town Councillors and the Employees had acted in good faith when they decided to waive the tender for the first contracts for MA and EMSU services, which were later awarded to FMSS. They are thus entitled to claim immunity from personal liability under s 52 of the TCA. We elaborate on our reasons for coming to this conclusion.

The First MA Contract

296 The Judge found that the Town Councillors and Ms How breached fiduciary duties which he considered were owed by them to AHTC, by awarding the First MA Contract to FMSS without calling for an open tender. Given our holding above at [211]–[212] that the Town Councillors and the Employees owed no such duties, we will only consider the Judge's reasoning in connection with *how* those duties were breached in determining their personal liability for the purposes of s 52 of the TCA.

297 In respect of Mr Low and Ms Lim, the Judge considered that they failed to comply with the strict requirements on waiver of tender in rr 74(17) and 74(18) in waiving the calling of a tender for the First MA Contract for

extraneous considerations, a course which was a breach of the TCFR (see the Judgment at [300]). In respect of Mr Singh, Mr Chua and Mr Foo, the Judge considered that they were aware, or ought to have been aware that a tender had to be called and that it could only be waived under special circumstances, and so they should have questioned why there was an urgent need to appoint FMSS as the MA and whether it was proper that no effort had been made to hold CPG to the CPG MA Contract, which still had a considerable period left (see the Judgment at [310]). As for Ms How, the Judge considered that she was intimately involved in the appointment of FMSS as MA, and furthermore she also stood to gain from FMSS's appointment as she was a shareholder of FMSS (see the Judgment at [311]). For completeness, we add that, as the Plaintiffs have not appealed against the Judge's finding in respect of Mr Loh, we focus our analysis only in respect of the liability of the remaining parties.

298 It bears highlighting at the outset what is undisputed among the parties. First, it is clear that following the 2011 GE, CPG did not wish to serve as the MA of AHTC. While it may have been under a contractual obligation to continue in this role, the evidence does not bear the conclusion that CPG would have been a willing party to such an arrangement, in the absence of coercive pressure such as the possible threat of legal proceedings. In analysing the evidence on this issue, we also note that *no* witness from CPG gave any evidence. Second, it is undisputed that at the 30 May 2011 Meeting, CPG had actually indicated to the Town Councillors that it wished to cease its services as the MA of AHTC (see [31] above). What remains in dispute is *why* the Town Councillors decided to waive the tender for the first contract for MA services and award the First MA Contract to FMSS, and how these undisputed realities informed that analysis. The Plaintiffs allege that the Town Councillors did not, as they claim, appoint FMSS as part of a "contingency plan" to cater for the prospect of CPG's desire to exit. Rather, it is their case that the Town

Councillors deliberately devised a plan to put in place FMSS as the new MA of AHTC so that they could remove what they perceived to be "PAP-affiliated" MA companies (such as CPG) from AHTC and instead hire the existing staff at HTC who were known to be loyal to the WP. This, the Plaintiffs submit, was not a legitimate basis for waiving the tender, and the Town Councillors therefore breached their duties owed to AHTC. The Judge essentially agreed with the Plaintiffs' submissions and made findings to such effect. In particular, the Judge found that Mr Low and Ms Lim failed to act in AHTC's best interests (see the Judgment at [300]–[301]), while Mr Singh, Mr Chua and Mr Foo failed to question whether the waiver of tender was proper (see the Judgment at [310]) and Ms How had engineered the plan together with Mr Low and Ms Lim to ensure that FMSS was appointed as MA without calling a tender (see the Judgment at [301]). As we have noted above, the Judge did not have the evidence of CPG. He depended very largely on the documentary evidence to draw various inferences and conclusions. Plainly, we are in as good a position as he was to consider the significance of the documentary evidence (see *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]). In doing this, we think it is necessary to have due regard for the practical realities that the parties were faced with. In this light we consider that certain aspects of the Judge's findings of fact are unsustainable and against the weight of the evidence. We first analyse the key contemporaneous documents and critical events which the Judge also relied on. This is important because these documents provide objective evidence of the parties' intentions at the material time, which is critical in assessing whether they were operating in good faith. We will then address the Judge's key findings in turn before we conclude by analysing the totality of the evidence.

9 May 2011 E-mail

299 There are a few critical statements made in the various correspondence that the Judge placed emphasis on in arriving at his decision. However, the Judge seemed to have overlooked the fact that, relying as he was solely on documents, it was not open to him to draw inferences – especially adverse ones – unless these were irresistible. With respect, we think that several of the inferences he drew do not fall into this category. Moreover, his analysis in relation to the events leading to the award of the first contract for MA services seemed to us to consist, impermissibly, of inference resting upon inference.

300 We begin with the 9 May 2011 E-mail sent by Mr Low to the elected members of AHTC and Ms How (see [28] above), just two days after the 2011 GE, which stated that "[w]e will be appoint [*sic*] managing agent". The text of the e-mail is as follows:

> Dear Team,
>
> The following are new developments after we have the discussion this morning:
>
> 1. I am asking Ms How, GM of [HTC] to attend both meetings to meet Secretary of [ATC] and HDB Town Council Secretariat. This is because feedback received by [HTC] that CPG Facilities Management has started not to manage or go into inactive management of the contract for some projects and some areas are poorly maintain. *We need to understand the situation in greater details* and *may have to take over management earlier* or *risk residents suffering from poor service and rubbish piling up.*
>
> 2. The name of the Town Council merged should be **Hougang-Aljunied Town Council** because majority of the HDB properties we managed will be in Hougang area and Singaporeans generally identify with [HTC] for all kinds of feedback based on calls received. For areas at Bedok such as Bedok Reservoir and Bedok North estate, they do not identify with Aljunied either, they are likely to identify more with Hougang.

> 3. I have also communicated to Ms How our decision that a) [HTC] will be merged with [ATC] b) *We will appoint managing agent to manage the town instead of self management* c) Party Chairman Sylvia Lim has been elected amongst us as elected members to be chairman of the Town Council.
>
> Aljunied Team will meet at [HTC] office tomorrow morning at 9.45am.
>
> [emphasis in original in bold; emphasis added in italics]

301 The Judge found that it was "clear from the entirety of the 9 May 2011 E-mail that [Mr Low] was communicating the *decision* to replace CPG with a different MA" and that the "emphatic tone of the e-mail [suggested] that a *decision* had been made on or before that date to replace CPG with a different MA" (see the Judgment at [252]) [emphasis added]. The Judge rejected Mr Low's claim under cross-examination that he had merely meant that they would appoint an MA rather than manage AHTC in-house (see the Judgment at [252]). However, the inference drawn by the Judge – that a *decision* had been made on or before 9 May 2011 to appoint another MA in CPG's place – is contradicted by *the very terms of the same e-mail*, which stated at paragraph 3 that Mr Low would "appoint [a] managing agent to manage the town *instead of self management*" [emphasis added]. That part of paragraph 3, in our view, clearly showed that any decision which might have been arrived at by that point in time was simply to appoint *an MA* in place of self-management, and not to appoint *a specific MA*, and even less so, to replace CPG. This, we note, was in contrast to the prevailing practice at HTC, which was being managed in-house and not by a MA. Hence, as Mr Low explained, one of the issues that was tabled for discussion amongst the elected members of AHTC at the meeting which took place in the morning before the 9 May 2011 E-mail was sent was "whether we're going to manage it ourselves as well, as we did in Hougang, or we going [*sic*] to appoint a managing agent". In fact, Mr Low's evidence was that the elected

members took a decision at that meeting "to engage a MA rather than directly manage the [AHTC] ourselves".

302 The 9 May 2011 E-mail also reflects another important factor influencing Mr Low at that early stage (which he shared with Ms How and the other elected members of AHTC): the fact that there was "feedback received by [HTC]" that CPG had already started "not to manage" or had gone into "inactive management", resulting in some areas being "poorly maintain[ed]". Therefore, Mr Low stated unequivocally that they "need[ed] to *understand* the situation in greater details [*sic*] and may have to take over management earlier *or risk residents suffering from poor service and rubbish piling up*" [emphasis added].

303 These extracts from the 9 May 2011 E-mail are of signal importance in setting out the context against which we are to ascertain the parties' intentions. The question is not whether CPG was in fact "going slow" to the prejudice of AHTC but whether the Town Councillors *sincerely believed* that this was or might be the case. These extracts show that they did and there is nothing in the evidence to suggest the contrary. This was what set the stage for Mr Low's and the other Town Councillors' concerns over CPG's commitment and its intentions. The fear was that, if the situation was not addressed (such as by "tak[ing] over management earlier"), the *residents* may have to suffer "from poor service and rubbish piling up". The Judge, unfortunately, appears to have overlooked this short but critical paragraph of the 9 May 2011 E-mail.

304 Importantly, at the trial, neither AHTC nor STC ever suggested, whether in their pleadings, cross-examination of Mr Low, or submissions, that Mr Low was, in the 9 May 2011 E-mail, lying about his concern that CPG might be going into "inactive management" or that any such concern was misconceived. In other words, this aspect of the 9 May 2011 E-mail – specifically that reflecting

Mr Low's perception of the risk of CPG's lack of commitment or inadequate performance following the 2011 GE – was not challenged by the Plaintiffs. The Judge himself seemed to accept this, as he observed that the extracts from the 9 May 2011 E-mail that we have referred to above at [302] showed that Mr Low was "expressing misgivings and dissatisfaction with CPG's service levels as MA" (see the Judgment at [252]). Indeed, while counsel for PRPTC in the trial below, Mr Davinder Singh SC, cross-examined Mr Low extensively on CPG's experience as compared to that of FMSS in managing an estate the size of a full GRC (which AHTC was, in contrast to HTC), and whether CPG was contractually obliged to continue, Mr Low took pains to stress in his testimony at trial that the key concern in his mind was not whether CPG could, but rather whether it *would* manage the estate *for WP* wholeheartedly. And Mr Low's perception – *which neither AHTC nor PRPTC challenged as being untrue* – was that CPG appeared, immediately after the results of 2011 GE were known, to be going into "inactive management". As Mr Low testified, the question of whether CPG had the relevant qualifications, personnel and experience to manage AHTC was "irrelevant to [him]". Rather, it was the concern about CPG "not managing" that was operative. In this regard, Mr Low's response at trial is illuminating:

> Q: Did you think that CPG did not have the expertise to manage 40,000?
>
> A: No, I did not think so.
>
> Q: Thank you.
>
> A: *The question is whether they would manage for us.*
>
> Q: Did you think that CPG didn't have the relevant people to manage 40,000 units?
>
> A: *No, that's irrelevant to me. The question is whether they could manage for us when we took over.*
>
> …

> Q: And let's see what was the first thing on your mind. According to your [9 May 2011 Email], it was to axe, a-x-e –
>
> A: No.
>
> Q: – CPG. It was to bring in a new managing agent. But after that decision, when you learned that some areas were being poorly maintained, you told your fellow defendants and other elected members that, 'We have to implement the decision earlier'; correct?
>
> A: No.
>
> Q: You see, Mr Low –
>
> A: The paragraph –
>
> Q: – far from doing a due diligence, far from CPG telling you they didn't want to continue, far from doing an assessment, far from reading the contract, you had already decided with your fellow elected MPs that you were going to change to a new managing agent.
>
> A: This is not true.
>
> Q: And your entire case that you are running in court today with your fellow defendants, which is that 'CPG wanted out, so it was not reasonable for us to ride an unwilling horse,' it's all a fabrication, sir.
>
> A: *That's not true, sir. I was responding to the ground feedback that CPG was not managing. So what are we to do with that?*
>
> [emphasis added]

305 The Judge unfortunately seemed not to have paid adequate attention to those parts of the 9 May 2011 E-mail that we have referred to above at [302] or to Mr Low's response under cross-examination, which demonstrated the realities of the situation faced by the Town Councillors at the material time. This is a point of particular importance in considering the Town Councillors' views on CPG and on the alternatives to CPG as the provider of MA services, and their decision eventually to waive the requirement for an open tender for MA services. This in turn, leads to whether the decision to identify or appoint a suitable new MA was carried out in good faith. This is where the heart of the

present dispute lies. The Plaintiffs charge that the Town Councillors were adamant from the outset on appointing FMSS and no one else. The reason for this was said to be two-fold: (a) first, so that they could retain HTC staff loyal to the WP; and (b) second, they were distrustful of working with existing players in the MA industry in Singapore including CPG because they were "PAP-affiliated". Therefore, the Plaintiffs submit, the Town Councillors had no *bona fide* reason for waiving the tender.

306 If the Town Councillors already felt by 9 May 2011 that they were not ready to work with CPG, due to a lack of trust in CPG, then perhaps they ought to have been more proactive in thinking about alternatives earlier, including by holding a tender to source for such an alternative. However, we should avoid assessing the Town Councillors' state of mind with the benefit of hindsight. It is important to consider the Town Councillors' intentions in the light of the practical considerations that weighed on the Town Councillors' minds at the material time. The 9 May 2011 Email spells out unequivocally that, while Mr Low thought that CPG was already contemplating or even going "into inactive management", he had not decided to discharge CPG there and then. That is why Mr Low wanted to "*understand the situation in greater details* [*sic*]" to see if AHTC "*may* have to take over the management earlier" [emphasis added] (see [300] above). What the text of the 9 May 2011 E-mail suggests is that, while Mr Low felt there was cause for concern over CPG's willingness to manage AHTC *for WP*, he was *uncertain* as to the exact nature of CPG's intentions. Thus, he was of the view that AHTC should endeavour to understand the situation better before coming to a firm decision. Mr Low also recognised that they "may have to take over the management earlier". However, as Mr Low testified, just three weeks later, "when [they] met CPG on 30 May [2011]", CPG made it clear that "they are not going to continue". This aspect of Mr Low's evidence was not challenged at trial, and it was undisputed that CPG formally communicated to

the elected members of AHTC and Ms How its intention to *not carry on* as the MA on 30 May 2011. Therefore, the question of the need to find an alternative – which would have been on the Town Councillors' minds from 9 May 2011 – concretised on 30 May 2011, even though the CPG MA Contract was due to expire only on 31 July 2013, and contained a contractual option to extend it until July 2016 (see [25(a)] above).

13 May 2011 Letter

307 The next important piece of documentary evidence is a letter written by Ms How to Mr Jeffrey Chua and Ms Png Chiew Hoon dated 13 May 2011 (the "13 May 2011 Letter"), written in her then-capacity as Secretary of HTC with the title "Request for Transfer of Documents and Data". The 13 May 2011 Letter reads as follows:

> Dear Mr Jeffrey Chua/Miss Png Chiew Hoon
>
> **REQUEST FOR TRANSFER OF DOCUMENTS AND DATA**
>
> We would like to inform that *we have been instructed by the Elected Members of Parliament for Aljunied GRC and Hougang SMC to arrange for the taking over of the management of Aljunied Town Council and Kaki Bukit Precinct.*
>
> Following the above, we would thus like to kick-off the taking over process and to facilitate same [*sic*], we would appreciate if you could arrange for the following documents and data/information of the Aljunied Town Council and Kaki Bukit precinct to be first transferred to us:-
>
> **1) FINANCIAL COLLECTION SYSTEM**
>
> To allow us sufficient time to complete the above, our computer vendor has listed the preliminary items required as shown in **Appendix A1 to A3** for your necessary arrangements to collate the information in the format requested therein for transfer.
>
> **2) ESTATE MANGEMENT/CUSTOMER SERVICE**
>
> **Appendix B1 and B2** list the preliminary items required. …

> As time is of essence and so as to enable us to commence with setting-up at our end, we would appreciate if the above items requested … could be transferred to us by 20 May 2011. For a better understanding of the details of the items required to be transferred to us and in particular that which are required for the setting up of the financial collection system, we too would like to arrange for a meeting between ourselves and our computer vendors …
>
> Meantime, perhaps Mr Jeffrey Chua could also provide us with the particulars and contact numbers of the staff at Aljunied Town Council for us to liaise directly with them pursuant to Mr Low Thia Khiang's assurance to Ms Cynthia Phua over her concern as expressed in the press pertaining to employment status of Aljunied Town Council staff.
>
> Yours sincerely
>
> MS HOW WENG FAN
>
> Secretary
>
> HOUGANG TOWN COUNCIL
>
> [emphasis in original in bold; emphasis added in italics]

308 The Judge focused on the portion of the 13 May 2011 Letter to which we have added emphasis in italics and found that this "clearly means that by 13 May 2011, it had been decided that CPG would no longer continue management of AHTC" (see the Judgment at [254]).

309 The 13 May 2011 Letter begins with the statement that "we have been instructed by the Elected Members of Parliament for Aljunied GRC and Hougang SMC to arrange for the taking over of the management of Aljunied Town Council and Kakit Bukit Precinct". The Town Councillors point out that, the 13 May 2011 Letter was not a letter sent by FMSS to CPG. It is undisputed that the letter was sent by Ms How *as Secretary of HTC* to Mr Jeffrey Chua *as Secretary of ATC* and Ms Png Chiew Hoon *as Secretary of Marine Parade Town Council*. In this context, it is clear that the letter was not sent as a letter to "terminate" CPG's services. Mr Low's evidence was that the portion of the 13 May 2011 Letter that we have italicised above was simply a reference to the

WP's management taking over ATC and the Kaki Bukit precinct, following the results of the 2011 GE. In addition, as Ms How explained, the purpose of the 13 May 2011 Letter was to obtain necessary financial data from ATC so that the financial collection system in HTC could be enhanced to handle the larger needs of the AHTC constituency, as well as for the elected members to be apprised of the term contract documents to ensure that there would be a continuity of services to the residents of the constituency under their charge. This too, was Mr Low's evidence.

310 Indeed, the very fact that CPG articulated at the 30 May 2011 Meeting its intention not to continue as MA of AHTC *shows that CPG itself did not interpret the 13 May 2011 Letter as a "termination" letter*; otherwise, CPG's intimation at the 30 May 2011 Meeting would have been superfluous. Our view of the 13 May 2011 Letter is also supported by an e-mail dated 14 May 2011 from Mr Low to the other elected members of AHTC. In that e-mail, Mr Low forwarded a query he had received from a reporter for The Straits Times on whether the elected members of the newly-constituted AHTC would "take on all the existing agreements" including the CPG MA Contract, and informed the elected members that "[w]e will not extend the managing agent agreement" and that he believed that it would be "better to wait till we look at the agreement before saying anything". Mr Low testified that, as at that date, no decision had been made to not continue with the CPG MA Contract or to appoint FMSS as MA. Instead, what he had in mind was the extension of the CPG MA Contract beyond its expiry, and that such a decision should not be made until he had had sight of what the terms of that contract were. Mr Low's 14 May 2011 e-mail supports our view that, as at that date, Mr Low (as well as the other Town Councillors) remained open as to what to do with the CPG MA Contract. We should also add that the terms of Mr Low's 14 May 2011 e-mail did not warrant

the inference which the Judge made, that the elected members did not intend to stand by the CPG MA Contract (see the Judgment at [257]).

311 Therefore, the 13 May 2011 Letter, in our judgment, does not support any finding that the Town Councillors had made up their minds to replace CPG with FMSS on or before 13 May 2011. We reiterate here that absent other evidence, inferences should only be drawn from the documents if these are irresistible.

19 May 2011 E-mail

312 The next piece of documentary evidence is an email dated 19 May 2011 sent by Mr Low to Ms How (the "19 May 2011 E-mail"):

> Dear Ms How, I have a short discussion with Sylvia [Ms Lim] today, we agree it is cleaner and easier to work by appointing Danny [Mr Loh] to be GM/Secretary of TC. This is on understanding that you will be actively involve [*sic*] with the company which will be appointed as MA for the transition period with a contract for one year.
>
> Please prepare the necessary personnel/company credential and information and document for the appointment by the council.
>
> As for the conflict of interest, we find that it is not a big issue as all transaction has to follow the Financial Rules and MA's company is subject to the Companies Act.
>
> Please confirm whether Toh Kay Seng is going to be a shareholder. If he is, I will Not propose to reappoint him as councillor.

The 19 May 2011 Email was sent a few days after FMSS's incorporation on 15 May 2011 with a paid-up capital of $450,000.

313 The Judge considered that the incorporation of FMSS pointed to the conclusion that a decision had already been made not to proceed with the CPG MA Contract "pursuant to a firm plan" to appoint FMSS as the MA because it

was an entity that was sympathetic to the WP (see the Judgment at [258]). In this light, the Judge considered that the 19 May 2011 E-mail fortified this conclusion and that FMSS was incorporated not as a contingency plan but to implement an already fixed decision for it to be installed as the new MA for AHTC (see the Judgment at [258]–[259]).

314 While we understand the Judge's analytical approach, in our judgment, he failed to consider the evidence suggesting that by 19 May 2011, while CPG had not yet formally informed the Town Councillors that they wanted to cease the services that they had until then provided to ATC, this was perceived by Mr Low and the other Town Councillors as a likely eventuality.

315 First, it appears that feedback was received by Ms Cynthia Phua, the then-Chairman of ATC, prior to 9 May 2011, that ATC's staff were concerned about losing their employment after WP had taken over Aljunied GRC. This would have suggested to Mr Low that the staff had received information that CPG was *not* intending to serve as MA for AHTC. Mr Low's evidence at trial was consistent with this. He testified that he had previously spoken Ms Cynthia Phua who expressed concern over the employment status of ATC's staff. He had assured her that *even if CPG were to cease providing MA services to AHTC*, the WP would be "prepared to employ them", referring to the staff that had hitherto been employed by CPG at ATC.

316 Second, on 13 May 2011, Mr T T Tan had emailed Mr Low to convey his belief that CPG allegedly intended to cease the services it had till then provided to ATC:

> Dear sir,
>
> I tried to alert to you to the ongoings at ATC thru' Mrs Low before polling day. Today, I read ST report regarding the matter and find some of the fact not matching what *my source in CPG*

stated. He suggested that u have met Jeffery Chua on Tuesday when the news report stated that you both haven't met. *He reported that some of the staffs in ATC have already been deployed to other departments and movement will begin from next week*.

It is quite apparent that CPG Mgt will be withd'awing from ATC according to this source.

He and others who are well versed in this industry speculates that *altough* [*sic*] *you have 45 days to take over ATC, you must act now because most staff need to serve a notice of 1 month before they can take up new employment. WP will be in a difficult position if you do not act now*.

When I ask him for solutions, he mentioned a few items and he drew it on paper…but he refused to let me keep the papers (altough [*sic*] I provided the papers). The below are what I can remember:

> 1. Get hold of the contract between CPG and ATC from Cynthia Phua and go thru it with your lawyers.
>
> 2. Ask for permission from ATC/CPG to speak with the current staff immediately before they are re-deployed. *It is not easy to employ qualified people in this industry, even CPG faces this problem*. Give them the true picture before they are all re-deployed by Jeffery Chua.
>
> 3. *Start employing or ask for tender now…at the last minute when you realise they are playing you out, prices are going to shoot up*.
>
> 4. Decide if you want to do Managing Agent (like what HGTC is doing now) or Integrated Facilities Management (the current ATC model).
>
> 5. The structure for GRC town councils as follows: 1 General Manager (usually well versed with HDB, LTA, NEA, URA etc … etc…) 5 Property Managers each tagged to an MP. Under each PM [*sic*] are about 5-10 Property Officers depending on the number of blocks they are in charge. Under CPF [*sic*] Mgt, this core team number about 30 pax.
>
> 6. Other non- core functions includes finance, HR, Counter etc which can easily be outsourced if you wish.
>
> 7. He suggested particular attention be paid to emergency lift rescue(1800-35X-8888) currently operated by CPG in ATC. These people just rescue residents trapped in lifts. They do not do repair or servicing.

> *I am worried if you will be sabo' by current ATC people. I think it will be more dangerous for you to keep Jeffery Chua if you had thought about it.* I am willing to volunteer myself for any position in ATC w/o any salary to help you out.
>
> If you need further info, I will help you dig further.
>
> --
>
> Regards
>
> T T Tan
>
> [emphasis added]

317 This is an important piece of contemporaneous documentary evidence, not to establish what CPG in fact intended to do, but rather to assess what the Town Councillors knew or were told, and what their intentions were, *at the material time*. This e-mail from Mr T T Tan, *quoting his source in CPG*, indicated that CPG was re-deploying its staff in ATC to other departments and that CPG was intending to withdraw from ATC. The e-mail also highlighted other concerns, such as the lack of available qualified personnel if CPG deployed its staff to other parts of its business. It should be noted that Mr Low's perspective on these issues was also shaped by the experience he had had as a Town Councillor with HTC (see his evidence reproduced at [319] below).

318 Mr Low forwarded Mr T T Tan's e-mail to Ms How to verify its contents, on the same day he received that e-mail. Later that day, Ms How replied to Mr Low, stating that Mr T T Tan's e-mail "[m]ore or less *coincides with what the AJTC* [referring to ATC] *Secretary told me*" [emphasis added]. Mr Low then forwarded both Mr T T Tan's e-mail and Ms How's reply to the other elected members of AHTC in the afternoon of 13 May 2011. It is undisputed that ATC's Secretary at that time was Mr Jeffrey Chua. Ms How's reply indicates that, by 13 May 2011, Mr Jeffrey Chua had already informed her that CPG was unlikely to want to serve as MA for AHTC. We note that this is consistent with Ms How's explanation in her affidavit of evidence-in-chief

("AEIC"). In her AEIC, Ms How explained that she had she had a conversation with Mr Jeffrey Chua earlier that day on 13 May 2011, in which Mr Jeffrey Chua had asked "if the new AHTC would manage ATC directly or engage an MA" and "said something to the effect that he might not continue as MA" during the conversation. She was not cross-examined on this aspect of her evidence, which thus remains unrebutted and is consistent with the contemporaneous documents. Mr T T Tan's e-mail and Ms How's later reply to Mr Low would therefore have strengthened the concern and belief on the part of Mr Low (as well as AHTC's other elected members, who were forwarded with both e-mails) that CPG did not intend to continue as the MA for AHTC.

319 In these circumstances, and given the concerns with securing qualified personnel at short notice, it should hardly be surprising that Mr Low was already developing a contingency plan that might have been quite firm, even at this early stage. Mr Low clearly had *already* foreseen this possibility by the time he sent the 9 May 2011 E-mail in which he observed, "we … may have to take over the management earlier" (see [300] above). The question then is: what exactly did Mr Low have in mind as the contingency plan? His evidence was that his options were constrained because, as he saw it, the other players in this industry (namely, CPG, EM Services and Cushman & Wakefield (formerly known as Emasco Township Management Pte Ltd)) were all aligned with the PAP and were unlikely to tender for a contract to work with a WP-led Town Council:

> … *All three of the abovementioned companies had been managing PAP TCs for many years*. Given that these companies had staff who were experienced in township management, the PAP MPs had an advantage in having these companies manage their estates. *However, none of these companies wanted to manage AHTC*. [emphasis added]

320 All this was also set out in Mr Low's AEIC as follows:

> … I had already received information from sources such as Mr Tan Thuan Tong ('TT Tan') (a WP member) *as early as 13 May 2011 that CPG was intending to withdraw from acting as MA and that CPG had already begun deploying some of their staff to other departments outside of the TC at the* time. This news did not come as a surprise to me given my past experience with HTC. In fact, this was consistent with my expectation that CPG would not want to continue managing Aljunied GRC under the WP's leadership. I also informed Ms How of this news I received by forwarding TT Tan's e-mail to her and she replied to this e-mail as follows: '… noted. *More or less coincides with what the AJTC [Aljunied Town Council] Secretary [i.e. Mr Jeffrey Chua] told me.*' I understood Ms How to mean that Mr Jeffrey Chua … similarly informed her that CPG will not continue to act as the MA for ATC. … *As such, my biggest concern was to prepare for this situation because the sooner we were prepared, the safer a position we would be in.* [emphasis added]

321 Again, Mr Low was not challenged on this position which was set out in his AEIC. And it is an important piece of evidence which assists in understanding the basis of the scepticism with which Mr Low viewed the existing players in the MA industry and their willingness to work with the WP, a point which the Judge accepted (see the Judgment at [284]). Thus, in these circumstances, while the possibility of holding a tender was a *theoretical* possibility, it was not seen by Mr Low and the other Town Councillors as a *practicable* way to find a solution to the perceived conundrum which they faced: the need for an MA company that would be committed to working with a WP-led constituency without reservation.

322 At trial, Ms Lim testified that, by 19 May 2011, the elected members of AHTC had discussed the possibility of a waiver because they were all aware that CPG's desire to no longer continue as MA *might* eventuate. Ms Lim testified that this discussion with the other elected members took place before her own discussion with Mr Low on 19 May 2011, in the course of which she informed Mr Low about the possibility of a waiver and the transitional appointment of FMSS for a period of one year instead of the usual three-year

period. The 19 May 2011 E-mail was meant to capture this development and that is why Mr Low envisaged the appointment of FMSS for a transitional period of one year (see [312] above). As Mr Low testified, he had referred to the transitional appointment of FMSS as MA in the 19 May 2011 E-mail "in the context of *when CPG is out*" [emphasis added]. Likewise, in his AEIC, he stated that:

> The above e-mail was sent *before it was confirmed* that CPG wished to be released from the MA Contract. As such, when I said that Ms How's company will be appointed as MA, *I was referring to the contingency of appointing her company in the event that CPG did not wish to continue. It was my belief at that time that this would come to pass.* [emphasis added]

323 Therefore, it seems to us that, by around 19 May 2011, the Town Councillors had a plan *in principle* that, *in the event CPG was not inclined to continue as MA for AHTC*, the tender for the first contract for MA services would be waived and it would be awarded to FMSS on a short-term basis. Doubtless, this emerged from the fact that Mr Low and the other Town Councillors believed that none of the existing players in the MA industry were viable alternatives because they would be unwilling to work with due commitment to serve the WP-led AHTC. This was the reality that Mr Low and his colleagues believed they would face and to that extent, and as far as they were concerned, it made little difference how experienced these other existing MA service providers might be if they were unwilling (see [304] above).

324 In these circumstances, given the situation, as Mr Low and the other Town Councillors saw it, and given the way CPG's position appeared to them to be unfolding, it is not surprising that they were developing plans premised on the contingency that CPG would likely not be willing to continue as MA for AHTC and for that matter, that none of the other established MA service providers would step in, in any event. As the Town Councillors point out, this

seemed to be borne out by the fact that none of these providers even submitted a bid when tenders for AHTC's MA contract were called the following year (see [50] above). Before leaving this point, we observe that the e-mails we have referred to in this section, in particular Mr T T Tan's e-mail to Mr Low and Ms How's reply to Mr Low (see [316] and [318] above), were written at a time when the writers of those e-mails would not possibly have imagined their words being parsed or scrutinised in a court years later. They therefore should be taken as a fair representation of what was operating on the minds of the persons concerned at the relevant time.

30 May 2011 Meeting with CPG

325 The next significant development occurred in the period ending with the 30 May 2011 Meeting, at which CPG formally indicated that it did not wish to continue as MA for AHTC under the CPG MA Contract (see [31] above).

326 The purpose of the 30 May 2011 Meeting, as reflected in an e-mail sent by Mr Low e-mail dated 26 May 2011 (addressed to the other elected members of AHTC and copied to Ms How), was to:

> acquaint ourselves with the Town Council, to have a look around the office *and to set some understanding on how the current MA will work with the new administration until handover*. [emphasis added]

327 This was followed, on 29 May 2011, by an e-mail sent by Ms Lim to the other elected members of AHTC updating them on "what has happened and will need to be done". Ms Lim stated in this e-mail that:

> Friday 27 May
>
> …
>
> The existing Managing Agent of AJ TC [referring to ATC], CPG, *will report to us until we release them* at such date not later than 1 Aug.

> …
>
> Secretary of TC
>
> *Jeffrey Chua of CPG will continue until we release him.* We will appoint our Secretary when our MA is ready to take over.
>
> …
>
> [emphasis added]

328 Under cross-examination, Mr Low accepted that, on the face of Ms Lim's e-mail, it would suggest that a decision had been made to release CPG as MA for Aljunied GRC, but he explained that this was on the assumption that CPG would not want to continue providing MA services to Aljunied GRC following WP's takeover. Indeed, following Ms Lim's e-mail on 29 May 2011, CPG confirmed its intention not to continue as MA at the 30 May 2011 Meeting. As for CPG's provision of EMSU services, this was to continue until the expiry of its EMSU contract with ATC on 30 September 2011 (see [25(b)] above). No official minutes were recorded at the 30 May 2011 Meeting, though briefing slides were presented by CPG and subsequently circulated by Mr Jeffrey Chua at Ms Lim's request. Ms Lim also took handwritten notes of the meeting. Ms Lim recorded in these notes, among other things, that:

(a) CPG would be released as MA pursuant to CPG's request and AHTC would need to find a replacement.

(b) In the interim "care taking" period, CPG would manage ATC [or AHTC] from 27 May 2011 to 31 July 2011.

(c) The new staff would have to understudy the existing staff in order to prepare for the takeover.

329 Mr Low stated in his AEIC that among CPG's stated reasons for not wishing to continue was that it was also managing the Ang Mo Kio Town

Council, which was led by the ruling PAP and helmed by the Prime Minister. No *witness* from CPG was called to testify at the trial, and this aspect of Mr Low's evidence remains unrebutted:

> In any case, at a later meeting on 30 May 2011 held at ATC's office at 10:00am, Sylvia, Pritam, Ms How, and I had our first meeting with CPG represented by Jeffrey. Jeffrey informed us at the meeting that CPG did not wish to continue as the MA and sought to be released from the CPG contract when AHTC takes over the running of the Aljunied ward on 1 August 2011. *One of the main factors cited by Jeffrey for not continuing as the MA was that CPG was also managing Ang Mo Kio Town Council which was a PAP TC helmed by the Prime Minister.* … [emphasis added]

330 Mr Low also maintained in his testimony in court that even by 30 May 2011, the Town Councillors had *not yet decided* to engage FMSS. Undoubtedly, on the evidence, this must have been an extremely likely eventuality by this stage.

2 June 2011 E-mail and the First Town Council Meeting

331 On 2 June 2011, Ms How e-mailed Mr Low and copied the other elected members in that e-mail (the "2 June 2011 E-mail"). At the trial below, counsel for PRPTC (now STC) pointed out that the 2 June 2011 E-mail noted the possibility of an extension of CPG's MA services until 30 September 2011. The 2 June 2011 E-mail stated:

> Dear Mr Low
>
> 1 August 2011 handover has never been an issue as this handover refers to TC to TC handover and is mandated by MND.
>
> With regards to services rendered by vendors, contractors and even MA, it is then between these parties and the Town Council they render their services to. With CPG we have always maintained that there is the possibility that *we may require them to continue their service until such time that we deem all matters are properly handed over to new MA. Indicative period is by a month ie up to 30 September 2011.*

> At yesterday's meeting between Chairman Sylvia and MA, this possibility of retaining CPG was again related to Mr Jeffrey Chua and Mr Seng Joo How. CPG is just trying to link the mandate of 1 Aug 2011 to their contract as MA and to NCS's services as the computer vendor as well. These two service contracts are what AJ-HG TC [referring to AHTC] has to take over by 1 Aug 2011. It is not a date for termination of their services.
>
> [emphasis added]

332 On 9 June 2011 at 12.31pm, before the First Town Council Meeting held later that day (at which Mr Jeffrey Chua and several other CPG representatives were also to be in attendance), Ms How e-mailed Ms Lim to remind her that:

> … for tonight's meeting, when discussing the MA's contract, *it is important not to confirm termination on 31 July 2011* which is what CPG is hoping for. [As there are a lot of records to take over and the computer system to settle, 31 August 2011 would be a better date. Jeffrey will use the reason that he has started re-deploying his staff for other projects but this decision of his should not be unilaterally made before seeking our consensus on a date of termination of the MA contract.]
>
> … we have from the beginning informed him [referring to Mr Jeffrey Chua] that we may want to retain their [referring to CPG] service beyond 31 July 2011.

333 Consistent with that, at the First Town Council Meeting held later that evening at 8.30pm, Ms Lim and Mr Low highlighted that "the Council [referring to AHTC] would not commit to 1 Aug 11 as the termination date until further notice". Under cross-examination, Mr Low conceded that CPG did not object to this.

334 Before the Judge, PRPTC pointed to the 2 June 2011 E-mail and also to Ms Lim's and Mr Low's position on the termination date at the First Town Council Meeting (to which CPG did not object) and submitted that the Town Councillors actually had four, rather than two, months (from 30 May 2011) to hold a tender for the First MA Contract. Therefore, PRPTC submitted, the lack of time or purported urgency of the circumstances could not have been the

reason for the waiver of tender for the First MA Contract. Although the Judge considered that it would have been open to the elected members of AHTC to seek an extension of CPG's services until such time as to give them sufficient time to call for a tender (see the Judgment at [271]–[273]), he did not make any specific findings on the possibility of extension until 30 September 2011 for the reasons pointed out by PRPTC.

335 In our judgment, the Plaintiffs have placed undue emphasis on the *potential* possibility of an extension of CPG's services until 30 September 2011. We return here to a point we have already made, which is that by the time the 2 June 2011 E-mail came to be sent, there was no doubt at all that *CPG did not wish to continue* providing MA services to the newly-constituted and now WP-led AHTC. Also by this date, at least as far as the Town Councillors were concerned, their reservations over CPG's commitment to serving AHTC under the WP had been proven to be properly founded. While a possible two-month extension until 30 September 2011 was floated, it was evident from the terms of Ms How's 2 June 2011 E-mail that this was to cater for the possible scenario in which the incoming provider of MA services, that was *meant to take over on 1 August 2011, was unable to do so*. This is also very clear from the transcript of the audio recording of the First Town Council Meeting held on 9 June 2011 (see [33] above):

> Mr Jeffrey Chua: I think I had a free discussion with Chairman and essentially our contract still runs for another 2 more years but I think the understanding is that we will facilitate the handover until the 1st of August and then, we will then do a [*sic*]
>
> Mr Seng Joo How: Deed of mutual… [*sic*]
>
> Mr Jeffrey Chua: Deed of mutual termination on 1st of August, I understand from Ms How that by the 15th of July, you should have your estate of Management team already in

	place. Then there was this request from Ms How that perhaps, can we still help to mend the counters for cash collection for another month. Think that is not an issue. That will, that will see through until the whole month of August. Basically for the 3 branches ah, here and 2 other branches
Ms Lim:	*That's the best case scenario right but we are not certain whether we can commit definitely to those 2 weeks you know*
Mr Jeffrey Chua:	So, erm …
Ms How:	Which means your contract has still have to [*sic*] run for (inaudible) (laughs)
Ms Lim:	I mean there might be might still [*sic*] room for a few weeks I think because you know so it may not be exactly be 1st August the worse *But of course we won't detain you longer than needed lah* [*sic*] *in that sense*.
Mr Seng Joo How:	*We will try to work towards the thing* or I think we would not want to commit that is only the deadline (inaudible) but we will work it out lah [*sic*]
Mr Jeffrey Chua:	*We are working hard to achieve that lah.* [*sic*]
Mr Seng Joo How:	Ya,ya,ya [*sic*]

[emphasis added]

336 What emerges from this transcript is that as far as CPG was concerned, they were willing to continue *as a concession* in the event the handover to the incoming provider of MA services could not be effected by 1 August 2011 but there was also no doubt that, as Mr Jeffrey Chua put it, they were working hard to achieve that earlier handover.

337 This was also Mr Low's testimony when cross-examined on this point:

> Q: [referring to the transcript of the audio recording of the First Town Council Meeting] And what was happening

> was Jeffrey said, 'Okay, 1 August,' but Ms Lim was saying, 'Look, we cannot commit to 1 August. It may be later by a few weeks'?
>
> A: Yes.
>
> Q: Right?
>
> A: Yes.
>
> Q: By 9 June, and having heard this discussion, you knew that CPG understood that the town council may need CPG to stay on for longer than 1 August; right?
>
> A: *If we cannot* –
>
> Q: Yes or no?
>
> A: – *take over* ….
>
> [emphasis added]

In these circumstances, the fact that CPG did not rule out the possible extension of their provision of MA services until 30 September 2011 cannot realistically be equated with the secured availability of an extension of CPG's MA services to that date, when in fact, all parties were working towards a handover on 1 August 2011, not 30 September 2011. As we have emphasised above at [298], neither Mr Jeffrey Chua nor any other witness from CPG had been called to give evidence and so CPG's position, for present purposes, must simply be that which may be gleaned from the documentary evidence. Further, and as noted above at [28], 1 August 2011 was the MND-directed date for the reconstituted Town Councils to assume responsibility for the new areas under their charge following the 2011 GE. Whether or not CPG was to continue providing MA services for AHTC, from that date onwards, the reconstituted Town Council and the Town Councillors would be responsible and hence accountable to their constituents from that date. For a new Town Council such as AHTC, it was therefore imperative, and indeed vital, that the Town Councillors had a committed MA that they trusted and could work with, in place as soon as possible.

338 We reiterate that the test for good faith under s 52 of the TCA is *subjective* (see [283] above). This means that the urgency of the circumstances must be assessed not by how *objectively* urgent the situation was, but how Mr Low and the other Town Councillors and Employees *subjectively* perceived it. Of course, the objective yardstick can be utilised to assess the credibility of a defendant's assertion. For instance, if there were ten months available for a tender to be called, then a defendant's claim that he or she subjectively felt that the situation was "urgent", even though a tender would ordinarily only take two months, would be an unbelievable and untenable claim. However, in this case, there were, as already highlighted, only two months from 30 May 2011 to 1 August 2011. Critically, Mr T T Tan's e-mail of 13 May 2011, which clearly influenced Mr Low, stressed the urgency of the circumstances *as advised by the CPG "insider" whom Mr T T Tan had apparently spoken to* (see [316] above):

> …
>
> He and others who are well versed in this industry speculates that *altough* [*sic*] *you have 45 days to take over ATC, you must act now because most staff need to serve a notice of 1 month before they can take up new employment. WP will be in a difficult position if you do not act now.*
>
> When I ask him for solutions, he mentioned a few items and he drew it on paper … but he refused to let me keep the papers(altough [*sic*] I provided the papers). The below are what I can remember:
>
> …
>
> 2. Ask for permission from ATC/CPG to speak with the current staff immediately before they are re-deployed. *It is not easy to employ qualified people in this industry, even CPG faces this problem.* Give them the true picture before they are all re-deployed by Jeffery Chua.
>
> 3. *Start employing or ask for tender now … at the last minute when you realise they are playing you out, prices are going to shoot up.*
>
> …
>
> [emphasis added]

339 Bearing this in mind, Mr Low and the other Town Councillors' claim that they perceived the situation as one of urgency is certainly *not* incredible.

340 This is to be seen in the context of our earlier observations that (a) CPG was unwilling to continue as the MA services provider for AHTC and was actively seeking to hand over their role as MA by 1 August 2011; and (b) the Town Councillors did honestly harbour doubts as to CPG's willingness to continue to undertake the work with due commitment. The latter belief, as we have noted earlier, is equally to be assessed on a subjective basis, so that the question is whether they honestly harboured this belief, and they clearly did so. Not only had CPG directly told the elected members of AHTC at the 30 May 2011 Meeting that they did not wish to continue as MA, this had earlier also been conveyed informally through Ms How (see [318] above). It was also consistent with the hearsay reports Mr Low was receiving from Mr T T Tan, and it was reinforced when CPG intimated reluctance, at the First Town Council Meeting, to extend their MA services for much beyond 1 August 2011.

341 Further, as mentioned above at [319]–[320], it was also consistent with the experience of Mr Low and the other Town Councillors which was to the effect that the other providers of MA services in the market were unlikely to work with a WP-led Town Council. This perception was fortified when Mr Jeffrey Chua explained at the 30 May 2011 Meeting that a principal reason for CPG not wishing to continue was that it was also managing Ang Mo Kio Town Council, which was a Town Council for a PAP-led constituency (see [329] above). From Mr Low's perspective, it may be noted that the other MA companies in the market were similarly serving other PAP constituencies.

Reasons for waiver of tender and appointment of FMSS

342 In that light, we examine the reasons for the waiver of tender for the first contract for MA services. The Plaintiffs highlight that there was no formal record of any deliberation about the waiver of tender in the period between May 2011 and June 2011. This, they submit, shows that the waiver of tender was not justified, and that any reasons proffered now are merely *ex post facto* rationalisations that ought to be disbelieved. They also submit that there is ample evidence supporting the Judge's findings that the Town Councillors never intended to hold a tender. In our view, the situation was not so straightforward.

343 We have, in the preceding section of the judgment, at [298]–[341] above, traced the events that showed that from a very early stage, the Town Councillors believed that CPG did not wish to continue with the CPG MA Contract and, in any event, they harboured doubts as to CPG's willingness to do so with due commitment for a constituency led by the WP. We have also noted Mr Low's evidence as to his experience with HTC, where, as he saw it, it was difficult to find service providers willing to work with a Town Council led by the WP. As noted above at [319], it was Mr Low's view that *none* of the existing three providers of MA services in the market would be willing to work with a WP-led Town Council like AHTC. Mr Low also attested in his AEIC that:

> 31. … After 20 years of directly managing the HTC, I realised the disadvantages of direct management:
>
> …
>
> (b) Manpower – to be able to manage a town efficiently, quality, professional staff are needed. It is hard to recruit quality staff because there is limited career development and TCs [referring to Town Councils] cannot afford to pay the upper end of the market rate salaries. *There are also some who feel uncomfortable*

> *working for opposition-held TCs, with a perceived disadvantage for their future employment opportunities* …
>
> 32. … Further, it is also typical of MAs in this industry to have other projects under their portfolios such as managing condominiums, other properties or organizations. This provides the MA with greater hiring powers because they can offer their staff better career advancement and flexibility in that he/she could be rotated to work on other projects (*and not have to work exclusively for an opposition TC which often has a 'stigma'*) that are under that MA's portfolio.
>
> [emphasis added]

344 The foregoing observations are cited not as evidence of the actual inclinations or work practices of these service providers, but rather of how the Town Councillors like Mr Low perceived the situation at the material time. The Town Councillors' evidence on this point was not seriously challenged. It is in that light that, as Mr Low attested, in the period "shortly after" the 2011 GE (between 9 and 13 May 2011), he explored with Ms How and Mr Loh "the possibility that [they] could form a new company to manage the town council under the WP's leadership together with the existing key staff of the HTC *in the event that the existing MA did not wish to continue*" [emphasis added]. Mr Low had come know Ms How and Mr Loh in the late-1980s and 1990s. He had headhunted Ms How for the post of Estate Manager for HTC in 1991 and she subsequently became HTC's Secretary/General Manager. Mr Loh, who had been in the business of real estate and private property management, provided EMSU services to HTC from 1997 onwards. It is evident from Mr Low's AEIC that he was impressed with Ms How's and Mr Loh's commitment and abilities. We reproduce the relevant portion of Mr Low's AEIC which shows the extent to which Mr Low trusted Ms How and Mr Loh and felt comfortable to have them on board so that he would have, what he perceived to be, reliable hands to manage AHTC:

> I worked closely with the wife and husband team [referring to Ms How and Mr Loh] during their years of managing HTC. *I have personally witnessed their commitment, how they could work with limited resources under adverse conditions and were able to resolve problems*. Some notable instances in my recollection would include their efforts to implement a number of cost-saving measures in estate maintenance, strategizing for tenders of major works to maximize their dollar values in tenders, and closely watching HTC's bottom line by controlling escalating management and routine maintenance costs to keep HTC afloat without needing to impose higher S&CC [service and conservancy] charges than all the PAP TCs for 20 years whilst attaining an acceptable standard of town management. To give a specific example, HTC was able to accommodate not having to increase the S&CC charges in 2004 even during the economic downturn when most other TCs felt it necessary and justifiable to do so. This particular instance was recorded in the 2005 Hougang Review which is a publication of the HTC which also published a copy of a Straits Times article dated 7 August 2004 entitled 'Potong Pasir and Hougang S&C charges not raised'. … *Ms How personally oversaw every aspect of the TC management together with me and she often worked tirelessly day and night. I personally observed how she was able to defend HTC's interests even in a hostile political environment. As such, I was confident that she and her husband were capable of managing the larger town in an opposition-held TC.* [emphasis added]

345 Mr Low further testified under cross-examination that, in his view, Ms How and Mr Low were the most competent people who could work with the WP-led AHTC and serve its constituents wholeheartedly:

> Q: I'm suggesting to you that underlying the [TCA] and the [TCFR] is a need for objectivity, independence, an arm's-length relationship with the managing agent. Would you agree?
>
> A: Yes and no.
>
> Q: Okay, I understand 'yes', but you'll have to explain 'no'.
>
> A: No, because the town council would work with the MA closely, so you're talking arm's length, yes, be professional about it, but you're talking about independent. I don't know what you mean by 'independent'. And moreover, [counsel], there is a Chinese saying –
>
> Q: Yes, please use it. Go ahead.

> A: The saying is this: (Speaking Mandarin). It means when you are recommending some people of certain ability to do something, there's no need for you to avoid whether the person is your close friend or relative or an enemy. *What is important is the person is going to be able to be competent and properly perform the job. So I look at who can perform the job for the best interest of the residents to make sure that the services will not be disrupted.*
>
> So, yes, I'm mindful about conflict of interest, but I'm not going to avoid that someone who can do their job, because of conflict of interest, we are not going to, I mean, use the person or employ the person or engage the managing agent. But, yes, I think we have to mitigate a conflict.
>
> [emphasis added]

346 Given the positive experience Mr Low had in HTC coupled with the perceived and subsequently evident reluctance of CPG to continue working with the WP-led team to manage AHTC, it is unsurprising that Mr Low wished to engage Ms How and Mr Loh to manage AHTC. This desire was unobjectionable if he believed in good faith that this course *would best serve the constituents of AHTC*. Mr Low attested as much in his AEIC:

> 35. … No training is provided to MPs to undertake this role. Other than myself and Sylvia [referring to Ms Lim] who was a councillor of HTC for some years, the other MPs-elect had no prior experience in township management. As such, I knew that the learning curve for them was going to be very steep such that direct management would be riskier in relation to any decision which the MPs would have to make for routine estate maintenance and operational matters, especially in having to take over the operations of AHTC during the transitional period. It was imperative that we had a dependable MA that AHTC was able to entrust with proper decisions on routine matters on the ground and giving sensible recommendations to the town council by having technical knowledge of estate management as some of these issues would require tapping on experience for a proper judgment to be made in the decision-making process.
>
> …

> 42. I worked closely with the wife and husband team [referring to Ms How and Mr Loh] during their years of managing HTC. I have personally witnessed their commitment, how they could work with limited resources under adverse conditions and were able to resolve problems. …
>
> …
>
> 59. In coming to the view that Sylvia and I came to in our 19 May 2011 discussion [referring to the discussion leading to the eventual decision to appoint FMSS as AHTC's MA for a transitional period of one-year in the event that CPG did not continue providing MA services to a WP-led AHTC: see [322] above], being able to ensure the best possible smooth transition and merger of the operations of HTC and ATC was our prime concern. *It was therefore of great importance that we appoint persons whom we could trust and rely on*, namely Ms How and Mr Loh, in roles such as the General Manager and the Secretary of AHTC.
>
> [emphasis added]

347 In these circumstances, it is unsurprising that, as set out in the Town Councillors' Defence, Mr Low and Ms Lim "wanted [FMSS] to be set up as soon as possible to provide an alternative to CPG, *particularly if CPG decided to pull out of the [CPG MA Contract]*" [emphasis added]. Therefore, contrary to the view taken by the Judge (see the Judgment at [258]), the establishment of FMSS does not in and of itself strike us as sinister. Indeed, faced with the prospect of a reluctant or unwilling incumbent provider of MA services (CPG), the perceived difficulty of finding other experienced MA service providers willing to work with a WP-led Town Council with due commitment, the perceived disadvantages of trying to run such a large Town Council without a professional MA, and the very positive experience Mr Low had had with Ms How and Mr Loh, the Town Councillors' wishes that FMSS be set up as a potential alternative to CPG seemed to be a prudent, and even an obvious step to take.

348 This, however, is a separate matter from whether a tender had to be or ought to have been called in the circumstances. Mr Low, when asked why he did not consider calling a tender on 28 May 2011 (when he e-mailed Ms How that "AHTC MA should employ All the existing staff of HGTC [referring to HTC], at least for a start") and later, on 8 July 2011 (when the LOI was signed by Ms Lim), responded in these terms:

> Q: So how is it that, neither on 28 May nor when the LOI was signed by Ms Lim, did it cross your mind that you needed to do a tender?
>
> A: No.
>
> Q: I'm asking 'why'.
>
> A: Why? *It didn't occur to me really to call a tender because it is novation of staff to the new company, and it's going to be the MA to manage Hougang.*
>
> Q: And that new company would charge the AHTC; right?
>
> A: The AHTC paid the staff costs.
>
> Q: Yes. So that is a cost to AHTC; yes?
>
> A: That is the cost that would have been the same if there's no MAs appointed.
>
> Q: … We're not talking about whether it's the same or not. A cost is being incurred; correct?
>
> A: It would have to incur anyway.
>
> Q: Please answer my question.
>
> A: Yes, the cost is incurred.
>
> …
>
> Q: Are you saying it actually crossed your mind, but you thought a tender is not needed because it would have to be incurred anyway?
>
> A: No.
>
> Q: Thank you. So having regard to the fact that, on your own case, the letter of intent, when signed, created an obligation on AHTC's part to pay FMSS, my question comes back to: Why did it not cross your mind that you needed to do a tender?

> A: Because it is a novation of staff to FMSS.
>
> Q: But a novation is merely a contract, a new contract; right?
>
> A: Yes.
>
> Q: Are you saying that in July, you thought about it and said, 'Okay, this is a novation; therefore, I don't need to do a tender'? Are you saying –
>
> A: *No, no, I didn't think about it.* Because now you ask me, so I trying to think why was it that I – *it didn't cross my mind.*
>
> [emphasis added]

349 The Judge did not find Mr Low's claim that the issue of a tender did not cross his mind or did not occur to him to be credible (see the Judgment at [282]). We respectfully disagree.

350 For the reasons summarised at [343]–[347] above, it is evident that Mr Low's primary intention from *9 May 2011* onwards was to be in a position to have an alternative to CPG. It is also clear that, because Mr Low believed that the difficulties that affected the prospects of a WP-led Town Council working successfully with CPG also applied to the two other providers of MA services in the market, any such alternative realistically had to be found from *outside* the existing pool of experienced MA service providers. In short, Mr Low thought in that event, *it would better serve the residents in AHTC* if the WP-led AHTC engaged a *new* company, established from scratch, made up of people who would serve a WP-led Town Council wholeheartedly and competently.

351 When we consider the entirety of Mr Low's evidence, it seems to us that he did not consider the need to call a tender at that stage for the simple reason that he believed *none* of the other MA service providers would be willing to undertake these services for the WP-led AHTC and in any event, serve it and its constituents wholeheartedly. In these circumstances, his priority was to ensure

that a competent and willing alternative was available and in place. It is for this reason and in this context, that, as Mr Low testified, it "didn't cross [his] mind" to call a tender to find an alternative to CPG. Mr Low did not mean that he did not know that a tender was required. Rather, his evidence, seen in the entire context of the case, is to the effect that it did not cross his mind that a tender *would affect how he could achieve his objective – to engage a competent and dedicated MA to serve the residents of the WP-led AHTC*. Respectfully, this is where the Judge seems to us to have misunderstood Mr Low's evidence.

352 The Judge accepted that the elected members of AHTC (which included Mr Low and the other Town Councillors) "might have felt that it would not be practicable for them, as WP MPs, to work with CPG in the long term because they viewed CPG as 'PAP-affiliated'" (see the Judgment at [273]). The Judge also accepted that the elected members "might have perceived that 'forcibly [retaining] CPG against its own will would not have been sensible because an unwilling MA would not have performed its functions effectively'" (see the Judgment at [273]). We agree with these findings. However, and with respect, the Judge failed to appreciate that, to Mr Low and the other Town Councillors, *the other two existing providers of MA services in the market were plagued by the same difficulties that applied to CPG,* when it came to working with a WP-led Town Council. These doubts about the existing MA companies, coupled with the urgency presented by the need to take over responsibility of the reconstituted Town Council by 1 August 2011 (see [28] above), and the fact that a tender would take about two months to complete, led to the waiver of the tender. This reasoning was repeated on numerous occasions by the Town Councillors in their evidence and in the contemporaneous record, and in our judgment, it was incorrectly rejected by the Judge.

353 Mr Low also testified that it did not cross his mind to ask CPG to stay on for an interim period while a tender was conducted for the first contract for MA services. The Judge considered that this showed that there was never an intention on the part of AHTC's elected members to call for a tender (see the Judgment at [279]). With respect, we disagree. It seems to us that Mr Low's evidence is entirely consistent with how he saw the position at the material time. If CPG had decided to step down and was reluctant to continue as MA for the newly-constituted AHTC even for a short period, because it was sensitive to its other clients (see [341] above), a point which is undisputed, then it makes sense that Mr Low and the other Town Councillors would not have been willing to consider retaining CPG for *any longer than was absolutely necessary.* This is even more the case if Mr Low reasonably believed, as he said he did, that none of the other service providers would want to work with a WP-led Town Council such as AHTC.

354 The foregoing context is also important to understanding Mr Low's acceptance during cross-examination that, even if there had been an open tender for the first contract for the provision of MA services to AHTC and there had been a bid from another provider of MA services, he would not have accepted it unless they hired the existing staff at HTC. For the present, we leave to one side the fact that Mr Low's acceptance was a response to a hypothetical question. In our view, this part of Mr Low's testimony cannot be viewed in the abstract and must be seen in the light of an earlier part of his testimony. There, Mr Low testified that it would *similarly* have been a condition of FMSS's appointment as AHTC's MA that FMSS hire the existing staff of HTC, because what gave FMSS value as a provider of MA services was the fact that it had staff from HTC who had substantial previous experience in managing HTC. This, with respect, appears to have been overlooked by the Judge:

> Q: Right. And so if you wanted FMSS to employ all the Hougang staff, you would have communicated that to FMSS at the time when FMSS's position was confirmed; yes?
>
> A: I think I did tell them. When, I'm not sure. I think there was an email or something. I said I would want FMSS to take on all the staff, and *that's where I think the value of FMSS was from, because it had staff from Hougang who has 20 years experience in managing HDB town*.
>
> …
>
> Q: Therefore, as you yourself have said, you would not have given these instructions to Ms How for FMSS to engage the Hougang staff unless their position was already confirmed?
>
> A: No. That was on the condition and my understanding, and I explained earlier, that *the value of FMSS is only where they employ Hougang staff*, and that is part of the contingency plan.
>
> [emphasis added]

355 This makes sense in the light of the fact that the principal driver of Mr Low's keenness to get Ms How and Mr Loh ready and willing to take on the MA role for AHTC was his past experience working with them (see [343]–[346] above). However, Ms How and Mr Loh, by themselves, could not possibly manage an entire GRC, no matter how dedicated or competent they were believed to be. Their new MA company would certainly have to come with staff who also had to have the same degree of competence and dedication *to a WP-led Town Council*. To Mr Low, the HTC staff had this demonstrable competence and dedication, based on his previous experience as a town councillor at HTC. This was a belief that Mr Low held in good faith.

356 Therefore, the fact that there was no formal record of a discussion or deliberation in June 2011 by the Town Councillors and Ms How of the reasons for the waiver of tender is not, by itself, dispositive. This must be seen in the full context of what had happened. And the evidence in totality suggests that:

(a) CPG had manifested its intentions to leave;

(b) Mr Low and the other Town Councillors were anxious to ensure that another MA company willing to serve the WP-led AHTC competently and wholeheartedly was in place;

(c) Mr Low believed that the other established providers of MA services in the market would be plagued by the same difficulties as CPG seemed to be;

(d) there was a need to ensure that the reconstituted AHTC was ready and able to take over its responsibilities by 1 August 2011;

(e) Ms How and Mr Loh – along with the existing staff at HTC – had *demonstrated their* competence and commitment to serve the WP-led AHTC residents; and

(f) it is in these circumstances that Mr Low and the other Town Councillors waived the tender for the first contract to provide MA services to AHTC *for an interim period of one year*, and so awarded the First MA Contract to FMSS. In our judgment, the Town Councillors had acted out of a good faith desire to serve the residents of the constituency.

Did Ms Lim and Mr Low seek to keep CPG in the dark?

357 Another key aspect of the Judge's reasoning was his finding that Mr Low and Ms Lim had deliberately kept CPG "in the dark" on their plans regarding FMSS "lest they blew the whistle" (see the Judgment at [289]–[290]). In particular, the Judge inferred this from the fact that (a) the decision of whether to appoint FMSS was deliberately kept away from its natural forum, the Second Town Council Meeting, and placed in the hands of Ms Lim; and (b) the Second

Town Council meeting was rescheduled until 4 August 2011 by which time CPG had been released (see the Judgment at [293]–[295]). The Judge also relied on the correspondence around this time, which the Judge found showed a lack of transparency and candour on the part of Ms Lim and Mr Low. In particular, the Judge found it unacceptable and wrong for Mr Low to have asked Mr Loh to prepare a draft report on FMSS's appointment (which was the MA Appointment Report) to be tabled at the Second Town Council Meeting, and for Ms Lim to have requested Mr Loh and Ms How to "sanitise" the MA Appointment Report to pass the scrutiny of auditors (see [36] above), when the report concerned FMSS's appointment as MA (see the Judgment at [297]). The Judge considered that the report and the subsequent press release on 5 August 2011 presented a misleading narrative of the reason why the tender was being waived (see the Judgment at [298]).

358 With respect, we disagree. We make a few points in this regard.

359 First, it is important to reiterate that no witness from CPG gave evidence at all, much less to say that it had been kept in the dark about its release and the appointment of a new MA (FMSS) in its place. Certainly, the Judge did not refer to any such evidence. Had CPG's representatives given evidence, they stood to be cross-examined on the fact that they *themselves* clearly did not want to continue as the MA for AHTC. It seems to us to be untenable that a party was being "kept in the dark" about an outcome it was itself seeking: its release as MA. While CPG may not have been made aware of FMSS, it was dealing at all times with Ms How.

360 Second, there was some internal correspondence regarding the scheduling of the Second Town Council Meeting, which the Judge placed

emphasis on. This merits further attention. According to the Judge, it is clear from the evidence that (see the Judgment at [295]):

> … Mr Low Thia Khiang and Ms Sylvia Lim did not want CPG to be apprised of the details surrounding the waiver of the tender or the appointment of FMSS, out of fear that CPG would play the whistle-blower and sound the alarm should the reasons for the waiver be revealed to them. …

361 We briefly set out the correspondence. On 6 July 2011, Ms Lim e-mailed Ms How to ask whether:

> by going via the [LOI], can we defer the formal appointment till after 1 Aug? Or do we need to get Council [referring to AHTC] to waive tender now … which *needlessly involves CPG*? [emphasis added]

362 On 13 July 2011, Ms Lim e-mailed Ms How, Mr Low and Mr Yaw, asking if it was better to proceed with the Second Town Council Meeting, which was then scheduled for 21 July 2011, or to wait until after 1 August 2011. Her e-mail stated as follows:

> I'm re-considering whether it is better to wait till CPG is out of the picture and Jeffrey is released as Secretary. But there is, to me, one big issue.
>
> One key item is the appointment of the new MA to replace CPG, and the appointment of Danny [referring to Mr Loh] as Secretary. Clearly this must be done before 1 Aug. *We have decided not to tender out the MA job for now*, and will do so in one year's time.
>
> As we have chosen to commit to appointing FM Solns & Svcs [FMSS] via letter of intent for now, *we may not need to let CPG know the details*. At the same time, we need to explain to the residents our plan, otherwise there will be a gap when they receive the Notification dated 15 July. So at least Councillors should know (tho we can go via circulation? but that must involve Jeffrey as Secretary, right?).
>
> According to the [TCFR] para 74(17), TC or Chairman can waive tenders in accordance with the authorisation limits. Even though TC delegated to me powers of TC, we can't contravene [TCFR]. I suspect my authority as Chairman does not entitle me

> to waive tender for such an amount as the MA contract value. So we need TC to endorse.
>
> We also need to document the reasons for waiver fully, as [TCFR] says. *(I think there is no issue here – that to ensure smooth transition and residents do not suffer, we decided to work with those familiar with running Hougang SMC, at the same rates charged by CPG, and will tender out after one year.)*
>
> Your views, pls, on *whether we should go ahead with the meeting on 21 July and confirm the new MA. My mind tells me it is safer somehow***.**
>
> [emphasis added]

363 Mr Yaw replied on the same day stating his support for going ahead with the Second Town Council Meeting on 21 July 2011:

> Personally I believe *we should be rather transparent*. Since we have *nothing to hide, Jeffrey's presence should not be a hindrance for the council to deliberate + to decide the appointment of FM Solutions & Services.*
>
> Furthermore, our interactions (at least mine) with Jeffrey thus far has found him to be a reasonable and responsible person.
>
> As such I am comfortable and support that we go ahead with the meeting on 21 July to confirm our new MA.
>
> [emphasis added]

364 Mr Low replied later that day, expressing his discomfort with having the Second Town Council Meeting scheduled on 21 July 2011 in the presence of Mr Jeffrey Chua (being the representative of CPG). The material parts of Mr Low's e-mail read:

> My view is that we do not need to meet to do so but I think Ms How should advise on this.
>
> 1. If we meet to appoint MA, it has to show at the meeting and on record that we have done our due diligent [*sic*] before decision is made. Although we have done so at separate meeting, *I do not think we want the information to be revealed to them*.
>
> 2. I am also not comfortable to go through the process in the presence of Jeffrey Chua and Co although they appear to be friendly and cooperative thus far.

> […]
>
> 4. I am of the view that based on the resolution passed, you do have the authority to waive tender requirement based on urgency of the matter and the circumstances. (Our confident [*sic*] level of the tenderer will be a prime factor in our consideration anyway *even if we have gone for tender now*)
>
> 5. However, I am not sure under the [TCFR], whether there is a limit of contract sum allowed on waiver by the Chairman and for that matter, the Council as a whole.
>
> […]
>
> 8. Residents are not interested in whether we manage the town directly or engage MA or which MA we engaged [*sic*], whatever happens, good or bad, all elected members will be affected and accountable. *I am of the view that the sole responsibility* [*sic*] *nature of the matter in Town Management means the decision making authority should solely rests* [*sic*] *with the elected members so long as we act in good faith and do not contravene 'explicit' financial rules***.**
>
> 9. However, there will be some 'interested' people who would want to look at who were appointed to manage the town and why etc … This is something we have to think through and prepared to answer [*sic*] but there is no need to offer explanation and dig in ourselves in the name of transparency.
>
> 10. We can properly document the reason for waiver as well as due diligent [*sic*] process you/we have gone through with elected members on appointment of MA at the separate meeting in a form of a report to the council with the new secretary in place.
>
> [emphasis added]

365 What is clear is that Mr Low preferred to postpone the Second Town Council Meeting so that CPG would not be involved in the discussion surrounding the waiver of tender and the appointment of FMSS. Indeed, the Second Town Council Meeting was subsequently postponed to 4 August 2011.

366 The Judge reasoned that the postponement of the meeting arose "out of fear that CPG would play the whistle-blower and sound the alarm should the

reasons for the waiver be revealed to them" and that if Mr Low and Ms Lim genuinely believed the waiver to be justified, "there would have been no harm in having an open discussion in front of CPG representatives at the originally scheduled date" (see the Judgment at [295]).

367 With respect, we are unable to agree with these inferences drawn by the Judge. First, Mr Yaw's e-mail (see [363] above) suggests that any concern Ms Lim might have had was probably unfounded because he had been of the view that the Second Town Council Meeting should proceed as originally scheduled. His e-mail suggests that, as far as he was concerned, there was nothing sinister to hide. Second, all the communications show that any discomfort was with CPG and/or Mr Jeffrey Chua, and not with the decision to waive tender and appoint FMSS as MA being made known *per se*. We return to this below at [368]. Third and most importantly, while Mr Low clearly conveyed his discomfort with the presence of CPG and Mr Jeffrey Chua at the originally scheduled Second Town Council Meeting, the entire context of his e-mail suggests that the reason for his discomfort was not with any possibility that CPG's presence might scupper the plans to appoint FMSS. Instead, Mr Low's e-mail indicates a genuinely held belief, as he himself indicated in paragraphs 8 to 10 of that very e-mail, that waiving the requirement to call for an open tender in the circumstances was wholly justifiable, for reasons that had been covered in a "separate meeting", which Mr Low also referred to at paragraph 1 of that e-mail. As paragraph 10 of Mr Low's e-mail shows, those reasons were summarised in the penultimate paragraph of Ms Lim's email of 13 July 2011 (see [362] above) and were to be properly documented by AHTC in due course.

368 Why then did Mr Low, in his 13 July 2011 e-mail, not want Mr Jeffrey Chua to attend the meeting? In our judgment, Mr Low's explanation for this under cross-examination, to the effect that he felt it would be uncomfortable or

"awkward" for both the Town Councillors and CPG to discuss CPG's replacement in front of CPG itself, was perfectly reasonable:

> Q: Yes. So if there was nothing to hide, and it was a perfectly legitimate, defensible engagement, all done in, according to you, the best interests of the residents, why was there a need to move the meeting so that Jeffrey Chua and his people would not know of the FMSS engagement?
>
> A: That is not – moving the meeting is not because we don't let them know. *We just feel it is awkward. I feel that it is awkward and it is not comfortable in front of meeting with president of CPG, saying, 'Okay, now you're out; this is the new MA coming in.' We don't feel that is comfortable. That's what I feel.*
>
> Q: Comfortable for whom? For you or for CPG? Were you concerned about –
>
> A: *For me, for CPG.*
>
> …
>
> Q: … Let's just talk about your feelings. What did you feel would put you in a difficult position if Jeffrey Chua was present during that discussion, and how?
>
> A: For me, it's not so much a discussion, but just feel that it's not right to, you know – to discuss this thing in front of them.
>
> Q: Why is it not right?
>
> A: *Perhaps I don't trust them.*
>
> Q: *You don't trust them?*
>
> A: *Yeah.*
>
> Q: Okay. So let's explore that. What did you think they will do?
>
> A: *I don't know what they will do.*
>
> Q: But you just said you don't trust them, so let's explore that.
>
> A: Yeah, so there's no need to let them have that information, ***although we know that they probably already know, yes, that FMSS going to take over***. But I don't see the need for them – to discuss this in front of them.

> Q: But let's go back to your 'I don't trust them'. What did you fear they would do with that knowledge?
>
> A: No, I don't fear anything.
>
> Q: Right. So how does the distrust then come into the picture?
>
> A: *No, there is the inherent distrust that I have, since day 1*, so there is a reaction.
>
> Q: So what did you not trust them to do with the information that they obtained?
>
> A: No, I don't think I should worry about the information they obtained, *but it's the feeling that I don't feel comfortable at the nature of distrust or discuss all this thing in front of them, and I also believe that some councillor may also not be comfortable. And I think for them to sit there and to say, "Okay, you are now released, we are going to appoint a new secretary," I don't think it's – I think it's awkward.* Right?
>
> [emphasis added in italics and bold italics]

369 With respect, we are unable to understand what was unacceptable about this explanation. Quite apart from Mr Low's distrust of PAP-affiliated entities, his discomfort in discussing the terms of CPG's replacement in front of CPG is not incredible.

370 When the correspondence leading to the originally scheduled Second Town Council Meeting is considered in totality, we cannot agree that the Town Councillors' postponement of the Second Town Council Meeting was animated by any subjective belief or knowledge that they were acting improperly in appointing FMSS as MA without calling for an open tender. We respectfully consider that the Judge's finding to this effect is unsustainable.

371 The Judge thought that, if the whole process was being undertaken in good faith, there should have been no discomfort in being open about all this with CPG. That may be so, but it does not mean that a discomfort in sharing

information with CPG, whom Mr Low distrusted because he perceived them to be sympathetic to the PAP, points ineluctably to the conclusion that Mr Low and his fellow Town Councillors were not acting in good faith. Indeed, if a nefarious scheme was afoot, one would have expected more concerted and definite steps to *prevent* the originally scheduled Second Town Council Meeting on 21 July 2011 from going ahead, instead of the Town Councillors only *discussing* whether or not it could be postponed. This was simply not the case.

372 We also note that, on 21 July 2011, a meeting was held by Ms Lim on AHTC matters. Amongst other persons, Mr Seng Joo How, a CPG representative, and Ms How, were in attendance. The minutes of this meeting referred to a "new MA":

> 1.4 CPGFM – Deed of Mutual Release and New Arrangement for Parallel Run and Project Management
>
> 1.4.1 On the Deed of Mutual Release, Mr Seng [Joo How] said that Clause 2(b) should be fair and reasonable to both parties. It was agreed to get the lawyer to redraft the Clause accordingly.
>
> 1.4.2 Chairman commented that there is no need to rush through the Deed of Mutual Release as it has already been agreed in principle. The formal document could be signed in August together with the new agreement for the parallel run and project management …
>
> 1.4.3 Ms How handed a list of the projects which *the new MA* will not be taking over and those *which they will be taking over*. The number of projects which CPGFM will continue is three …
>
> [emphasis added]

These minutes were *vetted and signed* by Mr Seng Joo How. It is clear then that by 21 July 2011, CPG *knew* that there would be a new MA. Indeed, Mr Low's evidence was that, at the time of the discussions to postpone the Second Town Council Meeting, CPG "probably already [knew] ... that FMSS [was] going to take over" (see [368] above). Unfortunately, the Judge seems to have

overlooked this. In our judgment, the Judge's finding that the Town Councillors and the Employees had intentionally devised a plan to keep CPG in the dark, was with respect, against the weight of the evidence.

373 Finally, we return to Ms Lim's enquiry to Mr Loh and Ms How on 3 August 2011 as to whether the MA Appointment Report recommending the appointment of FMSS as MA would "pass the auditors' eyes" (see [36] above). This, again, in our judgment, does not reflect a sinister intent. After all, Mr Low and Ms Lim were *aware* of the need to hold a tender. Therefore, the question as to why a tender was not held would naturally arise, and a person waiving tender would in good faith want to ensure that the report would withstand scrutiny. Indeed, the e-mails exchanged between Ms Lim, Mr Yaw and Mr Low about postponing the Second Town Council Meeting that we have referred to above at [362]–[364] showed that Ms Lim and Mr Low were at all times cognisant of the need to ensure that their *reasons* for waiver of tender were properly documented, even though they had been certain that the waiver of tender was, in the circumstances, justified. There was simply no basis at all for the Judge to hold that Ms Lim and the other Town Councillors had waived the calling of tender and appointed FMSS for improper reasons that were not in good faith believed to be in the interests of AHTC.

The Judge's findings

374 In this light, we turn to a number of other findings of fact made by the Judge, and which we respectfully disagree with:

(a) The Judge found that "the contemporaneous documentary evidence speaks unequivocally to one conclusion – that there was a clear plan for FMSS to replace CPG for the provision of MA services regardless of the intentions of CPG", and that "this was no contingency

plan" (see the Judgment at [251] and [261]). This, as we have analysed and explained above at [318]–[324] and [343]–[351], is not an accurate portrayal of the position. For a variety of reasons, at an early stage, Mr Low feared that CPG would not want to continue as the MA for AHTC and he was very anxious to ensure that an entity he trusted and believed to be capable and committed would be in a position to step in to provide MA services in that event. This is not inconsistent with acting in good faith.

(b) The Judge stated that, the fact the "[Town Councillors] had not taken more active measures to procure and examine the [CPG MA Contract] at an earlier date" led him to the conclusion that "the [Town Councillors] were simply unconcerned with AHTC's rights under the [CPG MA Contract] because they wanted FMSS to replace CPG regardless" (see the Judgment at [267]). This, with respect, is not an inference that flows inexorably from the fact that the Town Councillors had not studied the CPG MA Contract earlier. The Town Councillors' main concern was not AHTC's contractual rights against CPG, but *whether CPG wanted to continue serving a WP-led AHTC wholeheartedly*. The Judge's suggestion that the Town Councillors could have considered suing CPG to enforce performance of the CPG MA Contract (see the Judgment at [264]–[266]) does not, with respect, comport with the realities of the situation. Given the political situation that the Town Councillors believed in good faith they were faced with, it is not surprising they did not perceive litigation as a solution.

(c) The Judge found that "there was no urgency or public interest that warranted the waiver of tender" and it was "neither CPG's announcement on 30 May 2011 nor AIM's withdrawal of TCMS that

resulted in tender being waived". Instead, the Judge held that the elected members "could and should have at the very least sought to hold CPG to the [CPG MA Contract] until such time as necessary for the calling of a tender", but none of the Town Councillors explored the possibility of asking CPG to stay on for a longer period so that a tender could be called (see the Judgment at [279]). We respectfully disagree and consider this a theoretically possible *but* practically unrealistic proposition. The Town Councillors' reluctance to work with a company, the commitment of which to serve a WP-led Town Council they already, in good faith, doubted can be readily understood. This also has to be seen in the context of CPG confirming what Mr Low already suspected and believed – that CPG's unwillingness stemmed at least in part from their association with PAP-led Town Councils (see [329] above).

(d) The Judge placed emphasis on two factors which he found "must have weighed on and influenced" Mr Low: first, his distrust of what he perceived to be "PAP-affiliated" entities and second, his desire to ensure the continued employment of the existing staff of HTC (see the Judgment at [286]). The Judge accepted that the Town Councillors, or at least Mr Low and Ms Lim, perceived all the existing players in the MA industry to be "PAP-affiliated" (see the Judgment at [288]). Thus, the Judge found that the Town Councillors' concerns would only be assuaged if CPG was removed from the picture and the tender waived, providing a guarantee that FMSS would be appointed as MA for AHTC (see the Judgment at [288]). This, as we have explained, is an inaccurate interpretation of the mindsets of Mr Low and the other Town Councillors at the material time. Their distrust of the "PAP-affiliated" MA service providers was a background factor that operated on their minds and that hardened in the course of the various events that took

place in May 2011. It meant that, from their perspective, it would not have been practicable or realistic either to expect that the other service providers would be willing, or if they were, that they would be committed to working with entities led by the WP Town Councillors. Conversely, the wish to retain the HTC staff was driven by the need to work with people who, at least in the Town Councillors' perception, had demonstrable dedication and commitment to the work of a WP-led Town Council in the *contentious* field of politics. Practically speaking, this would not be blameworthy if such beliefs and intentions are harboured in good faith. It is not for a court to second guess the good faith decisions of the Town Councillors as to who they wish to hire or work with.

(e) The Judge held that the Town Councillors devised a "plan" to appoint an MA company that would not be a "PAP-affiliated" company and that would hire the HTC staff. This "plan" was "the emergence of a new player in the MA market who would be a viable alternative option to the 'PAP-affiliated' entities, which future opposition wards could work with", and it is for this reason that FMSS was incorporated and CPG was removed (see the Judgment at [288]). However, as we have explained, this is an incomplete picture. The biggest crisis from Mr Low's perspective, was the very real danger of CPG being unwilling to continue and having no alternative. This then became a reality following CPG's formal indication at the 30 May 2011 Meeting that it did not wish to continue as MA for AHTC, which the Town Councillors, to their minds, had no choice but to address urgently. Not only did CPG want to cease their MA services for AHTC, it might have also, to Mr Low's perception, gone into "inactive management" following the 2011 GE such that the constituency might start to become poorly

> managed (see [300] above). If *even an entity like the existing MA* – which on the Judge's own reasoning, had been contractually obliged to perform – was already underperforming because, at least as far as Mr Low honestly believed, of its unwillingness to work with a WP-led Town Council, then it is all the more unsurprising that Mr Low and the other Town Councillors, in good faith, did not expect anything different from the other MA service providers in the market. What would *not* have been in AHTC's interests would have been for the Town Councillors to have no contingency plan in place, and to unquestioningly stick to the existing MA services provider even on pain of having to bring a suit to compel performance or to hope that other players in the market would step up when, they had no reason to believe this would be the case.

Ms How's and Mr Loh's conflict of interest

375 There is another issue pertaining to Ms How's and Mr Loh's conflict of interest. This arises because, at the material time, they were being appointed, respectively, as the General Manager/Deputy Secretary and Secretary of AHTC while FMSS, a company in which both of them were shareholders, directors and employees, would be appointed as the MA for AHTC (see [14(g)] above). STC pleaded that the Town Councillors and the Employees all failed to disclose this fact at the Second Town Council Meeting on 4 August 2011. STC pleaded that they had acted in breach of their fiduciary duties and equitable and common law duties of care to AHTC by causing it to waive tenders in respect of the first contracts for MA and EMSU services, despite this fact. STC repeated this in their closing submissions below, highlighting Mr Low's 19 May 2011 E-mail to Ms How as evidence of Mr Low's knowledge of this conflict of interest as he had stated in that e-mail that the understanding was for Ms How to be "actively involve [*sic*] with the company which will be appointed as MA for the transition

period" and that, in respect of the potential conflict of interest, there should be no "big issue as all transaction has to follow the Financial Rules [referring to the TCFR] and MA's company is subject to the Companies Act" (see [312] above).

376 The Judge found that it was "quite clear" that full disclosure was not made at the Second Town Council Meeting on 4 August 2011, as there was "no mention of FMSS's shareholding in the [MA Appointment Report] tabled at the meeting". The minutes of the meeting, which were prepared by Mr Loh, only recorded the disclosure of Mr Loh and Ms How as directors of FMSS (see the Judgment at [315]). However, the Judge did not believe that the failure to disclose was deliberate, as the "contents of the 3 August 2011 correspondence [referring to Ms Lim's e-mail sent on that date (see [377] below)] suggest that there was an intention to disclose" (see the Judgment at [316]). The Judge also did not consider that the failure to make a full disclosure on FMSS's shareholding constituted any independent breach on the part of the Town Councillors, because it was "undisputed that the [Town Councillors] were aware that FMSS was helmed by [Mr Loh] and Ms How" and the Town Councillors "must have been equally aware that FMSS was a newly incorporated entrant in the MA market". Thus, "in reality the [Town Councillors] should be taken to have known at least that [Mr Loh] and [Ms How] were major shareholders of FMSS" (see the Judgment at [317]).

377 STC's submission raises the question of whether the Town Councillors, or at least Mr Low or Ms Lim, knew that Ms How's and Mr Loh's interests in FMSS raised a potential conflict of interest between their respective positions as senior employees of AHTC and as shareholders of FMSS. That is clearly the case, as is plainly spelt out in Mr Low's 19 May 2011 E-mail. However, as the Judge rightly pointed out, Ms Lim's e-mail of 3 August 2011 before the Second

Town Council Meeting, in which she asked for Mr Loh's and Ms How's comments on whether the MA Appointment Report would "pass the auditors' eyes" (see [36] above) shows that there was an intention to be transparent at the Second Town Council Meeting:

> Dear Mr Low and Shin Leong,
>
> Pls see attached draft report and recommendations *to be presented at tomorrow's AHTC meeting for decision, based on input from Danny*. Please let me know if you have any comments or amendments to suggest.
>
> Cc Danny and Ms How – fyi and any comments on whether it will pass the auditors' eyes – esp re waiver of tender. The exact MA fees, based on the adjusted electoral boundaries, would need to be told to Council as soon as you have worked it out – perhaps by the following meeting?
>
> THANK YOU.
>
> Sylvia

378 The MA Appointment Report, which was attached to Ms Lim's e-mail of 3 August 2011, reflected an intention to cover matters such as FMSS's shareholding:

> <u>Context of Managing Agent appointment</u>
>
> The following factors are to be taken into account when considering the appointment of the Managing Agent (MA):-
>
> …
>
> 5. FM Solutions & Services Pte Ltd (FMSS), incorporated in May 2011, was identified as a suitable MA for appointment. Its key management and staff were qualified and experienced in estate management, some of whom had worked with Hougang Town Council with proven track records.
>
> FMSS Solutions & Services (FMSS) presented their MA proposal in the presence of Ms Sylvia Lim, Mr Low Thia Khiang and Mr Muhamad Faisal in early June. *The presentation covered the following areas:-*
>
> - *Company set-up and organization structure*

> - Proposed Organization structure for managing Aljunied-Hougang Town Council (AHTC)
> - Proposed Action Plan for the taking over of AHTC
> - Proposed Managing Agent fee structure
>
> *Subsequent to the presentation, a copy of the proposal was extended to other elected Members who were not present.*
>
> [emphasis added]

379 Critically, as the Judge rightly found, it was clearly the case that all the Town Councillors knew that FMSS would be owned by Mr Loh and Ms How. After all, as has been stressed earlier, Mr Low was keen to hire Mr Loh and Ms How precisely because he trusted their capabilities and dedication. All the Town Councillors would also have known that FMSS was a new entrant into the market for the provision of MA services. As the Judge noted, it was Ms Lim's evidence that she had simply forgotten to disclose FMSS's shareholding at the Second Town Council Meeting (see the Judgment at [315]). Bearing in mind the fact that all the Town Councillors already knew that Mr Loh and Ms How were involved in setting up and running FMSS, this claim is certainly not unbelievable.

380 As such, the existence of the conflict of interest alone was not, in itself, any indication of bad faith on the part of the Town Councillors and the Employees. As Mr Low stressed in his evidence, the *competence* of the people he worked with was important although we accept that loyalty was also important to him. There is no evidence that the Town Councillors' sole or main purpose in engaging FMSS was to financially benefit Mr Loh and Ms How, much less the Town Councillors themselves. This observation also applies to the next two matters we discuss below. These pertain to an additional one-off cost incurred to hire new staff and an additional expense which might have been saved if CPG had been used also for the Hougang division of AHTC. Rather,

the dominant purpose was *to engage FMSS's services* because they trusted Mr Loh and Ms How's competence and commitment, and this, as we have noted, is not indicative of bad faith on the parts of the Town Councillors and the Employees.

The cost of engaging FMSS vis-à-vis *CPG*

381 Another issue stressed by STC below and on appeal pertains to FMSS's adoption of CPG's prevailing rates as the rates that it would charge for its MA services. There are three distinct issues, which we will deal with in turn.

382 The first issue pertains to the Judge's finding, which we can deal with briefly. The Judge found that FMSS's adoption of CPG's prevailing rates was questionable because FMSS was a new company with "neither the experience nor the employees to run a town of the size of AHTC", unlike CPG, which was "an established company experienced in the area of estate management" (see the Judgment at [320]). The Judge thus seemed to be expressing scepticism as to whether adopting CPG's prevailing rates *to engage a new company* like FMSS was actually in the best interests of AHTC. The problem with this aspect of the Judge's reasoning is, again, that it assesses the Town Councillors' intentions from an objective, rather than subjective, standard. Mr Low's reasoning for preferring Ms How, Mr Loh, and the existing staff at HTC (which were to be employed by FMSS) was that he had *personal experience* working with them and he believed that they could be trusted to run a WP-led Town Council well. As far as Mr Low was concerned, the same did not apply to CPG, even though CPG was a more established company, due to his distrust of "PAP-affiliated" entities like CPG. Therefore, the Judge's view that FMSS was essentially not worth CPG's rates is, with respect, not a proper basis on which to *undermine* the Town Councillors' decision to engage FMSS at CPG's

prevailing rates. This was strengthened by the fact that the value propositions represented by the continued use of an unwilling, albeit experienced MA services provider such as CPG, and the appointment of a new company such as FMSS, that was keen, committed and which the Town Councillors honestly believed to be competent, even if they lacked the experience or track record of CPG, were simply incommensurable.

383 The second related issue was not dealt with by the Judge but was raised by PRPTC below and by STC in the present appeals. STC contends that the part of the Media Statement which stated that "AHTC [did] not incur additional MA fees from appointing FMSS" had been inaccurate (see [38] above). STC contends that this is because FMSS was in fact *entitled* under the LOI to charge the expenses of hiring new staff, and FMSS *did indeed do so*. At the trial below, STC submitted that Ms Lim had admitted under cross-examination that she would have known at the material time that this part of the Media Statement was not true, and she also accepted that the other elected members knew of its untruth but none of them corrected it. At the hearing for the present appeals, STC's counsel, Ms Marina Chin SC ("Ms Chin"), further submitted that the waiver of tender had been secured at the Second Town Council Meeting on the basis of a "misrepresentation" by Ms Lim and Mr Low to the other Town Councillors that AHTC would be engaging FMSS at the same rates as CPG's prevailing rates, when in fact an *additional* one-off cost of $97,816 had been incurred by FMSS (and charged to AHTC) to hire new staff. Ms Chin thus submitted that there was an additional element of expenditure in engaging FMSS instead of retaining CPG, which MA contract still had two years to run (the CPG MA Contract would expire only on 31 July 2013). Ms Chin also contends that this submission had been adequately pleaded by PRPTC at the trial below.

384 In our judgment, it is necessary to examine this by considering exactly what Ms Lim had said on this at the trial below. She explained in her testimony that it was an innocent mistake that the Media Statement did not state the one-off expense required to hire additional staff:

> Q: 'AHTC does not incur additional MA fees from appointing FMSS, as FMSS has agreed to assume the scope of works and pricing of the former MA for [ATC], with only necessary adjustments made due to the electoral boundary changes from the inclusion of Kaki Bukit … and the handing over of … Hougang.'
>
> Do you see that?
>
> A: Yes.
>
> Q: Was that a true statement?
>
> A: Because of the talk about taking over of the Hougang staff –
>
> Q: Was that a true statement?
>
> Ms Lim, what is the difficulty in my question?
>
> A: Yes, yes. Okay, I'll answer it. There was an additional one-off expense for additional staff during that – to prepare for the handover, and, well, *I agree that I could have added that in as an additional sentence. But at the point in time, I didn't think it was material because that was just a one-time expense.*
>
> …
>
> Q: No, that's not my question. My question was: It was, to your knowledge, false?
>
> A: That was at the steady state.
>
> Q: Answer my question, please … That statement was, to your knowledge, false?
>
> A: *I did not think it was false at the time that I wrote it, because I was conveying that at the steady state, this is the CPG rate, plus the Hougang staff –*
>
> Q: You wrote it –
>
> A: – and I agree that, of course, I mean, there is an additional one-time expense for additional staff. *I can*

agree that I could have been more accurate here, but I didn't intend to mislead.

Q: Ms Lim, we've already settled the question of your state of knowledge at the time you issued this statement. We've already agreed that the statement is incorrect. My question is –

A: Yes, it is incorrect.

Q: My question is: That statement is untrue. Do you agree?

A: I can accept that it's not accurate.

Q: I didn't ask you that question. Do you agree it was untrue? Ms Lim? Ms Lim, minutes have passed.

A: Yes, it's not true.

Q: Thank you. And you knew it was not true?

A: I would have known, yes.

Q: Thank you. To know that you are stating an untruth is to lie; correct? Ms Lim.

A: [Counsel], my frame of mind when I wrote it was not like that, yes.

Q: I'm not asking you that.

A: It was not like that.

Q: I'm asking you whether you agree that to knowingly state an untruth is to lie.

A: *I would say that I was very careless.*

[emphasis added]

385 Therefore, the fact that the disputed line in the Media Statement was factually untrue is not the end of the enquiry. The crucial question is why this untrue statement was published in the Media Statement. As far as Ms Lim was concerned, at the material time, AHTC "[did] not incur additional *MA fees* from appointing FMSS" (*per* the Media Statement) because AHTC was indeed engaging FMSS at the prevailing CPG rates. Ms Lim explained that it did not occur to her to mention the *one-time* cost of hiring new staff. While this was certainly careless on her part, it is not an incredible claim because the relevant

part of the Media Statement refers specifically to "MA fees" and to FMSS's agreement to "assume the scope of works and pricing of the former MA for [ATC]", rather than a more generic term such as "cost". It is also critical to note that negligence does not in itself amount to bad faith (see [282] above). The question is whether the misstatement was a reflection of bad faith and there is no evidence to sustain that conclusion.

386 There are also some difficulties with Ms Chin's submission outlined above at [383]. We explain:

(a) First, contrary to Ms Chin's submission before us, the allegation behind this point about the waiver of tender having been obtained by a "misrepresentation" was not, in fact, adequately pleaded. PRPTC's statement of claim only pleaded that Ms Lim's and Mr Low's representations to the other members of AHTC at the Second Town Council Meeting, including the representation that "the terms offered by FMSS '*did not put the Town Council worse off than under the previous MA*' … were false and/or inaccurate and/or did not justify the waiver of a tender" [emphasis in original]. As we pointed out to Ms Chin at the hearing of the appeals, this is merely pleading that, factually, Ms Lim's and Mr Low's representations at the Second Town Council Meeting were inaccurate. This is *not the same* as a claim that Ms Lim and Mr Low had deliberately lied or misrepresented to the other Town Councillors to secure a waiver of tender. Indeed, the distinction between these two points boils down to Ms Lim's and Mr Low's state of mind – did they *know* that the representation was false and would mislead the others?

(b) Second, it bears emphasis that the Judge did not even deal with the specific point raised by Ms Chin in the Judgment at all. Ms Chin

accepted this fact in the hearing before us. This reinforces and supports our view that PRPTC did not plead or run a case of deliberate misrepresentation on the part of Ms Lim and Mr Low to secure a waiver of tender.

(c) Third, Ms Chin's submission also suffers from the same problem of impracticality that underlay some parts of the Judgment. While, *in theory*, the CPG MA Contract was indeed only due to expire in two years' time, the point is that CPG had *already, on 30 May 2011, formally informed the Town Councillors that it did not wish to continue*. Further, Mr Low and the other Town Councillors believed that CPG may already have gone into "inactive management" following the 2011 GE. Ms Chin's submission would thus rest on the expectation that AHTC would retain a company that was not performing adequately as its MA, or worse, have to sue CPG to enforce performance. This was clearly not a realistic expectation.

387 Finally, Ms Chin also made a further submission that there was another additional expense which AHTC had to incur by engaging FMSS because cl 2 of the LOI required AHTC to pay FMSS for the existing staff at HTC at the same rate that they had previously been paid (as at 31 March 2011) before the takeover on 1 August 2011:

> 2. Former Hougang Town Council
>
> a) We shall take-over all the existing staff of the former Hougang Town Council *at their existing salary and terms of appointment on 15 June 2011* for preparation of takeover. Our Managing Agent fees *shall be based on the annual staff cost as per the accounts as at 31 March 2011 which is $1,114,283.02 subject to adjustments*, if any based on the final audited accounts.
>
> [emphasis added]

388 Ms Chin emphasised that, if CPG had been retained for AHTC, their additional MA fees for the Hougang division of AHTC would have only amounted to $687,660 per year, as highlighted at paragraph 5.5.9 of the KPMG Payments Report (see [94] above). This is because CPG's rate for MA services was charged on a per unit basis, while HTC's existing rate – which FMSS adopted – was a fixed fee based on "annual staff cost" for HTC as set out in cl 2 of the LOI (see [387] above). Ms Chin thus submitted that the FMSS rates for the Hougang division were far higher than what CPG's rates would have been if AHTC had retained CPG's services.

389 In our judgment, this submission rests on an even more drastic departure from reality because it posits that Mr Low, who had considerable reservations regarding CPG, and who knew that CPG was already unwilling to continue as the MA under the existing contract, principally because of its existing relation with other PAP-led Town Councils, should be expected to realise and consider that some money could be saved if CPG were asked to cover the Hougang division as well. Furthermore, there is nothing at all to suggest that CPG would have been willing in these circumstances to take on the Hougang division which had been run by the WP, and specifically Mr Low, for an uninterrupted period of twenty years. It would have been even more far-fetched to imagine that Mr Low, who had built his political fortune around his representation of Hougang and managed that estate with the help of staff at HTC, would have countenanced the management of the Hougang division by CPG, which he believed was not to be trusted because of it being "PAP-affiliated". It bears reiterating that no witness from CPG gave evidence, and it is undisputed among the parties that CPG did not wish to continue its services. In these circumstances, we do not find it blameworthy that, to the Town Councillors, the quality of service was just as, if not even more, important than the quantity of the fees. It is not for us to find fault with the Town Councillors' decision to

appoint FMSS over CPG purely on the basis that CPG might have been cheaper, if the Town Councillors believed in good faith that FMSS would have performed better.

390 In this regard, AHTC's expert witness from KPMG, Mr Owen Malcolm Hawkes ("Mr Hawkes"), also explained in his testimony at trial that he was *not* in any position to comment on whether the quality of CPG's performance in a WP-led Town Council would have been "at the same level" as a PAP-led Town Council:

> Q: … We will come into progress a little later on to your thesis that CPG would be just as committed to carrying out – and I assume that is your thesis – that CPG would be just as happy, just as keen and just as committed to carry out managing agent services for a Workers Party controlled Aljunied as it was for a PAP controlled Aljunied. That is your thesis?
>
> A: No, that is not my thesis at all. My thesis is that they were contractually obliged to do so. They are a corporate entity with legal obligation [*sic*] and that they could be, if necessary, made to do so or a negotiation could be entered into where they gave up or rather where the town council gave up its right to receive those services in return for something else which might be staying on for another year, albeit that they would rather not have been there, for example. It doesn't mean that people are equally happy to provide their contractual obligations to people they work with?
>
> Q: And you think it was likely, it was just as likely that level of performance of CPG for a Workers Party controlled constituency would be just as – at the same level for a PAP controlled constituency?
>
> A: *To be honest, I am not really in a position to judge*. They have contractual obligations. They could be held to then. *Whether they are 90 per cent as good, 100 per cent as good, 50 per cent as good I am not really in a position to judge*. However, as I say, there are contractual obligations which they could have been held to.
>
> [emphasis added]

391 Furthermore, PRPTC never ran a case at the trial below, whether in their pleadings or submissions, that the Town Councillors should have retained CPG over FMSS because of this difference in fees for the Hougang division. The specific point pleaded by PRPTC on this point, as set out at paragraph 42 of PRPTC's statement of claim, was that the Town Councillors should not have waived the tender for the first contract for the provision of MA services to AHTC and subsequently awarded the First MA Contract to FMSS, and *not* that it should have retained CPG's services. Therefore, Ms Chin's submission now that the Town Councillors should have retained CPG over FMSS is not only unrealistic, it is also belated, and one we reject.

Analysis in the round

392 For these reasons, we find that the Judge erred in his conclusion as to the Town Councillors' and Ms How's intentions. In our respectful view, the Judge drew a number of inferences which did not follow inexorably from the documentary evidence. The Judge held that, in order to be compliant with the requirements of the TCFR and to act in the best interests of AHTC, the Town Councillors ought either to have held CPG to the CPG MA Contract until its expiry on 31 July 2013 or called a tender for a new MA services provider in 2011 and compelled CPG to stay on as MA for as long as it was necessary for this to be done, and then awarded a new MA contract to the lowest bidder (see the Judgment at [339]). For the reasons we have set out, these findings and expectations are unrealistic and miscast the approach that a court should take in this context. It is emphatically not the place of the court to second-guess the judgments and decisions made honestly and in good faith by the Town Councillors based on the facts and circumstances that they were presented with at the time they had to make those judgments and decisions. This does not

change even if those judgments may ultimately prove, with the benefit of hindsight, to have been wrongly made.

393 Any analysis of the events pertaining to the award of the first contract for the provision of MA services to AHTC has to be approached in the light of a few key facts, which were not controversial, but which were, with respect, not given adequate weight by the Judge. At the risk of repetition, we set these out again:

(a) the Town Councillors had concerns over CPG's commitment to working with a WP-led team;

(b) CPG in fact did not wish to carry on working with the new WP-led team at AHTC;

(c) the Town Councillors genuinely harboured a concern that the difficulties that affected CPG would also affect the prospect of their working with any of the other established MA service providers in the market;

(d) there was therefore a real risk of facing a prospect where no MA service provider would be willing or available to work with the WP-led AHTC;

(e) as against this, Mr Low was familiar with and had a high degree of confidence in the commitment and ability of Ms How and Mr Loh and the existing staff at HTC to undertake the role of AHTC's MA competently and to a high standard and considered that they could be persuaded to undertake this work for an interim period of one year so that the handover could be effected smoothly and a public tender be called thereafter;

(f) the interim arrangement did not result in the MA services being rendered at fees that were higher than what AHTC would have to incur in any case; and

(g) while it appears that there might have been some differences in cost, the notionally competing options were not commensurable, and it is not for the court to second-guess the decisions of the Town Councillors made in good faith.

394 In this light, when the evidence is reviewed, a few points stand out. First, there is an unmistakable political overtone that colours the way matters were seen by the Town Councillors. Mr Low was adamant in his belief that all the major MA service providers were inclined to work with PAP-led Town Councils and disinclined to work with Town Councils led by other political parties (see [343] above). In line with this, there was a suggestion in one of Ms Lim's contemporaneous e-mails on 16 September 2011 that CPG had been "spoken to" as a result of which it was not willing to extend the contract for the provision of EMSU services to AHTC beyond its expiry date , even though CPG appeared to have previously indicated an interest to renew that contract for a further period of six months (see [41]–[43] above):

> …
>
> This week, EM Services has stood firm that they will not extend beyond 30 Sep. However, CPG FM [referring to CPG] informed us on 14 Sep(in writing and orally) that they too are not extending – *it seems that they have been 'spoken to' about not helping us and have made a business decision.*
>
> This means that *we must make immediate provision* to have continuity of EMSU services beyond 30 Sep for all Divs in Aljunied GRC. We are likely to award the contract for 6 months (Oct 2011 to Mar 2012) and call a tender for the period Apr 2012 onwards.
>
> …

> Always expect the unexpected!
> [emphasis added]

395 It is perhaps not remarkable that the existing providers of MA services in the market may have been mindful of their commercial relations with the existing Town Councils. In any event, no evidence was presented to the Judge to suggest that these concerns of Mr Low and the other Town Councillors of the unwillingness of CPG and/or the existing MA service providers in the market to work with a WP-led AHTC had not been honestly held.

396 The Judge therefore accepted that the Town Councillors did harbour these concerns regarding CPG's commitment. The Town Councillors' concerns over CPG's commitment were plainly reflected even in the 9 May 2011 E-mail (see [300] above). As alluded to above, in our judgment, the Judge failed to pay sufficient attention to certain portions of the 9 May 2011 E-mail, which demonstrate that the Town Councillors believed that they could face a crisis, because they thought that CPG might be about to "go-slow". They were concerned that they might have to take over management from CPG at short notice in order to avoid the piling up of rubbish and *residents suffering* from poor service. There is no suggestion at all that these concerns were not honestly held and if they were held, as we are satisfied they were, they gave rise to reasonable concerns as to how this would affect the continued provision of services for *the benefit of residents* of AHTC.

397 The 9 May 2011 E-mail was written contemporaneously, just after the 2011 GE, and it is wholly improbable, and indeed untenable that such a document was written to leave a convenient paper trail for the sake of future proceedings such as the Suits. Seen from that perspective, the 9 May 2011 Email casts a very different light on the course which the Town Councillors took

subsequently. If they sincerely believed that there was a risk that CPG would not serve them with unqualified commitment, what then were the options open to them? The situation was inevitably politicised to a degree. As is evident from the extracts of the Parliamentary debates set out above at [194]–[197], the performance of a Town Council was seen to reflect the performance of the elected politicians. The Judge suggested that CPG could have been sued if it proved unwilling (see the Judgment at [264]–[266]). As alluded to above at [374(b)], this was, with the greatest of respect, unrealistic, and all the more so if one examines this from a standard of good faith. It was unrealistic to expect a new political team taking over a Town Council in a GRC to be led by a political party other than the PAP for the first time, to begin its term with a lawsuit against the incumbent MA services provider, much less if it harboured fears that the MA might not carry out its duties with the sort of commitment that might be desired and expected. While there might well have been contractual obligations, how well these were going to be performed was another matter. The prospect of lackadaisical performance was alarming considering the Town Councillors' concerns that some rubbish might begin to mount and that lift and other services might fall into a state of disrepair.

398 The Judge also suggested that if the Town Councillors had studied the CPG MA Contract earlier, this would have led them to "realise" that CPG had no legal entitlement to unilaterally terminate the CPG MA contract (see the Judgment at [266]). Again, as alluded to above at [374(b)], this was beside the point. The concern the Town Councillors had was that CPG might, whether intentionally or otherwise, underperform its duties because of its perceived reluctance to work with the WP-led team. Such under-performance could potentially sully the residents' perception of the elected members, because the blame for the poor management of the Town Council would ultimately fall on them.

399 Fears and concerns were harboured and litigation having, in our judgment, quite sensibly been excluded as an option, there was plainly a need to have fallback positions in place. The Judge concluded that by 30 May 2011, the Town Councillors' minds had already been made up. In our judgment, this is an incomplete portrayal of the position. If the Town Councillors genuinely and sincerely believed that CPG wanted out, they had no choice *but* to consider alternative options.

400 And, it became incontrovertible by 30 May 2011 that CPG did want out. This much is uncontroversial, and it is perhaps why no CPG representative (Mr Jeffrey Chua, in particular) was called as a witness at the trial. The evidence before the court suggests that CPG was reluctant even to continue providing MA services beyond 1 August 2011 (see [335]–[336] above).

401 In these circumstances, there is simply no basis for this court to find that the Town Councillors did not act in good faith, or even that they had breached their duty of care, for considering and ultimately deciding that they were better off with a new MA services provider who could be trusted to work with them in a committed way.

402 The Judge unfortunately did not examine the counterfactual, which in our judgment, was an important point of consideration. If CPG had indicated at the 30 May 2011 Meeting that it was fully committed to carry on with the remainder of its contractual obligations under the CPG MA Contract, then the Town Councillors might well have found it difficult to justify the course they ended up taking. In this hypothesis, the primary plank of their case, that they could not rely on CPG to do its work with full commitment, to the best of its ability, might have fallen away. However, at the 30 May 2011 Meeting, the Town Councillors' suspicions were, to their minds, *confirmed*. To put it simply,

their fears, whether well-founded originally, had materialised at the 30 May 2011 Meeting, and time was not on their side. With hindsight, it might be said that the Town Councillors should have started planning a tender earlier. However, with respect, this too is unrealistic. They were elected on 7 May 2011 and the 22 days between then and the 30 May 2011 Meeting does not seem an unreasonably long period for them to form their assessment of the situation. Even if they had heard indirectly that CPG wanted out, it was wholly appropriate for them to have waited to hear that directly from CPG – and that occurred at the 30 May 2011 Meeting. And by the date of the meeting, as we have noted, time was not on their side. This is the reason the Town Councillors gave for not calling a tender for the first contract for MA services and it is not disputed that it would have taken at least two months to call a tender. While theoretically there was still time to call a tender, there is simply no basis to find that the Town Councillors did not act in good faith or reasonably, or acted in breach of their duties, in deciding to proceed instead with the alternative plan they had developed, especially when this was essentially on the same terms as CPG's contract (besides the additional one-time expense of hiring new staff and a slight difference in the rates for the Hougang division, which we have addressed at [383] and [388]–[391] above).

403 In these circumstances, we find that the Town Councillors, as well as Ms How, acted in good faith in the execution of the TCA when they waived the requirement for a tender for the first contract for the provision of MA services to AHTC and awarded the First MA Contract to FMSS. It follows that s 52 of the TCA would avail them and afford them immunity from personal liability. In the circumstances, we need not reach the question of whether they breached their duty of skill and care in this regard, though from all we have said, it is by no means clear that they did.

The First EMSU Contract

404 We turn to the First EMSU Contract, the facts relating to which were broadly similar from the perspective of the Town Councillors. The same concerns that animated the decision in relation to the award of the First MA Contract to FMSS also applied in the context of the First EMSU Contract in as much as the concern was over CPG's commitment.

405 The question is whether the situation was of such urgency that it was necessary to waive the tender, or whether it was in the public interest to do so. The Judge found that the waiver of tender for the First EMSU Contract was part of a *premeditated plan* to merge the contracts for the provision of EMSU services and MA services into a composite contract, as this had been noted in slides which Mr Loh presented to Ms Lim, Mr Low and Mr Faisal on 2 June 2011 on behalf of FMSS about the provision of MA and EMSU services to AHTC (see [32] above; see the Judgment at [323]–[331]). However, in our judgment, this was more coincidental than nefarious, given that Ms Lim's e-mail on 18 September 2011, in which she described CPG's decision to reject AHTC's request to extend the provision of EMSU services as a "surprise" and informed the other Town Councillors that there was no time to call a tender for the contract for EMSU services (see [45] above), clearly intimated that tenders for the MA services contract and the EMSU services contract, though separate, should be called for at the same time after the transitional period.

406 The Plaintiffs submit that, either as early as 16 May 2011 or by the First Town Council Meeting on 9 June 2011, there was ample notice of CPG's intention not to continue with the provision of EMSU services. As to what happened thereafter on 26 August 2011 when the Town Councillors requested CPG and EM Services to continue providing EMSU services after the expiry of

their respective contracts, the Judge found this to be a late request and a self-inflicted disappointment that could have been avoided (see the Judgment at [331]). Respectfully, however, even if it was clear by 9 June 2011 that CPG might not agree to continue with its provision of EMSU services, the timeframe from June 2011 to September 2011 cannot be construed as an unduly protracted or long period of time. While there might have been *some* time for a tender to be called, the question is why the Town Councillors proceeded as they did. The contemporaneous documents show that it was thought likely to be difficult to find a willing service provider given the paucity of EMSU service providers, and the Town Councillors' perception that the existing EMSU service providers in the market were aligned with the PAP. This was considered by the Town Councillors at the Third Town Council Meeting on 8 September 2011, as is evident from the minutes of the meeting:

> …
>
> **2.7 EMSU Contract**
>
> The Managing Agent reported that the incumbent EMSU service providers were M/s CPG Facilities Management Pte Ltd and M/s EM Services Pte Ltd whose extended contracts would be expiring on 30 September 2011. Whilst M/s CPG had indicated interest to renew for a further period of 6 months, M/s EM Services was not agreeable to the proposed extension. However, the Meeting noted that M/s CPG FM had not confirmed officially in writing on the proposed extension despite several reminders.
>
> *The Meeting noted the lack of EMSU service providers in the market that would be willing to provide their services to Aljunied-Hougang Town Council. In view of the short time frame*, the Meeting decided to appoint a Committee required under Rule 76(4) of the Town Councils Financial Rules in order that the Council could consider *proposal from the current Managing Agent to provide the EMSU services* ***in case M/s CPG FM decided not to extend***. The Committee shall comprise Ms Sylvia Lim, Mr Chen Show Mao, Mr Muhamad Faisal and Mr Anthony Teo.

[emphasis added in italics and bold italics]

407 It is clear from the minutes that the Town Councillors thought, at that time, that CPG would at least extend its EMSU services for a few months which would have maintained the existing position until close to the time when the public tenders were to be called, but in the event, CPG declined to agree to the extension. In the circumstances, we find that the Town Councillors and the Employees had acted in good faith and did not breach their duty of care when waiving the tender for the First EMSU Contract either.

The Second MA Contract and the Second EMSU Contract

408 We turn very briefly to consider the Second MA Contract and the Second EMSU Contract. While it is undisputed that tenders were called for both services in 2012 and FMSS was the sole bidder in both tenders, the Plaintiffs' main argument below was that the absence of bids in 2012 was a consequence of a state of affairs *deliberately engineered* by the Town Councillors and the Employees, and which had culminated in the appointment of FMSS as MA in 2011 under the First MA Contract (see the Judgment at [335]). It was also argued that the continued non-disclosure of Ms How's and Mr Loh's shareholding in FMSS was a breach. Thus, the appointment of FMSS after an open tender in 2012 was simply a continuing breach of the various duties the Judge considered were owed by the Town Councillors and the Employees to AHTC (see the Judgment at [335]).

409 The Judge found that there were no independent or continuing breaches of duties arising from the award of the Second MA Contract and the Second EMSU Contracts to FMSS after tender (see the Judgment at [345]). The Judge reasoned that, since FMSS's re-appointment in 2012 was purely the natural consequence of its 2011 appointment and consequent incumbency, and not the

product of some further wrongdoing, this meant that no continuing breach was discernible in so far as the Second MA Contract and the Second EMSU Contract were concerned (see the Judgment at [338]). The Judge found that any loss caused to AHTC by the award of the Second MA Contract and the Second EMSU Contract to FMSS would be recoverable as consequential losses flowing from the breaches in relation to the award of the First MA Contract and the First EMSU Contract (see the Judgment at [338]–[339]).

410 The finding that no fiduciary duties are owed by the Town Councillors disposes of the claims of dishonest assistance and knowing receipt against the Employees as well as FMSS. Given that no liability is found in respect of the award of the First MA Contract and the First EMSU Contract, no claim remains as with regards to the award of the Second MA Contract and the Second EMSU Contract. In any case, no independent cause of action was pleaded against either the Town Councillors or the Employees in respect of the award of the Second MA Contract and/or the Second EMSU Contract to FMSS. Therefore, there was also no breach in respect of the Second MA Contract and the Second EMSU Contract.

411 In any event, we also doubt the Judge's finding that a subsequent tender would not remedy any breach of the Town Councillors' and Employees' duties, assuming there had been a breach in waiving the tender for the first contracts for MA and EMSU services. The Judge took this view because he accepted that the waiver of tender in respect of the first contract for MA services and the appointment of FMSS as MA pursuant to the award of the First MA Contract was part of a mid- to long-term plan to install trusted WP supporters in place of CPG (see the Judgment at [337]).

412 With respect, for reasons already highlighted above, this inference is not justifiable in the light of all the evidence. In respect of the First MA Contract, the need to secure the availability of FMSS and its subsequent appointment were seen as an urgent necessity as it became evident to the Town Councillors that they might be without a committed and willing MA. The evidence shows that the appointment of FMSS was only an interim plan for one year; there is no evidence at all that the Town Councillors had designed a plan for FMSS to be appointed to either ossify or cement its position for the longer term. The fact that FMSS subsequently had the advantage of incumbency is neither here nor there. Otherwise, it would be meaningless for any Town Council to call for a tender once there is an incumbent. Further, the absence of any other tenderers in 2012 corroborated some of the fears which the Town Councillors harboured in 2011. The First EMSU Contract also should not be conflated with the award of the Second EMSU Contract. The Judge posited a counterfactual to the effect that if CPG had been retained as MA until July 2013 under the CPG MA Contract, then it might have agreed to continue providing EMSU services for all of AHTC until that time, as part of the negotiations for AHTC not to exercise its option under the CPG MA Contract to extend the contract beyond its initial term (see the Judgment at [340]). However, this counterfactual rests on the assumption that CPG would have been content to continue providing MA services and therefore also EMSU services. This seems speculative at best in the light of our observations above and it is important to note, once again, the absence of evidence from CPG.

413 In the premises, we are satisfied that the actions carried out in respect of the award of the Second MA Contract and the Second EMSU Contract to FMSS were undertaken in good faith and in any case did not entail any breach of duty. It also follows from our conclusion on this point that the Second Issue in CA 200, namely whether the Plaintiffs would have to prove but for causation

before they could obtain recovery in the form of reparative compensation (see [115] above) falls away, because such relief was only sought in relation to the award of the Contracts.

Payments to FMSS and FMSI

414 As highlighted at [63] above, there were four broad issues before the Judge in respect of the Plaintiffs' claim for the allegedly improper payments made to FMSS and FMSI, pursuant to the Contracts and the FMSI EMSU Contract. Only two of these issues are the subject of these appeals: (a) the "control failures" in the process that was implemented for AHTC to approve payments to FMSS and FMSI; and (b) a series of other miscellaneous improper payments made to FMSS.

415 It can hardly be doubted that the institution of the payments process and disbursement of payments were all acts done "in the execution or purported execution of the" TCA. In particular, s 35(*c*) of the then-TCA mandated that a Town Council was to ensure that moneys were correctly spent and properly authorised, as well as to ensure that adequate control was maintained over the Town Council's assets. We shall deal with the two issues in turn to assess whether the requirement of good faith under s 52 of the TCA is met.

"Control failures"

416 There is no factual dispute as to the manner in which payments were made by AHTC to FMSS and FMSI under the Contracts and the FMSI EMSU Contract. Between 15 July 2011 and 24 January 2013, as well as between 29 January 2013 and 14 July 2014, AHTC disbursed a total of $2,689,434.15 and $20,601,049.12 to FMSS pursuant to the First MA and EMSU Contracts, and the Second MA and EMSU Contracts respectively. Of these, Conflicted

Persons approved payment vouchers ("PVs") with an aggregate value of $23,299,483, including Work Orders ("WOs") with an aggregate value of $1,213,580. In other words, the Plaintiffs claimed that, as a result of the flawed payment system, all the payments that AHTC had made to FMSS pursuant to the Contracts involved approvals by Conflicted Persons. And between 14 October 2011 and 24 April 2012, Conflicted Persons approved both the payment of, and signed six cheques for, FMSI invoices under the FMSI EMSU Contract, having an aggregate value of $176,400.

417 The only issue is whether the Town Councillors and Employees, in permitting FMSS and FMSI to receive payments under a system which the Plaintiffs contend is defective, did not act in good faith and hence breached the duties they owed to AHTC. We start by outlining the process by which payments were approved and made by AHTC.

An overview of the payments system implemented

418 For payments by AHTC for services rendered to it, the payment approval process generally involved the following steps:

(a) First, WOs were approved and issued on behalf of AHTC. These served as a certification *by* AHTC that the work and services carried out by the vendor had been duly provided to AHTC and received by AHTC.

(b) Second, AHTC would then receive the corresponding invoice from the vendor.

(c) Third, PVs were approved and issued on behalf of AHTC. The PVs served as an internal record and confirmation that payment for the services rendered ought to be made.

(d) Fourth, designated signatories of AHTC would imprint their final signature on the cheque or bank transfer instruction. These signatories included, among others, the Secretary and General Manager/Deputy Secretary of AHTC. In particular, for payments disbursed to FMSS (but not FMSI), there was a standing internal requirement that the co-signatory would be either the Chairman or the Vice-Chairman of AHTC, namely, Ms Lim, Mr Low or Mr Singh at the material time. This is what we term the "Standing Instruction" (see [64] above).

419 We shall refer to these as the First, Second, Third and Fourth Stages respectively.

420 The KPMG Payments Report (see [94] above) concluded that there was no meaningful oversight by the Town Councillors in relation to the payments made to FMSS and that "Conflicted Persons" who were shareholders in FMSS while holding key management and operational positions in AHTC were involved in approving the payments. These "Conflicted Persons", as mentioned above at [94], were Mr Loh, Ms How, Mr Yeo, Mr Koh, Mr Chng and Mr Lieow.

421 KPMG considered that these individuals were in positions of conflict of interest because, as shareholders of FMSS and/or FMSI, they had a personal profit incentive for approving payments from AHTC to FMSS and, in the case of Mr Loh and Ms How, to FMSI. These persons, as we set out below, were involved in the First, Third and Fourth Stages of the payment process.

422 The payment process has been outlined at [418] above. We elaborate on several stages of the payment process.

423 At the First Stage, the WOs issued appear to have the same function as "payment vouchers" under the TCFR, as outlined at [71] above. The WOs contained printed statements reading "[c]ertification that the contractor has attended to the above jobs" and "[t]his work is satisfactorily completed on …", and were supposed to be signed and dated by the Property Officer. That said, it did not appear that the relevant AHTC officers actually verified that work was done before they issued the WOs. At trial, Mr Yeo was brought through the payment process and he explained that, in one instance, he approved and issued a WO for $424,613.27 dated 5 May 2013 in his capacity as Operations Manager and Deputy General Manager of AHTC. He stamped the accompanying invoice with a chop that "certif[ied] that the works [for which the invoice was issued had been] delivered / completed". However, as he later explained, this, in fact, *only* reflected that the amount to be paid was accurate as against the amount due under the contract. This corresponded with Mr Yeo's explanations in his AEIC that it was more accurate to state that the Conflicted Persons merely "checked" the WOs, instead of "approving" them. Likewise, Ms How gave evidence that the WOs were generated for accounting purposes only, and that the FMSS employees preparing and signing off on the WOs would merely check that the numbers corresponded with any underlying contract or documents, such as the summary breakdown of MA fees, third party certificates or the unit rates in the contract.

424 At the Third Stage, PVs, as referred to by AHTC, were "payment requests" (from July 2011 to March 2012) and "journal voucher payment reports" or "voucher journal reports" (from April 2012 onwards). These reflected the various payments that were to be made to the same contractor and were usually automatically generated based on matching WOs. The Property Manager signed off on the PVs by checking them against the accompanying documents (including the invoices, WOs, and other supporting documents).

425 At the Fourth Stage, the PVs were consolidated for payment by a single cheque and the cheque was presented for co-signature. According to Mr Yeo, either he or Ms How would sign on the cheque if the amounts stated in the summary were calculated correctly. He emphasised that his "checking did not amount to an approval of payment" but "merely [made] sure there were no administrative errors in the summary presented to the Chairman". The cheque was then co-signed by the Chairman or Vice-Chairman, pursuant to an internal requirement implemented at the Third Town Council Meeting on 8 September 2011. The meeting minutes for that meeting stated that the usual payment protocol was for cheques not exceeding $50,000 to be signed by the Secretary and an appointed officer, from the Group A list (in line with r 33(2)(*a*) of the TCFR). All other cheques were to be co-signed by (a) the Chairman or Vice-Chairman; and (b) the Secretary or Deputy Secretary or an appointed officer (in line with r 33(2)(*b*)). However, it was decided that:

> Since those in Group A were all Directors of the Managing Agent, the Meeting resolved that all cheque payments to the MA must be signed by the Chairman or Vice-Chairman together with the Secretary or Dy Secretary or 1 Appointed Officer.

This is the Standing Instruction previously referred to at [64] and [418418(d)] above. The reason for this, as Mr Low explained in his AEIC, was that:

> Given that the WP's elected MPs had no prior experience in outsourcing AHTC's management using a MA, we decided to adopt the existing practices of MAs of the PAP TCs. In this regard, AHTC adopted the same practice used by ATC but with an additional layer of protection by instituting a standing instruction which required that <u>all</u> payments to FMSS regardless of quantum be co-signed by either the Chairman or Vice-Chairman of the TC, both of whom had no interest in FMSS. This standing instruction was given at the [Third Town Council Meeting]. The same standing instruction was also given for payments to FMSS under the subsequent [Second MA Contract and the Second EMSU Contract] – that the cheques be co-signed by either the Chairman or one of the Vice-Chairmen. … [emphasis in underline in original]

426 Pursuant to this Standing Instruction, all payments to FMSS were to be signed by AHTC's Chairman (Ms Lim) or Vice-Chairman (Mr Low or Mr Singh) together with the Secretary (Mr Loh), Deputy Secretary (Ms How), or an appointed officer (Mr Chng or Mr Koh). Ms Lim deposed that this Standing Instruction was implemented to go "one step further" than required under r 33 of the TCFR, with the purpose of "mitigat[ing] the potential conflict of interest which could arise when the directors of FMSS [namely, Mr Loh and Ms How] approved and signed off on payments to FMSS". Mr Singh's testimony was to the same effect. This Standing Instruction was, however, not in place for payments to FMSI. In signing the cheques, Ms Lim, Mr Low and Mr Singh all agreed that they would rely on supporting documents prepared by FMSS and on FMSS having done a proper job in verifying and calculating the sums owing to FMSI.

The Judge's decision

427 Relying largely on the KPMG Payments Report, the Plaintiffs alleged at the trial that the Town Councillors and the Employees had failed to institute protocols or processes that would ensure the independent and objective assessment of the service levels of FMSS and FMSI. This was exacerbated by the fact that some of the signatories authorising payments themselves had interests in FMSS and FMSI, evincing a grave conflict of interest that was not adequately managed. These "control failures", as they were termed, were embedded into the payment processes, and were thoroughly objectionable because there was no meaningful oversight exercised by AHTC in respect of the payments and AHTC's funds were impermissibly exposed to risks of erroneous, improper or unauthorised payments to FMSS.

428 The Judge agreed and found that the Town Councillors and Employees were in breach of their equitable duties of skill and care in permitting such "control failures" to exist in the payment process for payments to FMSS and FMSI (see the Judgment at [361]). The absence of safeguards created an inherent risk of overpayment or payment for work that was not adequately or satisfactorily completed (see the Judgment at [347]). The Judge reasoned that the fact that there was a system to monitor FMSS's general work performance, by way of the Standing Instruction, did not mean that there were sufficient safeguards to address the risk posed by Conflicted Persons certifying payments to FMSS because this was not a system meant to ensure that *each* payment was justified (see the Judgment at [349]).

429 There was, in his view, a systemic failure on two levels: (a) first, the involvement of Conflicted Persons gave rise to a conflict of interest and thus a "control failure" that was not rectified by the requirement of the co-signature of the Chairman or the Vice-Chairman, because any verification of the works, if at all done, would have been certified by the Conflicted Persons or others acting under their supervision; and (b) second, no proper verification, even by the Conflicted Persons, was undertaken, because at least in some instances, their signatures merely denoted a tallying exercise (see the Judgment at [352]). The approval process was insufficiently rigorous given the involvement of Conflicted Persons and this amounted to "control failures" for which the Town Councillors and Employees were responsible (see the Judgment at [354]). The Employees ought to have realised the importance of taking steps to manage their conflicts of interest in the payment process but failed to do so by permitting these "control failures" to exist (see the Judgment at [356]). This was even more the case with payments made to FMSI under the FMSI EMSU Contract; there was no Standing Instruction for co-signature by the Chairman or Vice-Chairman

on cheques for payments to FMSI and this would clearly have exacerbated the "control failures" (see the Judgment at [360]).

The parties' arguments

430 The Town Councillors' argument on appeal is straightforward: these Conflicted Persons, namely Ms How, Mr Loh and Mr Yeo, did not approve payments to FMSS, in the sense that they did not decide how much FMSS was to be paid. The payments under the First MA Contract and the Second MA Contract, as was the case for the payments to FMSI under the FMSI EMSU Contract, were for *contractually fixed monthly sums*. There was nothing as such that needed to be separately valued. It was just a question of being paid at intervals. This, they say, is unimpeachable and there was hence no real or material risk of any wrongful payment or unjustified payment. The Town Councillors make the further point that they had various means through which they monitored the work of FMSS as MA. They stress that the payment process had, in fact, several layers of checks by different non-conflicted persons, involving supporting documentation that would speak for itself in the course of the Chairman or Vice-Chairman's review of the same. These measures, viewed in totality, were, they submitted, adequate as safeguards. As Ms Lim put it, they "would have to do an overall assessment of the performance of the managing agent … on an ongoing basis, [they] had some mechanisms to monitor the overall outcomes in the town and how things were progressing".

431 The Employees' argument echoes that of the Town Councillors, but also emphasises the decision to institute the Standing Instruction mandating that all payments to FMSS be co-signed by either the Chairman or Vice-Chairman of AHTC. The Employees also submit that they did not breach any duties because AHTC was aware of their conflicts of interest and had decided on its own

motion that the Standing Instruction would suffice; there was nothing further for Ms How to advise Ms Lim on. In any event, the Town Councillors and Employees had acted in good faith, and would be entitled to rely on s 52 of the TCA.

432 In response, the Plaintiffs contend that the Judge did not err in finding that the Town Councillors and Employees breached their duties in respect of the "control failures", which led to improper disbursements of AHTC's funds pursuant to the Contracts. They say that, when the documents were presented to either the Chairman or the Vice-Chairman for their signature, as required under the Standing Instruction, the only people who were able to advise them that the work had been performed were the *very* people that had produced the documents for their signature. This was hardly an adequate safeguard. Given the involvement of Conflicted Persons, there was a systemic "control failure" that could not have been rectified by the Standing Instruction. Ms How and Mr Loh were "allowed to enrich themselves at will" and should have realised the importance of taking steps to manage their conflicts of interest but failed to do so and allowed the "control failures" to exist in the payment process. They also argue that even if the payments were contractually stipulated fixed sums, the fact remains that no one had checked either the quality of the work or whether the work had in fact been duly completed. The same point is made with regard to payments under the FMSI EMSU Contract which was migrated over from HTC upon its integration with ATC to form AHTC (see [24] above). In short, this was a failure to ensure proper financial governance.

Our decision

433 As mentioned at [292] above, the essential question is whether the Town Councillors and Employees had acted in good faith when they implemented the

process for AHTC to approve payments to FMSS and FMSI. For the reasons that follow, we answer this in the negative and consider that the Town Councillors and Employees breached their duty of care by permitting the "control failures" to exist in the payment process.

(1) Conflicted persons

434 The Plaintiffs take aim at the first level of the "control failures", namely, that the payment process for payments to FMSS and FMSI was overseen by and involved Conflicted Persons, in other words, individuals who had direct interests in FMSS and FMSI whilst simultaneously holding key management and operational positions in AHTC. This is undisputed by the parties, and is clear from the process outlined above at [418]–[426]. Mr Hawkes' evidence was that FMSS in particular, stood apart from other MAs because Ms How and Mr Loh were not mere employees of FMSS but were shareholders, and thus were the ultimate beneficiaries of all payments made by AHTC to FMSS. Yet, they were simultaneously involved in the payments process. Mr Yeo's evidence in cross-examination made this clear:

> Q: So my question is very simple. … Do you now not agree that the entire payment process was facilitated by the very people that payment was made to, yourself and Ms How, who are owners of FMSS, and including Mr Loh, who was then a majority owner of FMSS in 2013, who signed the cheque?
>
> …
>
> A: Yes, but –
>
> …
>
> A: – because for all – even all these signatures that we actually confirm that works have been delivered, but eventually who will be the final to actually pay us, I can actually do a lot of submission to anybody, but they won't pay us if we don't deliver the works. This is important. You are looking at saying that we signed, who signed, but eventually who is the paymaster? The

> town council is the paymaster. They pay us for our works that we have delivered.

This, the Plaintiffs contend, created a conflict between the Employees' obligations to AHTC on the one hand and their profit motive arising from their interests in FMSS and FMSI on the other hand, thereby exposing public funds to the risk of improper use.

435 In response, Ms Lim and Mr Low both gave evidence that it was industry practice to have employees of the MA assume key managerial positions in the Town Council, such as those of General Manager and Secretary. As Mr Low put it, "the MA's employees, who would include senior management staff … will inevitably be involved at some stages of processing the payments made by the [Town Council] to the MA itself". Mr Foo's evidence was to the same effect.

436 Indeed, as the Judge observed, MA contracts often required the appointment of an MA staff member as representative, who was to assume responsibilities identical to those of the Secretary as set out in s 20(1) of the TCA. This suggested that "it was intended for those two roles to be fulfilled by the same person" (see the Judgment at [234]). In addition, underlying much of the Town Councillors' evidence was the fact that this practice was one that had been adopted from the prevailing practice at ATC. In cross-examination, Mr Low testified as follows:

> Q: Okay. Could you explain why – and listen very careful to my question so that you can answer it – why, in circumstances where your senior employees at AHTC, the most senior employees, were shareholders of FMSS, and that did not give rise to a concern?
>
> A: What my understanding is that this has been an industry practice, and when we met CPG on 30 May, I think the issue was raised at that meeting, and CPG also had the same or similar payment structure in Aljunied Town Council. … And I also came to be aware that there was a report that in case of Jurong Town Council, the

> MA is the owner of the company, he also holding senior position in the town council, and he also a member of the PAP, so to me it is industrial practice. It is conflict of interest and you have to dealt with, but it's a conflict which can be mitigated. …

437 In so far as the Town Councillors' and the Employees' argument is that the industry practice *precludes* a conflict of interest from arising, we disagree. Instead, we agree with AHTC that, even if it were true that all MA operators were operating in the same positions of a potential conflict of interest, this would not necessarily make such conduct justifiable, much less form the *de facto* standard that ought to be applied across the board.

438 Another strand of the Town Councillors' argument is that the involvement of persons who held positions or even equity interests in the MA whilst occupying senior managerial positions in a Town Council was not without precedent. In particular, they point to Mr Jeffrey Chua, who had previously been Secretary of ATC. They say that he was also the Managing Director of CPG and had share options in Downer EDI Limited, CPG's ultimate holding company. They also point to the evidence given at trial by Mr Hawkes. He agreed that such shareholding would give rise to a profit motive, and would constitute "a type of conflict of interest".

439 We reject this assertion for three reasons. First, as we have already stated above, the subsistence of any such industry practice does not operate to absolve a Town Council from the need to prevent any conflicts of interest. Second, as to Mr Low's assertion that AHTC's practice was entirely analogous to ATC's practice with regard to CPG and Mr Jeffrey Chua's position, we are unconvinced. This is because it is unclear if Mr Jeffrey Chua's interest or shareholding in CPG was even comparable to that of Ms How and Mr Loh in FMSS. Third, it is unclear how payments disbursed by ATC were made and

whether such payments were disbursed in the same manner as that instituted in AHTC, as no evidence was led on this point. As to the other examples raised by Mr Low, he stated that the practices he had referred to were practices adopted in situations where the employees of the MA were also employed by the Town Council, but conceded that he had "no detailed information whether these people are also shareholder[s]". Hence, this argument from analogy must fail.

(2) The fixed payments

440 The Defendants also argue that there was no risk of unjustified payments to either FMSS or FMSI because those payments were contractually stipulated sums. Further, the payments for the First MA Contract and the Second MA Contract were on the same payment terms as the CPG MA Contract. Having been legally obliged to make these monthly payments of a fixed sum, no such room for abuse could exist. Put differently, because AHTC had a contractual obligation to make fixed monthly payments, it would be difficult to conceive how AHTC's officers tasked with approving payments to FMSS could exercise any preference.

441 The fact that the contractual arrangements were of such nature is not disputed by the Plaintiffs. But, in our judgment, the Defendants' argument misses the mark. It does not go towards responding to the second level of the "control failures", namely, that there was no independent verification that the payments were made either for work that was completely done, or for work that was in fact satisfactorily done (as noted by the Judge at [360] of the Judgment). Likewise, the Employees' submission that such conflict "could do no harm" *simply* because the amounts payable under the Contracts were fixed and/or easily determinable goes too far. Payments could have been made of fixed sums, but the possibility of improperly certified works remained. There is indeed no

suggestion that the obligation to pay was independent of any corresponding obligation on the part of FMSS and FMSI to provide MA and EMSU services. This remained the case even if AHTC could not, as a matter of law, withhold payments under the Contracts absent some breach of contract.

442 Simply put, we agree with the Plaintiffs that *just* because payments were made in accordance with stipulated rates on a monthly basis that did not absolve the Town Councillors from having to satisfy themselves that the work was in fact done (and done satisfactorily), given that this risk of improper payment subsisted *irrespective of the type of payment obligation* under the Contracts. As alluded to above, the key point is really whether the Standing Instruction was a sufficient safeguard. This is because, as the Judge put it, "*in the absence of safeguards,* [such serious conflicts of interest] created an inherent risk of overpayment or payment for work that was not adequately or satisfactorily completed" [emphasis in original] (see the Judgment at [347]). We turn to the Standing Instruction next.

(3) The Standing Instruction

443 The Town Councillors' case is that the Standing Instruction provided an independent check on payments made to FMSS, because it required cheques to be signed by either the Chairman or the Vice-Chairman, neither of whom had any interest in FMSS. As the Judge pointed out, Ms Lim's evidence was that the Standing Instruction was regarded as sufficient because it would have been incumbent on the Chairman and Vice-Chairman to satisfy themselves that the cheques they were being asked to sign were justified (see the Judgment at [348]). Ms How's evidence was to similar effect, as she testified that she had not advised the Chairman that there should be an independent third-party check in the payment process in the light of the Standing Instruction instituted.

444 The Town Councillors and the Employees were clearly alive to the concern that the Conflicted Persons were involved in the payment process. This seems to have been the impetus behind implementing the Standing Instruction in the first place, especially since "it must have been the understanding of all involved in the appointment of [Ms How] and [Mr Loh] under the [F]irst MA and EMSU [C]ontracts that they would serve two masters, AHTC and FMSS, as senior employees of both" (see the Judgment at [355]; see also [434] above). The Town Councillors also contend that they had various means of independently monitoring the work of the MA:

(a) First, AHTC had an Integrated Maintenance Management System ("IMMS"), which was a centralised computer system operated by AHTC's Property Managers and Property Officers. IMMS allowed the Town Councillors, as well as AHTC's staff, to record feedback, complaints or requests from residents.

(b) Second, Ms Lim gave evidence that she worked with the MA on a daily basis. There were also formal weekly meetings with the AHTC management staff and quarterly Town Council meetings involving all the Town Councillors and key staff of AHTC where issues pertaining to estate maintenance were discussed.

(c) Third, the Town Councillors would also receive feedback from their regular walkabouts and estate visits, which would at times include the Property Officers. Certainly, Mr Hawkes confirmed that he had no reason to doubt that this was being done, as it was a fact that teams of Property Officers were carrying out checks.

445 This is perhaps best encapsulated by Mr Low's evidence in his AEIC, in which he states that:

> The sum total of assessing a MA who has a wide range of work and responsibilities go[es] beyond documentary proof of its work. Reliance on reviewing the supporting documentation prepared by the MA without more in assessing whether the MA has carried out its work is simplistic and will only be a paper exercise. The real measure of the MA's performance comes from the level of satisfaction of the residents since they are the ones who pay monthly S&CC fees to receive the benefit of the MA's services. The MPs were in touch with the residents' sentiments through the feedback and comments we gathered which in turn assisted us in our assessment of the MA's work.

446 And this is also echoed by Ms Lim's evidence in cross-examination:

> Q: No. My question is: Where do you say you were, on the ground, personally checking every item before you signed the cheque?
>
> A: No, it was not a bean-counting exercise, [counsel].
>
> Q: I didn't say it was.
>
> A: It was an overall assessment of how things were being run at the town, and we satisfied ourselves that things were being managed …

447 The Plaintiffs point to Mr Hawkes's evidence that it was unlikely that the Chairman or Vice-Chairman of AHTC would have been independently informed, other than by the Conflicted Persons, as to whether the earlier certifications in respect of FMSS's invoices were appropriate or justified. As such, the Standing Instruction was of little utility. The KPMG Payments Report did not dispute that the avenues for feedback, as stated by the Town Councillors above, were implemented. However, it observed that AHTC did not have *formal* protocols or processes in place to independently and objectively assess the service levels of FMSS, and that AHTC did not have established processes for town council members or independent parties to monitor, in a regulated or structured manner, the integrity and sufficiency of work carried out by FMSS as the MA and the provider of EMSU services. The Plaintiffs' submission is that the risk of unjustified payments is something that could only have been

appropriately addressed and mitigated if there was a system in place to ensure that *each* cheque presented to the Chairman or Vice-Chairman for their signature was sufficiently verified and justified by independent parties.

448 The Judge rejected the Town Councillors' arguments, deeming that a system to monitor the MA's *general* work performance did not mean that there were sufficient safeguards to address the risk posed by the Conflicted Persons certifying *particular* payments to FMSS. Ms Lim's evidence was that the feedback mechanisms were an "overall assessment" and that they did not personally engage in a "bean-counting exercise" (see the Judgment at [348]; see also [446] above). However, the distinction that the Judge drew was one of *specificity* as against *generality* (see the Judgment at [349]). We agree with the Judge.

449 At the outset, what is clear is that there was no actual verification of whether work was done, even at the Fourth Stage of the payment process (see [425] above). Ms Lim, Mr Low and Mr Singh testified that their role was more to ensure that the cheque payments tallied with the invoices that they were presented with. It was never seriously contended by the Town Councillors that there was any process by which an independent person certified or verified that payment was made for work properly done. Indeed, there appeared to be *no* actual certification or verification of work being done; the various steps of the payment approval process simply involved tallying numbers to ensure that the figures were consistent. Furthermore, the supporting documents relied upon by the Chairman and Vice-Chairman were prepared by FMSS's personnel, which meant that the signatories were not independently informed other than by persons who were conflicted. For completeness, even though Ms Lim gave evidence that she would, on occasion, take such supporting documents away with her to seek clarification instead of signing the cheque at the Chairman's

meetings, it is not the Town Councillors' pleaded case that this was the standard practice. We hence do not think this is an answer to the complaint.

450 In our judgment, the Judge's holding that the channels for residents to raise feedback and complaints only provided a general means for AHTC to monitor FMSS's general work performance, and did not verify that work was done in relation to each particular cheque that was signed off, is correct. This was simply an inadequate safeguard. Indeed, it is not the Defendants' case that the Chairman and Vice-Chairman took the effort of satisfying themselves that each and every cheque presented to them for signature was justified, a point also noted by the Judge (see the Judgment at [348]). We agree with the Plaintiffs that this was simply not a system that was meant to ensure that each payment was justified. The mechanisms that AHTC implemented only surfaced *ad hoc* issues that required further attention. Ms Lim's own concession that it would not be practicable for her to "personally verify on the ground that every item of work is completed before appending [her] signature to the cheque" only serves to underscore the fact that the Standing Instruction was a woefully inadequate safeguard in the light of the involvement of the Conflicted Persons. Indeed, even in the context of major construction contracts, it is frequently the practice for there to be a clerk of works, aside from the architect, to verify the execution of works to the requisite amount and standards. It would not be a stretch to imagine AHTC employing its own team of such inspectors, and if need be, to have such expenses deducted from FMSS's fees as a safeguard necessitated by the conflict of interest. Certainly, this cannot be said to be an impracticable or onerous expectation.

451 We are unable to see how such conduct which we consider amounted to gross negligence can be said to have been done in good faith. We explain. The importance of ensuring that the disbursement of public moneys be subject to

oversight cannot be gainsaid. Such importance is reflected in the panoply of duties imposed under the TCA and TCFR to ensure such compliance (for example, see [82]–[83] above). Having sought to devise a system for monitoring the payments to FMSS in view of the clear conflict of interest that permeated the payments process, it simply cannot be said that the Standing Instruction, or even the general avenues for feedback that did not bear any direct nexus with each work as certified on a particular cheque, were adequate safeguards.

452 This was not mere negligence. This is because it is clear that the Town Councillors were aware of the existence of Ms How's and Mr Loh's potential conflict of interest *as early as* 19 May 2011 (see [375]–[380] above), but failed to properly address such conflict. And such conflict must have been even more apparent by August 2011, when the LOI had been signed, AHTC had awarded the First MA Contract to FMSS, and both Ms How and Mr Loh had assumed key managerial roles in AHTC, as General Manager/Deputy Secretary and Secretary respectively – all this while Ms How and Mr Loh remained shareholders, directors and employees of FMSS. The risk of overpayment or at least improper payments to FMSS was clearly present in the Town Councillors' minds; hence, the institution of the Standing Instruction (see [444] above). But for the reasons given above, the payments process instituted was woefully inadequate. AHTC simply did not have the adequate protocols or processes in place to assess independently and objectively the service levels of the work done by FMSS and FMSI. Accordingly, the extent of this risk cannot be overstated. Yet, this state of affairs was allowed to persist for at least three years – from July 2011 to July 2014 – and in that period of time, AHTC disbursed over $23m under the Contracts (see [416] above). The character of such neglect, in sum, was at least potentially grave.

453 We are thus unable to see how such conduct that amounted to gross negligence can be said to have been done in good faith, as we have explained above at [281].

454 It appears to us that the Town Councillors simply took it on faith that FMSS was performing the work it was contracted for and being paid to do. After all, they trusted FMSS to carry out the works properly and diligently (see [344] above). While this may explain why they were open to appointing FMSS to provide the services in question, it does nothing to address the need for a system to verify the payments to FMSS. This was exacerbated by the manifest conflicts of interest which were clearly perceived and understood by all concerned. In our judgment, this was a paradigm example of poor financial governance and a breach of the duty of care. We are also satisfied that s 52 of the TCA does not operate to shield the Town Councillors and Employees from personal liability because, given the severity of this failure, it could not be said to have been done in good faith. For completeness, we point out that this conclusion is not inconsistent with the Judge's observation that it was not the Plaintiffs' case that the Town Councillors and the Employees had deliberately constructed a system with these "control failures" and allowed them to persist so that FMSS would be able to receive payments which were unjustified (Judgment at [358]). In any event, a finding that the Town Councillors and Employees did not act in good faith does not require any demonstration of deceit or dishonesty.

455 We return here to a point that we alluded to at [65(d)] above. Although our analysis is based on the evidence based on what was led at the trial, it is a fact that, at least as far as the claim by AHTC is concerned, no specific breach in tort arising from the "control failures" in the System was explicitly pleaded by it against the Town Councillors. If this is correct, then it raises a question as to what orders the court may make in respect of a claim that is not pleaded or

not adequately pleaded by one of the parties, namely AHTC. And if we were then to make orders only in favour of STC, it would raise potential issues of apportionment. These points were not fully canvassed before us. In our judgment, it is appropriate for us to afford the parties an opportunity to address us on these issues. We will therefore not make final orders on this aspect of the appeals until we have heard the parties on what the proper orders should be.

(4) Damages recoverable

456 Having considered that the Town Councillors and Employees were in breach of duty for the "control failures", we turn to make some observations with regard to the damages that may ultimately be recovered. We preface our discussion here by noting that this is a matter that will necessarily be dealt with at the assessment of damages phase of the trial, but nevertheless observe that it is AHTC and STC, as claimants, that would bear the burden of proving any losses occasioned as a result of the "control failures". We also observe that the two issues in CA 200 as summarised at [115] above are not relevant here, because those issues pertained to the principles on the reliefs flowing from breaches of *fiduciary* duty, while we have found that the Town Councillors and Employees have breached their *tortious* duty of care for the "control failures".

457 We turn to make some brief observations on the potential damages recoverable. One difficulty that may stand in the way of the recovery of damages is the manner in which the Plaintiffs framed their claim in relation to the "control failures". The Plaintiffs relied on the KPMG Payments Report, which expressly did not preclude the possibility of there being additional payments to FMSS or FMSI that may be deemed improper, but stated that these remained undetected due to the "failure of the control environment that stem[s] from this flawed

governance [which] has the potential to conceal and hinder the detection and identification of all instances of improper payment" (see [96] above).

458 The Plaintiffs' case appears effectively to have been constructed on the *perceived* risks inherent in the payments process. It is not clear if AHTC or STC have provided evidence of any instance where the "control failures" resulted in improper payments, such as where a payment was improperly made under the Contracts (or the FMSI EMSU Contract) for works that were either not completed or not satisfactorily performed. It is noteworthy that the KPMG Payments Report does not appear to disclose any instances where Mr Low or Mr Singh signed off on a compromised payment, and Mr Low testified that he did not sign any cheques to FMSS. Preliminarily at least, the problems that plague the claim thus appear to us to be two-fold. The first is whether any loss has concretely been identified, and the second is whether any loss has been causally linked, in the *sine qua non* sense, to the existence of the "control failures" themselves.

459 In short, the "control failures" may only demonstrate the *risk* of improper payments. A mere *existence* of such a risk is, however, quite different from an *actualisation* of that very risk. This much is clear from the KPMG Payments Report, which emphasised the "potential" and "risk" of improper payments in an environment characterised by a paucity of checks and balances (see, for example, [94] above); the tenor is one of the potential for abuse, rather than the actual incidence of abuse. It is theoretically possible that these payments were certified and disbursed to FMSS and/or FMSI without the work having been done properly, but the burden lies on AHTC and STC, as claimants, to prove the same. To this end, AHTC seeks to proffer an explanation for the way it has framed its claim. Its inability to point to any specific losses, it says, is due to the information asymmetry that has been identified in the KPMG

Payments Report. This makes it difficult, if not impossible, to ascertain whether in fact the work had not been done or improperly done. The involvement of the Conflicted Persons, who were on the ground, also meant that it would be difficult to identify, with any precision, the losses that were incurred. However, this appears to us to reverse the burden of proof. And neither of the Plaintiffs proffered any authority to suggest that the burden of proof in this case could or ought to be reversed in this way.

460 We conclude this section only by reiterating that these issues will no doubt be appropriately dealt with and ventilated fully at the assessment of damages stage of the Suits. As the Judge succinctly put it, "the burden is on [the Plaintiffs] to prove that loss was indeed suffered, in the same way one would for breach of a duty of skill and care in tort" (see the Judgment at [359]).

Miscellaneous payments to FMSS

461 Finally, AHTC relied on the KPMG Payments Report to identify various other instances of payments to FMSS made as a result of the "control failures". The KPMG Payments Report summarised its findings on the "improper payments made to FMSS and FMSI, together with [KPMG's] assessment as to the amounts that ought to be recovered", as follows:

Improper payments	**Amount (SGD)**	**Amount that ought to be recovered (SGD)**
Overpayment to FMSS in respect of overtime claims and Central Provident Fund ("CPF") contributions	8,990	8,990
Overpayment to FMSS for electrical parts	3,720	3,720

Payment to FMSS for electrical parts	6,130	Not determinable
Payments to FMSS that were purportedly for project management fees, but which were actually covered by Managing Agent fees paid by AHTC	608,911	608,911
Payments to FMSS that were purportedly for project management fees, but which were actually in respect of matters that involved a combination of Managing Agent services as well as project management services	611,786	Not determinable
Payments to FMSS or FMSI that were unsupported by certifications of services received or contracts	194,759	Not determinable
Payments to FMSS made in breach of financial authority (namely, without the requisite co-signature of the Chairman or Vice-Chairman of AHTC)	80,990	Not determinable
Unclaimed liquidated damages under EMSU contract	3,000	3,000
Total amount determinable	**1,518,286**	**>=624,621**

462 The Judge observed that these did not form separate pleaded claims but were presumably subsumed under the broader claim for improper payments to FMSS, and that such claims were brought against the Town Councillors and the Employees generally. These impugned miscellaneous payments were:

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

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

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

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

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

(f) unclaimed liquidated damages under the First EMSU Contract – $3,000.

463 As for the sums of $608,911 and $611,786 that were for the payment of project management fees (see [461] above), the Judge had found that there was no breach arising from these acts on the Town Councillors' and Employees' part. The Plaintiffs have not appealed this aspect of the Judge's finding and we thus need say no more on these points.

464 The Town Councillors confirmed at trial that they were not disputing the KPMG Payments Report in respect of the sums of $3,720 and $3,000 (these being the claims at [462(b)] and [462(f)] above). These were the subject of claims that they have made or intend to make against FMSS in separate arbitration proceedings (see the Judgment at [383]).

465 In addition, in respect of the payments to FMSS for electrical parts amounting to $6,130 (which is the claim at [462(c)] above), there was no dispute by the Town Councillors that there was a technical breach of their duties of skill and care as there was no requisite approval of the rates before using such parts. However, their position was that the amounts charged by FMSS for electrical parts was reasonable and this was thus solely a question of loss, to be proven at

the damages phase of the trial (see the Judgment at [384]). There was no dispute that there were technical breaches of r 61(1) of the TCFR in respect of the payments amounting to $194,759 (the claim at [462(d)] above) and the dispute was whether the lack of certification meant that the services had not been satisfactorily rendered, an issue to be properly ventilated at the damages phase as well (see the Judgment at [385]). The same could also be said for the sum of $80,990 (the claim at [462(e)] above), which were for payments on five invoices that were not co-signed by either the Chairman or the Vice-Chairman of AHTC. This question too was one of loss (see the Judgment at [386]). We agree with AHTC that these are issues of loss that should be addressed at the assessment of damages stage and have no bearing on the present appeals.

466 The nub of the dispute thus centres primarily around the alleged overpayment to FMSS in respect of overtime claims and CPF contributions for $8,990 (see claim at [462(a)] above. These were for general overtime claims by FMSS employees as well as overtime claims for inspections conducted during the Chinese New Year public holidays. The Judge was inclined to give the benefit of the doubt in relation to inspections conducted during the Chinese New Year public holidays, as Ms Lim had given unchallenged evidence that these inspections were specifically requested due to the high volume of bulky items disposed of by residents and commercial tenants during the festive period; it thus appeared reasonable for AHTC to be billed separately (see the Judgment at [390]).

467 We agree with the Judge's reasoning and consider that his findings are not against the weight of the evidence. Accordingly, we are also satisfied that the Town Councillors and Employees had acted in good faith when AHTC made the miscellaneous payments to FMSS in respect of overtime claims and CPF contributions.

Award of contracts to third-party contractors

468 We turn to the penultimate area: whether the award of contracts by AHTC to LST Architects, Red-Power, Titan and J Keart was done in good faith (see [105] above). The Judge found that there was no breach in relation to the contract awarded to Rentokil (see the table at [99] above at s/n 10), and the Plaintiffs did not appeal against this aspect of the Judge's decision. We shall address the contracts in relation to each of the foregoing third-party contractors in turn.

LST Architects

469 On 31 August 2012, AHTC invited tenders, pursuant to r 74(1) of the TCFR, for the appointment of architectural consultants to a Panel of Consultants for a period of three years. Tenders were received from LST Architects and Design Metabolists. AHTC appointed both LST Architects and Design Metabolists to the Panel of Consultants under an "omnibus contract". LST Architects was the lower bidder for projects valued between $0.5m and $3.66m and Design Metabolists was the lower bidder for projects outside that range. The intent was to award a contract to the party with the lower bid based on the project value. However, AHTC's practice was to retain a residual discretion to award contracts to either of the panellists, and it awarded seven contracts to LST Architects for projects valued above $3.66m that Design Metabolists had offered lower rates for.

470 The Plaintiffs' complaint is two-fold. First, the practice of appointing consultants to a panel following the calling of a tender did not mean that no tender needed to be called for each separate contract for services awarded to the consultants on the panel. This was a breach of r 74(1) of the TCFR. Second, the fact that seven out of the ten contracts were awarded to LST Architects over

Design Metabolists when the latter had offered lower rates meant that r 74(13) of the TCFR was also breached (see the Judgment at [395]).

471 The Judge considered that r 74(1) of the TCFR did not prohibit constituting panels pursuant to a tender process inviting bids for omnibus contracts which were not contract- or project-specific. Such omnibus contracts referred to contracts under which a contractor has locked in rates for a period of time based on clearly defined parameters and specifications, for specific contracts that may be subsequently awarded in that period. Such an interpretation would help the Town Councils secure better rates and achieve efficiencies as the tenderer may offer more competitive prices in the hope of being awarded more than one contract during the term of the omnibus contract (see the Judgment at [396]–[397]). However, the Judge found that the award of contracts to LST Architects was problematic on two levels. First, rr 74(13) and 74(16) required AHTC to award contracts to the lowest tender meeting specifications unless the reasons for doing otherwise were fully justified and recorded. But as this was not done, AHTC should have awarded subsequent contracts to LST Architects for projects valued between $0.5m and $3.66m, and to Design Metabolists for projects valued below $0.5m or above $3.66m. There was no discretion retained by AHTC to award subsequent projects to the higher bidder (see the Judgment at [399]). Second, it was also in contravention of the TCFR to award the seven contracts to LST Architects as the higher bidder on the basis that the lower bidder, Design Metabolists, had such shortcomings that it was no longer a viable option. If the Town Councillors felt that Design Metabolists, the only other contractor on the panel, was not a legitimate option, then they should have called a fresh tender (see the Judgment at [403]). The awards to LST Architects thus represented a breach of the duties of skill and care of the Town Councillors who were members of the Tenders Committee which made the decision, namely, Ms Lim, Mr Singh and Mr Foo (see the

Judgment at [397]–[399], [403] and [405]). No finding was made against Mr Chua because Mr Singh gave unchallenged evidence that Mr Chua was not involved in this particular decision.

472 At the outset, it is evident that the award of the contracts to LST Architects was "in the execution or purported execution of" the TCA as it was in the exercise of powers under r 74(1) of the TCFR, which the Judge himself relied on.

473 In our judgment, Ms Lim, Mr Singh, and Mr Foo did act in good faith. Mr Singh and Ms Lim gave evidence that there were good reasons not to award the contracts to Design Metabolists. They considered that LST Architects was more focused and Design Metabolists had been less efficient in comparison, causing delays in projects. These are reasonable explanations and there is no reason to doubt their sincerity. Ms Lim referred to meeting minutes of the fifteenth AHTC meeting on 14 February 2013, where Mr Singh had requested FMSS to issue Design Metabolists an ultimatum to expedite its work on a project. Her evidence was that it was she who had made the decision to award projects between LST Architects and Design Metabolists, on the advice of FMSS. At trial, Mr Singh testified that this was because FMSS was best placed to decide on which consultant was more appropriate for the job. Having appointed LST Architects and Design Metabolists properly, the two consultants were reviewed as to their ability to undertake the contracts, and the appropriate consultant was awarded each job with considerations other than costs also taken into account.

474 There was no contention by the Plaintiffs that the various Town Councillors' concerns regarding Design Metabolists' performance were unfounded or a contrivance. There is thus sufficient evidence that the Town

Councillors genuinely and honestly assessed the ongoing performance of LST Architects and Design Metabolists, and awarded subsequent contracts to LST Architects under the belief that it was were the more efficient contractor. As against this, the main submission put forward against the Town Councillors was that the award of the projects did not comply with r 74 of the TCFR (since r 74(13) required the lowest tender offer to be accepted, unless reasons not to do so were justified and recorded (r 74(16)). However, there were reasons that were thought to justify the awards to LST Architect and if these were not recorded, that would at most amount to a technical breach of the TCFR which would not sound in damages or necessarily even amount to a breach of the Town Councillors' duties of skill and care.

475 Finally, we do not agree with the Judge that the Town Councillors should have called for a fresh tender. This was a judgment call that they were entitled to make and we are satisfied that they acted in good faith.

476 Therefore, we find that Ms Lim, Mr Singh, and Mr Foo acted in good faith and in any case did not breach their duties of skill and care.

Red-Power

477 In April 2012, AHTC called for a tender for some maintenance works, and Red-Power was the sole tenderer. On 11 June 2012, it was awarded a term contract for three years even though AHTC had the option to extend its existing contracts with Digo and Terminal 9 for the same services at significantly cheaper rates. Again, the award of the contract to Red-Power was "in the execution or purported execution of" the TCA as it was in the exercise of powers under r 74(1) of the TCFR. STC pleaded that the Town Councillors and Employees breached their duties owed to AHTC by causing AHTC to award this contract to Red-Power (see [85(a)] above).

478 The Judge found that the award of the contract to Red-Power, when there was an option to extend the existing contracts with Digo and Terminal 9 for a further 12 and 24 months that were at lower rates for the same services, was a breach of the equitable duties of skill and care of Ms Lim, Mr Singh, Mr Foo and Mr Chua as members of the Tenders Committee (see the Judgment at [411]).

479 However, only Ms Lim was involved in the decision to award the contract to Red-Power. As highlighted by the Town Councillors at the trial below, Mr Singh, Mr Chua and Mr Foo were not part of the specific decision to award the contract to Red-Power even though they were part of the standing Tenders Committee at the time. The e-mails regarding a meeting on 7 June 2012 state that only Ms Lim and Mr Faisal attended the meeting where the contracts were discussed. It was also put to Ms Lim that Mr Singh and Mr Chua were unable to attend that meeting. In this regard, we consider that the Judge erred in finding that Mr Singh, Mr Foo and Mr Chua breached their duties of skill and care in appointing Red-Power. In fact, this was also the Judge's own approach in relation to LST Architects where he held that Mr Chua did not breach his duties as Mr Singh gave unchallenged evidence that Mr Chua had not been present at the relevant meetings (see the Judgment at [405]; see also [471471] above).

480 We now turn to Ms Lim. STC's primary basis for challenging the award of the contract to Red-Power is that the rates that Red-Power offered for its two main services (the maintenance of transfer pumps and booster pumps) were many times higher than the rates that AHTC's existing contractors, Digo and Terminal 9, were charging for the same services. Specifically, it is undisputed that Red-Power's rate of $7 per unit for the maintenance of transfer pumps was 607% higher than the rate offered by Digo and 775% higher than the rate offered

by Terminal 9. It is also undisputed that Red-Power's rate of $4.50 per unit for the maintenance of booster pumps was 508% higher than the rate offered by Digo and 463% higher than the rate offered by Terminal 9. However, Ms Lim and Mr Faisal made the decision to award the contract to Red-Power despite this.

481 STC had clearly pleaded that Ms Lim had breached her fiduciary duties, statutory duties, and duties of care and skill in tort by causing AHTC to award the Red-Power Contract even though it had the option to renew the contracts with Digo and Terminal 9 at significantly cheaper rates. STC also adduced evidence in the form of a report by PwC which clearly explained that the rates in the contracts with Digo and Terminal 9 were significantly cheaper than Red-Power's rates. This evidence was unchallenged. Thus, the evidential burden of proof shifted to Ms Lim to explain that her decision not to renew the contracts with Digo and Terminal 9 did not breach her tortious duty of skill and care owed to AHTC. At the bare minimum, Ms Lim should explain *why* she did not renew the contracts with Digo and Terminal 9 for AHTC.

482 Yet, Ms Lim did not address this issue in her AEIC at all. Ms Lim made no attempt to explain why she did not decide to renew the contracts with Digo and Terminal 9 for AHTC, despite the significantly cheaper rates, or even if she knew that the rates were cheaper. When asked by counsel for PRPTC during cross-examination as to why she was silent in her AEIC on the issue of the Red-Power Contract, Ms Lim said that "[she] think[s] [that their] affidavits were drafted in consultation with [their] lawyers and [were] more segmented, you know, according to the topics that [they] would deal with". This does not provide a reasonable explanation for Ms Lim's failure to explain why she did not decide to renew the contracts with Digo and Terminal 9 at rates that were much cheaper than Red-Power's rates.

483 In her trial closing submissions, Ms Lim made the claim that the remaining time on the contracts with Digo and Terminal 9 was only for another year, so a tender would have to be called in a year's time anyway. The principal problem with this evidence is that it was neither stated in Ms Lim's AEIC nor given as testimony in court, so there was no evidential basis for this submission. Furthermore, the Judge found that this "is not a defence" (see the Judgment at [410]), and we agree, as it does not address the specific issue of *why* Ms Lim decided not to renew the contracts with Digo and Terminal 9 *at significantly cheaper rates*, which, even on Ms Lim's own submission, would have been for an entire year.

484 Consequently, we find that Ms Lim has failed to discharge her burden of proof that she acted in good faith when she chose not to renew the contracts with Digo and Terminal 9 for AHTC, and instead chose to invite a tender and then award the new contracts to Red-Power. We also find that this constituted a breach of Ms Lim's duty of skill and care in tort owed to AHTC, and that Ms Lim is thus liable in negligence in this respect.

485 However, this claim was only pleaded by STC. As such, the parties are also to address in further submissions how liability should be apportioned since AHTC did not make this claim. The actual quantification of any loss will be a matter for the assessment of damages stage of the proceedings.

Titan and J Keart

486 As stated at [80]–[81] above, AHTC awarded new contracts to Titan and J Keart after calling for a tender, even though the existing contracts with these parties, which were at lower rates, could have been extended at AHTC's option for an additional 12 months. According to PwC's calculations, the new contract with Titan represented an increase in rates of 67% compared to the existing

contract and the new contract with J Keart represented an increase in rates of between 43% (for monthly maintenance of decam) and 2567% (for annual maintenance of fire extinguishers) (see the Judgment at [417]).

487 The Judge found that the award of new contracts to Titan and J Keart when there were options to extend the existing contracts with both contractors was similarly a breach of the equitable duties of skill and care of Ms Lim, Mr Singh, Mr Foo and Mr Chua. These individuals were aware that Titan and J Keart's bids for new contracts were at much higher rates than those in their existing contracts. At this point, they ought to have satisfied themselves that the increase in rates was justified by examining the existing contracts. If they had done so, they would have realised that there was an option to extend the existing contracts, and the award of fresh contracts to Titan and J Keart at higher rates would have been avoided (see the Judgment at [421]–[423]). STC submitted below that, had AHTC exercised its options to extend the contracts with Titan and J Keart, it would have saved $423,147 and $27,249.20 respectively (see the Judgment at [130(g)] and [130(h)]).

488 The award of the contracts to Titan and J Keart would also have been done "in the execution or purported execution of" the TCA as it was in the exercise of powers under r 74(1) of the TCFR. As for the element of good faith, it was not disputed that, on 3 December 2014, AHTC's Contracts Manager, a staff member of FMSS named Mr Philip Lim ("Mr Lim"), sent an e-mail to the members of the Tenders Committee, among other persons, to request approval to publish a list of contracts. Mr Lim listed the proposed tenders in a table and reflected "NA" as to whether there were options to extend the existing contracts with Titan and J Keart. Ms Lim followed up and e-mailed Mr Lim to ask whether there was an option to extend those contracts. Mr Lim confirmed, "[t]here are no options to extend". The Judge accepted that the Tenders

Committee relied on Mr Lim's representations (see the Judgment at [419]) but held that they *ought* to have reviewed the existing contracts themselves once they realised that Titan and J Keart's bids were much higher than their existing rates (see the Judgment at [422]). STC does not challenge the Judge's findings on this issue.

489 In our judgment, absent evidence that Mr Lim was untrustworthy or inexperienced, the award of contracts to Titan and J Keart would not constitute a breach of the Town Councillors' duties. Indeed, the Judge was cognisant that Mr Lim was the Contracts Manager and this meant that it was "within his job scope to be aware of matters" such as whether there would be an option to extend (see the Judgment at [420]). It is clear that Ms Lim, Mr Singh, Mr Foo and Mr Chua did not act dishonestly or for improper purposes. As such, there can be no personal liability imposed on this basis. The short point appears to us to be this: it was never suggested to the members of the Tenders Committee that they doubted what they were told by Mr Lim, or that they had any basis to think otherwise. In our judgment, it was not unreasonable for them to rely on Mr Lim's representations, as they did, and this is sufficient to establish that the Tenders Committee acted in good faith, and therefore are not liable by reason of s 52 of the TCA.

Costs of investigations

490 Finally, we deal with the Plaintiffs' claim for the costs of the investigations relating to the Town Councillors' and the Employees' alleged breaches of duties. The Plaintiffs submit that the said breaches have resulted in them incurring such expenses, which included, among other things, the appointment of independent accountants to assist in identifying instances of outstanding non-compliances with the TCA, to advise on the appropriate

remedial steps and to establish whether there were any improperly-made payments that ought to be recovered. In particular, STC pointed to the fact that the court in *AG v AHPETC* had ordered the appointment of independent accountants (see [91] above).

491 What do the Plaintiffs say forms the basis for their claim for the investigation expenses? On one hand, AHTC sought as against the Town Councillors and the Employees, "[c]osts, including but not limited to costs incurred by AHTC in investigating and remedying the [Town Councillors and the Employees'] breaches". And on the other hand, STC pleaded for the Town Councillors and the Employees to "pay and/or compensate [STC] the costs and/or expenses incurred by [STC] in investigating the [Town Councillors' and the Employees'] breaches of duties", stating that STC "would not have incurred those costs and/or expenses but for the … breaches of duties". In other words, AHTC pleads recovery of these expenses as part of costs to be awarded in these legal proceedings, whereas STC pleads recovery of these expenses as a matter of compensation (see also the Judgment at [637]).

492 The Judge held that it would be "preferable to consider the claim for investigation expenses as giving rise to equitable compensation, as it is a loss flowing from the breaches of fiduciary duties and the equitable duties of skill and care", such that "once it is shown that the investigation expenses flow from the breaches …, there is no requirement to establish any further connection other than but-for causation" (see the Judgment at [639]). Notwithstanding that AHTC had pleaded its claim as one for an award of costs, the Judge was inclined to allow the Plaintiffs to pursue their claim for investigation expenses "in the form of equitable compensation if they so choose, and to lead the necessary evidence at the assessment stage of this trial", such costs not "strictly speaking

a separate remedy sought, but a part of the consequential loss for the various breaches" (see the Judgment at [640]).

493 On appeal, the Town Councillors' and the Employees' positions are largely aligned. They contend that neither of them ought to be liable for the investigation expenses purportedly incurred by the Plaintiffs, as the HDB had agreed to bear PwC's costs. In support of their argument, they rely on a letter dated 26 January 2017 sent by the HDB to PRPTC, in which the HDB stated that its "payment of PwC's fees pertains strictly to the scope of work under the agreed Letter of Engagement and as required by the [court's] orders [in *AG v AHPETC*]". The Employees further add that the KPMG Reports and the reports prepared by PwC were not relevant for the most part in the court's finding of liability as against the Town Councillors and the Employees.

494 In so far as we have concluded that the Town Councillors and the Employees are immunised from personal liability in respect of the decision to award the Contracts to FMSS, we allow the Town Councillors' and Employees' appeal against the Judge's decision allowing the Plaintiffs to pursue their claim for investigation expenses in the form of equitable compensation. The same goes for AHTC's award of contracts to third-party contractors, with the exception of the award of the contract to Red-Power. The Plaintiffs are not permitted to recover the investigations expenses which resulted from their pursuit of claims in which they have been unsuccessful.

495 In respect of the issue of the "control failures", we have held that, subject to the parties' further submissions on AHTC's pleadings and what the appropriate final order should be (see [455] above), the Town Councillors and the Employees are liable to the Plaintiffs in negligence. To this end, we depart from the Judge's decision to consider the claim for investigation expenses as

giving rise to equitable compensation. Rather, we see no reason to depart from the general principle that expenses incurred in the expectation of legal proceedings may be recovered only as costs rather than as damages (see *Winsta Holding Pte Ltd and another v Sim Poh Ping and others* [2018] SGHC 239 at [238], citing *Bolton v Mahadeva* [1972] 1 WLR 1009 ("*Bolton*")). This is even more the case since on the view we have taken, which departs from that of the Judge, the liabilities in question do not arise out any breach of fiduciary or equitable duties. In *Bolton*, Cairns LJ, sitting in the English Court of Appeal, held that the defendant's claim in respect of fees for an expert report ought to be recoverable as an aspect of costs, as opposed to an independent head of damages. He observed thus (at 1014):

> So far as the defendant's claim in respect of fees for the report which he obtained from his expert is concerned, it seems to me quite clear that that report was obtained in view of a dispute which had arisen and with a view to being used in evidence if proceedings did become necessary, and in the hope that it would assist in the settlement of the dispute without proceedings being started. In those circumstances, I think that the judge was right in reaching the conclusion that that report was something the fees for which, if recoverable at all, *would be recoverable only under an order for costs.* [emphasis added]

496 In respect of the Town Councillors' and the Employees' argument that it was in fact the HDB that incurred the investigation expenses, thereby disentitling the Plaintiffs from now recovering these expenses, we consider this to be placing the cart before the horse. This is a point that is being raised on appeal for the first time and was not ventilated at trial. It has also never been the Town Councillors' or the Employees' pleaded case that they ought not to bear the investigation expenses because the Plaintiffs had not incurred them. In any event, the Judge did not purport to hold that investigation expenses were claimable *per se*, but merely that the Plaintiffs would be allowed to pursue this claim and lead evidence on the same.

497 In other words, whether the expenses incurred by the Plaintiffs, if any, as a result of investigating the "control failures" as well as the award of the contract to Red-Power, are in fact claimable as a matter of costs, is a matter to be canvassed in full before the Judge, with the necessary evidence to be led. We therefore consider it appropriate for this issue of the costs of investigations to be dealt with by the Judge at the assessment of damages stage of the proceedings, specifically when determining the appropriate costs orders. This should properly be done after the assessment of damages, so that the actual liabilities are known before the question of costs is dealt with.

Summary of the Defendants' liability

498 For these reasons, we hold that the Town Councillors and the Employees had in fact acted in the execution of the TCA and the TCFR in carrying out the following acts, which were also done in good faith within the meaning of s 52 of the TCA, thereby entitling them to immunity from personal liability:

(a) The Town Councillors and the Employees had acted in good faith when they awarded the Contracts to FMSS.

(b) The Town Councillors and the Employees had acted in good faith when AHTC made payments made to FMSS in respect of overtime claims and CPF contributions.

(c) The Town Councillors had acted in good faith when awarding the contracts for AHTC to LST Architects, Titan and J Keart.

499 However, the Town Councillors and the Employees did not act in good faith when they implemented the Standing Instruction, as this was neither an adequate nor an independent safeguard in AHTC's approval process in respect of the disbursement of payments to FMSS and FMSI. They are correspondingly

not entitled to invoke the immunity from personal liability afforded under s 52 of the TCA in respect of the Standing Instruction. Furthermore, Ms Lim is also liable in negligence for not renewing the contracts with Digo and Terminal 9, and instead awarding the contract to Red-Power, and Ms Lim is not afforded protection by s 52 of the TCA for doing so. Subject to the parties' further submissions on AHTC's pleadings and what the appropriate final order should be (see [455] above), and how liability for the Red-Power contract should be apportioned and awarded (see [485] above), the Town Councillors and Employees are liable for damages in negligence in these respects, such damages to be assessed.

Conclusion

500 Before we conclude, it bears emphasising that this judgment is confined to the narrow legal issue of the intersection between public law and private law duties, and specifically whether AHTC's members and senior employees – the Town Councillors and Employees – owed private law duties to AHTC in the execution of their public law statutory duties. This judgment does not seek to pass judgment on the *competence* or *desirability* of the Town Councillors' and the Employees' actions. The question is whether the Town Councillors' and the Employees' actions were done in good faith and in the execution of the TCA.

501 Accordingly, subject to the parties' further submissions on AHTC's pleadings and what the final order should be (see [455] and [485] above), we allow the appeals in CA 196, CA 197, CA 198 and CA 199 in part, and we dismiss the appeal in CA 200. The parties are to file their submissions on the issues raised at [455] and [485] above, limited to 15 pages, within 21 days of the date of this judgment. These submissions should set out what the parties each contend the appropriate orders should be and we will then determine whether we need to hear oral arguments on these matters. The parties are also

to file submissions on the appropriate costs orders to be made in respect of the hearing below, as well as on the present appeals. However, the submissions on costs are to be filed within 14 days of the date on which we dispose of the issues raised at [455] and [485] above. These submissions too shall be limited to 15 pages.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Netto Leslie, Netto Leslie née Lucy Michael, Roqiyah Begum d/o Mohd Aslam, and Chiam Jia-An (Netto & Magin LLC) for the appellants in Civil Appeals Nos 196 and 197 and the third and fourth respondents in Civil Appeal No 200;
Chin Li Yuen Marina *SC*, Toh Zhen Teck Jeremy, Yeow Yuet Cheong and Teo Jin Yun Germaine (Tan Kok Quan Partnership) for the respondent in Civil Appeals Nos 196 and 198 and the appellant in Civil Appeal No 200;

Chelva Retnam Rajah *SC*, Eusuff Ali s/o N B M Mohamed Kassim, Yong Manling Jasmine, Rachel Hui Min De Silva and Samantha Tan Sin Ying (Tan Rajah & Cheah) for the appellants in Civil Appeals Nos 198 and 199 and the first and second respondents in Civil Appeal No 200;
Chan Ming Onn David, Joseph Tay Weiwen, Fong Zhiwei Daryl, Lin Ruizi and Tan Kah Wai (Shook Lin & Bok LLP) for the respondent in Civil Appeals Nos 197 and 199.

Annex

	Suit 668		**Suit 716**		**CA 196**		**CA 197**		**CA 198**		**CA 199**		**CA 200**	
	Plaintiff	Defendant	Plaintiff	Defendant	Appellant	Respondent	Appellant	Respondent	Appellant	Respondent	Appellant	Respondent	Appellant	Respondent
1. AHTC	✓							✓				✓		
2. PRPTC/STC			✓			✓				✓			✓	
3. Ms Lim		✓		✓					✓		✓			✓
4. Mr Low		✓		✓					✓		✓			✓
5. Mr Singh		✓		✓					✓		✓			
6. Mr Chua		✓		✓					✓		✓			
7. Mr Foo		✓		✓					✓		✓			
8. Ms How		✓		✓	✓		✓							✓
9. Ms How (as personal representative of the estate of Mr Loh)		✓		✓	✓		✓							✓

10. FMSS		✓		✓	✓		✓							