Tan Chin Seng and Others v Raffles Town Club Pte Ltd
[2002] SGHC 278

Case Number : Suit 1441/2001

Decision Date : 22 November 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Molly Lim SC, Ronald Tong and Wang Shao-Ing (Wong Tan & Molly Lim) for the plaintiffs; K Shanmugam SC, Boey Swee Siang, Sanjiv Rajan, Stanley Lai, Marcus Yip and Candace Ler (Allen & Gledhill) for the defendants

Parties : Tan Chin Seng; Lee Ah Sim Alan; Wong Leong Thong Peter; Kong Cheong Hin Steven; Chia Ee Lin Evelyn; Liu Hui Nan; Lim Choo; Ng Cheng Hwa; Meta Mui Khim Irene; Yong Kah Teck (each suing on behalf of himself and 4885 other members of Raffles Town Club as set out in Schedule 2 appended to the Statement of Claim) — Raffles Town Club Pte Ltd

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. Raffles Town Club Pte Ltd ("the defendants") was incorporated in 1996 for the purpose, inter alia, of setting up and running a proprietary club in Singapore ("the Club"). The Club was to be erected on a 30-year leasehold site at the junction of Dunearn Road and Whitley Road which has been acquired from the Urban Redevelopment Authority ("URA") in May 1996. A competition was held soon thereafter to select the architectural firm to be entrusted with the design of the Club and the firm so selected submitted building plans for the Club to the authorities. Provisional permission (with requirements) for the erection of the clubhouse was obtained on 18 October 1996. The Club was to open in late 1998 but delays in construction and in the obtaining of relevant approvals resulted in the Club opening its doors in March 2000.

The drive for membership: "founder" members

.

2. The Club began its membership drive with a priority launch for "founder" members in November 1996. A number of financial institutions participated in this launch. Letters of invitation (dated 9 November 1996) were sent out by these institutions to selected customers of theirs. Enclosed with the letter were a brochure on the Club ("the Brochure"), a question and answer sheet ("Q&A Sheet") and a priority application form for "founder" membership ("application form"). The memberships were all transferable memberships. The plaintiffs in their pleadings and at the hearing referred to the invitation letter, the Brochure and the Q&A Sheet as the common law prospectus but conceded that they were not using that term in any legal sense.

3. There were slight variations in the format of the letters of invitation that were sent out by the various institutions but in essence the letters stated that a limited number of exclusive individual "founder" memberships were available at $28,000 to selected customers. The ambience and facilities that would be available at the Club were described in effusive and laudatory terms in these letters. The invitation letter sent out by the United Overseas Bank, for instance, began by saying:

> "As your aspirations become reality, the desire for a place to pause and enjoy the rewards of your achievements becomes something of an aspiration in itself. UOB is proud to present you with an opportunity to actualize these aspirations for gracious living, with membership to a private city club without peer in terms of size, facilities, and sheer opulence – the Raffles Town Club."

And, after giving more details of this special offer to the selected customer, ended by stating:

> "Raffles Town Club is dedicated to providing the ultimate lifestyle investment for you and your family.

We invite you to join Singapore's elite in a most distinguished setting."

The letter emphasised that "founder" membership was available by invitation only and applications had to be submitted by 30 November 1996.

4. The Brochure, in keeping with the tone of its contents, was headed "A Treat For The Elite". It began with a quotation from Shakespeare:

> "There is a tide in the affairs of men,
>
> which, taken at the flood, leads on to fortune."

and declared to the invitee:

> "You are of the chosen few. The tide has risen, and you ride a wave of prominence. Indeed, now that you have evolved beyond a certain station in society, there is an exquisite reward awaiting you. It is called the Raffles Town Club."

The pages in the Brochure that follow unabashedly extol the facilities, ambience and services that will be available at the Club: "The Revival of a Venerable Lifestyle"; "The Epitome of Grace, Achievement and Opulence"; "Exclusivity and Cultivation in an Age of Sophistication" are the sort of sub-headings used to describe what was on offer at the Club. And, as was to be expected from a club using such unabashedly extravagant language to tout its virtues, the Brochure was a glossy publication resplendent with colourful illustrations envisioning lavish facilities.

5. There could be no doubt that what the Brochure was telling the invitees was that this was going to be a premier and first-rate club for the exclusive enjoyment of the selected elite in Singapore.

6. The Q&A Sheet also gave some pertinent assurances. There was an assurance, for instance, that:

> "Common problems will be addressed, such as carparking, where members will have ample space to park with nearly 600 lots. And by allocating much larger areas, traditional bottleneck facilities such as the gymnasium and coffeehouse will serve you smoothly even during peak periods."

and on the question of transferability of membership, invitees were told that membership would, subject to the Club's approval, be transferable and that a transfer fee of 10% of the prevailing entrance fee, set by the Club at $60,000 upon opening, will be applicable.

7. The Q&A Sheet posed and answered certain questions about the Club. This was also clearly a document aimed at promoting sales. The last question and answer, for example, read:

> Q. If I am not successful in this application, when can I re-apply for membership?
>
> A. As only a limited number of memberships are available under this priority launch, we may not be able to accommodate all suitable applicants. We will however be conducting an initial public launch from 1st December 1996 for Individual Ordinary memberships at $40,000.

By asking that question and giving that answer the promoters were insinuating that any invitee who did not immediately apply for "founder" membership at $28,000 would lose out: if he joined at a later date, he would have to pay the increased price of $40,000. Implicit in this answer was, of course, the suggestion that anyone who bought a membership (which was transferable) at $28,000 stood to make a good profit when the price went up.

8. The application form, besides requiring the personal details of the applicant, contained a number of declarations that the applicant was

required to make. The first of these declarations was the following:

> "I, the undersigned, undertake at all times to comply with and be bound by the rules and regulations as may be prescribed and/or varied from time to time by Raffles Town Club Limited (the 'Proprietor'). I understand that the current rules and regulations as prescribed by the Proprietor may be viewed by me at the office of the Proprietor at 2 Nassim Road, Singapore 258370. I further understand that a copy of the same will be sent to me upon acceptance of my application."

I will not refer to the other declarations as they were of no particular relevance in these proceedings.

9. Each of the plaintiffs herein, upon receipt of the invitation, applied for membership by submitting the duly completed application form to the defendants. It was not in dispute that when the defendants accepted each of these applications the contract between that applicant and the defendants came into being. It was also not disputed that the declarations in the application form – and in particular the Rules and Regulations of the Club ("the Rules") referred to in the very first declaration – was part of that contract. The defendants contended that the declarations contained in the application form constituted the entire contract with each of the plaintiffs. The plaintiffs, however, contended that some of the representations in the Brochure and in the Q&A Sheet also constituted the contract. I will deal with these contentions in dealing with the plaintiffs' claims in contract.

10. The priority launch for "founder" members met with considerable success and 18,992 persons who applied for membership were admitted as "founder" members. Subsequently (ie after the closing date for the priority launch), an additional 56 persons were admitted as "ordinary" members of the Club at the increased fee of $40,000 each. The plaintiffs in this case (all 4,895 of them) were from the group of 18,992 "founder" members.

11. It would appear that the general membership of the Club did not, at that time, know that the total number of "founder" members exceeded 18,000. This fact became publicly known only in late March 2001 as a result of disclosures made in court at the hearing of Suit No. 742/2000 in which Peter Lim (one of the original shareholders of the defendants) sued the other shareholders (Lawrence Ang, William Tan and Dennis Foo) as a result of certain disputes amongst them. These disputes were eventually settled out-of-court on confidential terms sealed by the court.

12. In July 2001, the original shareholders sold their entire interest in the defendants to two new investors: Lin Jian Wei and Margaret Tung. At the time the new shareholders assumed control, some $501.5 million of the $515 million collected as entrance fees had been spent leaving the defendants with a cash balance of only about $13.5 million. The financial viability of the defendants when the new shareholders took over was therefore dependent largely on the monthly subscription from members and the profits that the defendants could make from the food and beverage and other services provided at the Club.

13. On 15 November 2001, the ten named plaintiffs herein commenced this representative action – on behalf of themselves and the 4,885 other "founder" members of the Club – against the defendants for alleged misrepresentation/breach of contract. The remedy they sought was the rescission of their membership contracts or damages in lieu thereof on the grounds of misrepresentation. Alternatively, they sought damages for breach of contract. I will deal first with the claim based on misrepresentation.

The tort of misrepresentation

.

14. The representations relied on by the plaintiffs for their claim in misrepresentations were pleaded in paragraph 9(a) to (g) of the Amended Statement of Claim. I will set these claims out in full:

> "9. The prospectus contained, *inter alia*, the following highlights either by express representations or by way of necessary implications:
>
> > a. It was planned that the Club would have nearly 600 car park lots for the use of the members.

b. 'Raffles Town Club members will enjoy unparalleled privileges and facilities'.

c. 'The Club's exclusive and limited memberships will be fully transferable'.

d. The Club would be constructed to have a total built-up area in excess of 400,000 sq. ft. catering for the 'business entertainment, networking, socializing, personal and family leisure requirements' of each successful subscription for the duration of the membership. The Club would have 'separate formal, casual, sporting, children's and family facilities' for the successful subscribers.

e. A supplementary card would be issued to the spouse or fiance of the member allowing full membership privileges and benefits at no additional cost. This was intended to convey the meaning and message that each subscriber would receive two licences for the price of one.

f. The Club would be 'without peer in terms of size, facilities and sheer opulence'.

g. There would be two classes of individual members:

i. first, a limited number of exclusive transferable founder members at S$28,000 (exclusive of GST) available to the credit-card holding customers on a first-come-first-served basis. This class of founder members would be selected from those who submitted their applications not later than 30 November 1996. Based on 'priority applications', this class of members were called 'founder members'; and

ii. the second class of members would be selected from those not selected from the priority applications and from fresh applications submitted in response to a public launch to be made after 30 November 1996. The allotment price for this class of members was to be S$40,000. This class of members will hereafter be called 'second class members' ".

It is to be noted that nowhere in the Amended Statement of Claim was it averred that these representations (or any or more of them) were – at the time they were made/acted upon – false or untrue.

15. It was alleged, in paragraph 10 of the Amended Statement of Claim, that:

"10. The Plaintiffs and other members of the Class understood the representations to mean that they would be joining an exclusive and premier club, that the total number of members at any given time would be limited such that at any given time no member and the supplementary card-holder would be shut out from or be unable to use the facilities of the Club, including the car parks in the manner or up to the standard as represented in the prospectus. Such limitation was also to be inferred from the holding-out and

the representations (a) that the Club would be 'without peer in terms of size, facilities and sheer opulence', (b) that there would be a 'limited number of exclusive individual founder member memberships' and (c) as to the number of car park lots and the total built-up area. Further, the representations were to be understood, implied or inferred in the light of the provisions of the Building Control Act, the regulations made thereunder as construed and applied by the consultant architects engaged by the Defendant for the construction of the Club."

The thrust of paragraph 10 appears to be directed not at the state of mind of the defendants but the state of mind of the plaintiffs, namely, what the plaintiffs' understanding of the representations was. Even if paragraph 10, by virtue of the second half thereof, is read as providing particulars of additional representations relied upon, it was not alleged in paragraph 9 or paragraph 10 or anywhere else in the pleadings that the defendants made these representations knowing that these representations were false.

16. The falsity of the representation was adverted to only once in the pleadings. This was in paragraph 13 of the Amended Statement of Claim:

"13. The representations as set out above turned out to be untrue, false and misleading.

Particulars

a. The Club in fact accepted 19,000 members each of whom had paid S$28,000. The acceptance was communicated by the Defendant to the successful applicants in December 1996. There was no public launch of $40,000 for the second class members.

b. The Club was opened in March 2000 and not end of 1998 as promised and was woefully inadequate shockingly short of the representations to cater for and accommodate the huge number of members and the supplementary card-holders.

c. Not all facilities stated in the prospectus were available to the members.

d. The Defendant dreadfully failed to realise the representations set out above with the result that the Plaintiffs and the other members of the Class were unable to realise the aspirations and representations conveyed by the prospectus.

e. The membership became virtually useless."

But, as can be seen, even in paragraph 13 it was not alleged that the representations were false or untrue at the time they were made. All that paragraph 13 averred was that the representations "turned out" to be untrue, etc. The state of mind of the promoters of the Club when the impugned representations were made was not put into issue by the plaintiffs.

17. It would be relevant to note here that Ms Molly Lim SC, who appeared for the plaintiffs, confirmed, in the course of the proceedings that:

(1) the plaintiffs were not alleging fraudulent misrepresentations;

(2) the plaintiffs had no evidence of the defendants' state of mind and were not in these proceedings relying on the defendants' state of mind;

(3) the plaintiffs were not complaining of the quality (as opposed to the quantity) of the membership;

(4) the plaintiffs were not alleging that the defendants and the financial institutions did not have a selection criteria or that such selection criteria was not proper; and

(5) the plaintiffs accepted that none of the documents relied upon by them fix a limit to the number of members that the Club would have.

These confirmations were repeated at various times during the hearing.

18. Mr Shanmugam SC, who appeared for the defendants, also drew my attention to the fact that – in dismissing an appeal in these proceedings in respect of an interlocutory order relating to discovery of documents – Chao Hick Tin JA delivering the judgment of the Court of Appeal (reported in [2002] 3 SLR 345) said at page 352:

> "21. It is vitally important to bear in mind that the action is for the non-fulfilment of 'representations' and/or for breach of contract. *There is no allegation of fraud. Nor is it alleged that RTC made the representations knowing that they were false, or with no intention of fulfilling the same.* Fraud must be expressly pleaded with particulars. Thus, what was RTC's decision on the number of people to accept as founder members under the fee of $28,000 and as second class members under the fee of $40,000 and what was the actual number of applications received by 30 November 1996 were wholly irrelevant to the issues in the action. It was not alleged that the information in any of these three categories of documents were made known or conveyed to any of the plaintiffs. They knew nothing of these documents. The documents never formed the basis upon which RTC sought to attract the plaintiffs to join as members. Whatever representations made by RTC to the plaintiffs were exclusively in the three documents and nothing else. The information contained in the documents to be discovered under items 1, 2 and 3 played no part in the plaintiffs' appreciation of what RTC was trying to convey in the prospectus.
>
> 22. So what representations RTC did make to the plaintiffs must be gleaned from the prospectus and nothing else. And having established those representations, the plaintiffs must show, inter alia, that what RTC have in fact provided in the Club premises, applying objective standards, do not match the representations. The detailed drawings on the design of the Club's premises have already been furnished to the plaintiffs pursuant to the order of the Assistant Registrar. *What was in the mind of the promoters behind RTC is not an issue in the action.* We would reiterate that there is no allegation of fraud. The discovery sought was mere fishing. The documents are not necessary for disposing fairly of the action.
>
> 23. As for the alternative claim based on breach of contract, here again the plaintiffs must first establish what representations did RTC make in the prospectus. Second, plaintiffs must show that the representations had become terms of the contract. Third, the plaintiffs must establish a breach of those terms. Again for the same reasons above, the documents requested are wholly irrelevant."
>
> (Emphasis added.)

That ruling by the Court of Appeal, Mr Shanmugam submitted, underlined the fact that the plaintiffs' case did not involve any averment about the state of mind of the defendants.

19. The plaintiffs' case on misrepresentation was simply that the facilities and the services at the Club, when it was built and became operational in 2000, did not match the descriptions given in 1996 when the membership contract was entered into. There was no allegation in the pleadings that when the said representations were made in 1996 the defendants knew or should have known that those representations were not true and so misrepresented their intentions to the plaintiffs. As noted above, all that the plaintiffs in effect pleaded was that the representations made in 1996 "turned out", when the Club became operational in 2000, to be untrue, false and misleading.

20. Mr Shanmugam submitted that in the absence of the state of mind of the defendants, at the time the impugned representations were made or acted upon, being an issue, the representations relied on by the plaintiffs were not actionable representations and, accordingly, the plaintiffs' claim based on those representations ought to fail in limine. He submitted that even if the allegation that the Club, when built, did not match up to what had been represented in 1996 was true – an allegation strenuously denied by the defendants – those representations would still not amount to actionable representations unless the plaintiffs had pleaded that the defendants at the time they made the

representations had no intention of fulfilling those representations.

21. Mr Shanmugam submitted, in the alternative, that the representations made in 1996 set out in paragraph 9 of the Amended Statement of Claim were no more than advertising and promotional puff which cannot give rise to any cause of action either in misrepresentation or in contract.

22. The term "representation" and what constitutes an "actionable representation" or an "operative misrepresentation" is discussed in all text books on the law of contract. "*Anson's Law of Contract*" (1998) (27th Ed at page 233) summarises the position succinctly as follows:

> "An operative misrepresentation consists in *a false statement of existing or past fact* made by one party (the 'misrepresentor') before or at the time of making the contract, which is addressed to the other party (the 'misrepresentee') and which induces the other party to enter into the contract."
>
> (Emphasis added.)

"*Chitty on Contracts*" (26th Ed) takes a similar position. The learned authors, at paragraph 414, state:

> "The traditional rule is that *a representation must be a statement of fact, past or present, as distinct from a statement of opinion, or of intention, or of law*. A mere statement of opinion, which proves to have been unfounded, will not be treated as a misrepresentation, nor will a simple statement of intention which is not put into effect; for as a general rule these cannot be regarded as representations of fact, except in so far as they show that the opinion or intention is held by the person expressing it. *However, in certain circumstances a statement of opinion or of intention may be regarded as a statement of fact*, and therefore as a ground for avoiding a contract if the statement is false. *Thus, if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact*. So where, at a sale of property, the vendor described the occupier as 'a most desirable tenant', while in fact he knew that the rent was considerably in arrear, this was held to entitle the purchaser to rescind the contract."
>
> (Emphasis added.)

Chitty

, in the above paragraph, considers the circumstances in which a statement of opinion and a promise to do something at a future date can constitute the tort of misrepresentation. It will be noted that where a representation does not relate to an existing or past fact but is an expression of opinion or intention, the representation can still be actionable if the representee establishes that the representor, at the time of the representation, did not or could not have had that opinion or intention.

23. In the case of *Bestland Development Pte Ltd v Thasin Development Pte Ltd* (unreported, 13 February 1991), Chao Hick Tin J (as he then was) cited with approval the paragraph from Chitty quoted above and went on to say:

> "The first question to determine is, are the alleged statements representations? *To constitute a representation, a statement must relate to a matter of fact*. It must be a matter of present or past fact: see 31 Halsbury's Law (4th Edition) para 1005. A distinction ought to be drawn between a representation of an existing fact and a promise to do something in the future. Furthermore, mere praise by a man of his own goods or undertaking is a matter of *puffing and pushing* and does not amount to representation. However, a statement of opinion may in certain circumstances involve a statement of fact. This was explained by Bowen LJ in *Smith v Land and House Property Corporation* (1885) 28 Ch.D 7 at 15 as follows:-
>
> '… it is often fallaciously assumed that a statement of opinion cannot

> involve the statement of a fact. In a case when the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. *But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion*."
>
> (Emphasis added.)

I will revert to the question of "puffing and pushing" referred to by Chao J later in this judgment.

24. At the time that the Brochure and the other documents containing the impugned representations were sent to the invitees, only provisional building permission (with requirements) had been obtained from the URA and construction of the Club had barely begun. The representations impugned by the plaintiffs in paragraph 9 of the Amended Statement of Claim relate therefore to what the Club was expected to be like when completed. Those representations were therefore not statements of past or present fact but statements of intention or (perhaps) opinion.

25. Representations of intention can be actionable if it can be shown that the defendants made those representations without having any intention of complying with those representations. If that was the plaintiffs' case, then the court would embark on the exercise of determining the state of mind of the defendants at the time the representations were made. That, however, was not the plaintiffs' case. The plaintiffs did not, either in the pleadings or in the course of the hearing, seek to put in issue the state of the defendants' mind at the relevant time. To the contrary, the plaintiffs' position was that the state of the plaintiffs' mind was irrelevant to their claim on misrepresentation.

26. In this connection, Ms Lim submitted that there was no rule of law or equity that statements of intention or promises by a representor can never amount to a "representation" capable of giving rise to a claim for misrepresentation. In support, she relied on a number of cases where statements of intention had given rise to actionable misrepresentation. In particular, she quoted the paragraph from the judgment of Chao J in *Bestland Development* (quoted above). I would have no difficulty accepting Ms Lim's submission if the plaintiffs had pleaded that the defendants, at the time they made the statements in question, knew or ought to have known that the statements were false. But that was not the plaintiffs' case. Their case was that the representations (enumerated in paragraphs 9 and 10 of the Amended Statement of Claim) "turned out" to be false.

27. It was the plaintiffs' case that there was no need for them to concern themselves with or prove the state of mind of the defendants at the time the representations were made since the relief the plaintiffs were seeking was under s 2(1) of the Misrepresentation Act, Ch 390. That section read as follows:

> "2(1) Where a person has entered into a contract *after a misrepresentation has been made to him by another party* thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable *notwithstanding that the misrepresentation was not made fraudulently*, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."
>
> (Emphasis added.)

Ms Lim submitted that there was no requirement under s 2(1) of the Misrepresentation Act to plead the representor's state of mind and that to succeed under s 2(1) the plaintiffs need only prove the representations made, the falsity of those representations and the loss suffered. The falsity of the representations, Ms Lim submitted, was established by the evidence adduced by the plaintiffs that the Club by reason of having accepted an excessive number of members was unable to serve its members to the standards of a premier club that had been promised in the promotional material.

28. In support of her submissions, Ms Lim referred the court to a specimen pleading under the Misrepresentation Act given in Bullen & Leake "*Precedents of Pleadings*" (14th Ed) Vol. 2 at 817. No other authority was cited by Ms Lim. In that specimen, after the representations that induced the plaintiffs to enter into the contract had been set out, there was a specific plea that each of those representations was in fact false and particulars were given as to why it was alleged that those representations were false. The representations set down in that specimen, I would also note, were representations of existing facts. The specimen precedent was therefore of no assistance to the plaintiffs in this case.

29. Mr Shanmugam, in his response, submitted that whatever other changes the Misrepresentation Act may have brought about to the law, it did not effect any change on the question of what sort of representations were actionable. In support, he cited an article jointly authored by Atiyah and Treitel entitled "*Misrepresentation Act 1967*", 30 (MLR) 369 where the learned authors in dealing with identical provisions in the English Act, state:

> "*The Act leaves many important points to be decided in accordance with the old law. Thus the definition of 'misrepresentation' has not been affected: the term continues to exclude mere puffs, representations of law and representations as to the future.*"
>
> (Emphasis added.)

Mr Shanmugam also drew the court's attention to the recent case of *Spice Girls Ltd* ("SGL") *v Aprilia World Service BV* ('AWS'), [2002] EWCA Civ 15, where at paragraph 12 Sir Andrew Morritt V-C, after setting out s 2(1) of the Misrepresentation Act 1967, observed:

> "Thus liability depends on four elements: (a) a misrepresentation made by one person to another, (b) a subsequent contract between them, (c) consequential loss and (d) *an absence, at the time the contract was made, of a belief or reasonable grounds therefor in the truth of the facts represented.* If all those conditions are satisfied then the representor is liable to the representee for such damages as would be payable if the misrepresentation had been made fraudulently."

Those observations, Mr Shanmugam submitted, do not reflect the far-reaching changes to the law of misrepresentation that Ms Lim claimed had been effected by the Misrepresentation Act.

30. In the *Spice Girls* case the agent of SGL had sent a fax to AWS shortly before the Agreement was entered into confirming the commitment of each of the five Spice Girls to future implementation of the project. At that time, one of the five Spice Girls, Ms Geri Halliwell, had told the other Spice Girls that she would soon be leaving the group. In dealing with the effect of the representation contained in the fax the court said:

> "We consider that the fax of 30 March 1998 contained express representations by SGL as to the commitment of each of the Spice Girls to the future implementation of all the terms of the heads of agreement as subsequently incorporated into the formal agreement to be concluded between SGL and Aprilia. That statement was untrue because SGL knew that the term of the agreement for which provision was made in the heads of agreement was 12 months and that there was a risk that Ms Halliwell would leave after only six of them. … The unqualified assurance as to the commitment of each Spice Girl to the entire commercial sponsorship described in the heads of agreement contained within it the *implied representation that SGL did not know of any matter which might falsify the assurance. That was a representation of fact and it was false.*"
>
> (Emphasis added.)

It is relevant to note that in the *Spice Girls* case, AWS had specifically pleaded that the fax contained an express or implied representation that SGL was unaware of any matter which might give AWS reason to believe that the Spice Girls might cease to consist of all five members during the minimum term of the Agreement. There was no similar plea relating to the state of mind of the defendants in our present case.

31. I accept Mr Shanmugam's submission that the Misrepresentation Act did not effect any material change to the common law concept

of misrepresentation: mere puffs, representations of law and representations as to the future all continued to be excluded from the ambit of that tort even after the said Act came into effect. The law continued to be that a representation as to future conduct did not, by its very nature, constitute a misrepresentation unless, implied therein, was a representation of present or past facts which was untrue. There was no allegation in these proceedings of any such implied representation.

32. I am satisfied that the representations in the Brochure and Q&A Sheet impugned by the plaintiffs were, in the context of the pleadings and the evidence in this case, not actionable representations for the purposes of the tort of misrepresentation. The plaintiffs' claim based on misrepresentation therefore fails.

Salesmen's puff

.

33. Eulogistic commendation by a salesman of the wares that he touts is a common and expected feature of the market place. Courts are therefore reluctant to rescind contracts of sale merely on account of the exuberant and exaggerated language employed by salesmen. This reluctance is reflected in the maxim "Caveat Emptor" or "Buyer Beware". When Chao Hick Tin J in *Bestland Development* (quoted above) described praise by a salesman promoting his goods as "a matter of puffing and pushing" that did not amount to misrepresentation, Chao J was recognising this maxim.

34. Mr Shanmugam sought to persuade the court that the grandiloquent claims (not his words) contained in the Brochure should be recognised for what they truly were – ie salesmen's puff – and should not form the foundation for an action either in misrepresentation or in contract. I need not consider this submission in respect of the claim in misrepresentation as I have already dismissed that claim on the grounds that the impugned representations were not of a nature that was actionable. The submission, however, remains relevant in considering the claim in contract. There is a distinction between promotional statements that are mere puff and promotional statements that are outside the ambit of mere puff. Certain statements – although clearly promotional in nature – may, individually or taken together, amount to a binding promise that is part of the contract between the parties. Such statements would not be mere puff.

The claim in contract

.

35. As noted in paragraph 9 above, it was not in dispute that the declarations contained in the application form – in particular, the declaration that applicant would abide by the Rules – became, upon acceptance of the application, contractually binding between that applicant and the defendants. What was in dispute was whether that was the entire contract between the parties or whether some or all of the impugned representations also constituted terms of that contract.

36. Ms Lim submitted that, if it was the intention of the defendants that the terms in the application form were to be the entire contract, the defendants could and should have so stipulated in the application form. The absence of such a stipulation, Ms Lim submitted, prevented the defendants from alleging that other terms could not be implied. I cannot accept that submission. In my view, all that the absence of such a stipulation meant was that it made it easier for the plaintiffs to argue that the contract between the parties was not confined to the declarations in the application form.

37. Although the defendants' case was that the declarations contained in the application form constituted the entire contract between the successful applicant and the defendants, I will in this judgment where appropriate treat the defendants' case as being that the Rules constituted the entire contract between the parties. I do this because for the purpose of this case, except for the declaration referring to the Rules, all the other declarations are of no particular significance.

38. Ms Lim submitted that if the representations in the Brochure and other documents were not given legal effect, the defendants could, with impunity, ignore all those representations and – except where those representations were actionable for the purposes of the tort of misrepresentation – provide facilities and a level of services and ambience far inferior to and/or very different from what the defendants had been promised in the promotional material. She submitted that as the Rules did not spell out the facilities the defendants were obliged to provide, the defendants could, for example, provide car parking space for (say) 100 cars when 600 spaces had been promised or provide a

small wading pool when a large pool had been promised. In this context, Ms Lim pointed out that the Court of Appeal, in its interlocutory judgment, had alluded to certain of the impugned representations as being specific indications of what members could expect from the Club. This was at page 348 of the report where the Court of Appeal said:

> "3. … The action is based on a common law prospectus issued by RTC when inviting members of the public to join the club. The prospectus comprised the following documents:
>
> (1) a letter of invitation dated 9 November 1996;
>
> (2) a brochure;
>
> (3) a document giving general information in the form of questions and answers.
>
> 4. The prospectus promised 'lavish reception and facilities' and that the club would be 'without peer in terms of size, facilities and sheer opulence'. *It also gave, inter alia, the following specific indications as to what members could expect*:
>
> (1) there would be about 600 car parking lots for members;
>
> (2) the exclusive and limited membership would be fully transferable;
>
> (3) the total built-up area would be in excess of 400,000 sq ft."
>
> (Emphasis added.)

She submitted that specific indications given by the defendants in the promotional material ought to be given legal effect.

39. Ms Lim submitted that if the court gave no contractual effect to such promises, the plaintiffs would have no recourse against the defendants even for the most cynical disregard by the defendants of such representations/promises. That submission is not quite correct. There would be recourse in the tort of misrepresentation. But, as discussed earlier, to succeed in misrepresentation the plaintiff would have to show that the representations were false at the time they were made in that the representor had no intention of fulfilling that representation. In the present case, the plaintiffs' claim under misrepresentation failed because the plaintiffs not only did not seek to allege that the representations were false when they were made but took the position that the state of mind of the representor was irrelevant.

40. The Rules did not specify any limit to the number of members that the defendants could admit and it gave full authority to the defendants to determine, from time to time, the entrance fee payable. Unless constrained by the court, Ms Lim submitted, the defendants could flood the Club by issuing many more thousands of memberships (even at reduced prices) and make the demand on space at the Club so tight, that the claims in the promotional literature that this was to be a premier club without peer in Singapore, would be sheer mockery.

41. The Rules granted members a licence to use and enjoy the facilities at the Club up to October 2026 but the Rules did not define what those facilities would be. Instead, the Rules merely stated:

> "2. It is the intention of the Proprietor to provide for the use and enjoyment by the Members of facilities (the 'Facilities') for recreation, entertainment, dining and/or such other activities as the Proprietor may from time to time in its absolute discretion decide."

It is not very clear whether the phrase "in its absolute discretion decide" qualifies only the "other activities" or whether it also qualifies the facilities for "recreation, entertainment and dining" in the first part of the rule. The way the rule is drafted it appears to qualify only the "other activities". This would mean that there is nothing in the Rules to indicate what the facilities for recreation, entertainment and dining consisted of. Further, the Rules do not make any reference to the standards of service and ambience that the defendants were required to provide to the members.

42. In view of the lack of any detail in the Rules on crucial matters like what facilities the defendants were obliged to provide and the standards of service they were required to maintain, it would, Ms Lim submitted, not make sense for this court to hold that the Rules constituted the entire contract of membership. The only way to give some commercial sense to the situation, she submitted, would be to consider the underlying message in the impugned representations – that this would be an exclusive and premier club – as part of the contractual obligations of the defendants to its members.

43. Ms Lim conceded that some of the descriptions in the promotional material may well be salesmen's puff: a distinction would have to be made between statements that were mere puffs and statements intended to be binding. She submitted that in deciding what was mere puff and what were promises intended to be relied on, the test should be an objective one: the test of the reasonable man.

44. The plaintiffs' claim in contract was spelt out in the following paragraphs of the Amended Statement of Claim:

> "11. Additionally or alternatively, the representations and the holding-out set out above became terms of the contractual licences spawned by the acceptance of the Plaintiffs and other members of the Class.
>
> 12. The Plaintiffs and other members of the Class on the faith of the representations as set out above and the contents of the common law prospectus as a whole subscribed to and became the founder members. Each of them paid the subscription in the sum of S$28,000. All made their applications not later than 30 November 1996. In addition, they paid monthly subscriptions and deposits for the Food and Beverage Account."

The representations referred to in paragraphs 11 and 12 of the Amended Statement of Claim were the same representations that the plaintiffs relied on for their claim in misrepresentation. I have set out these representations in full in paragraphs 14 and 15 above.

45. The alleged breach of the contract by the defendants was pleaded in paragraph 14 of the Amended Statement of Claim:

> "14. Additionally or alternatively, by reason of the matters set out in paragraph 13, the Defendant was in breach of the contract of the terms as asserted above."

I have, at paragraph 16 above, set out in full paragraph 13 of the Amended Statement of Claim. In effect, what the plaintiffs were alleging was that the impugned representations set out in paragraphs 9 and 10 of the Amended Statement of Claim as the basis of their claim in misrepresentation, were also the promises that constituted the contractual obligations of the defendants. In failing to honour those promises the defendants, she submitted, were in breach of their contractual obligations to the plaintiffs.

46. Paragraph 13 of the Amended Statement of Claim gave particulars of the terms of the contract alleged to have been breached. In substance, the breaches complained of were as follows:

> (a) The defendants accepted 19,000 members at $28,000 per member.
>
> (b) There was no public launch at $40,000 for the second class of members.
>
> (c) The Club was opened in March 2000 and not end 1998 as promised.
>
> (d) The huge number of applications accepted as members resulted in the facilities at the Club being grossly inadequate and not measuring up to the impugned representations.
>
> (e) Not all the facilities stated in the impugned representations were available to members.
>
> (f) The defendants failed to provide club facilities matching the standards promised in the impugned representations.
>
> (g) The membership became virtually useless.

As the above are the breaches complained of by the plaintiffs, it would be necessary to consider in respect of each of them whether the terms allegedly breached, were, in the first place, terms of the contract.

(a) Accepting 19,000 members at $28,000

.

47. None of the impugned representations go anywhere near suggesting that that the defendants represented that there would be a cap on membership numbers either at 19,000 or at any other specified figure. In fact, Ms Lim had specifically conceded that this was so (see paragraph 17 above). As there was no specific representation as to the number of members, it would follow that there was no specific contractual term precluding the defendants from accepting 19,000 members.

(b) No public launch at $40,000

.

48. On the evidence, it was established that there was a launch of membership at $40,000. It was in evidence that in fact 56 persons were accepted as ordinary members at this price. There is therefore no merit in this claim for breach even if this was such a contractual term.

(c) The Club being opened in March 2000 instead of end 1998

.

49. It was not in dispute that the defendants had initially expected that the Club would be opened in late 1998 and had made this known to the invitees. This was, however, only a statement of expectation and was not, in my view, a statement intended to be a term of the contract of membership.

(d) The defendants would refrain from accepting a membership so large that the Club's facilities would become inadequate and the Club would not be a premier club

.

50. The thrust of Ms Lim's arguments, minus the emotive content, was that the defendants had promised that the Club would be a premier club in Singapore. This promise, Ms Lim submitted, was a crucial one in attracting the plaintiffs to apply for membership and was an express if not an implied term of the contract. She submitted that by taking in 19,000 members – a number that was in excess of what the facilities at the Club could cope with – the defendants had breached that term.

51. In considering this submission, the underlying question that needs to be answered is whether the impugned representations gave rise to a contractual term that the Club would have the sort of facilities and services that would make it a premier club. I will revert to this question shortly.

(e) Not all facilities were available to members

.

52. In the Brochure there was a page headed "Facilities at a Glance" in which all the food and beverage ("F&B") outlets, recreational facilities and other activity areas were listed. Amongst the nearly 40 items listed were a library and a computer room. The complaint by the plaintiffs was that these two facilities were not provided. The defendants' response was that a reading area with books and chairs had been provided and that was the library. Therefore, even if the provision of a library was a contractual term, as a library had been provided, the question of any breach of that term did not arise. In this context, I would note that the promotional material contained no particulars of what the library would be like. In any event, taking the cue from the promotional material as to the sort of "prestige club" that the defendants envisaged, the provision of library facilities could not have been a significant feature of the club envisaged.

53. Mr Shanmugam submitted that the listing of these two items on that page was no more than a projection of what the facilities at the Club were likely to be. There was, he submitted, no intention on the part of the defendants to bind themselves to provide these two facilities. In any event the library was provided for – it was only the proposal for a computer that had been shelved. A computer room may well be introduced if the defendants felt that there was a sufficient demand for it. Taking into consideration that in the promotional material, no prominence was given to these two facilities, I accept Mr Shanmugam's submission that the provision of these two items were not contractual obligations but merely projections of what the Club, when built, was expected to have.

(f) Failing to provide facilities matching the standards promised

.

54. This claim arises from the allegation of overcrowding. It appears to be connected to and contained within claim (d) above.

(g) The membership becoming virtually useless

.

55. There was no evidence adduced that the membership had in fact become "virtually useless". At best, this claim is also a facet of claim (d) above.

The terms of the contract

.

56. The defendants' case was that the write-up in the invitation letter, the Brochure and the Q&A Sheet were no more than invitations to treat. It was the defendants' case that the terms contained in the application form (in particular the Rules) were the terms on which each applicant was offering to join the Club and when that application was accepted, those terms became the entire contract between the applicant and the defendants.

57. The Rules make it abundantly clear – and this I suppose would be a fairly common feature in proprietary clubs – that the proprietors (ie the defendants) were in complete charge and had practically unfettered rights to run the Club as they chose. And there was nothing in the Rules specifying the sort of facilities, the sort of ambience and level of services that the defendants were obliged to provide. In short, the main selling points of the Club – its exclusivity, its up-market ambience, its prestige, its facilities and the quality of its services – were all not specified to in the Rules.

58. The plaintiffs' witnesses testified that the main reason they joined the Club was because it was to be an exclusive club with the ambience, service and facilities of a premier club. I accept that evidence. I was more than satisfied that the plaintiffs who testified joined the Club because they took seriously the promise by the defendants in their promotional material that this would be a premier club with first-class facilities and services. Ms Lim submitted, and there was considerable merit in that submission, that the absence of these rather crucial terms in the Rules indicated that the Rules could not be the entire contract between the parties.

59. Numerous authorities were cited by both sides as to the circumstances in which courts would hold that statements found in promotional literature constituted terms (implied or otherwise) of the contract. The underlying basis for accepting such statements as terms of the contract is the intention of the parties. If the court, applying an objective test, concludes that a reasonable man looking at the promotional material would have concluded that the promoter intended that the statements (or some of the statements) therein were to be taken seriously, then those statements were likely to be terms of the contract.

60. In the present case, looking at the factual matrix in which the statements were made – including the endorsement and co-promotion of the Club by reputable financial institutions – the representations that this was to be a premier club with first-class facilities and services seems to me to be more than mere puff. Such representations were, in my view, intended to be taken seriously. They were intended as a promise from the defendants that the Club, when functional, will meet those standards. It was this promise that led people like Tan Chin Seng (the 1st plaintiff) to join the Club.

61. In this regard, the following comments made by Sir Oliver Popplewell in *1406 Pub Company v Hoare & Anor* (Ch.D – 2 March 2001) (although Mr Shanmugam tried to distinguish the case on the facts) are apposite:

> "I look at the totality of the evidence and ask what a reasonable outside observer would infer from all the circumstances. The Claimants are, of course, entitled to take advantage of any legal point but I cannot help but think that an outside observer would think their conduct somewhat shabby. … This was part and parcel of a well presented sales pitch relating to important terms of contract and intended to form part of the contract. I am satisfied that the Claimants, through Mr Hughes and the brochure, did give the promises and assurances; did intend that the Defendants should act on them; did intend them to be part of the contract and the Defendants did act on them. They would not otherwise have entered into the contract."

The invitation letter, the Brochure and the Q&A Sheet in this case were part of a "well presented sales pitch" by the defendants containing important terms. The defendants did intend that the invitees should act on those terms and some of the invitees did act on them. I am satisfied that the plaintiffs who testified before me would not, but for the promises in the promotional material relating to the exclusivity, ambience and services at the Club, have entered into the membership contract. Ignoring the subjective views of the plaintiffs and applying instead the objective test of the reasonable man, I find that a reasonable man looking at the promotional material would have concluded that the defendants were serious about this Club being a premier club with first-class facilities. Viewed objectively the representations to that effect were, in my view, part of the contract.

62. Rule 6.1 specifically provides that the Club shall consist of such number of members as the proprietors may in their discretion from time to time admit. If this was an unfettered discretion, it would detract from the promise of the defendants – which I have held to be a contractual term – to provide an exclusive and premier club. If the defendants admit more members than what the facilities at the Club could reasonably cope with, then the Club would no longer be the kind of club that was promised. Rule 6.1 would therefore have to be read subject to the defendants' obligation to provide a club with the qualities promised. This will mean that, in exercising their rights under Rule 6.1 to admit members, the defendants will have to ensure that they do not admit so large a number that their obligation to provide and run a premier club would be compromised. The discretion given to the defendants under Rule 6.1 would, to that extent, be curtailed. To put it in an alternative way: to give business efficacy to the contract, I would imply as a term of the contract that the defendants would exercise their discretion under Rule 6.1 in such manner that there would be no breach of the defendants' obligations to provide the sort of club promised in the promotional material.

The facilities, ambience and service at the Club

.

63. At the invitation of the parties, I visited the Club and was shown all its facilities. The Club was spacious and its facilities were certainly up-market. Whilst the dcor of the Club may not be to everyone's taste, there can be no doubt that the physical facilities and ambience matched the adjectives "opulent" and "lavish" used in the promotional material. In fact, there was no serious complaint by the plaintiffs about the ambience or the quality of the physical facilities provided.

64. The plaintiffs' main complaint was that by admitting 19,000 persons (19,048 including the 56 "ordinary" members) as members, the demand for the usage of facilities and services at the Club became so strained that the Club was not the premier club that the defendants had contracted to provide. I now turn to consider whether the demands on the facilities brought about by the large membership that was admitted were such that the Club did not meet the first-class standards of a premier club that was promised.

Did the defendants breach their contractual undertaking to provide a premier club?

65. The Club was initially scheduled to open in June 1998 but because of construction delays and delays in getting various approvals, that schedule could not be met. The opening of the Club was an event that the thousands who had joined were eagerly awaiting – an eagerness made keener by the delay in the opening date. When the Club did open, large numbers of members/guests turned up at the Club during the initial weeks and months. This resulted in overcrowding and congestion. Matters were not helped by the fact that the defendants provided free food during the initial weeks.

66. It is pertinent to note that the bulk of the complaints made by the plaintiffs about facilities at the Club related to this initial few months and to festive days, after the initial period, when the demand at the F&B outlets, especially at the Caf & Terrace, still remained high. The usage of the pool during weekends, especially during school holidays, was very high and the gym also saw high usage during the more popular hours. The defendants did not seek to deny that there was a high demand for Club facilities during the initial months but pointed out that thereafter matters settled down to a more regular routine. It was the defendants' case that after the initial months the facilities at the Club were in fact under-utilised. They therefore denied any failure on their part to provide the premier club that had been promised.

67. A great deal of detailed evidence was adduced by both sides on the utilisation of club facilities. The defendants maintained computer records of transactions at the various outlets and printouts of the daily and monthly sales at the F&B outlets were produced. Ms Lim objected to the production of these printouts. I saw no merit in that objection. These were accounting records kept in the normal course of business and were admissible under s 34 of the Evidence Act.

68. Ms Lim, relying on the case of *Regina Fur Co Ltd v Bossom* [1958] 2 LLR 425, also objected to the defendants being allowed to adduce evidence of usage. In that case, Lord Evershed held that where the defence is one of a bare denial:

> "… the onus remains throughout upon the plaintiffs to establish the case they are alleging. Where such is the form of the pleadings, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged; and it is not, therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case."

Ms Lim submitted that the defence raised in this case was one of bare denial and the defendants therefore ought not to be allowed to adduce evidence of usage.

69. Mr Shanmugam disagreed. He submitted that the principle in the *Fur* case applied only where the defendants put the plaintiffs to strict proof and admitted nothing. The present case, he submitted, was not of the same genre. In the present case, the defendants had not just put the plaintiffs to strict proof – the defendants had also denied that the Club was overcrowded. The defendants were therefore entitled to put forward evidence to show that the Club was not overcrowded.

70. I accept the submission of Mr Shanmugam. The defence in this case was not the sort of bare denial that Lord Evershed was dealing with in the *Fur* case. The defendants here were entitled to adduce evidence, in support of their plea, that there was no overcrowding.

71. The plaintiffs adduced evidence – albeit anecdotal – that even outside the initial launch period (when some degree of congestion was to be expected), the number of members/spouses/guests patronising some of the facilities at the Club was so great that patrons had, at times, to queue for some time to get a place. It was alleged that some members had even walked away in disgust. The defendants admitted that even after the initial months there may have been occasions when members could not immediately get a place at the venue of their choice but this, it was claimed, happened rarely. And when it did, it was during public holidays or festive seasons when demand was bound to be high. It was, the defendants submitted, a common feature in all popular restaurants wherever situate – whether in a prestigious club or not – for there to be high demand during such periods.

72. I do not propose to rehearse here the evidence relating to usage that was adduced by the two sides. The evidence was not only from witnesses of fact (including employees of the Club) but also from expert witnesses familiar with the operations of clubs and comparisons were made between this Club and various other premier clubs in the region. Having heard all the evidence, I come to the conclusion that the demands on a number of facilities at the Club (especially the Caf & Terrace; the Chinese restaurant; the swimming pool; the gym; and the bathing/sauna facilities) were, at times, such that there was considerable pressure on the defendants to cope. This pressure arose because the available facilities had to serve the needs of the large membership of 19,000 persons (and their spouses and their guests).

73. Although I find that there was, at times, considerable pressure on the defendants to cope with the needs of so many members, I do not find that that pressure was such that it crossed the line where it could be said that the Club was no longer the premier club that was promised. I would also add, in case the defendants are inclined to admit even more members, that the pressure was very close to that line. Admission of more members can easily result in that line being crossed. In my view, the membership of the Club, as it now stands, is just

about the very maximum permissible to sustain the Club as a premier club.

74. For the above reasons, I dismiss with costs the claims made by the plaintiffs.

Sgd:

S. RAJENDRAN

Judge