

## SUPREME COURT OF SINGAPORE

11 October 2019

### Case summary

*Aljunied-Hougang Town Council and another v Lim Swee Lian Sylvia and others and another suit* [2019] SGHC 241  
*Suit Nos 668 and 716 of 2017*

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### Decision of the High Court (Kannan Ramesh J):

Outcome: *The High Court allows in part the claims of AHTC and PRPTC against town councillors, senior employees, and the former Managing Agent of AHTC, including for breach of fiduciary duties and allowing improper payments.*

### Facts

1 The first to third defendants – Ms Sylvia Lim, Mr Low Thia Kiang and Mr Pritam Singh – were elected as town councillors of Aljunied-Hougang Town Council (“AHTC”) following the 2011 General Elections. The fourth and fifth defendants, Mr David Chua and Mr Kenneth Foo, were subsequently appointed as town councillors of AHTC. The sixth and seventh defendants, Ms How Weng Fan and Mr Danny Loh, were later appointed Deputy Secretary/General Manager and Secretary of AHTC respectively. The claims in Suit 668 and 716 arise out of the defendants’ conduct in relation to AHTC, the plaintiff in Suit 668. The plaintiff in Suit 716, Pasir Ris-Punggol Town Council (“PRPTC”), makes similar claims against the defendants because Punggol-East Single Member Constituency was part of AHTC from 2013 to 2015 before it became part of PRPTC on 1 October 2015, resulting in the rights of Punggol-East Single Member Constituency being transferred to PRPTC on 1 October 2015 pursuant to the Town Councils (Declaration of Towns) Order 2015. As Mr Danny Loh has passed away, he is represented in these proceedings by his wife Ms How Weng Fan as the personal representative of his estate.

2 The trial has been bifurcated into two parts. In the present first stage of the trial, the court will decide only on the defendants’ liability to the plaintiffs for each of their claims, as well as the nature of the remedies the plaintiffs are entitled to obtain from the defendants. At the future second stage of the trial, the court will assess the quantum of compensation that the plaintiffs are entitled to from the defendants.

3 The claims against the first to seventh defendants generally arise out of their alleged breaches of fiduciary duties owed to AHTC, as well as statutory and tortious duties. These breaches allegedly occurred as a result of the award of managing agent (“MA”) contracts and essential maintenance services (“EMSU”) contracts to the eighth defendant, FMSS, which was controlled by Mr Danny Loh and Ms How Weng Fan.

- a. The first MA and EMSU contracts were awarded to FMSS in 2011 without a tender being called, purportedly because the requirement for such tender was waived under r 74(17) of the Town Council Financial Rules (“TCFR”) as a result

of urgent and “very special circumstances” (r 74(18)). The plaintiffs say that no such urgency or special circumstances existed.

- b. The second MA and EMSU contracts were awarded to FMSS in 2012 after a tender was called, in which FMSS was the sole bidder. The plaintiffs say that this was a state of affairs engineered by the defendants, and that the defendants failed to correct their breaches of duties from 2011.

The first to seventh defendants were also alleged to have breached their duties in relation to the approval of payments made to FMSS under these MA and EMSU contracts, as well as similar payments made under an earlier EMSU contract with FMSI, which is a sole proprietorship operated by Mr Danny Loh.

4 In addition to these four main contracts, the plaintiffs challenge the propriety of several other contracts awarded to third party contractors by the defendants from 2012 to 2015. These were to contractors known as LST Architects, Red-Power, Rentokil, J Keart, and Titan, and the awards are challenged by the plaintiffs as either failing to comply with the TCFR, or being at higher rates than were necessary.

5 The first to seventh defendants deny owing duties of a fiduciary nature to AHTC. They also deny any improper conduct in relation to the awarding of the four MA and EMSU contracts, the payments made under the contracts (including the earlier EMSU contract with FMSI), as well as the awarding of the contracts to the third party contractors. They argue that in any case, they can rely on the defence of good faith provided in s 52 of the Town Councils Act (“TCA”), and that some of the claims against them are time-barred under the Limitation Act.

## **Decision of the High Court**

### *Whether the defendants owed AHTC fiduciary duties*

6 The first to fifth defendants owed fiduciary duties to AHTC by virtue of being town councillors: (at [175], [191], [212], [216], [218], [223], [225]).

- a. In *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 (“*AHPETC (CA)*”), the Court of Appeal held that the relationship between a Town Council and the Ministry of National Development was governed purely by public law; this should not be taken to mean that every legal relationship involving a Town Council and another party is governed purely by public law. Whether a legal relationship created by statute and involving the exercise of statutory powers gives rise to private law obligations depends on whether that relationship has any legal character independent of public law.
- b. Section 5 of the TCA provides that the Town Council is to be a body corporate. This brings the role of town councillors in directing the Town Council within the template of a body corporate and its officers, and they must therefore act in accordance with the duties that the law imposes on officers of bodies corporate. In this regard, there is a close analogy between town councillors and directors of a company or council members of a strata development management corporation. There is no reason not to conclude that town councillors have undertaken to act on behalf of their Town Council in a relationship of trust and confidence that gives rise to fiduciary duties. This means town councillors must

manage the estate and serve the interests of their Town Council with single-minded loyalty, and for proper purposes.

- c. The political context of Town Councils does not militate against imposing fiduciary obligations on town councillors.
- d. The volunteer status of appointed town councillors such as Mr David Chua and Mr Kenneth Foo does not preclude them from owing fiduciary duties.

7 The sixth and seventh defendants owed fiduciary duties to AHTC by virtue of being part of the senior management of AHTC. Employees are fiduciaries if their duties require them to act with a single-minded loyalty, and “top management” will commonly have undertaken such duties to their employers. Ms How Weng Fan was Deputy Secretary/General Manager of AHTC and Mr Danny Loh was Secretary of AHTC, and these roles were part of the top management of AHTC – there were no other employees of AHTC more senior than them. It is true that the General Manager and Secretary of AHTC were intended by design to simultaneously also be senior employees of the MA, and would therefore also owe duties to the MA. However, any potential conflicts of interest that arise from this must be managed as part of Ms How Weng Fan and Mr Danny Loh’s fiduciary duties to AHTC, and did not mean that they cannot owe fiduciary duties: (at [228], [232], [235]–[237]).

#### *The award of the first MA contract*

8 The evidence shows that there was a clear plan for FMSS to replace the incumbent MA CPG regardless of CPG’s intention as regards the existing MA contract, and that this decision was made by Ms Sylvia Lim and Mr Low Thia Kiang shortly after the 2011 General Elections. The waiver of tender and subsequent appointment of FMSS was not a contingency, but a *fait accompli* by the time of the 30 May 2011 meeting with CPG. There was no urgency of circumstances that would have justified the waiver of tender, particularly since CPG was contractually obliged to continue serving as the MA under the existing MA contract, and the defendants should have held CPG to that contractual obligation, at least for such time as was necessary for a tender to be called. The TCFR does not allow a waiver of tender except in very special circumstances, and it is clear that other alternative solutions had not been explored in this case before tender was waived. This was because the sole objective was for CPG to be replaced as MA by FMSS: (at [250], [260], [261], [270], [278]).

9 Mr Low Thia Kiang’s own evidence showed that the real reason behind the waiver of tender and the plan for FMSS to replace CPG was his distrust of CPG and other entities he perceived to be affiliated to the People’s Action Party, as well as his sense of loyalty towards the staff of Hougang Town Council who risked being retrenched if CPG continued as MA of the expanded AHTC: (at [283]–[286]).

10 The decision of whether to appoint FMSS was deliberately kept away from its natural forum, the Town Council meeting, and placed in the hands of Ms Sylvia Lim. This, and the rescheduling of the second Town Council meeting to keep CPG out of the loop, as well as the correspondence around this time speak to a lack of transparency and candour on the part of Ms Sylvia Lim and Mr Low Thia Kiang. In particular, it is unacceptable and egregious for Mr Low Thia Kiang to have asked Mr Danny Loh to prepare a draft report on FMSS’s appointment to be tabled at the second Town Council meeting, and for Ms Sylvia Low to have requested Mr Danny Loh and Ms How Weng Fan to “sanitise” the report to pass the scrutiny

of auditors, when the report concerned FMSS's appointment as MA. This report and the subsequent press release on 5 August 2011 painted a misleading narrative of the reason why tender was waived: (at [293]–[298], [300], [304]–[311]).

- a. In the circumstances, the waiver of tender leading to the award of the first MA contract was not justified under the TCFR, and Ms Sylvia Lim and Mr Low Thia Kiang breached their fiduciary duties to AHTC as they had failed to act in AHTC's best interests and had acted for extraneous purposes.
- b. As Mr Pritam Singh's involvement in the early events is less clear from the evidence and there was no substantial cross-examination on his involvement, it cannot be said that he has breached his *fiduciary* duties to AHTC. However, he has breached his duties of skill and care to AHTC in respect of the award of the first MA contract, along with Mr David Chua and Mr Kenneth Foo, as they ought to have inquired as to the circumstances of the waiver.
- c. Ms How Weng Fan's heavy involvement in the award of the first MA contract to FMSS suffices for a finding that she too breached her fiduciary duties to AHTC. Mr Danny Loh's fiduciary duties to AHTC only began from the date of his appointment of Secretary of AHTC, 1 August 2011, and since the first MA contract was entered into before that date, he is not liable for breach of fiduciary duties in this regard.

#### *The award of the first EMSU contract*

11 The defendants ought to have been aware by May or June 2011 that the existing EMSU contract would expire on 30 September 2011, and would therefore have had time to call a tender. The reason they did not do so must have been because this would have derailed the plan to appoint FMSS as MA and to subsequently provide both MA and EMSU services to AHTC. Although CPG may have verbally indicated that it would extend its provision of EMSU services beyond 30 September 2011, this did not justify the defendants' inaction since there was no promise by EM Services, which was then providing EMSU services for another part of AHTC, to do the same. Since the award of the first EMSU contract is linked to the award of the first MA contract, the basis of liability of the defendants is the same, except that Mr Danny Loh is also in breach of his fiduciary duties to AHTC, since those duties would have arisen by the time of the award of the first EMSU contract: (at [323]–[326], [328], [334]).

#### *The award of the second MA and EMSU contracts*

12 There were no independent or continuing breaches of duties arising from the award of the second MA and EMSU contracts to FMSS after tender. However, to the extent that the award of the *second* MA and EMSU contracts to FMSS resulted in any loss to AHTC, these would be recoverable as consequential losses flowing from the breaches in relation to the award of the *first* MA and EMSU contracts: (at [335]–[338]).

#### *Improper payments to FMSS and FMSI*

13 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. The standing instruction for payments to FMSS to be co-signed by the AHTC Chairman or Vice-Chairman was not a sufficient safeguard because there was no system to ensure that each cheque

presented was fully verified by independent parties. In some instances, there was no proper verification even by conflicted persons, as supporting documents were signed after a mere tallying exercise. These control failures were systemic and represent a breach of the duties of skill and care owed by the first to seventh defendants: (at [347]–[349], [352], [361]).

14 AHTC has not shown that the payments to FMSS for project management fees were unjustified. AHTC relies only on unproduced “legal advice” regarding the MA contract to show that certain services were wrongly classified as project management services for which additional fees to FMSS were payable, when these services allegedly ought to have been classified as MA services for which no additional fees were payable. This does not suffice to show that the classification was factually wrong in each instance, since the MA contract was ambiguous as to the correct classification: (at [378], [379]).

*Award of contracts and payments to third party contractors*

15 The award of contracts to LST Architects was problematic on two levels. First, whilst r 74(1) of the TCFR allows the award of omnibus contracts for services to be provided for multiple projects over a period of time, it requires contracts to be awarded to the lowest bidder for the omnibus contracts on specific parameters. There should be no residual discretion to award omnibus contracts to two bidders on a panel based on those parameters, and yet award subsequent projects to the more expensive of those bidders, which was the effect of AHTC’s practice. Second, it was also in contravention of the TCFR to award 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 defendants felt that Design Metabolists, the only other contractor on the panel, was not a legitimate option, then they should have called a fresh tender. 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 Tender Committee which made the decision, namely, Ms Sylvia Lim, Mr Pritam Singh and Mr Kenneth Foo: (at [397]–[399], [403], [405]).

16 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 a breach of the duties of skill and care of Ms Sylvia Lim, Mr Pritam Singh, Mr Kenneth Foo and Mr David Chua as members of the Tender Committee. This breach does not extend to the subsequent inclusion of Punggol-East in the contract with Red-Power, since the other service provider, Tong Lee, was not obliged to extend its services to Punggol-East: (at [411], [412]).

17 The award of the contract to Rentokil was justified as the Tender Committee considered that Rentokil was more experienced and more likely to enable AHTC to obtain subsidies from NEA’s rat control programme than the slightly cheaper vendor, Pest-Pro. These reasons were properly documented in the meeting minutes of the Tender Committee and there was thus no breach of duties by the defendants: (at [415], [416]).

18 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 duties of skill and care of the town councillors who were members of the Tender Committee, namely, Ms Sylvia Lim, Mr Pritam Singh, Mr Kenneth Foo and Mr David Chua. The Tender Committee was aware that Titan and J Keart’s bids for new contracts were at much higher rates than 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: (at [421], [422]).

19 There were no breaches of duties on the part of the defendants in making payment on 12 invoices totalling \$171,112.62 and 56 invoices totalling \$674,388.70 to third party contractors. The mere fact that the 12 invoices were not accompanied by monthly service reports or other supporting documents did not mean that there was such a breach, since these were invoices to third party contractors for routine works, or works for which AHTC had since been reimbursed. As for the 56 invoices, any breach of the TCFR was by the Head of Department, and there was insufficient evidence of any of the defendants' involvement in the payment approval process for these invoices: (at [426], [427], [438], [439]).

*The liability of the sixth to eighth defendants for dishonest assistance and knowing receipt*

20 The sixth to eighth defendants dishonestly assisted Mr Low Thia Kiang and Ms Sylvia Lim's breach of fiduciary duties with regard to the first MA and EMSU contracts. Both Ms How Weng Fan and Mr Danny Loh assisted in FMSS's appointment under these contracts, and would have been aware that AHTC had waived tender improperly. Their knowledge can also be imputed to FMSS, since it is undisputed that they were FMSS's controlling minds. FMSS is also liable for knowing receipt for the payments to it under the first MA and EMSU contracts: (at [455]–[458]).

*Whether the claims are time-barred*

21 Although the claim in relation to the first MA contract and the claim in relation to four invoices issued between 28 May and 28 July 2011 would fall outside of a six-year limitation period, they are not time-barred. This is because s 24A(3)(b) of the Limitation Act applies: the plaintiffs did not have the requisite knowledge to bring a claim against the defendants until the Auditor-General's Report was issued on 9 February 2015, and a 3-year limitation period therefore commenced from that date under s 24A(3)(b). In the alternative, the claim for breach of fiduciary duties in relation to the first MA contract would also not be time-barred by virtue of s 22(1) of the Limitation Act. Ms Sylvia Lim and Mr Low Thia Kiang fall within s 22(1)(a) because their breach of fiduciary duties was "fraudulent" under s 22(1)(a), which uses an expanded definition of "fraud" that does not require deceit or personal gain. Ms How Weng Fan falls within s 22(1)(b) because she had beneficially received AHTC's funds under the first MA contract: (at [473], [484], [487]).

*Whether the defence of good faith under s 52 TCA applies*

22 Section 52 of the TCA does not apply in the present case. On a proper reading, s 52 only protects Town Council members, officers, etc, from personal liability to third parties, and not from liability to the Town Council itself. Interpreting s 52 as protecting members and officers from liability to the Town Council 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 or officer acted in good faith in the performance of statutory duties. This would rewrite many such obligations, and Parliament cannot have intended to do so by the terms of s 52 TCA: (at [494], [495], [498]).

*Other defences raised by the sixth to eighth defendants*

23 The sixth and eighth defendants' submissions that they are entitled to relief under s 60 of the Trustees Act, that the plaintiffs are estopped by convention from suing them, and that the Independent Panel was invalidly appointed are rejected: (at [518], [522], [526]).

*Summary of the defendants' liability*

24 The following table summarises the defendants' liability in Suit 668 and Suit 716:

	Claim	Liability of:							
		Ms Sylvia Lim	Mr Low Thia Khiang	Mr Pritam Singh	Mr David Chua	Mr Kenneth Foo	Ms How Weng Fan	Mr Danny Loh	FMSS
<b>Waiver of tender and appointment of FMSS as MA and EMSU provider</b>									
1	First MA contract	Breach of fiduciary duties		Breach of duties of skill and care		Breach of fiduciary duties	Dishonest assistance	Dishonest assistance	Knowing receipt
2	First EMSU contract					Breach of fiduciary duties			
3	Second MA and EMSU contracts	No independent or continuing breach, but possible consequential loss							
<b>Payments to FMSS</b>									
4	Control failures	Breach of duties of skill and care							
5	Invoice for \$106,559 dated 30 June 2011 and invoice for \$166,591 dated 31 July 2011	No breach							
6	Payment of project management fees								
7	Miscellaneous improper payments to FMSS	Breach of duties of skill and care, except re. payments for overtime claims							

	Claim	Liability of:							FMSS
		Ms Sylvia Lim	Mr Low Thia Khiang	Mr Pritam Singh	Mr David Chua	Mr Kenneth Foo	Ms How Weng Fan	Mr Danny Loh	
<b>Improper award of contracts to third parties</b>									
8	LST Architects	Breach of duties of skill and care	No breach	Breach of duties of skill and care	No breach	Breach of duties of skill and care	No breach		–
9	Red-Power	Breach of duties of skill and care, except re. inclusion of Punggol-East	No breach	Breach of duties of skill and care, except re. inclusion of Punggol-East			No breach		–
10	Rentokil	No breach							
11	Titan and J Keart	Breach of duties of skill and care	No breach	Breach of duties of skill and care			No breach		
<b>Improper payments to third parties</b>									
12	12 invoices without supporting documents	No breach					–		
13	56 invoices without Head of Department signature								

*Remedies which the plaintiffs are entitled to pursue*

25 Contrary to PRPTC’s submission, the first to seventh defendants are not trustees of AHTC’s assets. Town councillors, like company directors, may be akin to trustees, but are not trustees. Town councillors are, however, custodial fiduciaries. This means that they have custodial duties over their Town Council’s assets, and may be ordered to reconstitute those assets if they misapply them: (at [539], [543]).

26 Although the finding that Ms Sylvia Lim and Mr Low Thia Khiang are custodial fiduciaries means that they are liable to give a common account, the question is whether this makes any difference to the reliefs the plaintiffs are entitled to for their breach of fiduciary duties. Following the decisions of the House of Lords in *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 (“*Target Holdings*”) and the UK Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503 (“*AIB*”), the same approach to equitable compensation ought to apply to the remedy for a breach of a fiduciary duty, whether



or not this is preceded by the taking of a common account. When awarding equitable compensation, the court should be concerned not so much with the fact of the misapplication of the trust property, but rather the true or proper loss that is suffered. In the present case, all the disbursements under the first and second MA and EMSU contracts could be said to involve the misapplication of AHTC's monies. However, in return AHTC had received MA and EMSU services, which was something it was required to procure. The loss flowing from the misapplication is therefore *prima facie* the difference between the amount of money misapplied and the value of the net benefits actually obtained by AHTC: (at [546], [563], [564], [566], [568]).

27 The legal burden of proving loss falls upon the plaintiffs. The evidential burden of proof likewise starts with the plaintiffs, although equity will draw an adverse inference against the defaulting party provided there is reason to believe that the transaction in question is dubious in nature. Further, the plaintiffs must prove that the defendants' breach was the but-for cause of their loss. The position in *Winsta Holding Pte Ltd and another v Sim Poh Ping and others* [2018] SGHC 239 that but-for causation must be proven for all breaches of fiduciary duties, which follows the position in *Target Holdings* and *AIB*, is therefore preferred over the alternative approaches: (at [576], [579], [584], [594], [602]).

28 In addition, even if the court has the discretion to order a common account in the present case, it would not exercise this discretion. That is because the purpose of a common account is to identify the whereabouts of the trust property, and there is no confusion as to where and to whom AHTC's funds were paid in the present case (at [608]).

29 In respect of the other remedies sought by the plaintiffs in relation to the defendants' breach of fiduciary duties:

- a. The plaintiffs may seek an account of profits against Ms How Weng Fan and Mr Danny Loh, but they must elect between seeking an account of profits and equitable compensation: (at [613]).
- b. The first MA and EMSU contracts are *voidable* by virtue of being entered into in breach of fiduciary duty, and the plaintiffs may seek to rescind them. However, rescission of the contracts would also require the benefits received by AHTC under them to be returned: (at [614], [616]).
- c. In contrast, the plaintiffs' submission that the first MA and EMSU contracts are *void* from the start because they are unlawful as a matter of public law is rejected. Although the first MA and EMSU contracts are unlawful as a matter of public law, they are nevertheless only voidable, not void, because AHTC did not lack capacity to enter into those contracts altogether: (at [618], [627]).

30 In respect of the remaining remedies sought by the plaintiffs:

- a. The sixth to eighth defendants' liability for dishonest assistance is the same as the liability of Ms Sylvia Lim and Mr Low Thia Khiang for breach of fiduciary duties, including any consequential losses: (at [630]).
- b. FMSS's liability for knowing receipt only extends to payments made by AHTC under the *first* MA and EMSU contracts, and PRPTC is also entitled to a tracing order against FMSS in respect of these payments: (at [632], [633]).

- c. The remedy for the defendants' breaches of their equitable duties of skill and care is identical to damages for negligence: (at **[634]**).
- d. PRPTC's submission that the defendants are liable under rr 56(1) and 56(2) of the TCFR is rejected: (at **[636]**).
- e. The plaintiffs may pursue claims against the defendants for their investigation expenses as consequential losses flowing from the defendants' breaches: (at **[639]**, **[640]**).

*This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.*