Tonny Permana *v* One Tree Capital Management Pte Ltd and another

[2021] SGHC(A) 8

Case Number	: Civil Appeal No 32 of 2021
Decision Date	: 24 August 2021
Tribunal/Court	: Appellate Division of the High Court
Coram	: Quentin Loh JAD; See Kee Oon J; Chua Lee Ming J
Counsel Name(s)	: Lee Hwee Khiam Anthony and Huineng Clement Chen (Bih Li & Lee LLP) for the appellant; Siraj Omar SC, Allister Brendan Tan Yu Kuan, Teng Po Yew and Joelle Tan (Drew & Napier LLC) for the first and second respondents.
Parties	: Tonny Permana — One Tree Capital Management Pte Ltd — Gerald Yeo

Equity – Fiduciary relationships – When arising

Equity – Fiduciary relationships – Duties

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2021] SGHC 37.]

24 August 2021

Quentin Loh JAD (delivering the judgment of the court *ex tempore*):

1 This is an appeal by the appellant, Mr Tonny Permana ("the Appellant"), against the decision of the trial judge ("the Judge") dismissing his claims against the first and second respondents with costs (see *Tonny Permana v One Tree Capital Management Pte Ltd and another* [2021] SGHC 37 ("the Judgment")). The first respondent is a company, One Tree Capital Management Pte Ltd, which we shall refer to as "OTC", carrying on the business of investment fund management and the second respondent, Mr Gerald Yeo, whom we shall refer to as "GY", is its sole director and shareholder (collectively, "the Respondents").

2 The Appellant, who had invested successfully with the Respondents before, is an Indonesian businessman and permanent resident of Singapore. Sometime in late 2013, he became aware of an opportunity, through the Respondents, to invest in a project to purchase and renovate an existing shopping mall in Kuala Lumpur, Malaysia ("the Project"), undertaken by a Malaysian corporation known as Midas Landmark Sdn Bhd (since renamed CHN Commodity Trade Centre Sdn Bhd), which we shall refer to as "Midas". Mr Tan Chong Whatt ("TCW") and Mr Wang Jianguo ("WJG") were the promoters of the Project and were directors of Midas.

3 Following up on the Appellant's expression of interest, OTC sent an email on 19 November 2013 ("the 19 November 2013 Email") to the Appellant, through his assistant, Ms Denie Tiolani ("Ms Tiolani"), setting out OTC's views on the Project. In this email, GY described the Project as a "fast turnaround project" since Midas was taking over an existing mall and retrofitting it so that "we expect to get back our investment in 6 to 12 months and still get the full 20% return for 1 year." The Appellant told GY he was interested in investing US$1.6m by subscribing to convertible loan stock(s)/notes to be issued by Midas. Draft documents were sent to the Appellant on 25 November 2013. The Appellant arranged for his payment on 28 November 2013 and the designated account received his US$1.6m on 29 November 2013. The following documents, which were on identical terms as the draft documents forwarded, were executed:

(a) The Investment Agreement, dated 28 November 2013, describing OTC as the "agent", Midas as the "borrower" and TCW and WJG as "guarantors".

(b) A Deed of Guarantee, dated 28 November 2013 ("the Guarantee"), executed by TCW and WJG in favour of OTC and the noteholders under the Investment Agreement, and the Forms of Share Charge dated 28 November 2013 in favour of OTC (the "Share Charge"), which we shall refer to collectively as the "Security Documents".

(c) The Convertible Loan Note ("CLN") for the principal value of US$1.6m was issued by Midas to the Appellant. This included the Terms and Conditions ("T&Cs") which provided, *inter alia*, that it would mature and had to be redeemed by 28 November 2014, at which time the Appellant would be paid the investment sum of US$1.6m and a 20% return on that sum. There was also a form of the Agency and Security Trustee Deed ("ASTD") attached in Appendix D of the T&Cs.

4 On 11 February 2014, GY sent Ms Tiolani an email informing her that the structure of the Appellant's investment had to be changed and converted into a shareholder's loan with the Appellant becoming a shareholder of Midas and extending the loan to Midas. The proposed arrangement was to comply with Malaysian laws or rules on non-solicitation of investments. There were a number of email exchanges on details relating to this proposed change between 3 March 2014 to 14 May 2014. Importantly, however, this proposed change was not implemented.

5 On 26 July 2014, without informing the Appellant, the Respondents entered into a Memorandum of Agreement with TCW and one Mr Wang Yingde for the purchase of shares in Midas ("the July 2014 MOA"). The July 2014 MOA provided for:

(a) OTC to purchase a 50% stake in Midas by subscribing for five million new shares while Mr Wang Yingde would purchase a 30% stake by subscribing for three million new shares in Midas.

(b) Investor funds would be channelled to Midas through OTC as "Agent and Trustee" for the investors and that OTC would place these funds as shareholder loans from OTC to Midas.

(c) The shareholder loans would replace the Investment Agreement dated 28 November 2013 and the related guarantees shall be discharged.

6 This was followed by OTC issuing a letter dated 18 August 2014 ("the 18 August 2014 Letter") to Midas, TCW and WJG stating, *inter alia*, that OTC had terminated the Investment Agreement and fully discharged the Security Documents. The July 2014 MOA and the 18 August 2014 Letter were only made known to the Appellant upon the commencement of the current suit. These documents were integral parts of the eventual change to the structure of the Appellant's investment in the Project.

7 This was a fundamental change in the structure of the Appellant's investment. First, the investment was no longer through a CLN issued by Midas, which was a direct loan to Midas with an option to convert the loan to shares if the loan was not repaid or if certain stipulated events of default occurred. Secondly, there was no maturity date for the loan. Thirdly, the Guarantee and Share Charge, which formed the security for the Appellant's loan, were discharged. The Appellant's investment was now made in the name of OTC, who now became the shareholder and lender to Midas, although OTC held the Appellant's investment as his agent and trustee. Fourthly, as we shall note below, the loan from OTC to Midas was an "unsecured" and "subordinated" loan.

8 Some eight days after the July 2014 MOA was entered into, on 3 August 2014, GY emailed Ms Tiolani and informed her that the structure of the Appellant's investment would be altered by converting the US$1.6m into a "shareholder's loan" provided to Midas by OTC ("the Conversion"). The

Appellant would be investing in the Project through OTC by way of a trust deed under which OTC would hold US$1.6m of its shareholder loans to Midas on trust for the Appellant. This structure would replace the CLN. This arrangement would hold for all the other 12 investors in the Project. Through this structure, OTC would hold 80% of the shares in Midas and its shareholder loans to Midas would be held in trust for the respective investors to the extent of their investment sums that were previously structured as CLNs.

9 On or about 3 September 2014, GY sent Ms Tiolani a trust deed to be executed, which was dated 31 August 2014 ("the Trust Deed"). The parties to this Deed were stated to be the Appellant and OTC. The Trust Deed provided, *inter alia*, that OTC was the legal owner of a US$1.6m shareholder loan to Midas and OTC held the said loan and all interest accrued or to accrue on the same on trust for the Appellant.

10 Attached to this Trust Deed was a letter dated 30 June 2014 from OTC to Midas ("the OT Letter"). The OT Letter was signed sometime in August 2014 but backdated to 30 June 2014. This was the first time the OT Letter was brought to the Appellant's attention. This letter stated that OTC would provide shareholder loans to Midas in the aggregate sums of S$9.5m and US$4.94m to finance the purchase of the shopping mall in Ampang, Kuala Lumpur ("the China Mall") on the following conditions:

(a) the status of the shareholder loans were "[u]nsecured and subordinated";

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

(c) the repayment of the loans would be "at any time and in any amount as permitted by the project financing bank for the acquisition of [the China Mall]"; and

(d) the applicable interest rate was 20% per annum on an uncompounded basis, payable after project completion, and any revision to the interest rate shall be subject to agreement between OTC and Midas.

The appendix to the OT Letter also gave the breakdown of the various loans provided by the 13 investors (including the Appellant) and indicated that these "[r]emittances" to Midas were on behalf of OTC, which effectively put OTC in the shoes of a loan holder or creditor.

11 It is important to note that the Appellant did not sign the Trust Deed immediately. On 17 November 2014, GY sent an email to Ms Tiolani summarising what he wished to convey to the Appellant about his investment. GY stated that all the noteholders had signed their respective trust deeds to replace the CLNs. Further, there would be no collateral as that collateral was needed for the bank loan. The email also discussed the possibility of an additional investment in Midas. On 18 November 2014, Ms Tiolani sent an email to the Respondents inquiring into the Security Documents under the Trust Deed as it made no mention of the Share Charge or Guarantee. GY replied on 19 November 2014 stating that the Share Charge and Guarantee had been voided "as per the spirit of our note certificate agreement since the majority investors (represented by [OTC], Wang Yingde and other investors behind us) have taken over the 80% shares to speed up our project …"

12 The Appellant said there was a subsequent telephone call between him and GY on 20 November 2014 where, *inter alia*, GY assured him that the China Mall was valuable and could be sold to pay the investors back. GY asked for a three-month extension for repayment of the Appellant's US$1.6m and that interest at 20% per annum would continue to accrue. The Judge found as a fact that this

telephone conversation did take place and we see no reason to disturb this finding. It is not disputed that the Appellant signed the Trust Deed on 20 November 2014 and Ms Tiolani forwarded the Trust Deed to the Respondents on the same day.

13 Unfortunately, the Project failed and Midas was liquidated; this was recounted in the Judgment at [40]–[48]. The Appellant lost his investment sum and was never paid the 20% returns that were promised. The Appellant sued the Respondents on a variety of grounds in contract, tort and equity based on the agency relationship that he claimed had arisen. These claims were all dismissed by the Judge. The Appellant appeals only on the basis of his claims of breaches of fiduciary duties and dishonest assistance.

14 Whilst we do not completely agree with all the reasons given by the Judge below, we are overall in agreement with some of the important reasons and findings he made and in the result he arrived at.

15 We agree with the Judge that although the ASTD was never signed, the parties had accepted and agreed upon the ASTD by conduct. OTC was clearly an agent under the ASTD and the Investment Agreement. OTC would have owed fiduciary duties to the Appellant but only in the context of its powers and duties under the ASTD and Investment Agreement. We find that GY also owed fiduciary duties to the Appellant as cl 4.5 of the ASTD provided that OTC shall "exercise its duties, responsibilities and powers" through GY (there being no other person approved by the majority noteholders for this purpose). Clause 3.1(c) of the Investment Agreement also provided for GY to be the "Investor Director" in Midas and cl 3.1(d) provided that he was to be a co-signatory of the bank accounts opened for the purpose of the investments. In our view, GY owed fiduciary duties to the Appellant in the context of his role in exercising OTC's powers as well as his role spelt out in cll 3.1(c)–(d) of the Investment Agreement.

16 With respect, we do not agree with the Judge that the Respondents owed fiduciary duties to the Appellant in the context of dispensing advice and that they were engaged by the Appellant to advise on various aspects of his investment (see the Judgment at [146]). The ASTD did not impose such a duty and the evidence does not support such a finding. Further, the Appellant was an experienced businessman and in fact sought out this investment having made successful investments with the Respondents in the past. The Appellant made his own decisions and assessment of the investment prospects, and insofar as he relied on the Respondents, this was in the context of the roles and responsibilities dictated by the ASTD and the Investment Agreement, as set out above.

17 Further, while we agree with the Judge that the ASTD applied between the parties, we respectfully disagree with some of his views on the details of the ASTD. We do not agree with the Judge that cl 4.2(a) of the ASTD permitted OTC to act on the instructions of majority noteholders (see the Judgment at [151]). Clause 4.2(a) permitted OTC to *refrain* from exercising its powers until it has received majority noteholders' instructions. It is cl 4.1(d) that permitted, and indeed, compelled, OTC to act according to the instructions of the majority noteholders. We note the Respondents' reliance on cl 4.2(a) of the ASTD is mistaken. In any case, the Respondents' case below did not rely on the power to bind the Appellant based on the consent of the majority noteholders. Its case was that the Appellant consented to the change of the structure prior to signing the Trust Deed (see the Judgment at [145]). This can also be seen at para 66 of the Respondents' Closing Submissions at trial.

18 We pause to note that the Appellant claimed to have no knowledge of other investors at the time of his investment and even subsequently. Although nothing much turns on this, we do not think he is right. There were 12 other investors who made similar investments in the Project to the

aggregate sum of S$9.5m and US$4.94m. We note that in the 19 November 2013 Email, GY did state: "*Our consortium* will provide the mezzanine financing of RM50 million in SGD (S$20 million) and will arrange to get bank bridge financing for RM50 million (with the mortgage over land and building) to complete the acquisition and pay for the retrofitting costs" [emphasis added]. We doubt whether the Appellant, given his business experience, would have overlooked this email. The significance of this fact is that it was unrealistic, indeed incorrect, for the Appellant to expect the Respondents to place his interest above all the other noteholders.

19 The Judge also stated that cl 4.4 of the ASTD allowed OTC to construe its interests alongside interests of noteholders. To the extent that the Judge found that this clause meant that OTC, *as agent*, did not have to put the noteholders' interest above its own *in general*, we do not agree. As a general proposition, an agent cannot put itself in a position of conflict with its principal's interests. This is part of the fundamental duty of loyalty owed by an agent: Tan Cheng Han, *The Law of Agency* (Singapore Academy of Law, 2nd Ed, 2017) at para 7.047. While this duty can be attenuated or even displaced by the provisions of the underlying contract governing the relationship: see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206, attention must be paid to the specific contractual provision in question. All that cl 4.4 of the ASTD provided was that if OTC became a noteholder, it would have the

> same rights, liabilities and powers as any other [n]oteholder under the [Investment] Agreement, and all the transactions and documents contemplated thereunder, as though it were not also acting as agent or security trustee for the [n]oteholders.

There is no indication that OTC ever became a noteholder under the Investment Agreement, so this provision was of no relevance to the present dispute. In any event, the scope of cl 4.4 of the ASTD was restricted to maintaining the "rights, liabilities and powers" OTC would have as a noteholder – it was therefore only relevant to the exercise of those rights and powers and did not have the broader effect of altering OTC's duties as agent otherwise.

20 We find that by terminating the Investment Agreement, discharging the Security Documents and agreeing to an effectively open-ended payment date and altering the structure of the Appellant's investment so fundamentally without his consent, the Respondents were in clear breach of their duties to the Appellant. However, as we have referenced above, when this restructured deal was presented to the Appellant, he did not sign the Trust Deed immediately. He made his queries, he spoke to GY and, after that, he signed the Trust Deed, thereby signifying his agreement to these fundamental changes in the structure of his investment.

21 We note that although the Appellant's affidavit of evidence-in-chief ("AEIC") stated that he has a rudimentary knowledge of the English language and communicates mainly in Bahasa Indonesia, and whilst he testified at trial that his grasp of the English language was not that strong and he relied on his staff to explain matters to him in Bahasa Indonesia, he agreed under cross-examination that he understood the documents that he had signed. We note in any case that the Appellant did not run a defence that he did not understand what he had signed. We also note that the Respondents alleged in their pleadings that the Appellant is a "sophisticated and experienced investor". This was not denied by the Appellant in his Reply. The Appellant himself stated in his AEIC that he is a businessman and investor. As noted above, he has also been involved in two prior deals with the Respondents, investing in Yang Kee Logistics Pte Ltd and W Atelier Logistics Pte Ltd for S$1.5m and S$2.04m respectively.

22 It is clear to us that by signing the Trust Deed, the Appellant waived the breaches of fiduciary duties committed by the Respondents. By doing so, the Appellant also gave his informed consent to

the fundamental changes in the structure of his investment, which amounted to a ratification of the breaches committed by the Respondents. Even though the Appellant did not know of the July 2014 MOA and the 18 August 2014 Letter at that stage, he clearly knew the material facts that could be found in those documents. The Appellant signed the Trust Deed knowing that (a) OTC had become a majority shareholder in Midas; (b) his investment was no longer secured as the Security Documents had been discharged; and (c) there was no longer a fixed maturity date, as he conceded during cross-examination. Indeed, the Appellant was "prepared to live with a non-fixed maturity date" as long as the return was eventually paid.

23 While the Appellant relied on *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 at [91]–[92] to distinguish between ratification of a transaction and ratification of breaches of fiduciary duties, we do not think that this distinction assists him on the present facts. Having regard to the nature of the Trust Deed and the evidence concerning what the Appellant knew at the time, and in the light of the Appellant's conduct when he discovered the facts underlying the breaches of fiduciary duties, we conclude that the Appellant was in fact releasing the Respondents from liability for what had already been done.

24 For the foregoing reasons, we agree with the conclusion of the Judge in dismissing the Appellant's claims against the Respondents. The appeal is therefore dismissed.

25 Having heard counsels' submissions on costs, we award costs to the Respondents fixed at $36,000 (all-in). There will be the usual consequential orders.

26 It leaves us to thank counsel for their helpful and focussed submissions.