Koh Chong Chiah and others *v* Treasure Resort Pte Ltd and another [2012] SGHC 239

Case Number	: Suit No 849 of 2009 (Registrar's Appeal No 209 of 2011)
Decision Date	: 29 November 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Koh Swee Yen, Paul Loy and Benjamin Fong (WongPartnership LLP) for the plaintiffs; Adrian Tan, Jackson Eng and S Vanathi (Drew & Napier LLC) for the first defendant.
Parties	: Koh Chong Chiah and others — Treasure Resort Pte Ltd and another

Civil Procedure – Rules of Court

29 November 2012

Lai Siu Chiu J:

1 In this representative action, seven persons, *viz* Koh Chong Chiah, Soh Kah Wah @ Vincent Leow, Ong Hong Poh Cecilia, Yip Kum Thong, Tsu Pei Yuke, Yeo Choon Hock Christopher and Rozario Roland Charles (collectively referred to as "the named plaintiffs") on their own behalf as well as on behalf of 202 other persons listed in Schedule 2 of the Statement of Claim ("the 202 persons") sued Treasure Resort Pte Ltd ("the first defendant") and Colony Members Service Club Pte Ltd ("the second defendant") for alleged breaches of the terms of their memberships in Sijori Resort Club, Sentosa ("the Club"). Hereinafter the named plaintiffs and the 202 persons will be referred to collectively as "the claimants" or as "members" where the context requires. The action was first commenced by the named plaintiffs and the 202 persons were added to the action about two months after the issuance of the writ herein.

2 On 28 June 2010, the first defendant applied under Summons No 2965 of 2010 ("the Application") to discontinue the suit on the ground that the named plaintiffs and the 202 persons do not have the requisite "same interest" stipulated under O 15 r 12(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") so as to be able to maintain this class action. The court below dismissed the Application on 27 June 2011 as well as the first defendant's application in Summons No 2967 of 2010 ("the Striking Out application") to strike out certain paragraphs in the Statement of Claim pursuant to O 18 r 19 of the Rules. The first defendant appealed to a judge in chambers in Registrar's Appeal Nos 209 of 2011 and 210 of 2011 against the dismissal of the Application and the Striking Out application respectively.

3 Both appeals came up for hearing before this court. After considering the arguments put forth by the parties in four separate hearings that were spread over eight months, I allowed Registrar's Appeal No 209 of 2011 and ordered the suit to be discontinued vis a vis the 202 persons but without prejudice to their commencing action in their own right either in the High Court or in the Subordinate Courts. The claimants are dissatisfied with my decision and, after obtaining leave from this court pursuant to s 34(2)(d) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (read with O 56 r 3 of the Rules), have filed a notice of appeal (in Civil Appeal No 36 of 2012) against my decision in Registrar's Appeal No 209 of 2010. There is no appeal on the Striking Out application as I did not grant the same (although I awarded costs to the first defendant). As the Statement of Claim was

clearly deficient, I ordered the named plaintiffs to make further amendments to their pleadings.

The facts

4 The first defendant is a resort manager and was incorporated in Singapore on 28 June 2005. The second defendant was incorporated on 30 January 2008. The business of the second defendant is in recreation club management. The two defendants are related as both are subsidiaries of a company called Maxz Universal Development Group Private Limited.

5 The Club is located at Sentosa Island. Its genesis was in 1994 when Sijori Resort (Sentosa) Pte Ltd ("Sijori") obtained an 81 year lease over land in Sentosa from the Sentosa Development Corporation ("SDC") and developed the Club's building and facilities. Between 1994 and 2004, each of the claimants entered into agreements ("the Membership Agreement(s)") with Sijori to become members of the Club.

6 It was the claimants' case (according to para 9 of their Statement of Claim (Amendment No. 1)) that the express and/or implied terms of their Membership Agreements were as follows:

(a) Each member would be entitled to membership privileges until the year 2075;

(b) Each member would be entitled to complimentary three nights' accommodation at the Club for 20 years;

(c) Each member would be entitled to usage of facilities (swimming pool, gymnasium, food and beverage outlets, and karaoke room) at the Club;

(d) Each member would be entitled to special discounts for room stays, food and beverage outlets and karaoke entertainment.

(e) Each member would pay monthly subscription fees of $30 for individual memberships and $50 for family memberships.

7 The claimants alleged that on or about 14 November 2006, the Club was sold by Sijori to the first defendant pursuant to an option to purchase dated 26 January 2006 ("the Option to Purchase") made between the two parties. Clause 16 of the Option to Purchase states:

> A person who is not a party to this Option shall have no right under the Contracts (Rights of Third Parties) Act to enforce any of its terms.

8 The claimants averred that on or about 16 November 2006, the first defendant concluded a Membership Management Transfer Agreement (the "Transfer Agreement") with Sijori whereby the first defendant agreed to take over from Sijori the management of the Club with effect from 16 November 2006, pursuant to the terms of sale in the Option to Purchase. It is noteworthy that Recital 2 of the Transfer Agreement states:

> This Agreement is supplemental to the conditions stated in Option to Purchase Agreement with reference to membership concerns.

9 The claimants alleged that pursuant to cl 4 of the Transfer Agreement, the first defendant had agreed to accord substantially similar terms and conditions of membership to the claimants as Sijori had done, in particular the following membership privileges:

(a) Vouchers for 3 nights' complimentary stay yearly;

(b) Provision of transport services from Jardine Steps to the Club;

(c) Special discounts for Club members for room stays, food and beverages and karaoke;

(d) Free use of the swimming pool and gymnasium;

(e) Quarterly newsletters;

(f) Quarterly statements of accounts, update of Club activities, facilities and Sentosa's developments;

(g) Birthday and seasonal greeting cards; and

(h) A Customer Service Centre to handle members' enquiries, bookings, transfer of vouchers, complaints and feedback.

10 The claimants contended that it was provided under cl 4 of the Transfer Agreement that any complaints by members relating to their membership privileges must be resolved by the first defendant in a timely manner and any financial loss arising therefrom would be borne by the first defendant.

11 It was further alleged that under cll 5, 7 and 9 of the Transfer Agreement, the first defendant agreed to:

a abide by the bye-laws of membership;

b provide service quality that equalled if not surpassed current service standards that Club members received; and

c obligate existing reciprocal arrangements with other clubs, resorts, hotels, marketing and distribution channels.

12 The claimants added that pursuant to cll 6, 8 and 11 of the Transfer Agreement, Sijori had agreed that the first defendant had the right to collect ongoing monthly subscription fees from 16 November 2006 onwards, that the first defendant and Sijori had agreed to inform members about the ownership and management change and the first defendant had agreed to inform members of their new memberships with the latter and to convert their memberships in the Club by March 2007.

13 By its letter dated 16 December 2006, the first defendant informed the members of the change of ownership and that it would be upgrading and refurbishing the Club and its facilities. Members were also informed that the first defendant had acquired an adjoining piece of land.

14 The claimants alleged that the first defendant's letter in [13] made the following express and/or implied representations to each of them:

(a) they would continue to enjoy their existing membership privileges under the Membership Agreements as long as they continued to pay the monthly subscription fees to the first defendant; and

(b) that the first defendant would make the necessary arrangements for the transfer of their Club membership from Sijori to the first defendant and this would be completed by end January

2007.

15 By its letter dated 18 December 2006, Sijori informed the claimants that:

(a) it would hand over the Club to the first defendant to better serve the needs of members and to upgrade the Club's premises in line with SDC's future roadmap;

(b) the first defendant was the new owner of the Club and its facilities and the first defendant would acquire additional land to build a bigger and better world class resort;

(c) the first defendant would continue to accord the same membership privileges as long as membership and subscription fees were paid and all outstanding payments to Sijori were cleared; and

(d) the first defendant would make the necessary arrangements for the transfer of membership of each member from Sijori to the first defendant, which would be completed by end January 2007.

16 By its letters dated 27 December 2006 and 18 January 2007 respectively, the first defendant was said by the claimants to have represented to members that it was the new owner and manager of the Club and that all cheques, GIRO and credit card deductions were to be directed to the first defendant and that all outstanding payments up to 31 December 2006 were to be made to Sijori while monthly subscription fees from January 2007 onwards were to be paid to the first defendant. The claimants asserted that since 2007, the first defendant had received monthly subscriptions from them.

17 In 2007, the first defendant issued to the claimants complimentary room vouchers for three nights' stay at the Club. However, the claimants alleged the first defendant breached the representations set out in [14] by the second defendant's letter dated 4 February 2008 ("the 4 February letter") to the claimants, wherein the first defendant renounced its obligations as owner and manager of the Club under the Membership Agreements. The 4 February letter informed members that:

(a) the second defendant would arrange for new membership contracts to be offered to each of them;

(b) once they accepted the second defendant's offer of new membership contracts, all future monthly subscription fees should be paid to the second defendant;

(c) pending (a) and (b), the first defendant would only manage the Club by collecting membership subscription fees;

(d) the first defendant's obligations under the Membership Agreement would cease with the offer of a new membership contract from the second defendant; and

(e) if they did not accept the offer of the second defendant, they would have to look to Sijori for any recourse.

17 The claimants alleged that the membership fees which the second defendant then proposed to charge from 5 March 2008 onwards were 5½ times the original fees (*viz*, $165 and $275 for individual and family memberships instead of $30 and $50 respectively) and would be subject to further

increases from time to time as determined at the second defendant's discretion. Further, the new membership contract offered by the second defendant differed from the Membership Agreements. Under the new membership contract, the claimants were not entitled to membership until 2075 and were not entitled to complimentary three nights' stay at the Club for a period of 20 years. The second defendant then imposed a deadline of 30 days for each of the claimants to accept the new membership contract failing which each claimant would not be entitled to any further rights or privileges under the Membership Agreement(s).

18 The claimants alleged that the first defendant's conduct in [17] evinced an intention not to be bound by the Membership Agreements. The claimants said they accepted the first defendant's repudiation by ceasing payment of monthly subscription fees with effect from March 2008 and by not accepting the second defendant's offer of new membership contracts. Curiously, the Statement of Claim (Amendment No. 1) pleaded that in ceasing to collect monthly subscription fees from the claimants after March 2008, the first defendant was precluded/estopped from asserting that the claimants did not accept its repudiation of the Membership Agreements. This allegation was deleted from the draft Statement of Claim (Amendment No. 2) that was presented to this court for approval: see [25] below.

19 The claimants' alternative claim against the first defendant was for fraudulent misrepresentations on the basis that the first defendant well knew that the representations it made in [14] were made falsely or recklessly, not caring whether they were true or false, particularised as follows:

(a) the first defendant made the representations in order to induce each of the claimants to accept the first defendant as the new owner and manager of the Club, to agree to the novation of the Membership Agreements from Sijori to the first defendant and to direct the monthly subscription fees to the first defendant; and

(b) acting on the faith and truth of the representations and induced thereby, each of the claimants accepted the first defendant as the new owner and manager of the Club, agreed to the novation of the Membership Agreements from Sijori to the first defendant and directed payment of monthly subscriptions to the first defendant.

20 In the alternative, the claimants relied on s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) for their claim.

21 In the further alternative, the claimants alleged that the first defendant was under a duty to take care when making the representations to members. As the representations turned out to be false, the first defendant was in breach of its duty as the owner and manager of the Club and was guilty of negligence in making the representations.

22 The claimants levelled the same allegations against the second defendant and added that the second defendant wrongfully induced and procured the first defendant to breach the Membership Agreements by facilitating the first defendant's repudiation of the Membership Agreements by offering new membership contracts to each of the claimants and unilaterally increasing the monthly subscription fees. The claimants further alleged that the new membership contract offered by the second defendant amounted to an unreasonable and unilateral increase of the monthly subscription fees at 5½ times the original amount, which fees would be subject to further increase from time to time at the second defendant's discretion. It was alleged that the second defendant unreasonably imposed a deadline of 30 days for each claimant to accept the offer of a new membership contract failing which the claimants would not be entitled to any further rights and privileges under the

Membership Agreements.

23 The claimants further alleged that both defendants conspired to injure them by unlawful means and combined together to defraud and injure the claimants, based on the same set of facts set out earlier at [6] to [16] which the claimants rehashed as particulars in support of this allegation.

24 The loss and damage suffered by the claimants for all three claims were the same, *viz* since February 2007, they were not accorded membership privileges or three nights' complimentary stay and were denied usage of the Club's facilities.

25 I should point out that by the time the two Registrar's Appeals came on for hearing before me, the suit had been pending for some 20 months during which interval all three parties filed: Further and Better Particulars of their respective pleadings, Answers to Interrogatories administered by their opponents and specific discovery applications. I would also add that at the third hearing in January 2012, the claimants' solicitors had prepared a draft Statement of Claim (Amendment No. 2). Because there were still shortcomings in the draft and in view of the claimants' pending appeal to the Court of Appeal, the same was never filed.

The first defendant's arguments

26 Adrian Tan ("Mr Tan"), counsel for the first defendant pointed out that if there had been a proper novation of the Membership Agreements from Sijori to the first defendant (which the claimants apparently accepted since they raised no objections thereto) and there was no breach of contract on that score, how could the intended second transfer from the first defendant to the second defendant amount to a repudiatory breach? He submitted that the representative/class action was not sustainable because there were three key differences between the claimants, *viz*

(a) the alleged breaches took place in different circumstances and were not even common;

(b) their Membership Agreements were not on the same terms and conditions (there were twelve different application forms for membership of the Club); and

(c) some claimants were in arrears of their monthly subscription fees to the first defendant.

Mr Tan contended that the court below had (wrongly) adopted the broad brush approach adopted in *The Duke of Bedford v Ellis & Others* [1901] AC 1 ("*The Duke of Bedford*"), *Western Canadian Shipping Centres Inc. v Dutton* (2001) SCC 46 ("*Western Canadian*") and *Tan Chin Seng v Raffles Town Club* [2003] 3 SLR(R) 307) and chose to ignore other cases such as *Markt & Co Limited v Knight Steamship Company Limited* [1910] 2 KB 1021 ("*Markt & Co Limited*") and *Naken v General Motors Canada Ltd* 144 DLR (3d) 385 ("*Naken*") that adopted a different stand. The Assistant Registrar had held that notwithstanding the above three differences, the action could continue as a representative action.

27 Mr Tan contended that each claim in this suit was different so much so that it would not be possible for the court to be able to make findings at law that are common to all the claimants. Moreover, the 202 persons would not be obliged to give discovery or to testify. They would be riding on the coattails of the named plaintiffs who must take the stand. Consequently, the first defendant was unable to put the claimants into a common "basket" as it were. Mr Tan complained that the breaches alleged in the Statement of Claim were so general that he could not distinguish between them. Further, aside from the fifth plaintiff, the claimants had not produced any of their signed Membership Agreements to evidence their memberships. It was also contended that where damages had to be separately assessed and the loss suffered was different, representative action would also

not be suitable.

28 The claimants had annexed two additional schedules to their draft Statement of Claim (Amendment No. 2); Schedule 3 set out the particulars of the Membership Agreements of the claimants while Schedule 4 set out the particulars of breach alleged by some of the claimants.

29 Mr Tan pointed out that Schedule 3 showed that the named plaintiffs and 202 persons had different Membership Agreements. Not all held memberships that would expire in 2075. There were claimants such as Chan Yok Hung (one of the 202 persons) who were even unsure whether their memberships continued until 2075 while another member from the 202 persons *viz* Gan Ing Hin had a membership form that stated he was entitled to only a five year membership. In addition, some claimants held ten year memberships that provided for the possibility of conversion to full term memberships subject to payment of further fees to Sijori. Further, different entrance fees were paid by the claimants to Sijori ranging from $10,000 to $27,500. However, Schedule 3 did not refer to this difference.

30 The first defendant also highlighted a significant flaw in the statement of claim. The claimants had pleaded ([6] *supra)* that their membership benefits were based either on express and/or implied terms. I had pointed out to their counsel ("Ms Koh") that her clients' contractual relationship with Sijori would be based *either* on express terms as contained in their respective Membership Agreements *or* on implied terms but it could not be both. Otherwise, the defendants would be put in an invidious position. If some of the claimants had their rights and privileges (as pleaded) spelled out in the Membership Agreements while others did not and their rights were therefore implied, this action would fall foul of O 15 r 12(1) of the Rules which states:

> 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.

The claimants would not have the requisite "same interest" stipulated in the above rule so as to be able to mount a representative action against the defendants.

31 According to the first affidavit (filed on 25 June 2010) of the first defendant's director Lim Kwee Wah ("Lim's affidavit") in support of the Application, there were twelve types of application forms signed by the claimants when they applied for membership at the Club. Lim's affidavit exhibited (in LKW-15) copies (in the first defendant's possession) of the different application forms. Some but not all, membership forms specified that applicants could enjoy the facilities of a sister club Sijori Resort Batam while some members had obtained their memberships through transfers from Sijori Resort Batam. Some membership forms allowed the applicants to enjoy complimentary room stays or discounts for stays and food & beverages; others did not. Consequently, not all the claimants received the exact same benefits from Sijori.

32 Lim's affidavit further exhibited (in LKW-16) the dates of application for membership of the claimants, the fees they paid and the duration of their memberships. A number of the claimants' membership including those of the second and fourth plaintiffs did not state that their membership was until 2075. Some memberships were as short as five years. The entrance fees paid by the claimants ranged from $10,000 to $25,750. Lim's affidavit also listed the 40 claimants who were in arrears of their monthly subscriptions since about February 2007.

33 Lim's affidavit drew a response from the first plaintiff who by his affidavit (filed on 12 July 2010)

repeatedly emphasised (as did Ms Koh in her arguments) that the commonality amongst all the claimants was the breach committed by the first defendant; in that regard, the terms and conditions of their memberships, even if different, had little relevance. The first plaintiff disclosed that the members who transferred from the Sijori Resort Batam (in January 2000) had to pay a conversion fee besides a membership fee. Even then, the conversion fee varied depending upon whether it was for individual or family memberships and within those categories, the fee varied again depending upon whether there were stay or no stay benefits.

34 The first plaintiff's affidavit pointed out that the court below had ordered bifurcation of the trial with the first tranche dealing only with liability. The differences in membership terms and benefits if any, could be ironed out in the second tranche of the trial when damages were to be assessed, if the claimants succeeded in the first tranche. The first plaintiff added that many members who were allegedly in arrears of their monthly subscriptions had paid the arrears after February 2007. He complained that the first defendant did not send letters to the 40 members allegedly in arrears of their monthly subscriptions post-February 2007, to settle their dues. Was there a contractual obligation on the part of the first defendant to do so?

35 I should mention that Further and Better Particulars of the Statement of Claim had been filed on 8 January 2010 (on the allegation that the claimants had not been accorded membership privileges). In those particulars (at para 22.2), the claimants pleaded that a significant number of telephone calls to the first defendant to book rooms were unanswered, the first defendant's telephone lines were often engaged or busy and when there was a response, the first defendant's employees would inform the callers that room bookings could not be accommodated while those claimants who managed to obtain rooms were made to pay additional amounts for the stays or, were compelled to exchange additional vouchers for the stays or, could only use the first and/or the second vouchers. I accepted Mr Tan's submission that the claimants were relying not on one but on a number of defaulting incidents for the alleged breach. More importantly, the breaches were not common to all the claimants.

36 If the aggrieved persons were not the named plaintiffs but were from the 202 persons, each and every one of the latter must testify on the incidents of breach pertaining to their individual case. In this regard, according to Schedule 4 of the draft Statement of Claim (Amendment No. 2), at least eighteen claimants did not receive vouchers for complimentary stays because they were not entitled to the same. If that was the case, those claimants suffered no breach of the complimentary stay provision. There were six recipients of the stay vouchers (claimants Nos 59, 71, 72, 93, 106 and 115) who could not book rooms because of renovation works. Further, at least eleven other claimants (Nos 13, 76, 85, 90, 93, 96, 97, 98, 100, 105, 113) were unable to book rooms because they were told "there were legal issues between Sijori and the first defendant" but the claimants did not say who gave the information. There were numerous other claimants who could not book complimentary stays because they were told none were available. One claimant (Chan Hean Cheo) did not even attempt to use the stay vouchers because he was told by other members that they would not be honoured. There was also a claimant (Tay Chor Seng) who alleged that he could not use his third stay voucher despite two attempts – once due to renovation works while no reasons were given for the second unsuccessful attempt. Yet another claimant Hor Khoon did not use the facilities because he was told that members no longer had free entry to Sentosa Island. He did receive vouchers for complimentary stays but was unable to book rooms because he was told (i) there were renovation works and (ii) there were no rooms available.

37 Common sense dictates that if Chan Hean Cheo and other claimants did not even attempt to make use of the Club's facilities because they believed (from other members) that the stay vouchers would not be honoured, these persons could not be party to the common complaint that members

were denied complimentary room stays. By the same token, unless claimants had tried to but were denied the right to, usage of facilities like the swimming pool, gymnasium and karaoke lounge (to which facility the first defendant contended some or all claimants were not entitled to), they cannot allege the first defendant was in breach of the provision(s) set out in [9]. If claimants like Hor Khoon expected but could not gain free entry into Sentosa, he can hardly complain as his inability to enjoy the Club's facilities was not attributable to any breach on the part of the first defendant. Further, was there denial of facilities and benefits to all claimants since 2007? If only some of the named plaintiffs or some only of the 202 persons were so denied, a representative action is not practical. The first defendant would be deprived of defences specific to each claimant's claim.

38 Would the unavailability of rooms due to renovation works or full occupancy amount to a breach in the light of Rule 13(ii) of the Bye-laws of the rules and regulations (see [70] *infra*) of the Club? It cannot be because the terms and conditions appearing on the complimentary room vouchers clearly stated:

> 3 The use of each Voucher is subject to room availability and any Member who wishes to use a Voucher is required to place a reservation 3 months in advance. All reservations MUST be made through Colony through its customer service line at 6398-5276/6398-5277. For the avoidance of doubt, no Voucher can be utilised for any reservation not made through the Colony hotline.
>
> 7 The use of each Voucher is dependent on the Member's Membership status being valid and current. Colony reserves the right to revoke all or any of a Member's Vouchers if his membership has been suspended or terminated for any reason, including non-payment of subscription fees or breach of the Membership Terms and Conditions, Members' By-Laws or the Rules and Regulations of any Colony Hotel.

Condition 7 above meant that the 40 members who were in arrears of their monthly subscriptions could not complain that they were denied complimentary stays nor could they allege that the first defendant was in breach of their Membership Agreements.

The plaintiff's arguments

39 Ms Koh had contended that the difference in the application forms was not as important as the commonality in the terms and conditions of membership and the attendant privileges – the membership privileges from Sijori were common to all the named plaintiffs. She submitted the claimants were akin to the 4,895 plaintiffs in the 2001 class action against the Raffles Town Club ("RTC") members (see [60] *infra*) where the plaintiffs also had different membership application forms. Ms Koh added that when the first defendant sent the 4 February letter (at [17]) to members, it reneged on its obligations set out earlier at [14] and was thereby in breach of contract to all the claimants. She submitted that O 15 r 12(1) of the Rules was a rule of convenience to save judicial time and resources, relying on *The Duke of Bedford* and *Carnie and Another v Esanda Finance Corporation Limited* (1995) 182 CLR 398 ("*Carnie*"). Hence, the rule should be interpreted liberally and broadly (which interpretation the court below accepted).

40 In essence, the claimants in this case advocated the liberal approach propounded in *The Duke of Bedford* while the first defendant argued that the narrower approach in *Markt & Co Limited* should be adopted.

The decision

41 It bears remembering that the claimants are relying on the Transfer Agreement in [7] for their

claim. They are suing the first defendant based on novation of the Membership Agreements from Sijori to the first defendant by reason of the Transfer Agreement. That meant that the terms of the Transfer Agreement were dependent on the terms of the Membership Agreements. However, Recital 2 (at [8] *supra*) of the Transfer Agreement stated the same was supplemental to the conditions stated in the Option to Purchase and the latter's cl 16 (at [7] *supra*) stipulated that third parties have no rights thereunder. It should also be borne in mind (according to para 8 of the Statement of Claim) that the claimants became members over a span of 10 years between 1994 and 2004. If the Membership Agreement of each claimant and the benefits thereunder differed from those of another or others, how can the claimants maintain they have a commonality of action against the first defendant based on the same interest? Each claimant would have to take the stand to prove his/her own contractual terms (either express or implied but not both) with Sijori and that those terms had been novated to the first defendant.

42 Apart from the question of whether each of the claimants had Membership Agreements that contained identical terms, there was also the issue of the actual representations purportedly made by the first defendant and which formed the basis of the claimants' claim in misrepresentation. Did the first defendant make the exact same representation to each and every claimant? Did each claimant rely on the representation and if so to what extent? The same questions would arise in regard to the various letters sent by Sijori and/or the first defendant to the claimants, assuming each and every one of the claimants received the letters.

43 By the same token, the same question can be raised of the loss each claimant suffered as a result of the alleged breaches committed by the first defendant. It is highly unlikely that each and every one of them suffered the same loss or suffered an identical loss to the same extent. Indeed the first defendant contended that 85 of the claimants did not suffer any loss of provision of facilities and accommodation at all. Clearly, a representative action would not be suitable if the claimants, should they succeed, have to return to court to prove individually the damages/loss each one of them suffered as a result of the first defendant's breaches of the Membership Agreements while other claimants suffered no loss at all.

44 Adopting the analogy of Mr Tan, the claimants who relied on express terms to found their claim for breach against the first defendant would have to be put say into "basket A" while those who relied on implied terms would have to go into "basket B". The different types of breach suffered by the claimants meant that even those who could be put into basket A or B need to be further differentiated by being put into different sized baskets within basket A or B. The claimants would also have to overcome the hurdle of cl 16 of the Option to Purchase ([7] *supra*).

45 It would be appropriate at this juncture to turn to some case law on class actions starting with the House of Lords judgment in *The Duke of Bedford*. In that case, a representative action was brought by farmers/market gardeners against the defendant owner of a market regulated by the Covent Garden Market Act 1828 ("the CGM Act") on the basis that the plaintiffs had been given certain rights by the same statute. The defendant applied for a stay of the action on the ground that the plaintiffs had separate and different rights under the CGM Act and the class action would embarrass or delay the trial. The House of Lords dismissed the defendant's appeal against the Court of Appeal's dismissal of his application. Lord Macnaghten stated (at p 8);

> 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.

pointing out (at p 10) that "it was a simple rule resting merely upon convenience", referring to Order 16 rule 9 which states:

> Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

46 The UK Court of Appeal in *Markt & Co Limited* departed from the position in *The Duke of Bedford*. In *Markt & Co Limited*, a number of shippers had contracted to ship general cargo on the defendant's vessel from New York to Japan. Their cargo was lost when the ship was sunk by the Russian navy during the Russo-Japanese War. The plaintiffs on behalf of themselves and on behalf of forty-four other shippers sued the shipowner in two writs for "breach of contract and duty in and about the carriage of goods by sea". The defendant was unsuccessful in its application to the court below to set aside or strike out the writs on the ground that the plaintiffs could not sue in a representative capacity. The defendant's appeal was allowed, the appellate judges (Buckley LJ dissenting) holding that shippers of goods in a general ship could not have "the same interest in one cause or matter" within the meaning of Order 16 rule 9 of the UK Rules of the Supreme Court (at [45] *supra*).

47 Counsel for the claimants had also cited the Canadian case *Western Canadian* (at [26] *supra*) to support her clients' right to maintain this action. However, a closer reading of that case reveals significant distinguishing factors. The applicable rule in that case was Rule 42 ("Rule 42") of the Alberta Rules of Court ("the Alberta Rules") which states:

> 42 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.

It is to be noted that the words used in Rule 42 of the Alberta Rules are "common interest" whereas the operative words in O 15 r 12(1) of the Rules (at [30] *supra*) are "same interest".

48 Looking at the headnotes, the facts in *Western Canadian* were vastly different. There, the two Chinese representative plaintiffs L and W with 229 other investors became participants in the federal government debentures in Western Canadian Shipping Centres Inc ("WCSC") which was incorporated by its single shareholder D for the purpose of helping investor class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI for $5.5m, the rights to a Crown surface lease and also agreed to commit a further $16.5m for surface improvements. To finance WCSC's obligations to CRI, D directed that series A debentures be issued in an aggregate principal amount of $22.05m to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular series E and F debentures. Eventually the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to strike out that portion of the claim in which the two plaintiffs purported, pursuant to Rule 42, to represent a class of 231 investors. The judge dismissed the application which the majority of the Court of Appeal upheld although it granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to the Supreme Court against the dismissal of their application while the plaintiffs cross-appealed on the discovery order made against each class member. The Supreme Court dismissed the defendants' appeal but allowed the plaintiffs cross-appeal.

49 The Canadian Supreme Court *inter alia* held that class actions should be allowed to proceed under Rule 42 where the following conditions were met:

(a) the class is capable of clear definition;

(b) there are issues of law or fact common to all class members;

(c) success for one class member means success for all and; and

(d) the proposed representative adequately represents the interests of the class.

If the above conditions were met, the court must be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed. The court should also 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.

50 I was of the view that the claimants would not qualify for representative action based on the four criteria spelt out in *Western Canadian*, in the light of my earlier comments in [36] to [38] above. It should be noted that the 231 plaintiffs in that case had all invested in debentures issued by or at the behest of D and the other defendants. Although the debentures issued were of different series, they were eventually pooled. Consequently, the plaintiffs came from a common pool of investors and they had the same/common grievance against the defendants for breach of fiduciary duties in mismanaging the funds raised from the plaintiff investors.

51 A Canadian case (cited by the first defendant) which is more akin to ours is *Naken*. In *Naken*, four individual plaintiffs sued on behalf of themselves and all other persons who had purchased and still owned (at the date of the writ) motor vehicles of a certain make and model manufactured and marketed by the defendant as durable, tough and reliable whereas the vehicles were alleged by the plaintiffs to be defective in numerous respects. The endorsement in the plaintiffs' writ of summons stated:

> The plaintiffs' claim is for damages in the amount of $5,000,000.00 for breach of warranty and for breach of representation with respect to the sale of 1971 and 1972 Firenza motor vehicles in the province of Ontario. The plaintiffs further claim the sum of $1,000.00 for costs.

52 A divisional court had struck out the statement of claim on an application by the defendant. An appeal to the Ontario Court of Appeal was dismissed but the plaintiffs were given leave to file an amended statement of claim whereby the class represented would include only those purchasers of the vehicle who saw the defendant's printed materials or published advertisements and purchased the vehicle as a result. The defendant appealed against the orders. The Supreme Court allowed the defendant's appeal. In the judgment delivered on behalf of the Supreme Court, Estey J held that the class action was inappropriate under Rule 75 of the Rules of Practice of the Supreme Court of Ontario ("Rule 75") which states:

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

Rule 75 was taken from Order 16 rule 9 of the UK Rules of the Supreme Court.

53 Estey J *inter alia* reviewed *The Duke of Bedford* and *Markt & Co Limited* in his judgment. Having noted the subtle differences in wording between Rule 75 and Rule 42 of the Alberta Rules ([47] *supra*), the judge added that the claim would require at least three stages, *viz:*

(a) a trial on the issue as to whether there was a cause of action, and if so, whether it sounded in damages;

(b) a reference to the master to conduct hearings to determine what persons, if any, qualified for inclusion in the class;

(c) receipt of the master's report by the trial judge and computation of the total damages to be awarded.

He observed that Rule 75 made no provision for the above considerations nor for other important matters such as the rights of those owners of the vehicle unwilling to be represented in the action, the costs to be awarded against unsuccessful owners seeking admission in the representative group, discovery, production or other prehearing stages in connection with proceedings before the master, or for the deprivation of the right to have the issue fully tried in the high court. The action required a procedure or determinative process to identify those who were entitled to claim and would require the master to try up to 4,932 claims and the particular damages suffered by each claimant, which hearings would be complex. Rule 75 made no provision for discovery or costs in such proceedings, nor was there provision for the manner in which the trial judge would review the master's report. The defendant may have to actively defend several thousand claims for membership in the class in the absence of authority to award costs against unsuccessful claimants. Estey J added (at p 82):

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.

54 On the facts in *Naken*, clearly a class action was unsuitable. Some of the factors taken into account by the Supreme Court of Canada in arriving at its decision are equally applicable to our case – the need for pre-trial applications against all the claimants (including discovery) and the non-recoverability of costs by the first defendants against the 202 persons should the claimants fail in this action.

55 The claimants had also relied heavily on the Australian case of *Carnie*. I turn now to look at the facts in the case. There, the two plaintiffs were borrowers who sued their lender claiming that various matters had not been disclosed by the latter in the contract of loan between them, in contravention of the New South Wales Credit Act 1984 and that as a result, they were not liable to pay the credit charge for which the contract provided. The plaintiffs claimed to sue on their own behalf and on behalf of all borrowers who had entered into loan contracts with the lender that had the same characteristics as their contracts. The borrowers claimed a declaration that no represented party was liable to pay any credit charge to the lender.

56 The defendant applied to stay or dismiss the proceedings in so far as the proceedings and statement of claim purported to relate to a representative action. The application was refused but on appeal, the New South Wales ("NSW") Court of Appeal allowed the application. The borrowers appealed to the High Court of Australia which allowed their appeal.

57 The representative action in *Carnie* was brought pursuant to Part 8 r 13(1) of the Rules of the Supreme Court of NSW ("Rule 13(1)") which states:

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.

58 In allowing the appeal, Chief Justice Mason had this to say (at p 404) when referring to Rule 13(1):

> ...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.

He added (at p 405):

> Once the existence of numerous parties and the requisite commonality of interest are ascertained, the rule is brought into operation subject only to the exercise of the court's power to order otherwise. And that leaves for consideration the question whether the case is one in which the court should, in the exercise of that power, make an order that the action should not continue as a representative action.

59 Even though the High Court of Australia allowed the borrowers' appeal, the presiding judges (including Chief Justice Mason) remitted the case back to the NSW Court of Appeal for consideration of the question whether it should "otherwise order" within the meaning of Rule 13(1) that the action not continue as a representative action. As this court is unaware of what happened after the case was remitted back to the NSW Court of Appeal, even taking into account the fact that the wording of Rule 13(1) is *in pari materia* with O 15 r 12(1), *Carnie* is not particularly helpful; the claimants' reliance on numerous passages from the common judgment delivered by JJ Toohey and Gaudron may well be misplaced. In their judgment, the two judges did an extensive review of Commonwealth cases on representative actions including *The Duke of Bedford*, *Markt & Co Limited* and *Naken*. They opined that the "broad and liberal approach" to representative actions in *The Duke of Bedford* (which the Australian High Court adopted) suffered a setback in *Markt & Co Limited* which limited the scope of representative actions to exclude cases where the relief claimed was damages and where separate and individual contracts were involved.

60 Finally, it would be appropriate to refer to a local case on class actions *viz Tan Chin Seng v Raffles Town Club* [2002] SGHC 278 where the ten plaintiffs also represented 4,885 other members of the Raffles Town Club ("RTC"). The decision of the trial judge spawned two appeals. The first appeal which was allowed (*Tan Chin Seng v Raffles Town Club* [2003] 3 SLR(R) 307) related to the trial judge's dismissal of the plaintiffs' claim based on misrepresentation and breach of contract. The other appeal which was also allowed (*Tan Chin Seng v Raffles Town Club* [2005] 4 SLR(R) 351) related to the dismissal of the plaintiffs' claim for damages arising from the diminution in value of their founder membership of RTC (for which they paid $28,000 each) had RTC maintained a membership of between 5,000 and 7,000 instead of the 19,000 members actually admitted.

61 The class action against RTC was sustainable as each of the representative plaintiffs had received the exact same representation from RTC albeit through different financial institutions and other bodies *viz*, that they had been specially selected and invited to be founder members of a premier club at a discounted price of $28,000 against a full membership fee of $40,000. Each plaintiff had also received together with the invitation letter to be a member:

(a) a glossy brochure describing the facilities at the proposed club;

(b) a document containing questions and answers to give more information to the invitee and;

(c) a priority application form.

62 All the plaintiffs in the case raised the same complaint against RTC:

(a) there was overcrowding at the club premises because its facilities could not cope with the large number of members using the facilities at one and the same time;

(b) the club did not open at end 1998 as promised to founder members but in March 2000; and

(c) there was no exclusivity in the membership as represented to all founder members.

Clearly therefore, the founder members of RTC had the requisite "same interest" contemplated under O 15 r 12(1) of the Rules so as to mount a class action.

63 The "same interest" element however is missing from this case. The claimants in this action became members of the Club at different times and under different arrangements but all of them had to rely on the Transfer Agreement to found their claim, based on novation of Sijori's rights and obligations to the first defendant; this is problematic for reasons stated below.

64 Earlier (at [25]), I had alluded to the fact that the claimants' Statement of Claim (Amendment No. 2) was not filed. This was due to the fact that the proposed amendments did not overcome the insurmountable difficulties that the trial judge would face should this action proceed to trial as a class action, even on the issue of liability only. Indeed, the position was made worse by the claimants' attempt to add to the pleadings a new cause of action by para 27A of the Statement of Claim (Amendment No 2) based on collateral contract; the paragraph states:

> Further and/or in the alternative, by reason of the matters pleaded at paragraphs 7 to 25 above, the 1st Defendant has entered into a collateral contract with each of the Club Members, such contract being collateral to the Transfer Agreement, pursuant to which each of the Club Members would continue to enjoy their existing membership privileges under the Membership Agreement so pleaded in paragraph 9 above as long as they continued to make payment of their monthly subscription fees to the 1st Defendant.

Although required under O 18 r 12 of the Rules, no particulars were given on:

(a) when the collateral contract was made;

(b) the terms of the collateral contract; and

(c) who were the parties to the collateral contract – whether it was made with all or some of the named plaintiffs or with all or some of the 202 persons.

65 More importantly, for there to be a collateral contract (for which the *locus classicus* is *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854), it is stated in *Halsbury's Laws of England* vol 9(1) (Butterworths, 4th Ed Reissue, [1998]) at para 753:

> A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C. Before B can succeed in an action against C for breach of C's promise, B must prove the following:
>
> (i) that C made a promise to B *animo contrahendi* (ie with the intention to contract); and

(ii) in reliance on that promise, B entered into the contract with A or did the other requested act.

66 Here, the contract in question was the Membership Agreement that each of the claimants (*ie*, B) entered into with Sijori (*ie*, A). What did the first defendant (*ie*, C) promise to the claimants (B) in return for entering into the Transfer Agreement if indeed it was novated? To compound the claimants' difficulties, they are faced with cl 16 (see [7] *supra*) of the Option to Purchase which excluded the applicability of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("The CRTP"). Mr Tan cited s 2(1) and (2) of The CRTP which state:

Right of third party to enforce contractual term

2. (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —

(*a*) the contract expressly provides that he may; or

(*b*) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(*b*) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

Clearly, cl l6 of the Option to Purchase read with s 2(2) of the CRTP would apply to preclude the claimants from claiming any rights under that document or under the Transfer Agreement, because of Recital 2 therein referred to earlier (at [8] *supra*).

67 The claimants had alleged there was novation of the Transfer Agreement in their pleadings. Was there really a novation as understood at law? Novation is defined in Halsbury's Laws of England vol 9(1) (Butterworths, 4th Ed Reissue, [1998]) at para 1036 as being:

…where there is a contract in existence and some new contract is substituted for it, either between the same parties or different parties, the consideration usually being the discharge of the old contract.

Here, the first defendant informed Club members on 16 December 2006 that it had purchased the Club's land and building. On the same day, the Transfer Agreement was signed. Under the terms of the Transfer Agreement, the first defendant was contractually obliged to manage the Club. This was followed by Sijori's letter to Club members on 18 December 2006 informing them of the change in management. I very much doubt that a change in management of the Club amounts to a novation of the Membership Agreements between the members and Sijori.

68 Even if there was a novation, there is no term/condition in any of the 12 types of Membership Agreements or in the Club's Bye-laws (as far as the court is aware) that prohibited Sijori from transferring to other parties its obligations to Club members whether by novation or otherwise. Consequently, there is nothing to prevent the obligations of Sijori which were assumed by the first defendant from being transferred again.

69 Of greater significance is the fact that the 4 February letter was from the second, *not* the first, defendant to members. As Mr Tan put it rhetorically, what did it have to do with the first defendant? Yet, in para 29 of the draft Statement of Claim (Amendment No. 2) that the claimants had presented to this court for consideration, the claimants alleged:

Further, on or around 4 February 2008, contrary to the 1st Defendant's Representations, the 1st Defendant renounced all its obligations under the Novated Membership Agreement and as the owner and manager of the Club

Particulars

a Each of the Club Members was informed that the 1st Defendant had purportedly arranged for a new membership contract to be offered to each of the Club Members through the 2nd Defendant, an associate company of the 1st Defendant.

b Each of the Club Members was informed by the 1st Defendant that upon their acceptance of the offer of a new membership from the 2nd Defendant, all future monthly subscription fees should be paid directly to the 2nd Defendant whom (sic) should be contacted on all membership matters.

...

e The new membership contract offered by the 2nd Defendant amounted to an unreasonable and unilateral increase of the monthly subscription fees at 5.5 times the original amount, which fees would be subject to further increase from time to time at the 2nd Defendant's discretion.

f The terms and conditions and conditions of the new membership contract offered by the 2nd Defendant are different from that (sic) under the Novated Membership Agreement. Under the new membership contract offered by the 2nd Defendant, each of the Club Members is not entitled to membership privileges until the year 2075 and is not entitled to complimentary three nights' of room accommodation at the Club each year for 20 years.

...

h Being the owner of the Land and the building previously occupied by Sijori being the Club and facilities, the rightful and/or only party that is capable of according the membership privileges to the Club Members is the 1st Defendant.

70 The proposed pleading in para 29(b) is factually incorrect as the 4 February letter was not sent by the first defendant. So too was the proposed para 29(f) since not all the claimants (see [32] and [38] *supra*) were entitled to memberships until 2075 and three nights' complimentary accommodation respectively. It is also unsustainable because Bye-law 13(ii) of the Club's rules and regulations states:

All privileges and the use of Club facilities are subject to availability and changes without prior notice.

71 Further, the proposed para 29(e) is untenable in the light of Bye-law 5(i) of the rules and regulations of the Club which provision states:

The membership fee payable by any Member shall be in accordance to the application form and/or such form as the Company shall from time to time at its absolute discretion determine. Payment

of the membership fee shall be subject to the terms and conditions of the application form.

Consequently, it was perfectly in order for the second defendant to state in the 4 February letter:

> Under your membership with Sijori, in addition to your entrance fee of $20,000.00 to $30,000.00, Sijori charged each member a monthly subscription fee. Under the terms and conditions of your application for membership with Sijori, Sijori was entitled to revise the monthly subscription fee "from time to time" in their absolute discretion". In other words, the monthly membership subscription under your agreement with Sijori was subject to review and increase at Sijori's absolute discretion. This is also provided under Article 5 of the by-laws which govern your membership with Sijori.

72 The claimants alleged breach by the first defendant of the Membership Agreements despite the following extracts from the 4 February letter:

> Colony Members Service Club Pte Ltd ("Colony") is a wholly-owned subsidiary of Marx Unilever Development Group Pte Ltd, the parent company of Treasure Resort Pte Ltd ("Treasure Resort").
>
> Under various agreements between Sijori and Treasure Resort made in 2006, Treasure Resort agreed to arrange an offer of a new contract of membership to all Sijori members upon substantially the same terms and conditions as agreed between Sijori and its members. Under the agreement, Treasure Resort did not receive any part of the entrance fee of between $20,000.00 to $30,000.00 which Sijori members had paid to Sijori. Sijori has kept the whole of the entrance fee paid by Sijori members, and has simply arranged for the offer of a new membership contract to Sijori members by Treasure Resort or its nominee.
>
> Further to the above agreement, Treasure Resort has now arranged for its associate company, Colony, to make a formal offer of membership to all Sijori members. The details of the membership offer by Colony are set out below, which are intended to comprise a package of benefits on substantially the same terms and conditions as those you used to enjoy with Sijori. If you choose to accept Colony's offer, you will henceforth become members under a new membership agreement with Colony.

73 In the light of my observations in [67] and [68] that there are no contractual provisions that prohibit other third parties (including the second defendant) from assuming the obligations of Sijori to members, I was of the view that the proposed Statement of Claim (Amendment No. 2) would not assist to improve the claimants' class action against the first defendant.

74 As a class action would be a time-consuming, costly but ultimately fruitless exercise, I allowed the appeal in Registrar's Appeal No 209 of 2011 with costs, and ordered that the action be discontinued in so far as the 202 persons were concerned.