

**Can public servants exercising statutory duties be sued for
breaches of private law duties?**
How Weng Fan and others v Sengkang Town Council and other appeals
[2022] SGCA 72

I. Executive summary

How Weng Fan and others v Sengkang Town Council and other appeals [2022] SGCA 72 involved an examination into the management practices of the Town Council members for the Aljunied-Hougang Town Council¹ (“**AHTC**”). Specifically, the Court of Appeal (“**CA**”) considered the novel question of whether a public servant exercising statutory duties under public law is also subject to duties under private law.

Prior to this case, it was already established in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 that AHTC had breached some of its public law statutory duties arising from the Town Councils Act (Cap 329A, 2000 Rev Ed) (the “**TCA**”),² and from the Town Councils Financial Rules (Cap 329A, R 1, 1998 Rev Ed) (the “**TCFR**”). The question remained, however, whether AHTC’s members and senior employees could, and should, be made *personally* liable for AHTC’s breaches of its *public law* statutory duties, based on claims of breaches of certain *private law* tortious duties.

In this regard, the CA examined whether the defendants, who were either AHTC’s members or senior employees, in fact owed private law duties to AHTC, namely: (1) fiduciary duties, (2) equitable duties of care and skill, and (3) a common law tortious duty of skill and care. The CA then considered if any of these duties (if owed to AHTC) were breached.

Partially reversing the High Court’s (“**HC**”) decision, the CA held that the defendants did not owe AHTC any fiduciary or equitable duties. They, however, owed a common law tortious duty of care and skill to AHTC (subject to the limits placed by the TCA), which they had breached in certain respects. They were held personally liable for these breaches, and would be liable for damages (to be determined separately).

II. Material facts

A. Background

Singapore’s housing estates have been grouped into towns, and every town comprises one or more of what is known as “electoral constituencies”.³ Town Councils are responsible for controlling, managing, maintaining, and improving the common property of the residential flats and commercial property within the relevant town. To fulfil their duties, Town Councils will typically employ, among

¹ The procedural history behind this appeal is a complicated one, involving multiple suits, and an evolving of the claimants and defendants over the course of time. This is in part because the Town Councils for the Aljunied Group Representation Constituency and the Hougang Single Member Constituency (“**SMC**”) were variously reconstituted between 2011 and 2015. Before 27 May 2011, these constituencies were managed by the Aljunied Town Council (“**ATC**”) and the Hougang Town Council (“**HTC**”), respectively. On 27 May 2011, ATC and HTC merged to form the Aljunied-Hougang Town Council (“**AHTC**”). From 22 February 2013 to 30 September 2015, AHTC was reconstituted as the Aljunied-Hougang-Punggol East Town Council (“**AHPETC**”) to include Punggol East SMC. On 1 October 2015, AHPETC was reconstituted as AHTC, while Punggol East SMC was reconstituted to come under the Pasir Ris-Punggol Town Council (“**PRPTC**”). On 28 October 2020, all of PRPTC’s assets and liabilities were transferred to the Sengkang Town Council (“**STC**”).

As such, for ease of reference, this summary will adopt the CA’s method of referring to AHTC, AHPETC, PRPTC, and STC from 27 May 2011 as “**AHTC**”, unless there is a reason to distinguish between these parties. AHTC and PRPTC/STC will, in this summary, also be referred to collectively as the “**claimants**”.

² Section 52 of the then-TCA later became section 74 of the most recent version of the same Act (the Town Councils Act 1988 (2020 Rev Ed)).

³ There are currently 17 Town Councils responsible for the 31 electoral constituencies in Singapore. (See <https://www.mnd.gov.sg/our-work/regulating-town-councils/about-town-councils>.)

others, the services of a Managing Agent (“**MA**”) and an Essential Maintenance Service Unit (“**EMSU**”). MA services include services like the supervision of contractors. The EMSU is a 24-hour service to attend to residents’ maintenance and emergency requests.

The Town Councils’ duties are usually undertaken by members of each Town Council, who can either be elected or appointed. *Elected* members become members by virtue of their election to Parliament under the electoral division of the constituency for which the Town Council is responsible. For example, candidates elected to Parliament under the electoral division of the Aljunied Group Representation Constituency (“**GRC**”) will become elected members of the Aljunied Town Council (“**ATC**”). One of these elected members will then be designated as Chairman of the Town Council. In contrast, *appointed* members of Town Councils are appointed by the Chairman of the Town Council.

Before the 2011 General Elections (the “**2011 GE**”) which were held on 7 May 2011, candidates from the People’s Action Party (“**PAP**”) had been elected to the electoral division of Aljunied GRC, while candidates from the Workers’ Party (“**WP**”) had been elected to the electoral division of the Hougang Single Member Constituency (“**SMC**”). Hence at that point, ATC and the Hougang Town Council (“**HTC**”) were managed by Town Council members from the PAP and the WP, respectively.

Following the 2011 GE, candidates from the WP were elected to the electoral division of *both* Aljunied GRC and Hougang SMC. Both ATC and HTC thus went under the management of Town Council members from the WP; ATC and HTC were later merged to form AHTC on 27 May. A key point to note is that prior to the merger, in ATC, CPG Facilities Management Pte Ltd (“**CPG**”) and EM Services Pte Ltd (“**EM Services**”) had been the providers of the required MA and EMSU services.

Under the TCA, a key requirement was that AHTC had to be operational (i.e. it had to assume responsibility of Aljunied GRC and Hougang SMC, which responsibility included ensuring the provision of MA and EMSU services in these two constituencies) by 1 August, i.e. within two months of taking over.

B. Key players

The following people were key players in the situation that ensued. First, the following five of AHTC’s Town Council members (collectively, the “**Town Councillors**”) were involved:

- (1) Ms Sylvia Lim (“**Ms Lim**”), who served as Chairman from June 2011 to August 2015, and then as Vice-Chairman from October 2015 onwards;
- (2) Mr Low Thia Khiang (“**Mr Low**”), who served as Vice-Chairman from June 2011 to July 2012;
- (3) Mr Pritam Singh (“**Mr Singh**”), who served as Vice-Chairman from August 2012 to August 2015, and then as Chairman from October 2015 onwards;⁴
- (4) Mr Chua Zhi Hon (“**Mr Chua**”), who stepped down as a Town Councillor on 1 December 2016; and
- (5) Mr Kenneth Foo Seck Guan (“**Mr Foo**”).

Two senior employees of AHTC (collectively, the “**Employees**”) were also closely involved:

- (6) Ms How Weng Fan (“**Ms How**”), who served as Deputy Secretary from 9 June 2011 to 14 July 2015, and simultaneously as General Manager from 1 August 2011 to 14 July 2015. Ms How was also previously HTC’s Estate Manager, General Manager, and Secretary from 1991 to 2011. Ms How was married to Mr Danny Loh Chong Meng⁵ (“**Mr Loh**”); and

⁴ Following the GE 2011, Ms Lim served as the WP’s Chairman, while Mr Low and Mr Singh respectively served as the WP’s Secretary-General and Vice Chair, Media Team.

⁵ Following Mr Loh’s demise on 27 June 2015, Ms How became the personal representative of his estate.

(7) Mr Loh, who served as Secretary from 1 August 2011 to 31 May 2015. Mr Loh was also the sole proprietor of FM Solutions & Integrated Services (“**FMSI**”).

Finally, there was an entity, FM Solutions & Services Pte Ltd (“**FMSS**”), which Mr Loh had incorporated for the purposes of managing AHTC (as will be explained at Part II(C) below). While FMSS’ shareholding and directorship changed over time, it was always controlled and managed by Ms How and/or Mr Loh.

C. Key events

May 2011

On 9 May 2011 (two days after the 2011 GE), Mr Low sent an email to the other Town Councillors, expressing concerns that CPG intended to go into “inactive management” (i.e. to effectively stop providing its MA services to AHTC), and that AHTC should appoint an MA instead of attempting to manage AHTC on its own. On 13 May, one “T T Tan”, who claimed to have access to CPG’s plans with respect to AHTC, wrote to Mr Low. T T Tan had suggested, among other things, that CPG intended to cease providing the WP-led AHTC with the services which it had thus far been providing to the PAP-led ATC.

On 15 May, Mr Loh incorporated FMSS, with himself as the sole shareholder and director.

On 30 May, CPG formally informed the Town Councillors that it wished to stop serving as AHTC’s MA, and sought to be released from its present MA contract “as soon as practicable”.

June 2011

On 15 June, Mr Loh (as Managing Director of FMSS) sent a Letter of Intent (“**LOI**”) to Ms Lim, who was AHTC’s then-Chairman. The LOI stated FMSS’ intention to take over CPG, at CPG’s prevailing fees, to become AHTC’s MA for a period of one year with effect from 15 July. It also stated FMSS’ intention to take over all existing staff of the former WP-led HTC at their existing salaries and terms of appointment. Ms Lim signed the LOI on 8 July.

August 2011

On 4 August, a Town Council Meeting was held by AHTC. During this meeting, “given the tight time frame and urgency” of securing an MA to replace CPG, the AHTC members present, which included the Town Councillors (less Mr Chua), unanimously agreed to waive the calling of a tender for MA services from 15 July 2011 to 14 July 2012, which would usually have been necessary under rule 74(1) of the TCFR. They also agreed to appoint FMSS as MA for that period. The contract giving effect to this arrangement will be referred to as “**the First MA Contract**”.

On 11 August, AHTC and CPG signed a deed of mutual release with respect to CPG’s provision of MA services. At this point in time, CPG and EM Services were still the contractors for the provision of EMSU services to AHTC, as these contracts were only due to expire on 30 September 2011.

September 2011

On 7 September and 14 September respectively, EM Services and CPG each declined to extend their provision of EMSU services beyond 30 September. As a result, on 18 September, an internal committee of AHTC, which Ms Lim was also a part of, determined that it was necessary to come to an interim solution with respect to the provision of EMSU services.

The committee recommended that a contract for EMSU services be awarded to FMSS for an initial period of nine months – from 1 October 2011 to 30 June 2012. This recommendation was unanimously approved by the members of AHTC, including the Town Councillors. The contract giving effect to this arrangement will be referred to as “**the First EMSU Contract**”.

April 2012

The next year, on 13 April 2012, AHTC placed a tender notice for the provision of MA and EMSU services in The Straits Times (a national newspaper) in anticipation of the First MA Contract and the First EMSU Contract expiring.

On 4 May, FMSS submitted the sole bid for the second contracts for MA and EMSU services, increasing its rates by 17.3% and 8.5%, respectively, from the First MA Contract and the First EMSU Contract. Both bids were later accepted by AHTC, and became what will respectively be referred to as “**the Second MA Contract**” and “**the Second EMSU Contract**”. The First MA Contract, the First EMSU Contract, the Second MA Contract, and the Second EMSU Contract will collectively be referred to as the “**Contracts**”.

Setting up of payment process

Besides entering into the Contracts, sometime after they took over AHTC, the Town Councillors and the Employees also set up a payment process by which AHTC would make payments to FMSS for the Contracts, and to Mr Loh (trading as FMSI)⁶ for another similar contract. Under this process, these payments would be authorised or made by persons who had a direct interest in FMSS, but who concurrently held positions in AHTC (the “**Conflicted Persons**”).

However, as a safeguard against incorrect or improper payments, a standing instruction was put in place during AHTC’s Third Town Council Meeting on 8 September 2011 (the “**Standing Instruction**”), which required payments to FMSS to be co-signed by Ms Lim (AHTC’s then-Chairman) or Mr Singh (AHTC’s then-Vice Chairman). This Standing Instruction was, however, not put in place for payments to FMSI.

D. The claims

In 2017, AHTC commenced a number of lawsuits⁷ against the Town Councillors, the Employees, and FMSS in the HC. In these suits, the claimants first argued that the Town Councillors and the Employees owed AHTC fiduciary duties (i.e. the duty to act with single-minded loyalty to one’s principal), equitable duties of care and skill, and/or the common law tortious duty of skill and care. The rest of AHTC’s arguments were broadly centred on the following concerns: whether the award of the Contracts, and whether the setting up of the abovementioned payment process, constituted breaches of duties by the Town Councillors and the Employees (respectively, the “**Contracts issue**” and the “**payment process issue**”).

(1) The Contracts issue

The claimants argued that the Town Councillors and the Employees had, in waiving the requirement for tender for the contracts for the provision of MA and EMSU services to AHTC (which caused, or created the circumstances for, the Contracts to be entered into), breached certain provisions in the TCFR. The claimants argued that the Town Councillors and the Employees had thus acted in breach of their fiduciary duties, equitable duties of care and skill, and/or tortious duty of care and skill owed to AHTC.

(2) The payment process issue

The claimants also argued that AHTC made various improper payments to FMSS and FMSI. Specifically (among other claims): the payment process was embedded with what they termed “**control failures**”, because it lacked any protocol or process to ensure the independent and objective

⁶ As explained earlier at Part II(B), Mr Loh was the sole proprietor of FMSI.

⁷ AHTC can sue its own town councillors and employees because under Singapore law, AHTC exists as a separate legal entity, capable of making decisions through, among other methods, its agents. In this case, AHTC’s decision to sue the Town Councillors and the Employees was directed by an independent panel which was appointed to act as AHTC’s agent after an audit report identified certain lapses in AHTC’s management practices.

assessment of FMSS' and FMSI's service levels. They alleged that the Standing Instruction was not a sufficient safeguard. This was exacerbated by the Conflicted Persons being involved in authorising payments to FMSS and FMSI. There was thus allegedly no process which ensured that payments to FMSS and FMSI were correctly made, for services adequately rendered.

The claimants then argued that the institution of the above-described payment process constituted a breach of certain provisions in the TCA, and hence, that the Town Councillors and the Employees had breached their fiduciary duties, their equitable duty of care and skill, and/or their tortious duty of skill and care owed to AHTC.

(3) The section 52 TCA defence

In their defence, both the Town Councillors and the Employees had, apart from directly disputing the claimants' arguments, also sought to rely on section 52 of the TCA, on the grounds that section 52 afforded them immunity from personal liability with regard to the abovementioned acts. Section 52 of the TCA reads:

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]

E. HC decision

(1) Whether the Town Councillors and the Employees owed duties to AHTC

The HC found that the Town Councillors and the Employees owed fiduciary duties to AHTC. With regard to the Town Councillors, their relationship with AHTC closely paralleled that between a company and its directors, and directors typically owe fiduciary duties to their companies. With regard to the Employees, they also played pivotal roles in AHTC, and employees who play pivotal roles will normally be found to be fiduciaries. The HC further stated that "[a]ttendant with the existence of fiduciary duties [was] an equitable duty of skill and care", which was "[i]n substance ... equivalent to the duty of care in the tort of negligence".

Having established that the Town Councillors and the Employees owed AHTC these duties, the HC then considered if these duties were breached with respect to the Contracts issue and the payment process issue, before deciding whether section 52 of the TCA would immunise the Town Councillors and the Employees from personal liability.

(2) The Contracts issue

The HC found that the waiver of the requirement for tender, and the subsequent awarding of the First MA Contract and the First EMSU Contract to FMSS, constituted breaches of fiduciary duties by Ms Lim, Mr Low, and Ms How, and of equitable duties of skill and care by Mr Singh, Mr Chua, and Mr Foo. As for Mr Loh, because he was only appointed as AHTC's Secretary after the First MA Contract was awarded (but before the First EMSU Contract was awarded), he was only liable for a breach of his fiduciary duties in respect of the First EMSU Contract.

Specifically, the HC found that the waiver of the requirement for tender, and the award of the First MA Contract and the First EMSU Contract to FMSS, formed a preconceived plan by the Town Councillors and the Employees to remove the "PAP-affiliated" CPG, and enable them to retain and hire the existing staff at HTC who were loyal to the WP as employees of FMSS. The waiver of the requirement for tender, and the subsequent awarding of the First MA Contract and the First EMSU Contract to FMSS, were thus unjustified. Furthermore, the HC found that there was no urgency or public interest that warranted the waiver of the tender requirement. Hence, the HC held that these actions constituted breaches of fiduciary duties and/or equitable duties of skill and care.

As for the award of the Second MA Contract and the Second EMSU Contracts, which were done pursuant to a calling of open tenders, the HC held that there were no independent or continuing breaches of duties in those regards.

(3) The payment process issue

As for the alleged improper payments to FMSS and FMSI, the HC found that the Standing Instruction was not a sufficient safeguard because there was no system in place to ensure that each cheque presented for signature had been duly and independently verified. The HC thus found the Town Councillors and the Employees liable for a breach of their equitable duties of skill and care to AHTC in this aspect.

(4) The applicability of section 52 of the TCA

Having established that the Town Councillors and Employees had breached their duties owed to AHTC, the HC then went on to decide if they would nonetheless be immunised from personal liability by section 52 of the TCA. In this regard, the HC interpreted section 52 as protecting a Town Council's members and employees only from personal liability in relation to claims by third parties, and not from liability in relation to claims by the Town Council itself. The HC thus held that section 52 was inapplicable in this case.

The Town Councillors and the Employees appealed against the HC's decisions.

III. Issues on appeal

The CA considered the following issues on appeal:

- (a) Did the Town Councillors and the Employees owe fiduciary duties to AHTC?
- (b) Did the Town Councillors and the Employees owe equitable duties of skill and care to AHTC?
- (c) Did the Town Councillors and the Employees owe a common law duty of care to AHTC?
- (d) What was the proper interpretation and scope of section 52 of the TCA?

In brief, the CA held that the Town Councillors and the Employees did not owe AHTC any fiduciary duties or equitable duties of skill and care, but owed AHTC a common law tortious duty of care and skill (see Parts III(A)-(C) below). However, this last duty was subject to section 52 of the TCA (see Part III(D) below), which was held to be applicable to the Town Councillors and the Employees, as this provision applied equally to claims brought by a Town Council against its own members, employees, and officers (as in the present case), as it would apply to claims brought by third parties.

Since section 52 of the TCA was applicable, the question then became whether the Town Councillors' and the Employees' actions were carried out in good faith, because the element of good faith was a key requirement which had to be fulfilled before section 52 of the TCA could be applied. This required exploring the following issues of fact:

- (i) Was the waiver of tender for the first contracts for MA and EMSU, and the award of the First MA Contract and the First EMSU Contract to FMSS, done in good faith?
- (ii) Were the control measures put in place and instituted by the Town Councillors and the Employees with respect to the payment process done in good faith, even if such measures were ultimately found to be inadequate?

The CA held that the Town Councillors' and the Employee's decisions to waive the requirement for tender and award the Contracts to FMSS were done in good faith. The CA overturned the HC's decisions in that respect. However, the CA upheld the HC's decision that the payments process to FMSS and FMSI instituted by the Town Councillors and the Employees (which included the control measures put in place to prevent incorrect payments to FMSS and FMSI) were not done in good faith, as they were grossly inadequate.

Since the Town Councillors' and the Employees' institution of the payments process was not done in good faith, section 52 of the TCA did not indemnify them from personal liability in this aspect. Further, the Town Councillors and the Employees had breached their tortious duty of skill and care in implementing the payment system. They were hence, subject to the claimants' further arguments on what the appropriate final order should be, liable for damages.

A. Whether the Town Councillors and the Employees owed fiduciary duties to AHTC

The CA held that the Town Councillors and the Employees did not owe fiduciary duties to AHTC. The CA first highlighted a few preliminary points. It stressed that fiduciary duties are onerous private law duties. The core duty of a fiduciary is to act with undivided loyalty to the beneficiary, and such a duty should only be imposed if the characteristic expectation of undivided loyalty has been either explicitly or implicitly voluntarily taken by the fiduciary.

Moreover, 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, a court must carefully consider whether it is appropriate in the given circumstances to overlay private law duties over statutory duties, such that an act stemming from a breach of a statutory duty could also give rise to a concomitant breach of a private legal duty.

With these points in mind, the CA explained why the Town Councillors and the Employees did not owe any fiduciary duties to AHTC. *First*, a Town Council's relationship with its members and senior employees was not properly characterised as fiduciary in nature. This is because the Town Councillors and the Employees were executing statutory duties under public law arising from the TCA and the TCFR. To impose fiduciary duties would thus have effectively "converted" these public duties into private law fiduciary duties, thereby impermissibly eroding the distinction between public and private law.⁸

Second, the imposition of fiduciary duties on the Town Councillors and the Employees posed the potential danger of undermining the doctrine of separation of powers⁹ between the Judiciary and the Executive, because it would have required a court to pronounce on the validity of what was quintessentially a *political* or policy-laden judgement call by the Town Councillors.

Third, the relevant Parliamentary debates showed that the nature of the relationship between a Town Council and its members and employees was conceived primarily in political terms (instead of a fiduciary one), given that the members of a Town Council were ultimately accountable to the constituents of that Town Council. *Lastly*, the TCA and the TCFR already prescribe various remedies that are available to secure compliance with the obligations arising thereunder, which militated against the imposition of additional fiduciary duties in order to secure compliance with these obligations.

B. Whether the Town Councillors and the Employees owed equitable duties of skill and care to AHTC

The CA noted that STC¹⁰ had accepted that equitable duties of skill and care was "parasitic" on the finding that the Town Councillors and the Employees were fiduciaries. Since the CA found that the

⁸ While public law is concerned with the exercise of powers arising from a statute for a public purpose, private law is concerned with the exercise of powers arising out of private arrangements, such as a contract, and does not entail the exercise of a statutory power for a public purpose.

⁹ Under the doctrine of separation of powers, the Judiciary (i.e. the courts) should not interfere with the decisions made by the Executive, and Legislative branches (i.e. the Government, and Parliament, respectively), except on limited and largely procedural grounds.

¹⁰ For a fuller explanation of the parties, please see footnote 1 above.

Town Councillors and the Employees were not fiduciaries of AHTC (see Part III(A) above), it followed that the Town Councillors and the Employees did not owe equitable duties of skill and care to AHTC. Thus, the CA held that the Town Councillors and the Employees did not owe equitable duties of skill and care to AHTC.

C. Whether the Town Councillors and the Employees owed tortious duties of skill and care to AHTC at common law

The CA held that the Town Councillors and the Employees did owe tortious duties of skill and care to AHTC at common law, subject to section 52 of the TCA. (This qualification will be further explained at Part III(D) below.)

The legal test for the imposition of a tortious duty of care at common law was established in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 (the “*Spandeck test*”). Under this test, there is first a threshold requirement of factual foreseeability of damage, which is likely to be fulfilled in most cases. A two-stage test will then be applied. 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 claimant’s actual reliance upon the defendant. Where there is both factual foreseeability and legal proximity, there would be a *prima facie*¹¹ duty of care. The second stage entails weighing policy considerations to determine whether the *prima facie* duty should be negated or limited.

Applying the *Spandeck* test, the CA held that the threshold requirement of factual foreseeability of damage was satisfied in this case. This is because it could hardly have been 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.

Moving on to the first stage of the *Spandeck* test, the question was whether there was 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.

In this case, the Town Councillors and the Employees had accepted and assumed their appointments as members and senior employees of AHTC. With these appointments, they had assumed responsibility for their acts in carrying out their respective duties under the TCA and the TCFR for AHTC. Moreover, 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 to carry out its work. Hence, the first stage of the *Spandeck* test was satisfied, and the Town Councillors and the Employees owed AHTC a *prima facie* duty of care.

At the second stage of the *Spandeck* test, the primary question was whether the relevant statutory scheme excluded, modified, or limited the imposition of such a common law duty of care. In this case, there was nothing in the text of the TCA or the TCFR, or in the Parliamentary debates, 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 section 52 of the TCA. (Such limits will be explained further at Part III(D).)

Moreover, the imposition of a tortious duty of care and skill on the Town Council’s members and senior employees would not offend the doctrine of separation of powers. Unlike a claim for breach of fiduciary duties, which may require the court to consider highly political and policy-laden

¹¹ Generally, this means on first appearance, but subject to further evidence or information.

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 a breach of a tortious duty of care and skill in the carrying out of a duty under the TCA or the TCFR is generally not political or policy-laden. It is, instead, an operational question. Accordingly, nothing in the TCA or the TCFR militated against the imposition of a tortious duty of care and skill at common law, and stage two of the *Spandeck* test was satisfied.

Both stages of the *Spandeck* test being satisfied, the CA held 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, subject to the statutory immunity clause in section 52 of the TCA.

D. The proper construction of section 52 of the TCA

The CA held that section 52 of the TCA applied equally to claims brought by the Town Council itself against its members, officers, or employees, as it does to claims made by third parties. Hence, section 52 would, in this case, have protected the Town Councillors and the Employees against personal liability if its elements were satisfied. This was so because of three reasons.

First, the plain and ordinary meaning of section 52 showed 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. The text of section 52 also makes no distinction between these different types of claims. *Second*, this interpretation was not inconsistent with the legislative material in respect of the TCA, which is silent on the specific purpose of section 52, and does not raise any other considerations which point against such a reading of this provision. *Third*, it was in the public interest to protect individuals discharging public duties in good faith under the relevant legislation, such as members, officers, and employees of Town Councils, from the hindrance of personal liability, so as not to deter them from stepping forward to do so.

However, for section 52 of the TCA to apply, two elements must be satisfied. *First*, the Town Council member, officer, or employee must have been acting in the execution or purported execution of the TCA or any other statute. *Second*, this must have been done, or intended to be done, "in good faith". Good faith required, among other things, that the disputed act be done honestly, for proper purposes, and with a basic degree of competence and diligence.

Following these legal principles, the CA established a framework to be applied 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 would be whether the section 52 requirements are satisfied – specifically, whether the actions in question were done in the execution or purported execution of the TCA or any other statute, and in good faith. If so, then that is the end of the matter, and there would strictly speaking be no necessity to go further. If, however, section 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. For instance, in this case, the court would have to go on to consider whether the Town Councillors' and the Employees' actions constituted breaches in their common law tortious duty of skill and care owed to AHTC. With this framework in mind, the CA went on to examine whether the Town Councillors and the Employees were legally liable for their various actions.

(1) Contracts issue (whether good faith was present)

The CA held that section 52 of the TCA was satisfied, because both of its requisite elements were satisfied. As such, the Town Councillors and the Employees were entitled to immunity from personal liability.

The first element requiring the action in question to be done “in the execution or purported execution” of the TCA or some other statute was satisfied, as the requirements before a tender may be waived are prescribed by provisions in the TCFR. The second element of good faith was also satisfied. This is because the evidence indicated that:

- the Town Councillors indeed had concerns over CPG’s commitment to working with a WP-led team;
- CPG in fact did not wish to carry on working with the new WP-led team at AHTC;
- the Town Councillors genuinely harboured a concern that the difficulties that affected CPG (with regards to working with a WP-led team) would also affect the prospect of the Town Councillors’ working with any of the other established MA service providers in the market;
- 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;
- there was a need to ensure that the reconstituted AHTC was ready and able to take over its responsibilities by 1 August 2011 (leaving the Town Councillors with only two months left to, among other things, secure an MA service provider);
- a tender would ordinarily take two months;
- as against this, Mr Low was familiar with, and had (given their history of working together) a high degree of confidence in the commitment and ability of Ms How, 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;
- the interim arrangement (i.e. the arrangement for FMSS to provide AHTC with MA services from 15 July 2011 to 14 July 2012) 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
- while it appeared that there might have been some differences in cost, the notionally competing options were not commensurable, and it was not for the court to second-guess the decisions of the Town Councillors made in good faith.

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. Even on 8 September 2011, the Town Councillors had still thought that CPG would at least extend its EMSU services for a few months after its expiry on 30 September 2011, which would have maintained the existing position until close to the time when the public tenders were to be called. However, CPG declined to agree to the proposed extension. In the circumstances, the CA held that the Town Councillors and the Employees had acted in good faith, and they did not breach their duty of care when waiving the tender for the First EMSU Contract.

Given that no liability was found in respect of the award of the First MA Contract and the First EMSU Contract, the CA also held for completeness that no claim remained with regards to the award of the Second MA Contract and the Second EMSU Contract.

(2) Payment process issue (whether good faith was present)

With regards to the implementation of the process for AHTC to approve payments to FMSS and FMSI (and its in-built control measures, which included the Standing Instruction), the CA held that this cannot be said to have been done in good faith, and hence, that section 52 of the TCA was not satisfied. This is because under the payment process, there was no process by which an independent person certified or verified that payment was made for work properly done. Instead, the various steps of the payment approval process had simply involved tallying numbers to ensure that the figures were

consistent. Furthermore, the supporting documents relied upon by the Chairman and Vice-Chairman of AHTC had been prepared by FMSS's personnel, which meant that they had not been independently informed other than by persons who were conflicted. Indeed, for at least three years, during which AHTC had disbursed over \$23 million under the Contracts, there was no actual certification or verification of whether work was done.

Given these facts, and the manifest conflicts of interest which were clearly perceived and understood by all concerned, the Standing Instruction was a woefully inadequate safeguard to ensure that payments made to FMSS and FMSI were justified. The CA thus held that the Town Councillors and the Employees were grossly negligent, and cannot be said to have implemented the payment process in good faith. Section 52 of the TCA was thus not satisfied to protect the Town Councillors and the Employees from personal liability.

The CA further held that the Town Councillors and the Employees had breached their tortious duty of care, because they allowed the "control failures" to exist in the payment process to FMSS and FMSI.

Notably, the CA also emphasised 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 have made such conduct justifiable, much less form the *de facto* standard that ought to be applied across the board. In other words, the subsistence of any such industry practice did not operate to absolve a Town Council from the need to prevent any conflicts of interest.

IV. Conclusion

In light of the above, the CA held that the Town Councillors and the Employees had, in implementing the payment process to FMSS and FMSI, breached their tortious duty of care and skill owed to AHTC, for which they could not rely on section 52 of the TCA to protect them against personal liability. They were thus held personally liable in this aspect, and were liable for damages (subject to the claimants' further arguments on what the appropriate final order should be).

V. Lessons Learnt

This case leaves us with two important takeaways: one for general members of the public, and one for public or private officers who are required to execute certain legal duties.

For members of the public, this case is a reminder of the important distinction between public and private law duties. It would thus be prudent for those aggrieved by public servants to consider whether they were acting in a public or private capacity, and to thereby commence the appropriate action (in public or private law respectively) should they wish to do so.

For duty-bound officers, this case is a stark reminder that gross negligence, even without any element of dishonesty, can amount to "bad faith", and that the subsistence of any industry practice does not operate to absolve one of his or her duties. It would therefore be prudent for officers to always remain diligent in the execution of their duties.

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