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3. AGENCY AND PARTNERSHIP LAW

AGENCY LAW

Pearlie **KOH**
LLB (Hons) (National University of Singapore),
LLM (University of Melbourne);
Advocate and Solicitor (Singapore);
Associate Professor, Yong Pung How School of Law,
Singapore Management University.

3.1 An agent is generally thought to stand in a fiduciary position *vis-à-vis* his principal because he wields the power to affect the principal's legal relationship. Thus, an agent is subject to fiduciary obligations independently of any contract that might subsist between the parties. Nevertheless, as Lord Browne-Wilkinson noted in *Kelly v Cooper*:[1]

> [A]gency is a contract made between principal and agent; … [L]ike every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract.

3.2 The effect that contract terms have on the general fiduciary obligations imposed by equity on agents was considered in *Tonny Permana v One Tree Capital Management Pte Ltd*.[2] As Chan Seng Onn J observed, much of the contemporary case law in agency law has been concerned with the question of an agent's authority. The case therefore gave the court the opportunity to "reiterate and clarify the law of agency in Singapore, specifically on how one should engage in an analysis of an *agent's duties*" [emphasis in original].[3]

3.3 The suit was brought by Permana, an Indonesian businessman and investor, against One Tree Capital Management Pte Ltd ("OTC"), a Singapore-incorporated investment fund manager, and GY, its director and sole shareholder. The dispute arose out of Permana's investment in a project to develop a shopping mall ("the Chinamall Project") undertaken by Midas Landmark Sdn Bhd ("Midas"). Permana's investment was arranged by OTC. The investment was initially structured as secured convertible debt which was issued by Midas to Permana as well as

1 [1993] 1 AC 205 at 213–214.
2 [2021] 5 SLR 477 (HC); [2021] 2 SLR 1103 (HC(A)).
3 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [90].

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several other investors. The General Division of the High Court ("High Court (General Division)") held that the relationship between OTC and Permana was one of agency and governed by the terms of an agreement which the court found had been accepted by Permana by conduct ("the agency agreement"). This finding was affirmed by the Appellate Division of the High Court ("High Court (Appellate Division)"). Interestingly, the High Court (General Division) appeared to have also considered *GY* to be Permana's agent even though he was not technically a party to the agency agreement.

3.4 However, subsequently and without first informing Permana, OTC agreed with the developers to convert the form of the investment into an unsecured shareholder's loan provided by *OTC*, which consequently became the shareholder and lender to Midas. Any claims out of the investment against Midas would, however, be held by OTC on trust for Permana on terms governed by a trust deed ("the trust deed") which superseded the earlier agency agreement. On the evidence, Permana agreed to and did sign the trust deed. Both the General and Appellate Divisions of the High Court held that, in signing the trust deed, Permana had given his informed consent to the change in the investment structure. The Chinamall Project ultimately failed, and Midas was placed in liquidation. Permana submitted a proof of debt with regard to the shareholder loan, which was rejected by Midas's liquidator. Shortly thereafter, Permana commenced proceedings against OTC and GY asserting, *inter alia*, breach of "duties as agent" and of fiduciary duties.

3.5 Permana's claims were dismissed by the High Court (General Division). Although the agency agreement had been discharged by the trust deed, this did not terminate the agency relationship between the parties as OTC and GY had continued to advise Permana. OTC and GY therefore owed Permana and continued to owe him, after the discharge of the agency agreement, various duties as his agents. The High Court (General Division) held, however, they had not, on the facts, breached any of these duties.

3.6 The High Court (Appellate Division) dismissed Permana's appeal, agreeing with the High Court (General Division)'s conclusion albeit on different grounds. The appellate court held that the defendants were in "clear breach"[4] of their duties to Permana when they agreed with the project developers to fundamentally alter the structure of his investment without first obtaining his consent. However, in signing the trust deed, Permana had "waived the breaches of fiduciary duties"[5] committed by

4 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [20].
5 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [22].

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the defendants and given his informed consent to the changes to his investment. Specifically, the appellate court held that Permana's informed consent "amounted to a ratification of the breaches committed by [the defendants]".[6]

3.7 The judgments of both the General and Appellate Divisions of the High Court raise several points of note.

I. Defining "agency"

3.8 First, what defines "agency"? In the High Court (General Division), Chan J had observed that the *legal* term "agent" was neither homogenous nor monolithic, but that "in a general sense, [it] simply refers to a relationship, often undergirded by a contractual agreement, where one party is able to *act for* another party" [emphasis in original].[7] However, merely being able to act for another is, of course, insufficient to constitute an agency relationship in the strict legal sense – what is crucial is the agent's power to affect the legal relations of his principal.[8] It is *because* the agent is vested with this power that the law deems it necessary to protect the principal by subjecting the agent to fiduciary obligations. His Honour was clearly appreciative of this, stating:[9]

> As a result of being able to act for his/her principal, and thereby influence his/her principal's position and interests, the law imposes various duties on agents. These duties arise for the protection of the principal, who often reposes trust and confidence in the agent.

3.9 On the facts, the High Court (General Division) had concluded that the defendants clearly had the authority to "contract for and on behalf" of Permana.[10] The court found that such authority was, however, limited as OTC was empowered under the terms of the agency agreement to bind Permana (as well as the other investors) as long as a majority of the investors agreed. Without such consent, OTC would require Permana's written approval before it could commit Permana to any act in connection with the investment. Such authority, however, did not extend beyond the duration of the agency agreement. The agency relationship that survived the discharge of the agency agreement was thus based on the defendants' authority to "[dispense] advice to [Permana] and [provide]

6 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [22].
7 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [91].
8 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2018) at para 1-001.
9 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [91].
10 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [141].

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timely information on the status of his investment in the Chinamall Project".[11]

3.10 The High Court (Appellate Division), however, took a different view of the ambit of the agency agreement. The appellate court held that, as Permana's agent, OTC certainly owed fiduciary duties to Permana but only in the context of its powers and duties under the agency agreement. These duties would appear, however, to be confined to the timely conveyance to Permana of any information received from Midas concerning the investment and to promptly notify Permana of any matter that might affect the latter's investment.[12] Contrary to the High Court (General Division)'s view, the High Court (Appellate Division) held that the agency agreement did not, on its terms, impose any obligation on the defendants to dispense advice. The High Court (Appellate Division) noted that Permana was:[13]

> … an experienced businessman … [who] made his own decisions and assessment of the investment prospects, and in so far as he relied on the [defendants], this was in the context of the roles and responsibilities dictated by the [agency agreement].

3.11 Both the General and Appellate Divisions of the High Court thus accepted that OTC was Permana's agent even though it had no authority to affect Permana's legal relations with others. Agencies such as these are termed "incomplete agencies"[14] because there is no *external* aspect to the agency relationship. The agency is premised wholly on the *internal* relationship between the agent and its principal, but because such agents may act in a capacity which may involve the principal reposing trust and confidence in the agent, as in the present case, the agent may nevertheless be subject to the fiduciary duties of agents generally.

3.12 As noted above,[15] the High Court (General Division) had, in its judgment, seemingly assumed that GY was also an agent for Permana even though the agency agreement explicitly provided for only OTC to be appointed "as the agent".[16] Although the High Court did not explain the basis of this assumption, the High Court (Appellate Division) explicitly stated that fiduciary duties were also owed by GY because the agency

11 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [140].
12 See the High Court (General Division)'s extract of the terms of the agency agreement in *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [120].
13 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [16].
14 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2018) at para 1-020.
15 See para 3.3 above.
16 See the High Court (General Division)'s extract of the terms of the agency agreement in *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [120].

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agreement 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)".[17] Without holding that GY was also Permana's agent, the appellate court opined that "GY owed fiduciary duties to [Permana] in the context of his role in exercising OTC's powers".[18]

3.13 With respect, this is a difficult point. The party to, *inter alia*,[19] the agency agreement was OTC and not GY. It is of course trite that even though GY was the sole shareholder and director of OTC, OTC was nonetheless possessed of a separate legal personality and legal existence. The fact that GY had to exercise OTC's powers was a function of OTC being a *persona ficta*,[20] with no ability to act without the intermediation of human actors. In and of itself, therefore, that fact alone cannot be sufficient to impose liability on GY. To accept so would undermine the time-honoured *Salomon* principle,[21] with significant consequences for directors and shareholders of companies involved in the business of providing intermediary or advisory services.

II. Agency and contract

3.14 Secondly, is agency more than contract? Agency, it has been said,[22] is a relationship of a "special kind", one which "imports an undertaking by one to act in the interests of the other rather than his own". The law thus supervises the agent's conduct by imposing fiduciary duties on him. Chan J had opined that the fiduciary duties owed by the agent may be modified by the agency contract. Whilst this is apparently

17 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [15].

18 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [15].

19 It should also be pointed out that there were other agreements that governed Permana's investment in Midas, including an "investment agreement" which was executed by OTC as "Agent", Midas as "Borrower", and the project promotors as "Guarantors": *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [20]. The High Court (Appellate Division) had also relied on the terms of the investment agreement, which provided for GY to be "Investor Director" in Midas and for him to be a co-signatory of bank accounts opened for the purpose of the investment, to support its conclusion that GY owed fiduciary duties to Permana: see *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [15]. It does not, however, appear that GY was a party to the investment agreement. Accordingly, his individual involvement was purely necessitated by the fact that OTC was an incorporated entity.

20 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506.

21 *Aron Salomon v A Salomon & Co* [1897] AC 22.

22 Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2018) at para 6-035.

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generally accepted,[23] the question is whether such modification may be so extensive as to *wholly exclude* the agent's fiduciary duties. Chan J was of view that this was possible:[24]

> [E]ach unique agency relationship will be accompanied by distinct sets of rights and obligations. It is not the case that every agent will owe, for example, fiduciary duties. In principle, the fact that fiduciary duties may be modified by the agency contract or *even completely excluded would mean that situations of agency can and will involve agents that do not owe fiduciary duties*. [emphasis added]

3.15 With respect, this is an unsettled point. The authority cited[25] for the above proposition was Lord Upjohn's statement in *Boardman v Phipps*[26] that:[27]

> … [t]he facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position.

3.16 It is, however, important to have regard to the context for Lord Upjohn's statement – his Lordship was concerned with imposing fiduciary obligations on defendants who were "never in fact agents".[28] In such cases, where the parties do not fall within established categories of fiduciaries, fiduciary obligations may yet arise if *the nature of the relationship* is such as to give rise to fiduciary obligations. Thus, in *SM Trading Services v Intersanctuary Ltd*,[29] Judith Prakash J found that an individual, who was neither a director in the company nor its lawyer, nevertheless stood in a fiduciary relationship *vis-à-vis* the company because he was:[30]

> … so actively involved in running [the company's business] and advising [the company] on the proper management of the business. [The company] was therefore entitled to [that individual's] loyalty and to expect that he would act in good faith and would not make a profit out of his position or act for his own benefit without the consent of the defendant.

23 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206.
24 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [94].
25 His Honour had referred to Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) at para 07.036.
26 [1967] 2 AC 46.
27 *Boardman v Phipps* [1967] 2 AC 46 at 127.
28 *Boardman v Phipps* [1967] 2 AC 46 at 126.
29 [2006] 3 SLR(R) 39.
30 *SM Trading Services v Intersanctuary Ltd* [2006] 3 SLR(R) 39 at [79].

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This is a conclusion on the facts, and the casting of the relationship as a fiduciary one resulted from the nature of the specific relationship between the parties. As Paul Finn noted:[31]

> [The] courts have not limited fiduciary relationships to those presumed as a matter of law. They can arise *ad hoc* because in the actual circumstances of a relationship the requisite ascendancy or trust has in fact been obtained, or given, or confidential information has in fact been acquired.

3.17 On the facts of the present case, it appeared to have been contemplated that OTC could itself also participate as an investor in the Chinamall Project as the agency agreement had explicitly provided that "[w]ith respect to its own participation as a Noteholder,[32] [OTC] shall have the same rights, liabilities and powers as any other Noteholder … as though it were not also acting as agent … for the Noteholders".[33] Although the learned judge concluded that, in so providing, the agency agreement did modify the scope of the fiduciary duties owed by OTC, such modification did not go so far as to permit OTC to prefer its own interests over those of Permana. His Honour stated:[34]

> I do not accept that [the agency agreement] allows the defendants' interests to wholly supersede the interests of the noteholders. This would defeat the very purpose of the agency agreement and the defendants' facilitative and advisory role in the investment. I accept, at best, that the defendants were allowed to construe their interests *alongside* the interests of the investors, with a view to making the investment in the Chinamall Project profitable for all. [emphasis in original]

3.18 The High Court (Appellate Division), however, disagreed with the High Court (General Division) as to the effect which the agency agreement had on OTC's fiduciary duties. In its view, neither the facts (there being no evidence that OTC ever became an investor) nor the terms of the agency agreement (which sought only to maintain such rights as OTC would have had as a noteholder and did not therefore affect OTC's duties as agent) justified the High Court (General Division)'s conclusion that OTC did not have to place the interests of Permana *above* its own. The appellate court stated:[35]

> 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 …. While this duty can be attenuated or even displaced by the

31 Paul Finn, *Fiduciary Obligations* (The Federation Press, 40th Anniversary Republication with Additional Essays, 2016) at p 729.
32 The "Noteholders" are the investors in the Chinamall Project, including Permana.
33 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [120].
34 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [152].
35 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [19].

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> provisions of the underlying contract governing the relationship … attention must be paid to the specific contractual provision in question.

3.19 Nevertheless, in suggesting that the fundamental fiduciary duty may be "displaced", as opposed to being merely "attenuated", by the underlying contract, the High Court (Appellate Division) appeared to agree with the High Court (General Division) on this particular point. In *Henderson v Merrett Syndicates Ltd*,[36] which the appellate court had cited as authority for its statement, Lord Browne-Wilkinson had stated:[37]

> Although an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly …. The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise.

3.20 While his Lordship's statement of principle contemplated contractual modification of an agent's fiduciary duties, it did not suggest the total contractual release of fiduciary fetters. Indeed, Lord Mustill noted in *Re Goldcorp Exchange Ltd*:[38] "[t]he essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself".[39] What this suggests is that if indeed the contract has so altered the nature of the purportedly agency relationship such that no fiduciary obligations are owed by the "agent", perhaps the better view is to conclude that that relationship is in fact not one of agency at all.[40]

III. Ratification

3.21 Thirdly, does the principal, in ratifying a transaction or act tainted by breach of fiduciary duties, simultaneously forgive the agent of that breach? On the facts of the present case, the High Court (Appellate Division) held that Permana had, by his single act of accepting the trust deed, also "ratified" the breach of duty committed by the defendants. In *Nordic International Ltd v Morten Innhaug*,[41] which Permana had relied on, the High Court (General Division) had emphasised that the "ratification of the transaction which was brought about by a breach of

36 [1995] 2 AC 145.
37 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206.
38 [1995] 1 AC 74.
39 *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98.
40 See Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2018) at para 6-035.
41 [2017] 3 SLR 957.

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fiduciary duty and 'ratification' of [that] … breach of duty" were different matters. As the court noted, "ratification" in the latter sense is "more appropriately understood as a 'release' from liability".[42] While the High Court (Appellate Division) in the present case appeared to accept the distinction, it opined as follows:[43]

> [W]e do not think that this distinction [between ratification of a transaction and ratification of breaches of fiduciary duties] assists [Permana] on the present facts. Having regard to the nature of the Trust Deed and the evidence concerning what [Permana] knew at the time, and in the light of the [Permana's] conduct when he discovered the facts underlying the breaches of fiduciary duties, we conclude that [Permana] was in fact releasing the [defendants] from liability for what had already been done.

3.22 With respect, the appellate court's conclusion on the facts must be correct. The breach of duty, as the court found, laid in the defendants agreeing to fundamentally alter Permana's investment without his prior agreement. Such alteration was, however, effected through the trust deed, which Permana accepted and signed. The defendants' breach of duty was therefore inextricably bound up with the trust deed such that the acceptance of the deed must also signify "ratification" of the defendants' breach.

3.23 The position would, however, be different if a third party was involved. May LJ's statement in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd*,[44] albeit in relation to companies and directors, is instructive:[45]

> It is well established … that a company is bound, in a matter which is *intra vires* and not fraudulent, by the unanimous agreement of its members or by an ordinary resolution of a majority of its members. However, I do not think that this line of authority establishes anything more than that a company is bound by the legal results of a transaction so entered into …. This, however, is very different from saying that where all the acts of the directors of a company … have been carried out by them as nominees for, at the behest and with the knowledge of all the members of the company, … then forever the company as a separate legal entity is precluded from complaining of the quality of those acts in the absence of fraud or unless they were *ultra vires*. If … the directors … did commit breaches of the duty of care that they owed that company, as a result of which it suffered damage, then … the company thereby acquired a cause of action against those directors in negligence. The fact that all the members of the company knew of the acts constituting such breaches, and indeed knew that

42 *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 at [91].
43 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 2 SLR 1103 at [23].
44 [1983] Ch 258.
45 *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 280.

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those acts were in breach of that duty, does not of itself in my opinion prevent them from constituting the tort of negligence against the company nor by itself release the directors from liability for it.

PARTNERSHIP LAW

Stephen **BULL**
BA, LLB (Hons) (Wellington), LLM (Harvard);
Solicitor (England and Wales), Barrister and Solicitor (New Zealand), Member of the New York Bar;
Associate Professor (Practice), Yong Pung How School of Law, Singapore Management University.

3.24 The courts handed down a small number of decisions dealing with partnership law issues in 2021.

I. Existence of partnership

3.25 Alone among business organisations, a partnership can be formed without any formality such as registration with a government authority[46] or other prescribed steps. It is implicit that the relationship of partnership arises from contract but there is no required form of contract or even a need for writing. All that the law requires is that the parties are "carrying on a business in common with a view of profit": s 1(1) of the Partnership Act 1890.[47] Such a broad definition is at first sight capable of describing many different business collaborations, and it is not always easy to decide whether a given factual relationship amounts to a partnership. However, it is often important and necessary to do so because, once established, partnership gives rise to clear and significant legal consequences, including the ability of one partner to bind the firm to a contract, the joint liability of the partners, and the duties that they owe each other.

3.26 It was the existence of these duties that was at stake in *Sng Jing Xiang Benjamin t/a Blink! Events & Entertainment v Xie Shun Heng*[48] ("*Sng v Xie*"). The facts perhaps illustrate how the ongoing fragmentation of traditional work patterns can cause difficulties in applying the partnership definition. The parties clearly had some sort of business

46 The requirement to register under the Business Names Registration Act 2014 (2020 Rev Ed) is a consequence of having formed a partnership, not a precondition to such formation.
47 2020 Rev Ed.
48 [2021] SGDC 248.

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collaboration but the way it operated in practice raised the question of whether there was a "business in common" which, as noted, is essential for a partnership to exist in law. The plaintiff, Benjamin Sng, had as sole proprietor built up an events and entertainment management business known as Blink! Events & Entertainment ("Blink") since 2005. Between 2007 and 2012, Sng had engaged the first defendant, Xie Shun Heng, a freelance master of ceremonies, to perform at many Blink-organised events. In December 2012, Sng and Xie, together with a third person ("Chee"), reached an oral agreement for collaboration and profit-sharing in events management. Thereafter, the three worked together until 2017 when the relationship broke down and Xie and Chee submitted "letters of termination". Following this, Sng brought proceedings against Xie and companies under Xie's control alleging, *inter alia*, breach of fiduciary duties as a partner. These breaches essentially comprised diverting business from Blink by pitching for business using Blink's name and using Blink's resources to execute the work but then causing invoices to be issued by entities owned by Xie which he represented to be affiliated with Blink.

3.27 Sng and Xie also established a company, Nova Artiste Management Pte Ltd ("Nova"), in 2014 as a talent management agency to source performers for Blink's events. In addition to the alleged partnerial duty breaches, Sng also claimed that Xie committed similar breaches of his fiduciary duties as a director of Nova. As Nova's majority shareholder, Sng caused Nova to bring an action against Xie in parallel with Sng's own action, and the judgment in *Sng v Xie* deals with both actions. However, the company law claim is beyond the scope of the present chapter.

3.28 The precise terms of the oral agreement were disputed, and the key issue was whether in law they gave rise to a partnership. While it was broadly agreed that profits would be shared on a per-project basis (for example, Sng would receive a 30% share of the profit on all projects, while each of the other two would receive a profit share on those projects introduced by them respectively or on Sng-introduced projects which they executed), Sng and Xie put forward different versions of the effect of the agreement. Sng characterised it as creating an "informal partnership" under Blink and in consequence each partner owed fiduciary duties to the others. In this partnership, Sng was the chief executive and Xie's role was as business development manager. Xie, on the other hand, argued that the oral agreement was a contract for services where he, as an *ad hoc* contractor, managed his own projects and retained "ownership" of his clients but shared fees with Blink (which remained Sng's sole proprietorship) in return for use of its office space and other services. Therefore, according to Xie, he remained free to carry out other projects outside Blink (and had done so) with Sng's implicit consent.

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3.29 In the liability phase of the trial, District Judge Tan May Tee found in favour of Sng, holding that the arrangement amounted to a partnership and that Xie had breached his partnerial fiduciary duties to Sng, and so was liable to account. (In the company law claim by Nova, Xie was similarly held to have breached his duties as a director). Many of the issues were factual, but a few points are worth mentioning from a partnership law perspective.

3.30 First, as there was no written agreement, the finding of partnership had to be based on the facts as found by the judge. This was not a paradigmatic partnership involving a well-defined business, co-ownership of capital and assets, and shared management. Blink started as Sng's sole proprietorship and such assets as it had – in particular, an office in an Aljunied warehouse unit – belonged to him: there was no suggestion that Xie or Chee had any beneficial interest of any kind in that, even though it was purchased in 2016, during the partnership. Nor were Xie and Chee involved in taking significant "partnership" decisions in the typical way – the overall management of the business was under Sng's control, with the role of the other two apparently focused on bringing in new projects and working on the execution of projects (whether introduced by themselves or by Sng). Those roles could, on appropriate facts, have been undertaken by persons who were not partners.

3.31 The finding of partnership was primarily based therefore on the sharing of profits, meaning in this case not the overall annual profits of Blink but only the profits arising under projects either introduced or worked on by Xie or Chee. While there was obviously no written definition of "profits", it does appear that it was intended to refer to the net profit (that is, after accounting for expenses) of each relevant project rather than simply to a commission on the amount charged to the client.[49] The concept of partnership is flexible enough to include, in appropriate circumstances, the sharing of the profits of part of a business.

3.32 The judge further accepted that profit-sharing was not in any event essential for a finding of partnership, relying on the English Court of Appeal decision of *M Young Legal Associates Ltd v Zahid*[50] ("*M Young Legal Associates*"). This proposition may well be correct but it was clearly *obiter* in *Sng v Xie*[51] since the court concluded, as noted above, that there was relevant sharing of profits. Indeed, had there not been a finding

49 Had it been the latter, the case for partnership would have been weaker as it is clear that the law focuses on whether net profits have been shared: see s 2(2) of the Partnership Act 1890 (2020 Rev Ed) which states that the sharing of gross returns does not of itself create a partnership.

50 [2006] 1 WLR 2562.

51 See para 3.26 above.

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of profit-sharing, it is doubtful whether the *M Young Legal Associates* principle could have been applied in *Sng v Xie* as profit-sharing was almost the only indicium of partnership on the facts. The cases where a partnership will be made out despite the absence of profit sharing will, it is submitted, be rare.

3.33 The other main support for the court's finding of partnership was that Xie had been represented to third parties to be a partner of Sng. The court highlighted a notable instance of this in a letter from Blink to the National Service ("NS") authorities seeking to defer Xie's reservist duties, which stated that Xie was "the business development manager … [who] plays an integral part of operations …. As a partner to the Company [*sic*], he would incur a substantial loss of income on an add-on commission-per-project basis".[52] According to the case law, the holding out of a person as a partner can be relevant evidence of the parties' intention to create a partnership. However, it has to be recognised that the words "partner" and "partnership" have become so commonplace in modern marketing/public relations-speak that they cannot always be assumed to be used in a precise technical sense. Even when found in a letter to a government authority (especially one not drafted by a lawyer), they are not necessarily meant to convey the strict legal meaning of partner, nor would the NS authorities necessarily read them in that way. By contrast, the *M Young Legal Associates* decision illustrates a context where a technical reading is appropriate. In that case, an experienced solicitor was admitted by a law practice as a "partner", but without a profit share, in order to enable the firm to meet the English Law Society's regulatory requirement to have a partner with sufficient expertise. The court held that the parties' intention was for him to be a partner in the strict legal sense and that this status had been achieved, despite his lack of a profit share. It is not clear that Xie's status as a partner or otherwise in particular would be crucial in the context of deferral of NS duties.

3.34 Having said that, in *Sng v Xie*, the NS deferment letter was not the only example of Xie being held out as a partner, and there was evidence that some clients had the impression that he was a partner. Taking all the facts into account, the judge held that Xie was a partner of Sng. The court went on to find that the diversions of business alleged by Sng had been proved; hence, Xie was in breach of fiduciary duty.

3.35 The same issue of the existence of a partnership arose on very different facts in the Singapore International Commercial Court ("SICC")

52 *Sng Jing Xiang Benjamin t/a Blink! Events & Entertainment v Xie Shun Heng* [2021] SGDC 248 at [57].

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in *The Micro Tellers Network Ltd v Cheng Yi Han*.[53] In brief, the plaintiffs were interested in purchasing an offshore bank and sought the assistance of the defendant, Then, a solicitor with a law firm called Walkers Solicitors ("Walkers"). According to the plaintiffs, in reliance on representations made by Then, they transferred over US$6m to a bank account which Then falsely represented to be owned and controlled by Walkers. Then also represented that there was an available bank to purchase for US$4m, and that he himself would be a "partner in the new venture". Ultimately, Then misappropriated the sums involved. The plaintiffs sued Then (among others) primarily in the tort of deceit; however, they also claimed that an implied partnership had arisen between them and Then and that his actions had breached his partnerial fiduciary duties.

3.36 Simon Thorley IJ in the SICC upheld the claims in deceit. However, the claim for breach of partner's duty was dismissed as no partnership had arisen.[54] The proposed transaction was the purchase of a banking company in which Then had agreed to take a 15% shareholding. Thorley IJ stated that the business in question (for purposes of the s 1(1) definition of "partnership") was the running of the offshore bank. While a partnership can arise before the commencement of trading, there must be an identifiable joint enterprise.[55] Then's activities simply amounted to being a proposed investor and providing legal services, which did not constitute a relevant joint enterprise.

3.37 It might be added that a company *per se* cannot be a partnership: see s 1(2) of the Partnership Act. Where the "joint enterprise" intended by the parties is to be conducted by a company, preliminary steps taken to establish or acquire it will amount to a partnership only in unusual cases.[56]

II. Dissolution of partnership

3.38 *Brian Ihaea Toki v Betty Lena Rewi*[57] ("*Toki v Rewi*") was an appeal from the High Court's decision noted in last year's review.[58] The appellants, a married couple, had formed a partnership with the respondents, another married couple, to own and operate a charter business for an escort vessel known as the MV *Ngata Haka* ("the Vessel").

53 [2021] 5 SLR 328.
54 *The Micro Tellers Network Ltd v Cheng Yi Han* [2021] 5 SLR 328 at [122]–[128].
55 Although Simon Thorley IJ did not cite it, authority for such proposition is found in *Khan v Miah* [2000] 1 WLR 2123.
56 See *Keith Spicer v Mansell* [1970] 1 WLR 333.
57 [2021] SGCA 37.
58 (2020) 21 SAL Ann Rev 87 at 97.

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The appellants had a 60% share, and the respondents a 40% share, in the partnership. The Vessel was registered in the name of, and the business was managed by, a company ("VOM") owned and controlled by the appellants. However, following the breakdown of the relationship between the two couples, the partnership was consensually dissolved in October 2013. It was then agreed that the appellants would put the Vessel up for sale through VOM. In the meantime, the appellants continued to charter out the Vessel, though without the express consent of the respondents. An independent valuation report was obtained in 2014 which valued it at US$845,000. Shortly after that, an offer was received from a Nigerian party for US$1.2m, but the appellants had an asking price of US$2.2m, or at least US$1.8m to continue negotiations, and the offer fell through. The market for such vessels continued to fall, and the Vessel was eventually sold in September 2017 for US$790,000. The respondents consented to the sale but without prejudice to their right to contest the price, and in 2018 they brought proceedings against the appellants for breach of their partnerial duties. The High Court found for the respondents, holding, first, that the post-dissolution charters had been made without authority and, second, that the appellants had breached their duties in relation to the sale of the Vessel. The appellants appealed against the judge's decision on the second ground only.

3.39 The Court of Appeal dismissed the appeal in a short oral judgment. The question was whether the appellants had breached their duty of care, that is, to use all diligence to secure the best price reasonably obtainable for the Vessel in the circumstances. The court rejected the appellants' stance of holding out for a higher price than the US$1.2m offer by arguing that the Vessel came with ongoing charters and could also be upgraded to fetch a higher price. The appellants' valuation evidence was also out of date and speculative. Finally, although the respondents had not pleaded breach of fiduciary duty, the Court of Appeal accepted the trial court's finding that the appellant's decision to reject the US$1.2m offer was influenced by their belief that keeping the Vessel out on charter would benefit them more through continuing to earn both charter hire and also fees for VOM's related services.

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