Koh Chong Chiah and others *v* Treasure Resort Pte Ltd
[2013] SGCA 52

Case Number	: Civil Appeal No 36 of 2012
Decision Date	: 01 October 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Koh Swee Yen, Paul Loy and Benjamin Fong (WongPartnership LLP) for the appellants; Adrian Tan and Jackson Eng (Drew & Napier LLC) for the respondent.
Parties	: Koh Chong Chiah and others — Treasure Resort Pte Ltd

Civil Procedure – Representative Proceedings

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 1069.]

1 October 2013 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 The present appeal raises the question of the scope and application of O 15 r 12(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"), which concerns when a representative action may be brought.

The facts

Background to the originating suit

2 The suit from which this appeal arises, Suit No 849 of 2009 ("Suit 849"), was commenced pursuant to O 15 r 12(1) of the Rules of Court ("O 15 r 12(1)") by seven persons, *viz*, Koh Chong Chiah, Soh Kah Wah alias Vincent Leow, Ong Hong Poh Cecilia, Yip Kum Thong, Tsu Pei Yuke, Yeo Choon Hock Christopher and Rozario Roland Charles ("the Representative Plaintiffs"), on behalf of themselves as well as 202 other persons listed in Schedule 2 of the Statement of Claim (Amendment No 2) dated 9 April 2012 ("SOC No 2"), all of whom were members of Sijori Resort Club, Sentosa ("the Club"). The Representative Plaintiffs are the appellants in the present appeal. In this judgment, we shall refer to the 202 persons listed in Schedule 2 of SOC No 2 as "the Represented Persons", and to the Representative Plaintiffs and the Represented Persons collectively as "the Claimants".

3 Treasure Resort Pte Ltd ("Treasure") is the first defendant in Suit 849 and the respondent in the present appeal. Colony Members Service Club Pte Ltd ("Colony") is the second defendant in that suit, but it is not a respondent in this appeal. Both Treasure and Colony are subsidiaries of Maxz Universal Development Group Pte Ltd.

4 The land on which the Club's premises and facilities are situated ("the Land") was leased by Sentosa Development Corporation ("SDC") to Sijori Resort (Sentosa) Pte Ltd ("Sijori") for a period of 81 years until 2075 pursuant to a building agreement dated 21 October 1994 ("the Building Agreement").

5 Between 1994 and 2004, Sijori, through various means, including brochures, marketing agents and tie-ups with credit card companies, invited the public to apply for membership of the Club. Individuals who wished to become Club members had to submit a membership application form and pay an entrance fee to Sijori. There were eight different versions of the membership application form (numbered "M1" to "M8" in Schedule 3 of SOC No 2) in use during that period to enable the public to apply for Club membership. [note: 1] The entrance fees paid by Club members ranged from $10,000 to $25,750. Club members also had to pay a monthly subscription fee of $30 for an individual membership and $50 for a family membership.

6 On 26 January 2006, Sijori sold the Club to Treasure pursuant to an option to purchase of the same date ("the OTP"). [note: 2] Under the terms of the OTP, Sijori also granted Treasure an option to purchase the property on the Land. Clause 2(g) of the OTP provided as follows in relation to the status of the Club members: [note: 3]

> [Treasure] agrees to offer to members of [the Club] who have contracted with [Sijori], a new contract of membership on substantially the same terms and conditions which they (the members) have entered into with [Sijori]. *Provided always, [Treasure] shall be at liberty to impose such other terms and conditions as [Treasure] shall deem fit for such membership and for the avoidance of doubt [Treasure] shall in its own discretion decide which of such members it will make the aforesaid offer to. In the event the members do not accept the offer by [Treasure], [Treasure] shall have no further liability to the said members under this clause.* [emphasis added]

In July 2006, Sijori and Treasure agreed to amend cl 2(g) of the OTP by deleting the words in italics above. [note: 4]

7 The sale was subject to the novation of the Building Agreement to Treasure in order for it to operate a hotel on the Land. On 14 November 2006, Treasure, Sijori and SDC signed a deed of novation under which Treasure became the new lessee of the Land and agreed to perform the Building Agreement in place of Sijori. On the same day, Treasure and SDC also entered into a supplemental agreement under which SDC leased to Treasure a piece of land adjacent to the Land ("the Additional Land"), and Treasure further agreed to redevelop the existing property on the Land and the Additional Land into a hotel development.

8 On 16 November 2006, Sijori and Treasure concluded a membership management transfer agreement ("the Transfer Agreement") covering the Club members, which then numbered approximately 1,591. The Transfer Agreement was expressed to be "supplemental to the conditions stated in [the OTP] with reference to membership concerns". [note: 5] Pursuant to the Transfer Agreement, Treasure agreed to take over the management of the Club's membership with effect from 16 November 2006, and also to accord "substantially similar terms and conditions of membership" [note: 6] to the Club members with reference to certain membership privileges, including complimentary room vouchers for three nights yearly and free use of the swimming pool and the gymnasium.

9 Pursuant to cl 11 of the Transfer Agreement, on 16 December 2006, Treasure wrote to inform all the Club members that (*inter alia*):

(a) it was the new owner of the Land;

(b) Club members would be able to continue enjoying the membership privileges accorded to

them under their existing membership with the Club as long as they continued to pay their monthly subscription fees to Treasure;

(c) the membership privileges which Club members would continue to enjoy included all existing benefits extended to them when the Club was owned by Sijori; and

(d) Treasure would correspond with the Club members in due course and was "making the necessary paperwork arrangements for the transfer to be completed by end January 2007". [note: 7]

On 18 December 2006, Sijori sent a letter with broadly similar contents to the Club members. [note: 8]

10 On 27 December 2006, Treasure wrote to inform the Club members to direct their monthly subscription fees to it with effect from January 2007. [note: 9] Accordingly, from January 2007 onwards, the Club members, including the Representative Plaintiffs, made payment of their monthly subscription fees to Treasure.

11 On 4 February 2008, Treasure wrote to inform the Club members, including the Representative Plaintiffs, of an offer of a new Club membership contract through Colony in lieu of their existing Club membership contracts. [note: 10] The offer and the terms of the new Club membership contract were set out in Colony's letter of the same date to the Club members. Amongst the changes, the monthly subscription fees under the new Club membership contract would be $165 for an individual membership and $275 for a family membership, a more than five-fold increase from the original monthly subscription fees (see [5] above). Club members were given until 5 March 2008 to accept the offer; they were also informed that those who rejected the offer would not be entitled to any rights and privileges as a member of Colony, and would have to look to Sijori for any recourse.

12 Eventually, on 12 October 2009, the Representative Plaintiffs, on behalf of themselves and 198 Club members, filed Suit 849 against Treasure and Colony. Of the causes of action pleaded in the Representative Plaintiffs' Statement of Claim dated 12 October 2009 ("the Original SOC"), those which are material for the purposes of this appeal are the following:

(a) *vis-à-vis* Treasure – breach of contract, repudiation of contract and misrepresentation; and

(b) *vis-à-vis* Treasure and Colony jointly – conspiracy to injure.

In respect of their contractual claims, the Representative Plaintiffs alleged that from January 2007 onwards, Treasure acted in breach of the terms of the Club members' membership agreements with Sijori ("the Original Membership Agreements"), which membership agreements had been novated to Treasure (the Original Membership Agreements will be referred to as "the Novated Membership Agreements" after their alleged novation to Treasure). The Representative Plaintiffs further pleaded that on or around 4 February 2008, Treasure, by reason of (*inter alia*) its letter of the same date to the Club members, repudiated the Novated Membership Agreements. With regard to their claim for misrepresentation, the Representative Plaintiffs pleaded that Treasure made the representations set out at [9(b)]–[9(d)] above ("the Representations") fraudulently; they also relied on s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) in the alternative. As for the claim based on conspiracy to injure, that was based on Treasure's alleged breach and repudiation of the Novated Membership Agreements as well as the matters outlined at [11] above. The Original SOC was later amended on 2 December 2009 to add four more persons to the list of Club members set out in Schedule 2.

13 As we see it, the reliefs sought in respect of the above causes of action are, in brief:

(a) a declaration that each of the Claimants is entitled to damages (to be assessed separately at the assessment of damages stage) from Treasure for breach and repudiation of contract, as well as for misrepresentation; and

(b) a declaration that Treasure and Colony are jointly and severally liable to each of the Claimants in damages (likewise to be assessed separately at the assessment of damages stage) for conspiracy to injure by lawful or unlawful means.

Treasure's interlocutory applications

14 On 28 June 2010, Treasure filed Summons No 2965 of 2010 for an order that Suit 849 be discontinued pursuant to O 15 r 12(1) ("the Discontinuation Application"), and Summons No 2967 of 2010 for an order that certain paragraphs of the Representative Plaintiffs' then statement of claim (*viz*, Statement of Claim (Amendment No 1) dated 2 December 2009 ("SOC No 1")) be struck out ("the Striking-Out Application").

15 The same assistant registrar ("the AR") heard both applications and dismissed both of them in his decision issued on 27 June 2011. Dissatisfied, Treasure appealed against both decisions of the AR by way of Registrar's Appeal No 209 of 2011 ("RA 209") *vis-à-vis* the Discontinuation Application and Registrar's Appeal No 210 of 2011 ("RA 210") *vis-à-vis* the Striking-Out Application. The same High Court judge ("the Judge") heard both appeals. She allowed RA 209 in full, and allowed RA 210 in so far as while she did not grant the relief prayed for in the Striking-Out Application, she ordered the Representative Plaintiffs to amend those paragraphs of SOC No 1 which were the subject matter of that application. The result is that as the Judge's decision currently stands, Suit 849 will not continue as a representative action.

The decision below

16 As the Representative Plaintiffs appealed to this court only in respect of the Judge's decision in RA 209, the Judge's written grounds of decision, *Koh Chong Chiah and others v Treasure Resort Pte Ltd and another* [2013] 1 SLR 1069 ("the GD"), dealt with that registrar's appeal alone. In brief, the Judge held that the Representative Plaintiffs were unable to show that the Claimants had the requisite "same interest in [the] proceedings", an essential prerequisite stipulated in O 15 r 12(1) for the institution of a representative action. The Judge noted that the Claimants became Club members at different times and under different arrangements (see the GD at [31], [41] and [63]), having signed different versions of the membership application form whose terms were not identical. The membership benefits accorded to each Claimant thus differed, depending on the specific version of the membership application form which he or she had signed (see the GD at [41]). The Judge rejected the Representative Plaintiffs' pleaded case that the Claimants' entitlement to membership benefits was based on either express and/or implied terms as this would have, in her view, placed Treasure in an invidious position (see the GD at [30]).

17 The Judge further found that the Representative Plaintiffs' contention that Treasure had denied the Claimants their membership privileges and thereby breached the Novated Membership Agreements was fraught with difficulty as the Claimants were relying not on one, but on a number of defaulting incidents which were not common to all of them (see the GD at [35]). Addressing the specific alleged breach arising from Treasure's non-provision of complimentary room vouchers between January 2007 and February 2008, she held that if an individual Claimant had not even attempted to make use of his or her complimentary room vouchers, he or she would have no basis to be party to the complaint of

being denied this particular membership privilege.

18 Further and related to the lack of commonality in the circumstances of Treasure's alleged breaches of the Novated Membership Agreements was the Judge's concern that Treasure would be deprived of defences specific to each defaulting incident. She noted, for instance, that where a particular Claimant was denied a complimentary room stay because of renovation works at the Club or a lack of room availability, Treasure could raise the defence that the complimentary room stay was subject to room availability (see the GD at [38]).

19 The Judge also briefly considered the Representative Plaintiffs' misrepresentation claim and noted the difficulties faced by the Representative Plaintiffs in establishing that the Representations (as defined at [12] above) had indeed been made by Treasure to all the Claimants. Difficulties as to proof also existed *vis-à-vis* whether the Claimants had in fact relied on the Representations, and if so, to what extent (see the GD at [42]).

20 Finally, the Judge held that for Suit 849 to proceed as a representative action, each and every one of the Claimants must have suffered "the same loss or … an identical loss to the same extent" (see the GD at [43]). She opined that a representative action would clearly be unsuitable as, should the Representative Plaintiffs succeed, each Claimant would have to return to court to prove individually the damages or loss which he or she had suffered as a result of Treasure's breach and repudiation of contract and/or misrepresentation (see, likewise, [43] of the GD).

21 For the above reasons, the Judge allowed RA 209, thereby discontinuing Suit 849 as a representative action, albeit without prejudice to each of the Represented Persons commencing a separate action in his or her own right in either the High Court or the Subordinate Courts (see the GD at [3]).

The parties' submissions in this appeal

22 We turn now to the parties' submissions in this appeal. In brief, the Representative Plaintiffs (the appellants in this appeal) submit that the Judge erred in law and in fact in discontinuing Suit 849 as a representative action for the following reasons. First, contrary to recent Commonwealth judicial pronouncements on provisions similar to our O 15 r 12(1), [note: 11] the Judge adopted a "fine-toothed comb" [note: 12] approach in determining if the "same interest in [the] proceedings" requirement in O 15 r 12(1) ("the 'same interest' requirement") had been met, and therefore failed to give sufficient weight to the underlying rationale and policy of that provision. [note: 13] Second, the Judge incorrectly found that: (a) the allegedly dissimilar terms of the various versions of the membership application form in use at the material time (*ie*, from 1994 to 2004) meant that there was a lack of common interest among the Claimants; [note: 14] and (b) such dissimilar terms were incapable of establishing commonality in a representative action. [note: 15] Thirdly, the Representative Plaintiffs submit that contrary to what the Judge held, there was sufficient generality in the alleged breaches of Treasure's obligations to the Claimants for a common grievance to be found. [note: 16] Finally, they submit that the declaratory reliefs sought will be beneficial to all the Claimants, [note: 17] and that the discontinuation of Suit 849 as a representative action will severely prejudice each of the Claimants. [note: 18]

23 In contrast, Treasure submits that the Judge's decision below is correct as the Representative Plaintiffs failed to establish that the claims set out in SOC No 2 gave rise to the same issues to be determined by the court as a matter of fact. [note: 19] First, Treasure submits that given the different

versions of the membership application form in use at the material time, the Claimants did not execute a common membership agreement [note: 20] and thus could not have a common interest. Second, Treasure contends that the Judge was correct in focusing on the circumstances surrounding the alleged breaches of Treasure's obligations to the Claimants as this was critical to the question of liability. [note: 21] Treasure emphasises that in the light of the different circumstances surrounding the alleged breaches, the Claimants cannot be claiming for the same breaches. Finally, Treasure submits that the Representative Plaintiffs failed to demonstrate how the Judge improperly exercised her discretion under O 15 r 12(1) to discontinue Suit 849 as a representative action. [note: 22]

24 The following issues therefore arise in relation to this appeal:

(a) the nature and extent of the "same interest" requirement in O 15 r 12(1);

(b) the nature of the court's discretion in O 15 r 12(1); and

(c) whether, on the facts of the present case, Suit 849 was properly commenced as a representative action, and if so, whether it should be allowed to proceed as such with regard to the Representative Plaintiffs' claims for breach and repudiation of contract, misrepresentation and conspiracy to injure.

The law on representative actions

Overview

25 We think it expedient to first address the nature of a representative action. In this regard, O 15 r 12(1) is germane:

> Where numerous persons have the *same interest* in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, *unless the Court otherwise orders*, continued, by or against any one or more of them as representing all or as representing all except one or more of them. [emphasis added]

For ease of reference, we shall, in discussing this provision, use the following terms where appropriate to the context:

(a) "representative plaintiff" to denote the plaintiff who seeks to bring a representative action;

(b) "representative defendant" to denote the defendant who is sued in a representative capacity;

(c) "represented persons" to denote the persons whom the representative plaintiff purports to represent;

(d) "represented defendants" to denote the persons whom the representative defendant purports to represent; and

(e) "claimants" to denote the representative plaintiff and the represented persons collectively (in the context of representative actions brought by representative plaintiffs).

We should also point out that as this appeal concerns a representative action brought by

representative plaintiffs against two defendants sued in their individual capacities (as opposed to against representative defendants), our discussion of O 15 r 12(1) will, unless otherwise indicated, be from the viewpoint of representative actions (brought by representative plaintiffs) which do not involve representative defendants.

26 Essentially, what is sought in a representative action is a final determination of the rights of all the claimants *vis-à-vis* the defendant and *vice versa* based *solely on the claims brought by the representative plaintiff and the defence raised by the defendant*. Therefore, all the claimants in a representative action will succeed or fail based on the strength of the case mounted by the representative plaintiff and the defence pleaded by the defendant. Order 15 r 12(3) further provides:

> A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

In the words of Jeffrey Pinsler SC, *Singapore Court Practice 2009* (LexisNexis, 2009) at para 15/12/1, "[t]he representative action was introduced so that persons interested in the proceedings could be directly involved, not by being parties themselves, but through representation". Hence, the "same interest" requirement is really the crux of O 15 r 12(1). But, as will be elaborated in a moment, this does not mean that the interests of the claimants must be *identical* in all respects before this requirement is met. The main thing is that the claimants must share some *common* interests in relation to a substantial question (or questions) of fact or law. That said, we ought to also underscore that a representative action should not be allowed to proceed where it is in reality a composite of completely disparate actions.

27 Order 15 r 12(1) also vests a residual discretion in the court to refuse to permit proceedings to be continued in the form of a representative action even where it is found that the claimants have the same interest in the proceedings. This discretion is apparent from the words "unless the Court otherwise orders" in the provision, and has been recognised in various common law authorities including *J Bollinger SA and Another v Goldwell Limited* [1971] RPC 412, which considered the application of O 15 r 12(1) of the Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("RSC 1965 (UK)"), a provision *in pari materia* with our O 15 r 12(1). In that case, Megarry J stated (at 420):

> … The power to bring representative proceedings is a beneficial power, as tending to finality in disputes and I would not readily curtail it: but there must be an overriding consideration, namely, whether the proceedings are of a nature which is suitable for such proceedings. That suitability will normally be established where for the purposes of the dispute the three-fold test of common interest, common grievance and a remedy beneficial to all is satisfied: but I do not think that this necessarily suffices in every case. … *The words "unless the court otherwise orders" seems to me to contemplate that even if the numerous persons have the same interest, the court has a discretion to refuse to permit the proceedings to be continued in the form of a representative action*. [emphasis added]

28 In the Australian High Court case of *Carnie and another v Esanda Finance Corporation Limited* (1995) 182 CLR 398 ("*Carnie*"), a representative action was brought under Part 8, r 13(1) of the Supreme Court Rules 1970 (NSW) ("the 1970 NSW Rules"), a provision materially similar to our O 15 r 12(1). Part 8, r 13(1) of the 1970 NSW Rules provided as follows:

> Where numerous persons have the same interest in any proceedings the proceedings may be

commenced, and, unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them.

McHugh J noted (at 427):

> In my opinion, a plaintiff and the represented persons have "the same interest" in legal proceedings when they have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings. *Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for the exercise of discretion, not jurisdiction*. [emphasis added]

29 Therefore, O 15 r 12(1) operates in **two stages** – a jurisdictional stage, followed by a discretionary stage. At the first (jurisdictional) stage, the threshold requirement that the claimants have the same interest in the proceedings (*ie*, the "same interest" requirement) must be met. It is only after the "same interest" requirement is met and the representative action properly commenced that we come to the second (discretionary) stage. At this stage, the court may exercise its discretion to discontinue the proceedings in question as a representative action where the overall circumstances of the case so justify.

The origin and rationale of O 15 r 12(1)

30 Any inquiry into the nature and scope of O 15 r 12(1) must necessarily be informed by an understanding of its history and the policy behind it. This is a matter which we shall now consider.

31 Representative actions were first developed by the Courts of Chancery in response to the injustice arising from the insistence that all the parties interested in the outcome of a case must be joined in the proceedings. As explained by Lord Macnaghten in the seminal English case *The Duke of Bedford v Ellis and Others* [1901] AC 1 ("*Bedford*") at 8:

> … The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. *But when the parties were so numerous that you never could "come at justice", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed*. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. … [emphasis added]

Following the Supreme Court of Judicature Act 1873 (c 66) (UK) ("the 1873 UK Act"), the representative action rule which existed in the Chancery Courts was extended to common law actions through r 10 of the Rules of Procedure set out in the Schedule to the 1873 UK Act, which rule was subsequently replaced by O 16 r 9 of the Rules of the Supreme Court 1883 (UK) ("RSC 1883 (UK)"). The latter rule remained in force until it was replaced by O 15 r 12(1) of the Rules of the Supreme Court (Revision) 1962 (SI 1962 No 2145) (UK), which in turn subsequently became O 15 r 12(1) of RSC 1965 (UK).

32 Given the equitable origin of O 15 r 12(1), we are of the view that its application should be broad and flexible. The words of Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd and Others* [1981] 1 Ch 229 ("*Prudential Assurance*") at 245 come to mind – "[c]onsideration of the history of the rule … militates against any narrow construction of it". As was further observed in Peter Cashman, *Class Action Law and Practice* (The Federation Press, 2007) at para 3.2.1:

> *The re-formulation of the representative action rule in terms of 'same interest' was not intended to give the rule a narrower operation than the former Chancery practice, which was premised on a 'common interest'*. The rule was intended to facilitate the administration of justice and 'ought to be applied to the exigencies of modern life as the occasion requires'. [emphasis added]

33 We therefore concur with Megarry J's view in *John v Rees and Others* [1970] Ch 345 (at 370) that "the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice". In this regard, we find it significant that unlike the new English Civil Procedure Rules ("CPR") which provide for the mechanism of a group litigation order to manage claims which give rise to common or related issues of fact or law (see CPR rr 19.10–19.15), there is no such mechanism in Singapore. As Jeffrey Pinsler SC, commenting on our O 15 r 12(1), opined in *Principles of Civil Procedure* (Academy Publishing, 2013) at para 07.053:

> Unlike other jurisdictions which recognise class actions or a case-managed group litigation system, the representative action under Order 15 rule 12 of the Rules of Court is the only general process in Singapore which enables a large number of persons to be directly involved in the litigation. Accordingly*, it is important that the rule be interpreted as flexibly as possible to preserve the principle of access to justice.* … [emphasis added]

In a similar vein, Mason CJ, Deane and Dawson JJ of the Australian High Court observed in *Carnie* (at 404) *vis-à-vis* the representative action rule in Part 8, r 13(1) of the 1970 NSW Rules:

> … All that this sub-rule requires is numerous parties who have the same interest. *The sub-rule is expressed in broad terms and it is to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions*. … [emphasis added]

34 The function of O 15 r 12(1) as an "access of justice" tool has been elaborated on by various academics. Rachael Mulheron ("Mulheron") observed in *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) at pp 53–54 that representative actions are a practical and economical method of asserting and enforcing a claim by allowing parties to overcome cost-related barriers and gain a more powerful adversarial posture *vis-à-vis* the defendant than they would otherwise have through individual litigation.

35 In *Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co, Ernst & Young, Alan Lundell, The Royal Trust Company, William R MacNeill, R Byron Henderson, C Michael Ryer, Gary L Billingsley, Peter K Gummer, James G Engdahl, Jon R MacNeill v Western Canadian Shopping Centres Inc and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc* [2001] 2 SCR 534 (indexed as "*Western Canadian Shopping Centres Inc v Dutton*" and referred to hereafter in this judgment as "*Dutton*"), the Supreme Court of Canada considered in depth (at [27]–[29]) the function of representative actions (which they termed "class actions"). To summarise, the court noted that representative actions offered three important advantages over a multiplicity of individual suits – judicial economy; costs savings for claimants and defendants; and the prevention of moral hazard in cases where wrongdoers who caused widespread but individually minimal harm might not otherwise take into account the full costs of their conduct.

36 However, we emphasise that the competing interests of the defendant in a representative action ought not to be overlooked. In particular, it must be borne in mind that represented persons are not deemed to be "parties" before the court: see *Singapore Civil Procedure 2013* (G P Selvam gen

ed) (Sweet & Maxwell Asia, 2013) at vol 1, para 15/12/8, citing *Ventouris v Mountain* [1990] 1 WLR 1370. This could in turn give rise to several prejudicial consequences for the defendant in a representative action. For instance:

(a) the represented persons are not obliged to give discovery or evidence relating to the claims in the representative action;

(b) the defendant will not be entitled to cross-examine the represented persons; and

(c) the defendant will not be entitled to seek costs against the represented persons in the event that he succeeds in defending the representative action.

37 Moreover, representative actions suffer from several procedural limitations in contrast to the statutory class action device. The latter typically includes express provisions that provide further statutory protection to both the claimants and the defendants in a class action. As Mulheron noted in her article "From representative rule to class action: Steps rather than leaps" [2005] CJQ 424 (at p 448):

> … [T]he representative rule is lacking in crucial respects as a procedural tool. A detailed and contemporary class action regime includes various protections and benefits for class members and defendants alike (such as compulsory judicial approval of settlement agreements, the aggregate assessment of damages, and cy-pres distributions) which are simply not required or permitted under the representative rule. …

That said, it must not be overlooked that it is open to the court in a representative action to make the relevant orders to deal with the issues raised by the parties as it deems necessary and/or just. Here, we note and concur with the views of Toohey and Gaudron JJ in *Carnie* (at 422) that the representative action rule is broad and flexible enough such that the court retains the power to reshape the proceedings at a later stage if they become impossibly complex or if the defendant is prejudiced.

38 Ultimately, therefore, O 15 r 12(1) envisages the court striving to strike a balance between the interests of both parties, bearing in mind the purpose of the provision, which is to facilitate access to and the efficacious administration of justice.

The "same interest" requirement

39 This brings us to the first issue which arises in this appeal (see [24(a)] above) – the nature and extent of the "same interest" requirement in O 15 r 12(1). It would appear that O 15 r 12(1) has not hitherto been examined in depth in our local jurisprudence. However, there are helpful precedents from other Commonwealth jurisdictions where provisions similar to our O 15 r 12(1) apply. As we embark on a survey of these authorities, we think it vital to bear in mind Lord Lindley's caution in *The Taff Vale Railway Company v The Amalgamated Society of Railway Servants* [1901] AC 426 (at 443):

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. …

40 The classic pronouncement on the "same interest" requirement was made by Lord Macnaghten in the seminal English case of *Bedford* at 8 (see also [31] above):

> … Given a *common interest* and a *common grievance*, a representative suit was in order if the *relief sought was in its nature beneficial to all* whom the plaintiff proposed to represent. … [emphasis added]

Thus, the claimants in a representative action must all share a common interest and a common grievance, as well as benefit from the relief sought in the action. Applying this test, the House of Lords in *Bedford* held that a representative action by a group of growers of agricultural produce, on behalf of themselves and other growers, against the owner of a statute-regulated market for contravening the statute governing their commercial relationship was properly instituted.

41 However, as aptly observed by Jillaine Seymour in "Representative Procedures and the Future of Multi-Party Actions" (1999) 62 Mod L Rev 564 (at p 570), the above test "is a paraphrase which does not serve to elucidate the circumstances in which the procedure will be available". The courts must therefore further give the "same interest" requirement some content. In this regard, the key question to be determined is the *degree of commonality* required before a representative action may be commenced.

42 We turn first to consider the scenario where the claims in a representative action arise from separate contracts. Strictly speaking, where claims arise from separate contracts, the source of each claimant's rights would differ. Nevertheless, the House of Lords in *Bedford*, in line with the object behind representative actions, adopted a liberal approach and allowed such an action to be brought for claims arising from separate contracts between each claimant grower and the defendant owner of a statute-regulated market.

43 This liberal approach suffered a setback in *Markt & Co, Limited v Knight Steamship Company, Limited* [1910] 2 KB 1021 ("*Markt*"), which concerned a representative action by a group of plaintiff shippers, on behalf of themselves and "others [*sic*] owners of cargo lately laden on board the steamship *Knight Commander*" (at 1033), against the shipowner for the loss of their cargo at sea. The majority of the English Court of Appeal (namely, Vaughan Williams and Fletcher Moulton LJJ) took a considerably narrower view of the "same interest" requirement in O 16 r 9 of RSC 1883 (UK), the then English equivalent of our O 15 r 12(1), and held that the action should not be allowed to continue as a representative action. Fletcher Moulton LJ stated (at 1039–1040):

> … The counsel for the plaintiffs suggests that the people in the list are in similar circumstances, because they shipped goods under similar bills of lading in the same ship. Assuming, for the sake of argument, that this is so (although nothing of the kind appears on the record), each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. … *To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of [O 16] r. 9*. … [emphasis added]

4 4 *Markt* thus appeared to stand for the proposition that no representative action could be brought pursuant to O 16 r 9 of RSC 1883 (UK) where the claims in question emanated from separate contracts of shipment, even though the separate contracts were similar or potentially identical and were terminated by the same event. *Bedford* was distinguished by the majority of the English Court of Appeal in *Markt* on the basis that all the claimants in *Bedford* had the same rights arising from the same statute. However, what is equally interesting are the dissenting views of Buckley LJ in *Markt*, where he said (at 1047–1048):

> … Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and of duty in shipping contraband of war. In respect of that liability which exists towards all each is entitled severally to relief which exists only towards himself. Supposing that declaration be made, the named plaintiffs, say Markt & Co., Limited, can recover the damage to which they are entitled. To enable the represented firms to recover the damages which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps, such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all. Subsequent proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation he was for some reason personal to himself not entitled to recover. Such difficulties always occur in every representative action. The purpose of Order XVI., r. 9, was, I think, to extend to common law actions the flexibility which had for many years been enjoyed in actions in the Court of Chancery. If I may say so respectfully, I wholly agree with Lord Lindley that the principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. This seems to me to be exactly a case in which the spirit, nay, more, the words, of Order XVI., r. 9, justify, and good sense requires, that the principle should be extended to a case for which I daresay no precedent is exactly to be found. If the writ in Markt & Co.'s action were amended so that the plaintiffs should be expressed to be Markt & Co., Limited, on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander* not being shippers of goods which were contraband of war, and the indorsement were amended so as to ask for a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and/or duty in and about the carriage of goods by sea, and for damages, that writ would, I think be good within Order XVI., r. 9. …

The approach enunciated by Buckley LJ pointed the way forward and was adopted in subsequent cases.

45 Since *Markt*, there seems to have been a reversion to the liberal approach adopted in *Bedford*. For example, in *Cobbold v Time Canada Ltd* (1976) 13 OR (2d) 567 and *Irish Shipping Ltd v Commercial Union Assurance Co plc and Another* [1991] 2 QB 206 ("*Irish Shipping*"), the Ontario Supreme Court and the English Court of Appeal respectively held that the representative actions in question had been validly commenced even though the claims arose from multiple separate contracts. The extension of "same interest" to encompass interests arising from separate causes of action in contract has similarly occurred in tort. There was previously resistance against allowing claims in tort to proceed on a representative basis where the claims of the claimants arose not from a joint cause of action, but from separate causes of action. However, in the landmark case of *Prudential Assurance*, Vinelott J held that a representative action could be brought as regards claims in tort even where each claimant had a separate cause of action.

46 Treasure does not dispute the Representative Plaintiffs' contention that claims arising from separate contracts or separate causes of action in tort would not necessarily defeat the "same interest" requirement. However, it submits that a representative action may only be brought where the claims present *identical* issues to be decided. [note: 23] Treasure thus argues (*vis-à-vis* contractual claims in representative actions) that a high degree of similarity between the separate contracts, verging on their being *identical*, is required before the court will find that the claimants have the same interest. [note: 24] For this proposition, Treasure relies on the decision of the Supreme

Court of Canada in *General Motors of Canada Limited v Helen Naken, Stephen Cranson, William J Pearce and Roberto Bandiera suing on behalf of themselves and suing on behalf of all other persons who have purchased new 1971 and 1972 Firenza motor vehicles in Ontario* [1983] 1 SCR 72 ("*Naken*"), which concerned a representative action instituted pursuant to r 75 of the Rules of Practice of the Supreme Court of Ontario for damages for breach of warranty and misrepresentation. That rule stated:

> Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

The claimants in *Naken* had entered into contracts of sale of an automobile of a certain make and model with the defendant. Delivering the judgment of the court disallowing the proceedings from continuing as a representative action, Estey J held (at 103):

> … [I]t is … clear from the terms of Rule 75 itself and the context in which it appears in the Rules of Practice that *it is not enough that the group share a "similar interest" in the sense that they have varying contractual arrangements with the [defendant] which give rise to different but similar claims in contract relating to the same model of automobile*. No doubt the claims are similar and they might even be the same in the classification of contract claims but it does not necessarily follow that all such claims under similar but not identical contracts will have "the same interest" in a contract right or the subject of a contract arising between the [defendant] and the [claimants] in the sense of Rule 75. … [emphasis added]

47 Upon closer examination, the decision of the court in *Naken* appeared to be premised on the view that a representative action might only be properly commenced where all that was required was a process to identify the members of the group of represented persons. As Estey J held (at 98):

> … The outcome of these proceedings will depend upon how one properly characterizes in law this process whereby the identity of the members of the represented group is determined. *If it is simply a labelling process*, as for example where a security holder comes forward and presents the security which is the subject of the action, *then the [claimants] clearly are correct in advancing their rights under Rule 75. If, on the other hand, the process is not so much identification as the establishment of a complete, independent cause of action, then the [defendant] will succeed. It is not enough, in order to come within Rule 75, simply to be able to string together a series of similar claims against a common defendant*. [emphasis added]

4 8 *Naken* aside, Treasure avers that *Irish Shipping* should also be read as requiring that contractual claims in a representative action must arise from identical contracts. *Irish Shipping* concerned a charterparty under which the plaintiff shipowners chartered their ship to the charterers on terms that, *inter alia*, cargo claims were to be the charterers' liability. The charterers took out insurance policies with 77 insurers in respect of such liability. The charterers later went into liquidation and failed to indemnify the shipowners in respect of certain cargo claims which the shipowners had paid. The shipowners commenced proceedings against the leading underwriter and another insurer, suing them "on their own behalf and on behalf of all other liability insurers subscribing to the insurances of [the charterers]" (see *Irish Shipping* at 217) for the sums owed by the charterers. The English Court of Appeal allowed the proceedings to continue as a representative action. It emphasised that the different insurance contracts, whilst executed separately by each individual insurer, were on identical terms save for the proportion of risk undertaken by each insurer, and included a "leading underwriter clause" whereby each insurer undertook to be bound by the acts of the leading underwriter and to be liable for its share in respect of all decisions taken against the leading underwriter. Staughton LJ noted (at 227) that "[f]or all practical purposes this is one claim

upon one contract, which the shipowners have an interest in pursuing and the insurers all have the same interest in resisting".

49 As regards claims in tort, Treasure maintains that in order for a representative action to be brought, the cause of action must be shown to arise from the same facts for each claimant. In this regard, Treasure cites Eve J's decision in *Aberconway (Lord) v Whetnall* [1918] 87 LJ Ch 524. There, the representative plaintiffs, on behalf of themselves and "the subscribers to the fund called the Whetnall Fund" (at 526), brought an action against the defendant for misrepresentation. Eve J held that the proceedings could not continue as a representative action, reasoning that (at 526):

> … [A]ssuming in favour of the plaintiffs that the description [of the persons whom the plaintiffs purport to represent] is equivalent to the subscribers to whom the circular was addressed, *how can it be said that the recipients of that circular who became donors to the fund have a common interest and a common grievance, when the very existence of the grievance depends upon facts which may differ in each individual case?* … [emphasis added]

Treasure argues that a representative action in tort will not lie if an assessment of the individual circumstances of each claimant is necessary for the establishment of a cause of action for each claimant.

50 We are not persuaded that the approach canvassed by Treasure is the correct one to adopt as it evinces nothing more than a superficial shift away from the reasoning in *Markt* and would confine the use of the representative action procedure to an extremely narrow band of cases. This is incongruous, given the importance of representative litigation in this modern age as a means for the courts to efficiently dispense justice. Our view is further buttressed by the two more recent authorities from Australia (*Carnie*) and Canada (*Dutton*) (referred to earlier at [28] and [35] above respectively) that promulgated an expansive interpretation of the "same interest" requirement. We shall now examine these two cases a little more.

5 1 *Carnie* concerned two representative plaintiffs who had entered into loan contracts that were subject to the Credit Act 1984 (NSW) ("the NSW Credit Act") with the defendant. The representative plaintiffs fell into arrears with repayment. The parties then executed a variation agreement extending the time for repayment. The representative plaintiffs alleged that various matters were not disclosed in the variation agreement in contravention of the NSW Credit Act, and brought a representative action on behalf of themselves and all other borrowers who had executed *different* variation agreements with the defendant but also subject to the same Act. The representative plaintiffs sought a declaration that as a result of the defendant's breach, none of the claimants was liable to pay the credit charge for which his or her variation agreement with the defendant provided. The defendant sought to strike out the statement of claim in so far as it purported to plead a representative action. That application was dismissed at first instance, but was allowed on appeal to the New South Wales Court of Appeal. The representative plaintiffs then appealed to the High Court of Australia.

52 The High Court of Australia allowed the representative plaintiffs' appeal, although it also remitted the case to the New South Wales Court of Appeal to consider whether it should "otherwise order", pursuant to Part 8, r 13(1) of the 1970 NSW Rules, that the action not be permitted to continue as a representative action. On the "same interest" requirement, McHugh J opined (at 427) that the requirement was met where the representative plaintiffs and the represented persons "have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings". In a similar vein, Toohey and Gaudron JJ, having perused various common law authorities, held (at 421):

> There are many persons who have entered into variation agreements with the [defendant]. They have the "same interest" in testing those agreements against the [NSW Credit] Act to see if the method of calculating the amount owed was correct. If that method was not in accordance with the Act, then those persons have a common interest in obtaining the relief of being released from liability for the credit charges. *That is, they have the same interest in these proceedings in the sense that there is a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the [representative plaintiffs] seek*. [emphasis added]

53 With respect, we do not agree with the Judge's observation (at [59] of the GD) that "*Carnie* … is not particularly helpful". Notwithstanding the fact that the case was remitted to the New South Wales Court of Appeal to consider whether it should exercise its discretion to order that the action not be allowed to continue as a representative action, the High Court of Australia clearly endorsed a broad interpretation of what would constitute "same interest". Indeed, this broad approach was endorsed in the subsequent decision by Young J in *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465 (at 468). Although the Judge was correct in noting (at [59] of the GD) Toohey and Gaudron JJ's observation in *Carnie* (at 416) that the "broad and liberal" approach to representative actions adopted in *Bedford* suffered a setback in *Markt*, their observation must be seen in the context of the paragraph which immediately follows that observation, where Toohey and Gaudron JJ stated emphatically (at 417 of *Carnie*), "[b]ut the subsequent history of representative actions evidences a greater readiness to sanction them".

54 An expansive interpretation of the "same interest" requirement was also adopted by the Supreme Court of Canada in *Dutton*, which concerned a representative action brought by a group of representative plaintiffs, on behalf of themselves and 229 other investors, against the defendants for breach of fiduciary duty. The applicable statutory provision governing representative actions was r 42 of the Alberta Rules of Court (Alta Reg 390/68) ("the Alberta Rules of Court"), which provided:

> Where numerous persons have a *common interest* in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all. [emphasis added]

In *Dutton*, the representative plaintiffs and the 229 other investors had purchased debentures in a corporation at *different* times pursuant to *different* offering memoranda presented to them by *different* defendants. The Supreme Court of Canada held that the institution of the representative action was nonetheless proper.

55 In the court below, the Judge sought to distinguish *Dutton* on the ground that the critical words used in the applicable Alberta provision were "common interest", whereas the operative words in our O 15 r 12(1) are "same interest". We do not agree that this is a valid distinction. First, as noted by McLachlin CJ at [31] of *Dutton*, r 42 of the Alberta Rules of Court was based on r 10 of the Rules of Procedure set out in the Schedule to the 1873 UK Act, which was the forerunner of our O 15 r 12(1). Second, the test for "same interest" as articulated in *Bedford* and consistently applied in multiple common law jurisdictions since then has been formulated in terms of "common interest" and "common grievance". Thus, any difference in phraseology between "common interest" and "same interest" is purely an issue of semantics. Finally, such a distinction flies in the face of numerous authorities which advocate that a broad and flexible purposive interpretation be given to the concept of "same interest" in O 15 r 12(1) (see also above at [32]–[33]).

56 Recognising the importance of the representative action (which was termed a "class action" in *Dutton*) as a procedural tool in modern litigation, the Supreme Court of Canada in *Dutton* expressly

rejected (at [46]) the approach in *Naken*. McLachlin CJ addressed the question of commonality as follows (at [39] of *Dutton*):

> … *The commonality question should be approached purposively.* The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. *It is not essential that the class members be identically situated* vis-à-vis *the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues*. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [emphasis added]

57 From *Carnie* and *Dutton*, it is clear that the claimants in a representative action in contract do *not* need to be identically situated *vis-à-vis* the defendant. Rather, all that is needed to meet the "same interest" requirement is that there are one or more significant issues of fact or law common to all the claimants for determination by the court.

58 Where the claims in a representative action arise in tort, there needs to be a common ingredient in the cause of action of each member of the class of represented persons. This was held by Vinelott J in *Prudential Assurance* (at 255) to be one of three conditions that needed to be satisfied in order for a representative action in tort to be brought:

> … The *second condition is that there must be an "interest" shared by all members of the class*. In relation to a representative action in which it is claimed that every member of the class has a separate cause of action in tort, *this condition requires, as I see it, that there must be a common ingredient in the cause of action of each member of the class*. … [emphasis added]

Although Vinelott J phrased the "same interest" requirement in terms of "a common ingredient in the cause of action" in relation to a representative action in tort, we are of the view that there is no discernible difference between that requirement and the requirement (*vis-à-vis* a representative action in contract) of a common issue of fact or law between the claimants for determination by the court.

59 Whether an issue is common between the claimants in a representative action is largely fact-dependent and will have to be determined on a case-by-case basis. Nonetheless, as a general guideline, where the legal and factual inquiry required for the determination of an issue in a claim in a representative action is also relevant to the determination of the same issue in the other claims in the representative action, we think it highly probable that the issue is common to all the claimants.

60 In our judgment, a shift in focus towards the commonality of issues is the proper approach to take in deciding whether an action has been properly commenced as a representative action, bearing in mind the representative action's roots in equity and its function as a flexible tool of convenience in the administration of justice. To demand that all the claimants in a representative action should have identical interests would render O 15 r 12(1) otiose. As articulated by McLachlin CJ at [39] of *Dutton* (see [56] above), in each representative action, the court will have to embark on an inquiry into the significance of the common issues between the claimants in relation to the individual and/or different issues to determine if the "same interest" requirement has been met – *ie*, the court must compare the

significance of the common issues between the claimants with the significance of the issues which differ as between them. Where the latter clearly outweighs the former, the "same interest" requirement would not be met.

61 We stress that in carrying out the aforesaid inquiry, the focus of the court's attention should be on what is common between the claimants, and not what differentiates the cases of individual claimants: see Lord Macnaghten in *Bedford* (at 7), cited with approval by Toohey and Gaudron JJ in *Carnie* (at 422). The court, as McLachlin CJ noted in *Dutton* at [39], has to be mindful of the difficulties which a representative plaintiff would face in pleading the claims of each member of the class of represented persons with the same particularity as would be required in an individual suit.

62 We would further observe that the need to compare common and differing issues is not an unusual exercise – it is required in relation to consolidation of causes or matters pursuant to O 4 r 1 of the Rules of Court and joinder of parties as of right pursuant to O 15 r 4(1) of the Rules of Court. In this regard, we find it significant that both O 4 r 1(1)(*a*) and O 15 r 4(1)(*a*) of the Rules of Court contain the similar condition of "common question of law or fact". The court practice in relation to these two procedural rules would certainly be relevant for the purposes of O 15 r 12(1): see generally *Daws v Daily Sketch and Daily Graphic Ltd and Another* [1960] 1 WLR 126, *Lewis and Another v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601 and *Payne v British Time Recorder Company, Limited, and W W Curtis, Limited* [1921] 2 KB 1.

63 Before moving on, we shall touch briefly on another point canvassed by Treasure, which is that representative actions are improperly commenced where defences which would otherwise be available if the claims were brought separately are foreclosed. [note: 25] The term "defences" is used loosely here, in the sense that it refers to facts and circumstances specific to each claimant in a representative action which may defeat the claims of that particular claimant. The perceived difficulty with a situation where separate defences may be raised against different claimants is that a number of individual trials might be required and liability would not be determined in one single action. Moreover, if the defendant were unable to raise the defences available *vis-à-vis* a particular claimant against the representative plaintiff(s), it would amount to an unjust bar to defences that might have been available in a unitary action. This was the concern of Vinelott J in *Prudential Assurance*, where he noted (at 254) that one of the three conditions to be satisfied in order for a representative action in tort to be brought was that the defendant must not be barred from raising a defence which would otherwise have been available to him if there had been separate individual actions. We do not dispute this proposition.

64 At this juncture, we emphasise that the present appeal is not concerned with the situation where represented defendants seek to raise specific defences that differ from those of the representative defendant. For that situation, it is plain that the "same interest" requirement would apply to determine if such a representative action should be allowed. Hence, the cases of *Roche v Sherrington and Others* [1982] 1 WLR 599 and *Mercantile Marine Service Association v Toms and Others* [1916] 2 KB 243 (which Treasure sought to rely on), as well as *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624 (which the Representative Plaintiffs sought to rely on) are not entirely on point.

65 Several English authorities appear to endorse the proposition that where the defendant in a representative action may have claimant-specific defences, it is indicative of there being no common interest and/or no common grievance between the claimants in the action. In *Markt*, the majority of the English Court of Appeal placed some emphasis on the fact that the defendant shipowner could potentially raise different defences against various claimant shippers that did not exist against other claimant shippers. Vaughan Williams LJ highlighted (at 1030):

> … All sorts of facts and all sorts of exceptions may defeat the right of individual shippers. The case of each shipper must to my mind depend upon its own merits. …

In fact, Fletcher Moulton LJ appeared to suggest (at 1040) that the *theoretical* possibility of the defendant shipowner having different defences against different claimant shippers could be sufficient to prevent any finding of a common interest among all the claimant shippers.

66 More recently, in *Emerald Supplies Ltd and another v British Airways plc* [2011] Ch 345 ("*Emerald Supplies*"), the English Court of Appeal upheld the decision of the court below to disallow a representative action brought under CPR r 19.6 by two representative plaintiffs on behalf of themselves and all other direct and indirect purchasers of air freight services from the defendant. Mummery LJ found (at [64]) that if defences existed against some members of the class of represented persons but not against others, the members of the represented class could not be considered to have the same interest in the action. The Canadian courts have similarly held thus in *Van Audenhove v Nova Scotia (Attorney General)* (1994) 28 CPC (3d) 305 and *Ker v Auto Marine Electric Ltd* (1990) 43 CPC (2d) 278.

67 With respect, it seems to us that the approach taken in *Emerald Supplies* might be too broad. The mere fact that a particular defence is available against only some but not all of the claimants in a representative action should not necessarily suffice for the court to hold that there is no common issue warranting the institution of a representative action. The mere existence of issues which are not common between the claimants does not mean that there cannot be common issues arising from the claims of the claimants. There need not be complete identity in the claimants' claims before a representative action is allowed. The more important question, therefore, is whether there are common issues of fact or law which arise from each claimant's claims. Moreover, the courts have allowed a representative action to proceed even where the defendant has theoretically lost the opportunity to raise a defence against one or more of the claimants. For example, in *Wyld and Others v Silver* [1963] Ch 243, a representative action on behalf of the inhabitants of the parish of Wraysbury for a declaration that they had a right to hold a fair or wake on wasteland was allowed to proceed even though the defendant lost the opportunity to argue that any one of the claimants had not come to court with clean hands.

68 In *Carnie* and *Dutton*, the respective courts held that a representative action was properly commenced so long as the requisite community of interest was present in any substantial question of law or fact arising in the proceedings. But, the fact that the defendant has separate defences against different claimants will be a factor to be considered by the court in determining whether to exercise its discretion to discontinue the action as a representative action. In *Carnie*, Mason CJ, Deane and Dawson JJ held (at 405):

> Once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule [*ie*, the representative action rule in Part 8, r 13(1) of the 1970 NSW Rules] is brought into operation subject only to the court's power to order otherwise. And that leaves for consideration the question whether the case is one in which the courts should, in the exercise of that power, make an order that the action should not continue as a representative action. …

Toohey and Gaudron JJ further observed (at 424 of *Carnie*) that "[i]f it did appear that other rights [which one or more members of the class of represented persons might have against the defendant] would be affected, it would be a matter for consideration in determining whether the Court should otherwise order". Likewise, in *Dutton*, McLachlin CJ noted (at [42]) that the fact that the defendant might wish to raise different defences with respect to different groups of claimants was a factor that might weigh against the court allowing the action to proceed in a representative form.

69 Although regarding the issue of separate defences against different claimants as a matter to be considered only at the second (discretionary) stage of O 15 r 12(1), as opposed to at the first (threshold jurisdictional) stage, will not obviate uncertainty as to whether the court will allow a representative action which has been properly commenced to continue in a representative form, we think this alternative approach is clearly advantageous. Instead of invoking the issue of separate defences against different claimants to shut the gate at the threshold stage, this issue can, in our view, be considered more holistically at the discretionary stage. In this way, the court will be best placed to strike a balance between the interests of the claimants (in litigating the action as a group) and those of the defendants (in defending the claims of the different claimants separately) by weighing the pros and cons of the various options available to it – for example, by splitting the original representative action into two or more smaller representative proceedings to deal with distinct defences separately, or even sub-classing the claimants.

70 When considering whether separate defences may be raised against different claimants, the courts should adopt a practical and *realistic* approach, and not indulge in speculation on hypothetical possibilities that separate defences could be raised. In *Irish Shipping*, for instance, Staughton LJ noted (at 222–223) that while it was theoretically possible that any one of the represented defendants might raise separate defences, there was no indication on the facts of the case that such a contention would be made. His Lordship continued (at 223) that he would disregard "theoretical possibilities" and deal with what were likely in practice to be the issues. Likewise, in *R J Flowers Ltd v Burns* [1987] 1 NZLR 260, a decision of the New Zealand High Court, McGechan J observed (at 271–272):

> The first cause of action is in contract. … This opens up potential for differences in [the] content of [the] contracts made. … At this stage it appears the question of contract or non-contract will raise issues similar in the case of each [claimant]. …
>
> *However, the reality is that at this early interlocutory stage I am in no position to make a factual finding on that point, or on the two points which follow. Unless I am to elevate the mere expression of contest by a defendant into an automatic barrier to a representative action, I cannot regard these contentions as decisive*. …
>
> [emphasis added]

71 We now turn to the final condition elucidated in *Bedford* for a representative action to be brought, namely, that the relief sought must, in its nature, be beneficial to all the persons whom the representative plaintiff(s) proposed to represent. Both the Supreme Court of Canada in *Dutton* (at [40]) and Vinelott J in *Prudential Assurance* (at 255) recognised that all the members of the class of represented persons must benefit from the relief granted by the court. Therefore, where there are divided views between the members of the class of represented persons as to what outcome they are hoping to achieve in the litigation or as to the desirability of seeking a particular remedy, then a representative action cannot be maintained.

72 On this point, we note that the Judge was clearly troubled by the fact that the Representative Plaintiffs were only seeking declarations that the Claimants were entitled to damages, and that each of the Claimants would have to return to court (if the Representative Plaintiffs succeeded in Suit 849) to individually prove the damages or loss which he or she had suffered (see the GD at [43]).

73 Some authorities do appear to support the proposition that a representative action for damages can never be brought. For instance, in *Markt*, Fletcher Moulton LJ stated (at 1040–1041):

> … The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. …

74 Another example is *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd and Others* [1980] 1 QB 585, where a trade union, on behalf of itself and each of its individual members, commenced a representative action against a newspaper, seeking damages for libel. The English High Court held that the representative action was improperly commenced. O'Connor J explained (at 601):

> … [A] *representative action is not available to a number of different individuals where the relief sought is damages*; and that I think becomes quite obvious if one is thinking of a libel action because one would be looking at the individual reputation of all the members of the union and, no matter whether we are talking of 500, 5000 or half a million, they would all be different and the damages would be different and for that reason alone it makes it quite unworkable and impossible to bring a representative action on behalf of all the members. [emphasis added]

75 In a similar vein, Jessup JA observed in *Farnham et al v Fingold et al* (1973) 33 DLR (3d) 156 (at 160):

> … [W]here the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims. …

76 It is apparent to us from the above authorities and other cases like *Stephenson v Air Canada* (1979) 103 DLR (3d) 148 that it is not the fact that damages are sought which is offensive to a representative action, but the need for assessment on a personal basis of the damages due to each claimant. This was noted by McGillivray CJA in *Alberta Pork Producers Marketing Board et al v Swift Canadian Co Ltd, Canada Packers Inc, Burns Foods Limited, Intercontinental Packers Limited, Burns Meats Ltd, Gainers Foods Ltd, Fletcher's Fine Foods Ltd, Fletcher's Limited, Fletcher's (Alberta) Limited, Cummings, Robertson and Telford* (1984) 53 AR 284 (indexed as "*Alberta Pork Producers Marketing Bd v Swift et el*" and referred to hereafter in this judgment as "*Alberta Pork*"), where he quoted (at [20]) the decision of the chambers judge below:

> … *It is not the damages aspect which is offensive to a [representative] action, but the requirement for assessment on a personal basis.* If, as in this case, the damages of the class do not require personal assessment but instead may be determined by an assessment of loss on each transaction and a mathematical computation to establish the total loss on all transactions, the offensive aspect of personal assessment is absent. … [emphasis added]

I n *Alberta Pork*, where the representative action in question was allowed to continue in its representative form, the damages determined in relation to any of the transactions concerned would form part of a fund, which would then be allocated to each claimant appropriately. There was thus no need for assessment of damages on a personal basis. Similarly, in the case of *EMI Records Ltd v Riley and Others* [1981] 1 WLR 923, the damages sought were for the total loss of all the claimants and were to be distributed subsequently amongst them. In both cases, the appropriate allocation of damages to each claimant could be determined at a later stage.

77 By the same token, the reliefs sought in the present case are declarations that the Claimants are entitled to damages, with an assessment of the damages due to each Claimant to be carried out

separately on a non-representative basis at a later stage. We think it pertinent to highlight Vinelott J's decision in *Prudential Assurance* (at 255–256) that where a common element of a cause of action is proved, any of the claimants would be entitled to rely on the judgment as *res judicata* and prove the remainder of the elements of the cause of action in separate proceedings. Where there is a common issue or issues in the claims of numerous individuals and those issues are crucial in the determination of liability, it makes absolute sense and is expedient that those issues are determined on a representative basis. Otherwise, it will be a waste of judicial time if those same issues are canvassed many times over in separate actions, with the attendant risk of inconsistent decisions. This was the position in *Carnie*, where the High Court of Australia held that although the amount of credit charges ultimately forfeited by the defendant lender would vary based on the terms of each individual variation agreement, this would not prevent the claimants from seeking a right to a release from the general liability to pay credit charges, which general liability (although not the exact degree of liability) was common to all of them. In this regard, we endorse the observations of Staughton LJ in *Irish Shipping* (at 227) that:

> In that state of the authorities it is not, in my judgment, the law that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous plaintiffs severally or resisted by numerous defendants severally. The rule is more flexible than that. …

Whether it would be efficacious and just to allow a group of claimants to seek, by way of a representative action, only declaratory relief, with each claimant subsequently (if the representative action were to succeed) bringing separate individual proceedings to prove his or her loss is, in our view, a matter best left to the trial court's discretion as opposed to being a threshold requirement. We are thus unable to concur with the Judge's ruling (at [43] of the GD) that a representative action "[c]learly … would not be suitable" where, if the representative action succeeded, each claimant would have to return to court to prove individually the damages or loss which he or she had suffered.

78 To summarise, it is clear that the courts of various common law jurisdictions have in recent years taken a more expansive view of the "same interest" requirement. The following legal principles may be discerned from authorities like *Dutton*:

> (a) The class of represented persons must be capable of clear definition. This is critical because it identifies the individuals who are entitled to relief and who will be bound by the judgment – members of the class of represented persons must be identified by an objective criterion which bears a rational relationship to the common issues being asserted.
>
> (b) As a corollary of O 15 r 12(3), the proposed representative plaintiffs must adequately represent the interests of the class of represented persons, and must vigorously and capably prosecute the interests of the entire class.
>
> (c) There must be significant issues of fact or law common to all the claimants in a representative action. To this end, the courts must carry out a comparison of the significance of the common issues between the claimants with the significance of the issues which differ between them.
>
> (d) All the claimants in a representative action must benefit from the relief granted by the court, *ie*, they must have the same interest in the relief granted by the court.

79 We note Treasure's concern that such a broad and flexible interpretation of the "same interest" requirement would result in a flood of disparate claims being brought under the guise of representative

actions. However, we are not persuaded by this floodgates argument, especially since the courts retain a residual discretion under O 15 r 12(1) to order that a representative action which has been properly commenced should nevertheless not be allowed to continue in a representative form. It is to this exercise of discretion which we now turn.

The court's discretion under O 15 r 12(1)

80 In our opinion, the standard of "plain and obvious case" which applies to the court's exercise of its discretion to strike out an action should not apply to the court's exercise of its discretion under O 15 r 12(1) to discontinue an action as a representative action. This is because once an action is struck out, that will sound the death knell as far as the claims pleaded in the action are concerned. That is not the case where a representative action is not allowed to continue on a representative basis. Prejudice to the claimants aside, the discontinuation of a representative action in its representative form will not bar the claimants from making the same claims in separate individual actions.

81 As stated above at [29], once the threshold requirement of "same interest" is met, the court will proceed to determine whether there are other reasons not to allow a representative action to proceed in its representative form. In the words of McLachlin CJ in *Dutton* (at [44]):

> Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

Thus, in respect of the exercise of the court's discretion under O 15 r 12(1), much hinges on the "suitability" of the representative proceedings and the need for the court to strike a balance between efficiency and fairness.

82 As mentioned above, the real possibility that the defendant could raise separate defences against different claimants is one factor which the court will take into consideration in deciding whether to exercise its discretion to disallow a representative action from continuing in its representative form. In *Dutton*, McLachlin CJ briefly observed (at [42]):

> … Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

83 Possible cost considerations are also relevant. For instance, in *Independiente Ltd and Others v Music Trading On-Line (HK) Ltd and Others* [2003] EWHC 470 (Ch), the court allowed the proceedings to continue as a representative action because, *inter alia* (at [38]):

> It is true that the representative element of the claim is likely to make the proceedings longer and more expensive than would be the case if they were confined to the claims of the individual claimants. But that is not the only comparison to be made. The other is to compare the aggregate time and cost involved if there were separate claims brought by these claimants and

each and every Relevant Member. Plainly the saving of time and expense by permitting the representative element of the claim to be pursued in conjunction with the individual claims of the claimants is considerable. …

84 In *CBS/Sony Hong Kong Ltd and Others v Television Broadcasts Ltd and Another* [1987] FSR 262, a decision of the Hong Kong High Court, Jones J exercised his discretion to disallow the representative action to continue in a representative form as, if the action had continued in that form, it would have deprived the defendants of their right to apply for security of costs and discovery (at 271): see also above at [36]–[37] for the procedural limitations of a representative action. However, in each case, there is a need to balance these procedural limitations against the procedural convenience arising from the use of the representative action procedure. In *Irish Shipping* (which concerned an action brought against representative defendants), for instance, Purchas LJ emphasised (at 240) the benefits of the representative action in enabling the plaintiff shipowners to bypass the procedural difficulties of serving 77 different insurers in different parts of the world.

85 Finally, we would cite *Smith and Others v Cardiff Corporation* [1954] 1 QB 210, where the English Court of Appeal, endorsing the decision of the English High Court, refused to allow the action to proceed as a representative action on the ground that the claimants did not all have a common grievance since the purported claimants in fact constituted two classes whose interests were in conflict (at 221–222). However, the action was allowed to continue as a suit brought by the four named representative plaintiffs in their individual capacities. What is interesting is that the English Court of Appeal suggested (at 223), and the defendant seemed to have agreed, that the case could be treated as a test case on the interpretation of a certain provision in the Housing Act 1936 (c 51) (UK).

86 Ultimately, it must be borne in mind that O 15 r 12(1) is a facilitative provision for the efficient and speedy administration of justice. While it must be applied flexibly and sensibly, the court should still discontinue an action as a representative action where the representative action procedure will not provide an efficient or effective means of dealing with the claims in question, or where it is otherwise inappropriate in the circumstances.

Our decision on this appeal

87 Having set out the broad framework of the applicable legal principles above, we now apply them to the facts of the present appeal as follows: first, we shall determine if Suit 849 meets the "same interest" requirement. Second, if we find that Suit 849 was in fact properly commenced as a representative action, it remains for us to decide if we should nevertheless exercise our discretion to refuse to reinstate the suit as a representative action.

88 As mentioned earlier at [3] above, Colony is not a respondent in this appeal despite being a joint defendant with Treasure to the Representative Plaintiffs' conspiracy claim in Suit 849. As regards the conspiracy claim, Treasure's position is that that claim is premised on the Representative Plaintiffs proving the alleged novation of the Original Membership Agreements (as defined at [12] above) to Treasure, and Treasure's subsequent breach and repudiation of the Novated Membership Agreements (as defined at, likewise, [12] above). Hence, if those issues cannot be determined by way of a representative action, it would follow that the conspiracy claim cannot be pursued in a representative action. We agree that this must be the case, and further observe that there is no difficulty in dealing, by way of a representative action, with the question of whether there was an intention on the part of the alleged conspirators (*ie*, Treasure and Colony) to injure the Claimants. Therefore, should we find that Suit 849 was properly commenced as a representative action in respect of the Representative Plaintiffs' contractual and misrepresentation claims and, further, should be allowed to continue on a

representative basis *vis-à-vis* those claims, we shall make the same finding in respect of the conspiracy claim.

89 At this juncture, we think it important to emphasise the interlocutory nature of the present proceedings. In this regard, the following observations of the Hong Kong High Court in *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd* [2005] 1 HKC 565 (at [16]) are instructive:

> … [T]here are cases where the question on substantive law could not be finally resolved at the interlocutory stage. Obviously, the court cannot adjudicate on disputes of facts going to the merits when it is asked to consider an application under Order 15 Rule 12. *At the interlocutory stage, all that the court could do is to assess by reference to the materials and the submissions before it whether there is sufficient identity of interest amongst those members so that it would be fair and just to have the action proceeded by way of representative action.* [emphasis added]

Put simply, in order to satisfy this court that their appeal should be allowed, all that the Representative Plaintiffs need to do is to make out a *prima facie* case that: (a) the "same interest" requirement has been met; and (b) there is nothing in the facts and circumstances of this case to warrant the court exercising its discretion to refuse to reinstate Suit 849 as a representative action. Assuming that the Representative Plaintiffs clear the first hurdle (apropos the "same interest" requirement), this court, in deciding on the propriety of exercising its discretion to refuse to reinstate Suit 849 as a representative action, must guard against wandering into the realm relating to the *merits* of the claims pleaded in the suit.

90 We should also address a concern expressed by Mr Adrian Tan ("Mr Tan"), counsel for Treasure, at the hearing before this court, *viz*, that some of the Represented Persons did not even come within the definition of the class of Claimants, *ie*, "the 202 other members of the Club whose names are listed in Schedule 2 [of SOC No 2]" [note: 26] [strikethrough text and underlining in original omitted]. Mr Tan averred that Treasure had no record of six of the Claimants ever having been Club members or ever having paid their monthly subscription fees. Ms Koh Swee Yen ("Ms Koh"), counsel for the Representative Plaintiffs, countered that all the Claimants held membership cards and had paid their monthly subscription fees. She further pointed out that Treasure itself had been able to make reference to the membership numbers of all the Claimants, including the six Claimants whose membership it was disputing.

91 We would have thought that as the status of only six of the Claimants was in issue, their inclusion in Suit 849 (as Represented Persons) was a matter which could have been easily resolved between the parties' counsel. In any case, without proposing to make a finding at this interlocutory stage, we are not persuaded that Treasure's allegation would be an insurmountable barrier to our allowing Suit 849 to proceed as a representative action *vis-à-vis* all the Claimants if it were otherwise warranted. As mentioned earlier at [37] above, O 15 r 12(1) is flexible enough such that the court retains its power to reshape the proceedings at a later stage. Treasure is not foreclosed at the trial stage from arguing the preliminary point that the aforesaid six Claimants were not Club members at the material time and therefore did not fall within the definition of the class of Claimants. Should the trial judge eventually agree, he or she can then discontinue Suit 849 as a representative action *vis-à-vis* those six Claimants.

Whether the "same interest" requirement has been satisfied

The claims in contract

92 We now go on to examine whether the "same interest" requirement has been satisfied in

respect of the Representative Plaintiffs' claims, beginning with the claims in contract. As mentioned at [12] above, the Representative Plaintiffs' contractual claims fall into two categories – the claim that Treasure breached the terms of the Novated Membership Agreements by failing to accord certain membership privileges to the Claimants from January 2007 onwards ("the breach of contract claim"), and the claim that Treasure repudiated the Novated Membership Agreements on or around 4 February 2008 ("the repudiation claim"). At the hearing before us, Ms Koh averred that the repudiation claim was the focal point of the Representative Plaintiffs' contractual claims against Treasure, and also indicated her clients' willingness to drop the breach of contract claim from Suit 849 (in its representative form) if necessary. Be that as it may, we shall deal with the findings of the Judge and the arguments of the parties in relation to both of these contractual claims.

(1) Preliminary issues relating to the contractual claims

93 As mentioned above at [78(c)], for the "same interest" requirement to be met, there must be (*inter alia*) significant issues of fact or law common to all the claimants in a representative action. Therefore, the starting point in the "same interest" inquiry in relation to the Representative Plaintiffs' contractual claims is the identification of common issues arising from these claims.

94 The parties do not dispute that in order to rule on the Representative Plaintiffs' contractual claims, the trial judge will first have to determine whether the Original Membership Agreements with Sijori were novated to Treasure in or around December 2006 and January 2007 ("the novation issue"), and if so, what the terms of the Novated Membership Agreements were ("the terms issue"). These two issues are thus common to all the Claimants in that the trial judge must decide both issues in respect of all the Claimants in order to rule on the contractual claims in Suit 849. The parties differ, however, on the commonality of the Claimants' *method of proving* the alleged novation of the Original Membership Agreements to Treasure and the terms of the Novated Membership Agreements. Simply put, the Representative Plaintiffs say that all the Claimants are relying on the same facts and the same evidence apropos the novation issue and the terms issue, whereas Treasure denies that that is the case. The ensuing discussion on the commonality of the novation issue and the terms issue (at [95]–[104] below) should thus be viewed from the specific perspective of the commonality of the Claimants' *method of proving* their case on these two issues.

95 Dealing first with the novation issue, it is trite law that a novation essentially involves the discharge of the original contract through mutual agreement and the creation of a new contract where a new party assumes the rights and obligations of an existing party. As described in *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at vol 1, para 19-086:

> … Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.

96 Treasure argues that even on the Representative Plaintiffs' own case as pleaded in SOC No 2, not all the Claimants are relying on the same facts to establish the alleged novation of the Original Membership Agreements to Treasure since: [note: 27]

> … One of [the] facts on novation is [Treasure's] issuance of complimentary room vouchers to the Claimants. On the Claimants' own case …, at least 18 of the Claimants did not receive complimentary room vouchers. In other words, these Claimants do not have the same facts on novation as the others.

We are not persuaded by Treasure's contention as this difference, even if it is real, is not a particularly significant one. The Representative Plaintiffs primarily base their claim of novation of the Original Membership Agreements to Treasure on facts which are common to all the Claimants – namely, the terms of the OTP and the Transfer Agreement, the December 2006 letters from Treasure and Sijori to all the Club members (see [9]–[10] above) and the contemporaneous correspondence between Treasure and Sijori in and around December 2006. [note: 28] Moreover, the defect raised by Treasure – *viz*, that some Claimants were issued with complimentary room vouchers while others were not – can be relied upon as additional arguments (as far as those Claimants who were issued with such vouchers are concerned) to reinforce the contention that there was indeed a novation of the Original Membership Agreements from Sijori to Treasure. Alternatively, the defect can easily be remedied by amending SOC No 2.

97 The requirement that all parties must consent to a novation would appear, at first glance, to pose some difficulty. It would seem that this is an element of the novation issue that must be individually proved by each Claimant and is therefore not suitable for determination by way of representative proceedings. However, it is clear that the Claimants are all proceeding on the common basis that their consent to the novation of the Original Membership Agreements to Treasure was evidenced by the same act, *ie*, by their making payment of their monthly subscription fees to Treasure from January 2007 onwards as directed by Treasure's letters of 16 and 27 December 2006 to all the Club members. [note: 29] *Prima facie*, nothing on the facts of the present case suggests that the legal and factual inquiry apropos the Claimants' consent to the alleged novation would differ materially as between the Claimants. In this regard, only a single question arises for determination at the trial, namely, did the Claimants' act of paying their monthly subscription fees to Treasure from January 2007 onwards amount to consent to the alleged novation?

98 For the aforementioned reasons, we find that the Claimants do share a common means of proving the alleged novation of the Original Membership Agreements to Treasure.

99 Turning now to the terms issue, it ought to be emphasised that at this juncture, the question which this court is interested in is whether the Claimants share sufficient commonality of interest in their means of proving the terms of the Novated Membership Agreements, and *not* whether the terms of all the Novated Membership Agreements are common. As regards the latter, we would add that given that the terms of the Novated Membership Agreements depend in part on the terms of the Original Membership Agreements, and given that the Claimants did not all fill in the same version of the membership application form when they applied for Club membership, it is only to be expected that the terms of the Original Membership Agreements and, in turn, the terms of the Novated Membership Agreements may not all be the same.

100 The Representative Plaintiffs contend that the Claimants share a common means of proving the terms of their respective Novated Membership Agreements as each Claimant is relying on the documents enumerated at [96] above, read with the terms of his or her Original Membership Agreement, to determine the terms of the corresponding Novated Membership Agreement. Treasure denies that that is the position, and, in support of its stance, points to the Judge's criticism of the Representative Plaintiffs' case on the terms issue. The Representative Plaintiffs initially pleaded (in para 9 of SOC No 1) that the material terms of the Original Membership Agreements were express (in respect of those Claimants who had received promotional materials or brochures accompanying the membership application forms given to them), "and/or" [note: 30] implied for reasons of business efficacy (in respect of those Claimants who had not received such promotional materials and brochures). The Judge held that the material terms of the Original Membership Agreements must be either express or implied, but could not be both express and implied. She was particularly concerned

that Treasure would be placed in an invidious position when conducting its defence if some of the Claimants had their membership rights and privileges expressly spelt out in their Original Membership Agreements, whilst others did not and needed terms to be implied (see the GD at [30]). Eventually, the words "express and/or implied" were deleted from para 9 of SOC No 1 and the resultant paragraph (*viz*, para 9 of SOC No 2) was limited to pleading that the terms of the Original Membership Agreements were "express". Notwithstanding these deletions from para 9 of SOC No 1, it appears that the Representative Plaintiffs have resurrected their implied terms argument before us, as can be seen from the following extract from their written case for this appeal: [note: 31]

> … [T]he membership benefits extended to each of the [Claimants] were effectively the same. Specifically, the [Claimants] argue that, insofar as the promotion materials or brochures were received by the [Claimants], the terms and conditions set out in paragraph 9 of [SOC No 2] constituted the express terms of the [Original] Membership Agreements of those [Claimants]. Where the promotional materials or brochures were not received, *the same terms would nevertheless be implied* into the relevant [Original] Membership Agreements in order to give them business efficacy. It could not be the case that some [Claimants] received certain membership benefits which were not available to others when all of them were granted access to the same facilities upon presentation of their membership cards. [emphasis in original omitted; emphasis added in italics]

101 Urging us to accept the Judge's criticism of the Representative Plaintiffs' case on the terms issue, Treasure additionally argues that the Representative Plaintiffs' case would be problematic even if *all* the Claimants were relying on the terms of the Original Membership Agreements being implied terms. Treasure submits that in order to determine if a term should be implied in fact, the court will have to look at the presumed intention of the contracting parties: see *The Moorcock* (1889) 14 PD 64 (at 68), which was affirmed locally in, *inter alia*, *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927. Hence, each Claimant would have to take the stand to prove the contractual terms in his or her Original Membership Agreement, and would have to further prove that those terms were novated to Treasure, thus undermining the representative character of Suit 849 as a representative action.

102 We do not find Treasure's arguments persuasive. As noted by this court in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 at [34]–[35], in determining whether certain terms should be implied into a contract, the court is not concerned with the *actual subjective* intentions of the contracting parties, but rather, focuses on the contracting parties' *presumed* intentions as ascertained from *objective* evidence. It is thus not clear how a cross-examination of each of the Claimants (209 in all) will aid the trial judge in determining the terms issue. As for the Judge's concern (at [30] of the GD) that "[t]he [C]laimants would not have the requisite 'same interest' stipulated in [O 15 r 12(1)]" if some of the Claimants relied on the terms of their Original Membership Agreements being express whilst other Claimants relied on such terms being implied, we think it will suffice if the Representative Plaintiffs identify amongst the Claimants who are relying on the terms of their Original Membership Agreements being express and who are relying on those terms being implied in fact. Should the trial judge find, *vis-à-vis* a Claimant proceeding on the implied terms basis, that the alleged terms could not be implied in fact, he or she could, at that stage, discontinue Suit 849 as a representative action in so far as that Claimant is concerned.

103 More fundamentally, the terms of the Original Membership Agreements form only part of the factual matrix which the trial judge has to examine in determining the terms of the Novated Membership Agreements. As a novation essentially involves the creation of a new contract, it is entirely possible for the parties to incorporate new terms into the novated contract or vary (in the novated contract) the terms of the original contract, subject to the usual requirements of

consideration and the consent of all the parties: see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 15.059. Thus, the trial judge, in ascertaining what the terms of the Novated Membership Agreements are, must also look at the documents and acts which collectively brought about the Novated Membership Agreements as those documents and acts may indicate variations of the terms of the Original Membership Agreements in the Novated Membership Agreements and/or the addition of new terms in the Novated Membership Agreements.

104 For the above reasons, we find that the Claimants do share a common method of proving the terms of the Novated Membership Agreements. We make one further observation – *viz*, that even if the Representative Plaintiffs' contractual claims are allowed to proceed by way of a representative action, Treasure will *not* be foreclosed at the trial from arguing that the terms of each Claimant's Novated Membership Agreement would depend on the particular version of the membership application form which that Claimant signed. Should the trial judge agree with Treasure on this point, we think that O 15 r 12(1) provides him or her with the option of sub-classing the Claimants according to which version of the membership application form they signed and allowing smaller representative actions to proceed in relation to each of the eight different versions of the membership application form used at the material time.

(2) The repudiation claim

105 Having dealt with the commonality of the novation issue and the terms issue, we turn now to consider the Representative Plaintiffs' contractual claims proper, beginning with the repudiation claim. The Judge held below that there could have been no commonality of interest in the repudiation claim (and, likewise, the breach of contract claim) as the Claimants did not share common membership privileges, having become Club members at different times and under different arrangements (see the GD at [31], [41] and [63]).

106 A preliminary point to be made is that the Judge's finding seems to be based on the premise that at the trial, the membership privileges conferred on each Claimant must be proved, and as the membership privileges granted to each Claimant are not the same, representative proceedings will not be the proper process. The same premise would appear to apply to the Representative Plaintiffs' submission that the same objective membership privileges and benefits were made available to all the Claimants without any distinction between Claimants who joined the Club at different times, or paid different entrance fees, or filled in different versions of the membership application form. [note: 32]

107 Without pre-empting the trial judge's findings on the membership privileges conferred on the Claimants, we are of the view that the lack of commonality between the Claimants in this regard will *not* pose an insuperable obstacle to finding a commonality of interest as regards the repudiation claim (although, as noted at [110] below, the differences between the Claimants' membership privileges may be relevant at the subsequent assessment of damages if the Representative Plaintiffs succeed on a representative basis in the repudiation claim).

108 For a start, we find that the Judge was mistaken in construing (at [69]–[70] of the GD) the Representative Plaintiffs' case on the repudiation claim as being based on the 4 February 2008 letter from *Colony* to the Club members setting out the offer of a new Club membership contract and the terms of such new contract, and in concluding, on that basis, that the Representative Plaintiffs' case on this claim was factually erroneous. The crux of the Representative Plaintiffs' case on the repudiation claim rests on Treasure's repudiation of the Novated Membership Agreements by its 4 February 2008 letter to all the Club members, the contents of which evinced (according to the Representative Plaintiffs) Treasure's intention to renounce all of its obligations under the Novated

Membership Agreements. [note: 33] The Representative Plaintiffs' case on repudiation thus falls into what this court defined as "Situation 2" in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 at [93]:

> In … Situation 2 …, where a party by his words or conduct, simply *renounces* its contract inasmuch as it clearly conveys to the other party to the contract that it *will not perform its contractual obligations at all*, that other party (*viz*, the innocent party to the contract) is entitled to terminate the contract. [emphasis in original]

Therefore, the key question to be determined apropos the repudiation claim is what the manifested intentions of Treasure were in sending its 4 February 2008 letter to all the Club members. This in turn requires the court to embark on an inquiry into what a reasonable man in the position of a Club member would have inferred from the words in that letter: see *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447.

109 In other words, had the Claimants brought individual actions against Treasure for repudiating their respective Novated Membership Agreements, the one single question which would arise in all these individual actions in relation to the repudiation claim is: did the 4 February 2008 letter from Treasure amount to a renunciation of its obligations under the Novated Membership Agreements and, therefore, a wrongful repudiation of those agreements? Therefore, even if there are differences in the terms of the individual Novated Membership Agreements and/or the membership privileges conferred on individual Claimants, they do not *prima facie* preclude a determination of the Representative Plaintiffs' claim against Treasure for wrongful repudiation of contract by way of a representative action. In the light of the foregoing, we do not accept the Judge's conclusion, and instead find that the issue of Treasure's alleged repudiation of the Novated Membership Agreements was common to all the Claimants.

110 To complete our analysis of the repudiation claim, we turn to examine the nature of the relief sought. The Representative Plaintiffs pray for *declaratory* relief in relation to Treasure's alleged repudiation of the Novated Membership Agreements. [note: 34] Such declaratory relief does not require an assessment of damages on a personal basis in a representative action, and thus will not offend the "same interest" requirement (see [76] above). We should, however, add that if the Representative Plaintiffs succeed (on a representative basis) in the repudiation claim, the differences between the Claimants' membership privileges may be relevant at the subsequent assessment of damages, where it remains entirely open to the assessor to find that an individual Claimant is only entitled to nominal damages for Treasure's repudiatory breach of contract by reason of the terms of his or her Novated Membership Agreement. It is also only at this subsequent stage – and *not* at the present stage of determining whether Suit 849 meets the "same interest" requirement – that Treasure's contention that the terms of the Novated Membership Agreements are critical to the trial judge's determination of whether damages are appropriate in the case of each individual Claimant [note: 35] comes into play.

111 In the light of the significant common issues arising from the repudiation claim and the nature of the relief sought, we find that the "same interest" requirement has been met and Suit 849 was properly commenced as a representative action with regard to this claim.

(3) The breach of contract claim

112 Moving on to the second category of contractual claims (*viz*, the breach of contract claim), the above analysis of the novation issue and the terms issue would also be applicable here. In respect of the breach of contract claim, quite apart from the point that the terms of the Novated Membership

Agreements (including the membership benefits conferred) could be different, it is also quite unlikely that Treasure's alleged breaches of the Novated Membership Agreements will be the same *vis-à-vis* each of the Claimants as each alleged breach (*eg*, failing to accord three nights of complimentary room stay at the Club per year) would have to be examined in the light of the circumstances prevailing then to see if there was in fact any actual breach in relation to the particular Claimant concerned. As is evident from Schedule 4 of SOC No 2 and acknowledged by the Representative Plaintiffs, the circumstances surrounding Treasure's alleged breaches of the Novated Membership Agreements differ as between the Claimants. [note: 36] Moreover, *vis-à-vis* (specifically) Treasure's obligation to offer three nights of complimentary room stay at the Club yearly, there could not possibly be a breach by Treasure of this particular obligation in relation to *all* the Claimants as some of them, on their own pleaded particulars, did not even assert that they attempted to make use of their complimentary room vouchers (*ie*, to exercise that membership privilege). These are matters of fact which would have to be gone into and examined individually. Accordingly, we hold that the breach of contract claim is not a common issue between all the Claimants.

113 The Representative Plaintiffs suggest that Suit 849 can still proceed as a representative action *vis-à-vis* the breach of contract claim as it remains open to the court to place the Claimants into different baskets for the purposes of granting the relevant declaratory relief. [note: 37] Sub-classing, as we have so termed this, is a tempting but ultimately unsatisfactory solution here. A quick perusal of Schedule 4 of SOC No 2 shows that the circumstances surrounding Treasure's alleged breaches of the Novated Membership Agreements are too varied for the Claimants to be appropriately sub-classed. We thus concur with the Judge's decision below that Suit 849 should not be allowed to continue as a representative action where the breach of contract claim is concerned. That claim will thus have to be pursued by each Claimant in separate proceedings brought in his or her individual capacity.

The misrepresentation claim

114 We now turn to consider whether the Representative Plaintiffs' misrepresentation claim meets the "same interest" requirement. In this regard, we note that Mr Tan, counsel for Treasure, made the point before us that the misrepresentation claim is not the Representative Plaintiffs' main concern in Suit 849 in its representative form. Even if that were indeed the case, we do not see how it matters. More importantly, it cannot be denied that the misrepresentation claim is an expressly pleaded claim in SOC No 2. Treasure has not applied to strike out that claim on the ground that it is wholly without merit. It therefore does not lie in Treasure's mouth to allege that the misrepresentation claim is not the main claim in Suit 849 in its representative form.

115 The Representative Plaintiffs' case on misrepresentation rests on the Representations as defined at [12] above, *ie*, the representations made by Treasure in the 16 December 2006 letter which it addressed and sent to all the Club members. [note: 38] Treasure does not dispute that it sent that letter. In our view, the following issues arise from the misrepresentation claim:

(a) whether the Representations were false ("the falsity issue"); and

(b) if the Representations were false:

(i) whether those representations were made to the Claimants;

(ii) whether those representations were made with the knowledge that they were false, and/or without any genuine belief that they were true, and/or negligently;

(iii) whether those false representations were material;

(iv) whether Treasure, in making those representations, intended to induce the Claimants to consent to the novation of their respective Original Membership Agreements; and

(v) whether the Claimants actually relied on those representations, suffering damage and/or loss as a result ("the reliance issue").

116 The parties' dispute primarily centres on the commonality of the falsity issue and the reliance issue. As regards the other issues listed above at [115(b)(i)]–[115(b)(iv)], we note that they are common issues as they are concerned either with the Representations themselves or with Treasure's state of mind in making those representations. The same factual and legal inquiry required for the determination of those other issues will apply to all the Claimants in respect of the misrepresentation claim.

117 Treasure contends that the falsity issue is not common to all the Claimants as the Representations concerned the enjoyment of existing membership privileges [note: 39] which differed from one Claimant to another. [note: 40] We disagree. In our opinion, the statement in Treasure's 16 December 2006 letter (that Club members would be able to continue enjoying the privileges accorded to them under their existing membership with the Club provided they paid their monthly subscription fees to Treasure) and the statement in Treasure's 27 December 2006 letter (that Club members should pay their monthly subscription fees to Treasure from January 2007 onwards) are the crucial statements which the Claimants are relying on in the misrepresentation claim. The enjoyment of existing membership privileges and the denial of such privileges relate instead to the breach of contract claim (which, we have held, is not suitable for determination by way of a representative action). It is only in relation to the breach of contract claim that the circumstances pertaining to and the proof required of each Claimant may be different (see [112]–[113] above). That is not the case in relation to the misrepresentation claim as, in every instance, Treasure's letters of 16 December 2006 and 27 December 2006 would be the foundation to prove Treasure's alleged misrepresentation.

118 We do not think that any alleged differences in the Claimants' existing membership privileges would *prima facie* be material to the commonality of the falsity issue. In order to establish the falsity of a representation, the plaintiff must show that he understood the representation in a particular sense, and that it was false in that sense: see *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [63]. Such understanding from the words used must be assessed objectively in their factual matrix: see *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487 at 515. The nub of the Representative Plaintiffs' case is that the Representations turned out to be false as the Claimants were effectively deprived of their existing membership privileges by Treasure's repudiation of the Novated Membership Agreements pursuant to its letter of 4 February 2008. [note: 41] Hence, the factual and/or legal inquiry to be made to substantiate the allegation of misrepresentation will not differ as between the Claimants – the Representations were made to the Claimants in their identical capacities as Club members and were contained within a single document (namely, Treasure's 16 December 2006 letter to the Club members). What the Claimants' existing membership privileges were and the fact that the Claimants may not have been identically situated *vis-à-vis* the existing membership privileges would not be material to the determination of the falsity issue. In any case, even if there are differences between the Claimants on this front, that will be a factor which the trial judge could take into account in exercising his or her discretion as to whether to let Suit 849 continue as a representative action in respect of all the Claimants *vis-à-vis* the misrepresentation claim. The trial judge could also allow Suit 849 to proceed

as a representative action with regard to that claim by splitting it into several representative actions (apropos that claim) through sub-classing the Claimants as may be appropriate. We therefore find that the falsity issue is common between all the Claimants.

119 Moving on to the reliance issue, Treasure argues that this issue is fact-dependent and, therefore, has to be individually proved by each Claimant. [note: 42] As in the previous question of consent to the alleged novation of the Original Membership Agreements from Sijori to Treasure, we think it pertinent to note that *prima facie*, nothing on the facts of the present case suggests that the legal and factual inquiry in relation to this question of reliance would differ materially as between the Claimants. In this regard, the Representative Plaintiffs, and, indeed, all the other Claimants too, are proceeding on the same basis – that their reliance on the Representations was evidenced by the *same* act of their paying their monthly subscription fees to Treasure from January 2007 onwards. [note: 43] We therefore find that the reliance issue is a common one between all the Claimants.

120 As regards the relief sought by the Representative Plaintiffs for misrepresentation, it is abundantly clear that the declaratory relief prayed for [note: 44] will benefit the entire class of Claimants. The question of assessment of the damages due to each of the Representative Plaintiffs (and each of the other Claimants) does not arise at this stage.

121 For the above reasons, we find that the Representative Plaintiffs' misrepresentation claim meets the "same interest" requirement and Suit 849 was properly commenced as a representative action in respect of this claim. In view of this and our earlier ruling on the "same interest" requirement *vis-à-vis* the repudiation claim, we also find (*per* our reasoning at [88] above) that Suit 849 was properly brought as a representative action in respect of the conspiracy claim, even though we have found that the "same interest" requirement has not been met in respect of the breach of contract claim. In short, we hold that Suit 849 was properly constituted as a representative action in relation to the repudiation claim, the misrepresentation claim and the conspiracy claim (collectively referred to hereafter as "the Permitted Claims"), but not in relation to the breach of contract claim.

Whether this court should exercise its discretion to refuse to reinstate Suit 849 as a representative action

122 Having held that the threshold requirement for a representative action has been met, we now turn to the second stage of the analysis – whether this court should nevertheless exercise its discretion under O 15 r 12(1) to refuse to reinstate Suit 849 as a representative action *vis-à-vis* the Permitted Claims and thereby affirm the decision of the Judge.

123 Before we embark on such analysis, however, we need to deal with Treasure's preliminary point that this appeal should fail *in limine*. Treasure contends that the Representative Plaintiffs failed to discharge their burden of providing a basis for this court to intervene in the Judge's exercise of her discretion under O 15 r 12(1) to discontinue Suit 849 as a representative action: see *QBE Insurance Ltd v Sim Lim Finance Ltd* [1987] SLR(R) 23. In support of its proposition that the Judge did exercise her discretion under O 15 r 12(1), Treasure cites [49] of the GD, where the Judge considered the court's discretion under O 15 r 12(1) to discontinue an action as a representative action. Treasure further argues that it is apparent from the Judge's reasoning that she was troubled by countervailing considerations if Suit 849 were allowed to continue in its representative form, and that it was for those same countervailing considerations that she concluded (at [74] of the GD) that Suit 849 should be discontinued as a representative action because "a class action would be a time-consuming, costly but ultimately fruitless exercise".

124 We are unable to accept Treasure's contention that this appeal should fail *in limine*. Having examined the GD, it is clear to us that the Judge did not allow Suit 849 to continue as a representative action because, in her opinion, the "same interest" requirement had not been met, and *not* because, having decided that the "same interest" requirement had been met, she then, in the exercise of her discretion and considering all the other relevant circumstances, held that she should not allow the suit to continue in its representative form. This is clear from [50] of the GD. Order 15 r 12(1) contemplates a two-stage approach (see [29] above). The Representative Plaintiffs did not satisfy the Judge as to what was needed to move to the second (discretionary) stage. We are, therefore, in the present case not interfering with the Judge's exercise of her discretion under O 15 r 12(1).

125 Having dealt with the aforesaid preliminary point and having held (at [111] and [121] above) that the Representative Plaintiffs have met the threshold "same interest" requirement for commencing a representative action as regards the Permitted Claims, we turn now to the balancing exercise that must be carried out to determine if this court should exercise its discretion to refuse to reinstate Suit 849 as a representative action *vis-à-vis* these claims (see [81]–[86] above). In this regard, the factors in favour of reinstating Suit 849 as a representative action in relation to these claims must be weighed against the prejudice to Treasure which might arise from the procedural limitations of a representative action.

126 As regards the former, we observe that there will be considerable time and cost savings for both parties should Suit 849 be reinstated as a representative action *vis-à-vis* the Permitted Claims since the factual inquiry and legal analysis for the determination of the common issues in these claims would not need to be repeated for each of the individual Claimants.

127 Turning to the possible prejudice to Treasure, we deal first with the issue of costs canvassed by Mr Tan at the hearing before us. We recognise that should Treasure successfully defend itself at the trial, an order for costs can be made only against the Representative Plaintiffs, but not against the Represented Persons. This, however, will not be an obstacle to the court's exercise of its discretion to make such order as will ensure that all the costs appropriately incurred by Treasure in respect of Suit 849 as a representative action are recoverable against all the Claimants. Significantly, Treasure has not raised any concerns about the Representative Plaintiffs (or any of the Represented Persons) being impecunious; we doubt, therefore, that there will be any real prejudice to Treasure in this regard. Mr Tan's other concern was that should Treasure lose at the trial, it might be subject to larger costs claims even if the quantum of damages are later assessed to be very small or even non-existent for a sizeable proportion of the Claimants. Again, we do not think that this will pose any real problems to Treasure since its concern can easily be allayed by the court, if it thinks fit, making no costs orders until all outstanding issues arising from Suit 849 have been resolved. In any event, we would also reiterate the view expressed by this court in *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052 and recently affirmed in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] SGCA 46 (at [90]) that taxation of costs in a claim for unliquidated damages should ordinarily not be carried out until damages have been agreed by the parties or determined by the court.

128 Another contention which Treasure has raised in relation to, specifically, the repudiation claim is that it might be precluded from raising Claimant-specific defences should that claim be allowed to proceed by way of a representative action. In particular, Treasure points out that some of the Claimants were in arrears with their monthly subscription fees at the material time and were therefore not entitled to enjoy any membership privileges. [note: 45]

129 Again, we are not persuaded by this contention. Even if some of the Claimants were indeed in

arrears with their monthly subscription fees at the material time, we do not think that this would *prima facie* amount to an absolute defence warranting Treasure's repudiation of the Novated Membership Agreements. The issue of subscription arrears could perhaps be better dealt with by reducing any damages awarded to those Claimants who were in arrears by the relevant amounts owing. In any event, this is a matter which can be dealt with at a later stage, *ie*, at a separate assessment of damages. Moreover, even if the arrears in monthly subscription fees are found to be an absolute defence justifying Treasure's repudiation of the Novated Membership Agreements, we agree with the Representative Plaintiffs' submission that such a Claimant-specific defence can be dealt with by the trial judge if and when it emerges on the facts. The Claimants against whom this defence is available can be identified and placed into a different group, in respect of which the trial judge can make provision or otherwise treat as appropriate. We would emphasise that the mere possibility that separate defences could be raised against some of the Claimants is not sufficient to induce this court to exercise its discretion to refuse to reinstate Suit 849 as a representative action.

130 A further contention by Mr Tan is that Treasure may be prejudiced as regards cross-examination and discovery pertaining to versions M4 to M8 of the membership application form in so far as the Representative Plaintiffs consist only of those Club members who signed versions M1 to M3 of the application form. At the close of the hearing of this appeal, without determining whether there was any merit in this alleged prejudice, we directed the Representative Plaintiffs' solicitors to take instructions and confirm if they would be able to put forward a Representative Plaintiff for each of the eight versions of the membership application form used at the material time, for instance, by adding as Representative Plaintiffs those Club members who signed versions M4 to M8. The Representative Plaintiffs' solicitors have since written to inform this court that they will be able to do so. This should assuage Treasure's fears of being prejudiced on this front.

131 In any case, while we do not think that cross-examination of and/or discovery from each individual Claimant is really called for, that question, if it should arise, can appropriately be left to the trial judge. As we see it now, both parties, in conducting their respective cases, will largely be relying on documentary evidence in the form of the documents set out at [96] above and Treasure's bank records, all of which are already in Treasure's possession. Cross-examination of and/or discovery from each of the Claimants is unlikely to aid Treasure's case.

132 As regards the misrepresentation claim, as noted earlier, the falsity of the Representations has to be *objectively* determined within the factual matrix. The relevant documentary evidence will already be in Treasure's possession. We are thus not persuaded that Treasure will really be prejudiced by its inability to seek discovery from all the Claimants. In the same vein, we do not share Treasure's concern that it will be unduly prejudiced by its inability to cross-examine each Represented Person as it is unclear why such cross-examination would be needed and how it would materially advance Treasure's case, other than prolonging the trial of Suit 849.

133 All said, it seems to us that the assertion that Treasure might raise separate defences against the Claimants is more hypothetical than real. In any case, as alluded to at [118] above, should the trial judge find that the existing membership privileges did in fact differ as between the Claimants and that such difference would likely impede a fair disposal of Suit 849, O 15 r 12(1) empowers the trial judge to sub-class the Claimants and direct that separate representative actions continue for each of the sub-classes of Claimants. Again, Treasure will not be unduly prejudiced since such a sub-classing will not be complicated and any increase in costs can be dealt with by appropriate orders from the court.

134 A final point which we need to address relates to Treasure's contention that reinstating Suit 849 as a representative action would prejudice Treasure's position concerning the reliance issue

in the misrepresentation claim. We recognise that where false material representations are proved to be fraudulently made, this gives rise to a rebuttable presumption that the person to whom the representations were made did rely on them: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] SGCA 36 at [42]–[45]. Thus, it could be plausibly argued that Treasure will be unduly prejudiced in the conduct of its defence as a result of its inability to cross-examine each Claimant to show that the Representations neither operated in the mind of a particular Claimant, nor played a real and substantial part in inducing that Claimant to act on the Representations.

135 A few points can be made in response to this argument. First, we note that Treasure itself has not raised anything more than a theoretical possibility of there being Claimant-specific defences. As mentioned at [70] above, mere postulations that the defendant may have separate defences against different claimants do not constitute an insurmountable barrier to allowing a representative action which has been properly commenced to proceed in its representative form. Second, we think it worth emphasising that O 15 r 12(1) is a rule of convenience. It might be that at the trial, certain facts emerge such that the trial judge deems it unsatisfactory to decide the reliance issue by way of representative proceedings. We do not think that the trial judge will be precluded from ordering that the reliance issue be decided together with any separate and individual assessment of damages for misrepresentation. While this might pose some inconvenience, we are not at all persuaded that such hypothetical inconvenience will outweigh the convenience to *both* parties of having all the other elements of the misrepresentation claim which are common to the Claimants decided in a representative action. Realistically, and as a matter of common sense, where (as in the present case) pursuant to representations made in writing, the addressees acted in compliance therewith (and such acts of compliance are objectively proved), we do not see what further evidence is needed to prove reliance. In the context of this case, this alleged prejudice is simply unreal.

136 Indeed, we think it incumbent upon us to point out that the alternatives canvassed by Treasure pose difficulties of their own and are more likely to lead to higher costs and inconvenience. For instance, the suggestion of a test case will encounter the same problems in the light of Treasure's own argument that each individual Claimant has to be treated separately and individually. Putting it another way, for a test case to be effective, it must also be representative of all the other Claimants; the same difficulties which allegedly bedevil Suit 849 as a representative action will therefore be present in a test case scenario. As for the alternative of joinder of all the Represented Persons as named plaintiffs in Suit 849, we think this is hardly a practical solution, bearing in mind that there are 202 Represented Persons in total. Costs-wise, joinder is a bad suggestion as each of the Represented Persons, after being joined as a plaintiff, will have to file his or her own affidavit of evidence-in-chief in support of his or her claim, rendering the whole proceedings costly and unwieldy – the very outcome which a representative action is intended to avert.

Conclusion

137 In the premises, we are entirely satisfied that there are no compelling reasons not to reinstate Suit 849 as a representative action *vis-à-vis* the Permitted Claims. The advantages in favour of reinstating Suit 849 in a representative form far outweigh the alleged downsides, which, to our minds, are no more than mere speculative possibilities. Accordingly, we allow this appeal and set aside the order of the Judge. The Representative Plaintiffs shall have only 75% of the costs here and below because they failed on the breach of contract claim. However, no taxation of such costs shall be made until the conclusion of the substantive hearing of Suit 849 (including the assessment of damages and any appeals therefrom).

138 Leave is also hereby given to the Representative Plaintiffs to:

(a) add any new party as a Representative Plaintiff and/or substitute any of the existing Representative Plaintiffs with a new party so that there will be at least one Representative Plaintiff for each of the eight different versions of the membership application form used by the Claimants to sign up as Club members; and

(b) make the appropriate consequential amendments to their pleadings following the substitution of existing parties and/or the addition of new parties.

[note: 1] See SOC No 2 at pp 61–112.

[note: 2] See the Appellants' Core Bundle ("ACB") vol 2A, pp 29–34.

[note: 3] See ACB vol 2A, p 30.

[note: 4] See ACB vol 2A, p 35.

[note: 5] See ACB vol 2A, p 42.

[note: 6] *Ibid*.

[note: 7] See ACB vol 2A, p 44.

[note: 8] See ACB vol 2A, p 45.

[note: 9] See ACB vol 2A, p 46.

[note: 10] See ACB vol 2A, p 48.

[note: 11] See paras 8 and 46 of the Appellants' Case dated 19 February 2013 ("AC").

[note: 12] See para 46 of AC.

[note: 13] See para 51 of AC.

[note: 14] See paras 51, 52 and 121 of AC.

[note: 15] See para 104 of AC.

[note: 16] See paras 154–159 of AC.

[note: 17] See para 166 of AC.

[note: 18] See para 53 of AC.

[note: 19] See para 139 of the Respondent's Case dated 19 March 2013 ("RC").

[note: 20] See paras 158–163 of RC.

[note: 21] See para 182 of RC.

[note: 22] See paras 201–212 of RC.

[note: 23] See para 67 of RC.

[note: 24] See para 138(a) of RC.

[note: 25] See para 137 of RC.

[note: 26] See para 3 of SOC No 2.

[note: 27] See para 193 of RC.

[note: 28] See paras 138–144 of AC.

[note: 29] See para 23 of SOC No 2.

[note: 30] See para 9 of SOC No 1.

[note: 31] See para 134 of AC.

[note: 32] See para 137 of AC.

[note: 33] See para 161 of AC.

[note: 34] See prayers 2 and 4 at p 25 of SOC No 2.

[note: 35] See para 13 of Drew & Napier LLC's letter to the court dated 6 June 2013.

[note: 36] See paras 155–156 of AC.

[note: 37] See para 156 of AC.

[note: 38] See paras 17–18 of SOC No 2.

[note: 39] See para 18(a) of SOC No 2.

[note: 40] See para 198 of RC.

[note: 41] See paras 29, 30 and 34(c) of SOC No 2.

[note: 42] See para 197 of RC.

[note: 43] See para 150 of AC.

[note: 44] See prayers 5 and 6 at p 25 of SOC No 2.

[note: 45] See para 185(b) of RC.