Freddie Koh Sin Chong *v* Singapore Swimming Club
[2014] SGHC 276

Case Number	: Suit No 634 of 2012
Decision Date	: 31 December 2014
Tribunal/Court	: High Court
Coram	: Lee Kim Shin JC
Counsel Name(s)	: Paul Seah and Kenneth Tay (Tan Kok Quan Partnership) for the plaintiff; Tan Chee Meng SC, Chang Man Phing and Yin Juon Qiang (WongPartnership LLP) for the defendant.
Parties	: Koh Sin Chong Freddie — Singapore Swimming Club

Unincorporated Associations and Trade Unions – resolution

Res Judicata

Restitution – unjust enrichment

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 9 of 2015 was allowed by the Court of Appeal on 26 April 2016. See [2016] SGCA 28.]

31 December 2014

Lee Kim Shin JC:

Introduction

1 The Singapore Swimming Club ("the Club") represents itself as "The Premier Family Club" in Singapore. The objects of the Club are to promote and provide facilities for, amongst other activities, swimming. In recent years however, the Club has found itself swimming in a sea of litigation. Excluding the present proceedings, all proceedings connected with the subject matter of the present proceedings and all proceedings commenced in the State Courts, the Club has been named a party to seven unrelated sets of proceedings in the High Court brought by members of the Club since 2008.

2 There must be something in the water.

3 In the present proceedings, Freddie Koh ("the Plaintiff") claims that he is entitled to be indemnified by the defendant, the Club, for all damages and litigation costs incurred by him in a defamation suit commenced against him in 2009. The Plaintiff's claim is based on a resolution passed in 2009 by the management committee of the Club, of which the Plaintiff was then the President. I will refer to the management committee of the Club as "the MC".

4 The Club denies that the Plaintiff is entitled to the indemnity which he claims on various grounds. The Club also counterclaims for the recovery of the sums that it had previously paid out pursuant to the aforesaid MC resolution. Its counterclaim is based on another set of resolutions passed at a member's extraordinary general meeting held in 2012.

5 Values, intentions and sentiments, however long established or firmly held, are aspects of

human nature that may change over time. To the extent these aspects are expressed as policies or principles approved as resolutions of a legal entity, it follows that resolutions of such nature may be amended, revoked or completely reversed to reflect a change in thinking. This present dispute involves a change in an established policy of the Club and the legal consequences that follow.

6 I delivered oral judgment on 12 December 2014. These are my detailed grounds.

Background

Key players

7 I first set out a list of the key persons involved in the present dispute.

8 The Plaintiff's tenure as President of the Club lasted from May 2008 to March 2012. During this time, the composition of the MC changed. Two periods are significant.

9 The first is the period between May 2008 and May 2009 when the MC comprised the following 12 persons ("the 2008 MC"):

(a) the Plaintiff as President;

(b) Michael Ngu as Vice-President;

(c) Tan Wee Tin as Honorary Treasurer; and

(d) various other committee members, namely, Eric Ng, Loreen Teo, William Kwok, Ng Kok Seong, Ashok Sharma, Shahul Hassan, Mike Chia, Theresa Kay and Gary Oon.

10 The second is the period between May 2011 and March 2012 when the MC comprised the following 11 persons ("the 2011 MC"):

(a) the Plaintiff as President;

(b) David Poh as Vice-President;

(c) Tan Wee Tin as Honorary Treasurer; and

(d) various other committee members, namely, Eric Ng, Loreen Teo, William Kwok, Ng Kok Seong, Soh Kee Hock, Lim Khee Lim, Jane Loh and Andy Tang.

11 The other key persons in the dispute are:

(a) Chua Hoe Sing, the Club's current President;

(b) Khoo Boo Beng ("BB Khoo"), a former general manager of the Club; and

(c) Jennifer Wee, the Club's financial controller from 31 January 2008 to the present.

12 In the present proceedings, the Plaintiff was represented by Mr Paul Seah ("Mr Seah"). Mr Tan Chee Meng SC ("Mr Tan") represented the Club.

13 The constitutional document of the Club which sets out, *inter alia*, the powers of the MC, is

known as the Rules of the Club, and will hereafter be referred to as "the Club's Rules".

The defamation suit

14 The present proceedings have their origins in Suit 33 of 2009 ("Suit 33"). This was a defamation action commenced in the High Court against the Plaintiff by four members of the MC that preceded the 2008 MC (respectively "the Suit 33 Plaintiffs" and "the 2007 MC"). The alleged defamation arose from two statements made by the Plaintiff at separate MC meetings, which were subsequently published on the Club's notice board in October and November 2008.

15 The thrust of these statements concerned the 2007 MC's decision to purchase a new water system for the Club's swimming pools. In making the purchase, the 2007 MC had relied on a provision in the Club's Finance Operating Manual ("the FOM"), which allowed the MC to approve unbudgeted expenditure on the basis of it being an "emergency" before having the expenditure ratified at the next Annual General Meeting ("AGM") of the Club.

16 The 2008 MC was elected at the Club's AGM on 25 May 2008 ("the 2008 AGM"). When the expenditure for the water system was put forward for ratification at the 2008 AGM, a motion was instead carried for a Special Ad-Hoc Audit Committee ("the Audit Committee") to be formed to investigate the said expenditure. The Audit Committee later submitted its report to the 2008 MC. The Audit Committee found that the expenditure was of an emergency nature and that the 2007 MC had not breached any Club procedures.

17 Subsequently, the Honorary Treasurer of the 2008 MC, Tan Wee Tin, found several documents which were not disclosed to the Audit Committee. These documents contained information which was inconsistent with representations made by the 2007 MC at the 2008 AGM. After further investigations, Tan Wee Tin reported his findings at two MC meetings on 29 October and 26 November 2008.

18 At the MC meeting on 29 October 2008, the Plaintiff made the first statement suggesting that the 2008 MC should correct a "misrepresentation of the facts made by the [2007 MC] to influence the ratification of the expenditure at the [2008 AGM]". At the subsequent MC meeting on 26 November 2008, the Plaintiff made the second statement which consisted of several allegations including that, "[i]t could be a case of misrepresentation of facts to the [2008 AGM] to get ratification for a capital expenditure for a water system that could not be justified under the urgent/emergency reason".

19 Both the first and second statements were recorded in the minutes of the respective MC meetings which were then published on the Club's notice board, in accordance with Club practice.

20 On 22 December 2008, the Suit 33 Plaintiffs, through their solicitors, WongPartnership LLP ("WongPartnership"), sent a letter of demand to the Plaintiff. The letter of demand alleged that the statements made by the Plaintiff were defamatory of the Suit 33 Plaintiffs. It was further alleged that the Plaintiff had falsely and maliciously defamed the Suit 33 Plaintiffs. It was demanded that the Plaintiff, amongst other things, apologise and undertake not to repeat the defamatory statements and compensate the Suit 33 Plaintiffs for the damage to their reputation.

Events preceding the 14 January 2009 MC meeting

21 On 23 December 2008, BB Khoo, acting on Eric Ng's instructions, emailed the Club's insurance brokers, Acclaim Insurance Brokers Pte Ltd ("Acclaim"), to enquire whether the Plaintiff's case would be covered by the Club's existing Directors & Officers Liability Insurance Policy ("the insurance policy") that had just been renewed in October 2008. Eric Ng was then the Rules and Membership

Chairman of the 2008 MC. On 26 December 2008, Acclaim replied to state that the insurer had not determined the policy liability.

22 On 29 December 2009, Acclaim sent another email to BB Khoo to highlight that the Plaintiff's case might fall within the "Insured v Insured" exclusion clause under the insurance policy ("the Insured v Insured Exclusion"). The effect of the Insured v Insured Exclusion was that the insurance policy would not cover a case where both the party suing and the party being sued fell within the definition of an "insured" person under the policy. Acclaim noted in its email that the definition of "insured" covered all past, present and future MC members, and therefore, the Plaintiff and the Suit 33 Plaintiffs would both fall under that definition.

23 BB Khoo forwarded Acclaim's email to Eric Ng and the Plaintiff on 30 December 2008. On the same day, Eric Ng replied to BB Khoo stating as follows:

> We would let the members know that in this instance the Club would not be covered by its insurance policy because this is an action taken against the present MC by the previous one. It is fully understandable that the policy would exclude such actions. Regardless of the insurance cover the Club would still have to defend its MC.
>
> It is good to let the members know who is wasting their money.

24 On 12 January 2009, Suit 33 was filed against the Plaintiff. The Suit 33 Plaintiffs' principal claim was that the Plaintiff had falsely and maliciously made the statements which were defamatory of them. In his defence, the Plaintiff denied that the meaning of the statements were defamatory. Even if they were, the Plaintiff averred that they were justified.

25 On 13 January 2009, the insurer wrote to Acclaim to state its position that the Plaintiff's case fell within the Insured v Insured Exclusion. On the same day, Acclaim forwarded a copy of the insurer's letter to BB Khoo and the Plaintiff via email.

26 In the midst of these events, the Plaintiff, Eric Ng and another 2008 MC member, William Kwok, met with Mr Hri Kumar Nair SC of Drew & Napier LLP ("D&N") regarding the Plaintiff's representation in Suit 33. The Plaintiff, Eric Ng and William Kwok agreed that Mr Nair should be engaged to act for the Plaintiff. Pertinently, however, D&N required the Club to confirm that it would indemnify the Plaintiff for his legal costs in Suit 33 before D&N would agree to act for him.

The passing of the Indemnity Resolution

27 An MC meeting was held on 14 January 2009 ("the 14 January 2009 MC Meeting"). During this meeting, the 2008 MC first discussed the issue of the Club's insurance coverage under its renewed policy. Suit 33 was discussed next. The latter discussion was concerned, in particular, with the issue of whether the Club should cover its MC members in the event that they were sued for acts done in their capacity as MC members. The 2008 MC then unanimously adopted and approved the following resolution:

> After some discussion, MC affirmed that the Club will assume all and any liability in the defense of and awards against any member of the Management Committee ("MC") including but not limited to defense costs, legal costs and expenses including incidentals in respect of any legal action, demand or claim brought against the Management Committee (whether in part or whole) as a result of the MC or individual MC member discharging its, his or her duties and responsibilities for and on behalf of the Club as office bearers including any claims for any errors and omissions

resulting from the discharge of its, his or her said duties and responsibilities

Both parties in the present proceedings referred to this resolution as the "Indemnity Resolution". I will retain this term in these grounds.

28 It should be noted that there are two key disputes of fact in these proceedings regarding the circumstances under which the Indemnity Resolution was passed:

(a) The first concerns a letter which was sent to the Club by 10 Club members on 14 January 2009, just before the MC meeting held on the same date ("the 14 January 2009 Members Letter"). In that letter, the 10 Club members expressed the view that the Club should not be liable for the tortious acts of its MC members; and that Club funds should not be used to pay for the Plaintiff's legal costs, expenses or damages in Suit 33. The 10 Club members also asked that their letter be forwarded to the 2008 MC. It is disputed whether this was in fact done.

(b) The second concerns the Insured v Insured Exclusion under the Club's insurance policy. The parties disputed whether this exclusion was discussed at the 14 January 2009 MC Meeting and whether the 2008 MC, apart from the Plaintiff and Eric Ng, knew of this exclusion before adopting the Indemnity Resolution.

29 The minutes of the 14 January 2009 MC Meeting, which contained the Indemnity Resolution, were put up on the Club's notice board. Thereafter, the Club proceeded to pay various sums in relation to the Plaintiff's defence in Suit 33 and the further proceedings precipitated by it. In this regard, when payments were to be made, the Plaintiff would generally forward the relevant invoice to Jennifer Wee, the Club's financial controller. Jennifer Wee would then prepare the necessary cheque or cashier's order for Tan Wee Tin's approval, as Honorary Treasurer, in accordance with the Club's FOM.

OS 469 - The challenge to the Indemnity Resolution

30 On 22 April 2009, a member of the Club, Poh Pai Chin, filed Originating Summons No 469 of 2009 ("OS 469") against the 2008 MC members who had passed the Indemnity Resolution, with the exception of Gary Oon, Theresa Kay and Mike Chia. The Club was later joined as a defendant on 3 August 2009.

31 Poh Pai Chin sought:

(a) a declaration that on a proper interpretation of the Club's Rules, Club funds could not be used to pay the Plaintiff's legal costs in Suit 33;

(b) a declaration that the Indemnity Resolution was void and ultra vires the Club's Rules;

(c) a declaration that the defendants' authorisation for Club funds to be used to pay the Plaintiff's legal costs in Suit 33 was void and ultra vires the Club's Rules;

(d) an order that the defendants repay the Club all the funds which had been used to pay the Plaintiff's legal costs in Suit 33; and

(e) an order that the defendants be restrained from using Club funds to pay the Plaintiff's legal costs in Suit 33.

32 Without diving too deep into the facts of OS 469, it is important to note that one of the main

factual issues which surfaced in OS 469 related to the 14 January 2009 Members Letter. In this regard, Gary Oon filed an affidavit on Poh Pai Chin's behalf, deposing that the letter had not been circulated at the 14 January 2009 MC Meeting, and that he would not have authorised the use of the Club's funds for the Plaintiff's defence in Suit 33 had the letter been made known to him. Against this, Ashok Sharma and BB Khoo filed affidavits for the defendants in which they both deposed that the letter was circulated at the 14 January 2009 MC Meeting. Ashok Sharma also deposed that the Indemnity Resolution was passed *because* the Club was not covered by insurance in respect of the Plaintiff's defence in Suit 33. He stated that the Club had obtained insurance coverage in furtherance of the Club's longstanding policy to indemnify the Club and its office bearers in respect of legal proceedings taken against them. However, the insurance policy contained the Insured v Insured Exclusion, which excluded any insurance coverage for Suit 33. Pursuant to the Club's policy of indemnifying office bearers, the 2008 MC therefore passed the Indemnity Resolution in accordance with their powers.

33 OS 469 was dismissed by the High Court on 24 August 2009 without written grounds being issued. Poh Pai Chin did not appeal.

The 2009 AGM

34 The Club's members were informed about OS 469 at the Club's AGM on 24 May 2009 ("the 2009 AGM"). This arose in the context of a motion to refer Gary Oon and Theresa Kay to the Club's Disciplinary Committee for writing to Poh Pai Chin's solicitors in connection with OS 469. The complaint in the motion was that Gary Oon and Theresa Kay had, without first consulting with the other 2008 MC members, informed Poh Pai Chin's solicitors that they had both not authorised the use of Club funds for the Plaintiff's defence in Suit 33 when the 2008 MC had, in fact, unanimously passed the Indemnity Resolution.

35 During the discussion of this motion at the 2009 AGM, the Plaintiff informed the Club's members that it had always been the Club's practice and policy to use Club funds to defend its MC members if they were sued in the course of discharging their duties and responsibilities. Gary Oon took the converse position and told the members that defamation was a voluntary act and could not be said to have been done in the discharge of duties as an MC member. He therefore said that defamation should not be covered by Club funds.

36 Thereafter, a member of the Club, Mr Rajsingham, proposed a motion that the general meeting re-affirm the Indemnity Resolution in the following terms:

> That the House affirms the Management Committee's resolution that the Club indemnifies all Management Committee members, Sub Committee members, Disciplinary Panel/Committee members, and Ad Hoc Committee members who, in the discharge of their duties and responsibilities for and on behalf of the club are sued, the Club funds will be used to defend them, an indemnity which has been the practice of the Club.

The minutes of the 2009 AGM show that a vote was taken, there were no objections and the general meeting unanimously adopted the re-affirmation of the Indemnity Resolution.

37 However, the Suit 33 Plaintiffs and two other members of the Club challenged the re-affirmation of the Indemnity Resolution at the 2009 AGM in Originating Summons No 826 of 2009. The High Court found the re-affirmation to be null and void on the ground that it was not a matter specified on the agenda for the 2009 AGM and that this amounted to a breach of the Club's Rules.

The 2010 AGM

The 2010 AGM

38 The Indemnity Resolution again came up for discussion at the Club's AGM on 23 May 2010 ("the 2010 AGM"). Prior to the 2010 AGM, the Club's 2009/2010 Annual Report was distributed to the Club members. The Club's audited accounts for the financial year ending 31 January 2010, which were exhibited in the 2009/2010 Annual Report, indicated that the Club had spent $508,000 on legal and professional fees during that financial year.

39 This prompted two members, namely, Frances Wong and Chew Siong Lim, to request a breakdown of this expenditure item at the 2010 AGM. The minutes of the 2010 AGM state that the breakdown was projected on the screen during this AGM. It showed that the bulk of the expenditure, in the sum of $403,000, had gone towards the Plaintiff's defence in Suit 33.

40 Thereafter, the use of the Club's funds for the Plaintiff's defence in Suit 33 was debated in some detail by the members at the 2010 AGM. It is recorded that the following was explained to the members:

(a) a further $350,000 had been set aside in the Club's budget for use in Suit 33 for the financial year ending 31 January 2011;

(b) in the event that the Club (or to be more accurate, the Plaintiff) lost Suit 33, the Club would have to bear the total costs and damages itself because it was not covered by insurance; and

(c) it would be difficult to predict what the total costs of the Plaintiff's defence in Suit 33 would be.

After this debate, the Annual Report and Accounts were confirmed and adopted by the members without objections.

The High Court judgment in Suit 33

41 Suit 33 was dismissed by the High Court on 29 October 2010, with written grounds reported as *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie* [2010] SGHC 324. By its decision, the High Court found that the statements made by the Plaintiff were defamatory of the Suit 33 Plaintiffs based on their natural and ordinary meaning. However, the High Court found that the Plaintiff had justified the gist of the defamatory sting. The parties in Suit 33 filed appeals against those parts of the High Court's decision which were adverse to them, the Suit 33 Plaintiffs' appeal being Civil Appeal No 210 of 2013 and the Plaintiff's appeal being Civil Appeal No 213 of 2013 (collectively, "the Suit 33 Appeals").

The 2011 AGM

42 As was done previously, the Club's 2010/2011 Annual Report was distributed to the Club's members prior to the Club's AGM on 22 May 2011 ("the 2011 AGM"). Notably, under the part of the report dealing with the Club's finances, Tan Wee Tin updated the members on the costs that the Club had incurred in relation to Suit 33. It was noted that the Plaintiff's defence in Suit 33 had cost the Club $920,370 up to 31 January 2011. The report also set out the background to Suit 33 and summarised the High Court's decision. The notes to the financial statements for the financial year ended 31 January 2011 also indicated that the Club had spent $551,000 on legal and professional fees during that financial year.

43 It appears from the minutes that there was no discussion relating to Suit 33 at the 2011 AGM. However, as the members had done in the previous year, the Annual Report and Accounts were confirmed and adopted without objections.

The CA Judgment in Suit 33

44 The Court of Appeal's judgment for the Suit 33 Appeals was delivered on 21 November 2011. Its written grounds can be found in *Chan Cheng Wah Bernard v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("the CA Judgment"). The Court of Appeal allowed the Suit 33 Plaintiffs' appeal and dismissed the Plaintiff's cross-appeal. The Court of Appeal found that the statements were defamatory and had not been justified.

45 The Court of Appeal then went on to consider whether the statements were made on an occasion of qualified privilege, even though the issue was not canvassed in the Suit 33 Appeals. The Court of Appeal found that the statements were made on an occasion of qualified privilege, but that this defence was defeated by the Plaintiff's malice in making the statements. On the issue of malice, the Court of Appeal observed that:

> 65 …Notwithstanding the fact that the Audit Committee had exonerated the [2007 MC] of any wrongdoing in relation to the expenditure and had maintained its stand even after the Treasurer had drawn its attention to the documents found in the office of the Previous GM, [the Plaintiff] continued his "witch-hunt". This whole episode smacked of nit-picking or fault-finding, or worse, that [the Plaintiff] had an agenda of his own against [the Suit 33 Plaintiffs], culminating in the utterance of the two statements which are the subject of the present defamation suit.
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> …
>
> 94 …[N]otwithstanding that the Audit Committee charged by the 2008 AGM to look into the expenditure had exonerated the [2007 MC], [the Plaintiff] and the rest of the [2008 MC] were determined to embark on a "witch-hunt" against the [Suit 33 Plaintiffs] by conducting their own investigations into the expenditure, and repeatedly beseeching the Audit Committee to amend the Audit Report, despite the Audit Committee's repeated refusal to do so… it is evident that the [2008 MC], including [the Plaintiff], had, from the beginning, decided to indict the [Suit 33 Plaintiffs] of wrongdoing, and was determined to proceed to do so themselves when they failed to persuade the Audit Committee to their position.
>
> …
>
> 96 …[W]e are satisfied that [the Plaintiff's] dominant motive for publishing the Statements was to injure [the Suit 33 Plaintiffs], whether out of personal spite or as follow-up actions after having made ratification of the expenditure an election issue during the 2008 AGM. Indeed, there is overwhelming evidence that [the Plaintiff] was determined, on the pretext that the expenditure was irregular, to soil the reputation of [the Suit 33 Plaintiffs] in the eyes of the members of the Club. Therefore the defence of qualified privilege is not available to [the Plaintiff] on account of malice.

Events following the CA Judgment

The re-affirmations of the Indemnity Resolution

46 Shortly after the CA Judgment was delivered, a special confidential MC meeting was convened,

on 14 December 2011, to discuss the verdict in the Suit 33 Appeals ("the 14 December Special Meeting"). It should be noted that the MC's composition at this time was different from when the Indemnity Resolution was passed (see [9]–[10] above), in that five members of the 2011 MC were not in the 2008 MC. Only six members of the 2011 MC attended this meeting as the other five were overseas, on medical leave, or in the Plaintiff's case, excused from attending because the subject matter of the meeting related to him.

47 During the 14 December Special Meeting, it was noted that D&N had asked the Club to reconfirm its indemnity to the Plaintiff should they be asked to represent the Plaintiff in the hearing on assessment of damages for Suit 33. The 2011 MC was of the view that there was no need to provide a further indemnity. It was noted that the Indemnity Resolution remained in effect and the Club's ability to provide such an indemnity had been upheld when challenged in OS 469. Further, the 2011 MC unanimously agreed that the Club should provide an indemnity to all members who served on the MC or its sub-committees.

48 On 19 December 2011, a further special confidential MC meeting was convened. This time, 10 of the 11 members of the 2011 MC attended. The 2011 MC members, with the exception of the Plaintiff who was excused from attending on this item, were asked to confirm their agreement with the decisions and actions taken at the 14 December Special Meeting. They did so unanimously.

49 On 18 January 2012, the Club received a requisition for an Extraordinary General Meeting ("the EOGM") from 538 Club members. The requisition was for the purpose of passing the following three resolutions (collectively, "the EOGM Resolutions"):

(a) that the Club seeks return from the Plaintiff of all monies paid by the Club including legal costs and expenses arising out of or in connection with Suit 33 and the Suit 33 Appeals;

(b) that no Club funds be authorised to pay for the legal costs, expenses and/or damages arising out of or in connection with Suit 33 and the Suit 33 Appeals; and

(c) that the members have no confidence in the Plaintiff.

50 The requisition for the EOGM had been sparked off by the CA Judgment. In particular, the requisitioning members noted the Court of Appeal's finding that the Plaintiff had acted with malice and took the view that the statements made by the Plaintiff could not be said to have been made in the discharge of his duties as an office bearer of the Club. Hence, it was asserted that the Club was not bound to pay the legal costs and damages occasioned by Suit 33.

51 On the very same day that the Club received the requisition for the EOGM, a special confidential MC meeting was convened on an urgent basis. Having discussed the requisition, the 2011 MC decided to re-affirm the Indemnity Resolution. The minutes of the meeting state that:

2.5 [The Plaintiff] invited MC members to express their views on the requisition for the EOGM. The MC viewed that the Indemnity Resolution remained legally valid. At the Special Confidential MC Meeting held on 18 January 2012, the MC was unanimous in upholding the principle of the Club to indemnify all committee members if they are sued in the course of duty to the Club. The MC reaffirmed the validity of the indemnity resolution on 14 January 2009 that the Club pays for the defense of [the Plaintiff] in the Defamation Suit 33. The MC was unanimous in that they did not support the three resolutions proposed by the requisitions.

The payment of $1,021,793.48

52 On 14 February 2012, which was after the EOGM was requisitioned but before the EOGM was held, the Club made payment of $1,021,793.48 to the Suit 33 Plaintiffs for their costs in Suit 33 and the Suit 33 Appeals. The events leading to this payment are not really disputed and may be briefly stated as follows.

(a) On 31 January 2012, the Plaintiff's then solicitors, Bajwa & Co, sent a letter to the Plaintiff and the Club to inform them of the outcome of the taxation of the Suit 33 Plaintiffs' costs in Suit 33 and the Suit 33 Appeals. The Plaintiff forwarded this email to the rest of the 2011 MC on 2 February 2012.

(b) On 3 February 2012, WongPartnership sent a letter to Bajwa & Co to demand payment of the Suit 33 Plaintiffs' costs. Bajwa & Co forwarded this letter to the Plaintiff on 10 February 2012 via email. Bajwa & Co's advice in their email was in the following terms:

> …
>
> 4) As there is no stay of the cost order, the said sums are payable otherwise will keep mounting.
>
> 5) Since we are not reviewing the appeal cost, there is no reason not to pay it now.
>
> 6) For the trial costs we have file [sic] for review but even then there is no harm in paying now and getting a refund if the amount is reduce [sic].
>
> 7) We will leave it to you to decide.

(c) The Plaintiff, in turn, forwarded Bajwa & Co's email to Tan Wee Tin and Jennifer Wee on 13 February 2012. The Plaintiff indicated in the email to Jennifer Wee that:

> …
>
> As the amounts are due on 31 January 2012, and interest is payable, we should take the lawyer's advice and settle the amounts payable now to avoid accruing interest.
>
> We can still get a refund for the trial costs if we succeed to get the costs reduced subsequently at the appeal.
>
> Please consult with the Treasurer on this matter and if payment is to be made, on booking into which account payment year since the payment was due on 31 January 2012, ie in the last financial year.

(d) On 13 February 2012, Tan Wee Tin reminded Jennifer Wee to make the payment as soon as possible to avoid accruing interest. The next day, Jennifer Wee received an email from Eric Ng suggesting that the monies be put in escrow pending the outcome of the review of taxation. Eric Ng's concern was that there might have been collection issues between the Club and the Suit 33 Plaintiffs should the costs order be subsequently varied by the court. However, as Jennifer Wee did not receive further instructions to hold back the cheque, she prepared a payment voucher and a cheque for $1,021,793.48 which was approved and signed by Tan Wee Tin on the same day.

The EOGM

53 The EOGM was held on 4 March 2012 and the EOGM Resolutions were passed. The Club thereafter ceased paying further sums in respect of the Plaintiff's legal costs and damages in Suit 33 and the Suit 33 Appeals. Instead, the Plaintiff paid the outstanding sums personally.

Events after the EOGM

54 Subsequently, two further matters arising from Suit 33 and the Suit 33 Appeals came to be heard by the High Court. First, the review of the taxation of the costs of trial in Suit 33 was heard on 30 March 2012. It was ordered that costs be taxed down such that the Plaintiff was to pay $602,500 (and GST on this sum) to the Suit 33 Plaintiffs. Following that, the assessment of damages in Suit 33 was heard on 15 May 2012. The High Court eventually ordered that the Plaintiff pay $420,000 in damages to the Suit 33 Plaintiffs plus costs of $18,000 for the assessment hearing; its grounds of decision can be found in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie* [2012] SGHC 193. Both the Plaintiff and the Suit 33 Plaintiffs filed appeals, Civil Appeal No 63 of 2012 and Civil Appeal No 68 of 2012 respectively, against the assessment of damages.

55 On 18 June 2012, the Suit 33 Plaintiffs issued a statutory demand against the Plaintiff for the sum of $440,168.69, being the sum of $420,000 awarded in damages plus the $18,000 awarded for the costs of the assessment hearing plus interest up till 18 June 2012. The Plaintiff thereafter filed Originating Summons (Bankruptcy) No 35 of 2012/Q ("OSB 35") on 29 June 2012 to set aside the statutory demand. The Plaintiff also applied for a stay of the execution of the High Court's orders in Suit 33 pending his appeal to the Court of Appeal against the High Court's assessment of damages. The stay was granted on 31 August 2012 on condition that the Plaintiff furnish $300,000 as security. OSB 35 was subsequently withdrawn by consent, with the Plaintiff paying $400 in costs to the Suit 33 Plaintiffs.

56 Civil Appeal Nos 63 and 68 of 2012 were heard on 18 March 2013. On appeal, the Court of Appeal varied the High Court's orders as follows:

(a) the Plaintiff was to pay the Suit 33 Plaintiffs $200,000 in damages, with interest on the said sum to run from the date of assessment in the High Court to the date of payment at the rate of 3% per annum;

(b) each party was to bear his own costs for the appeals as well as for the assessment of damages in the High Court;

(c) the costs of the trial for Suit 33 was fixed at $200,000 plus disbursements fixed at $80,000;

(d) the costs of the Suit 33 Appeals was fixed at $45,000 inclusive of disbursements, to be paid by the Plaintiff to the Suit 33 Plaintiffs; and

(e) the surplus amount paid by the Plaintiff for the costs of Suit 33 was to be refunded to the Plaintiff with interest at the rate of 3% per annum to run from the date the money was paid to the date it was refunded.

The present action

57 The present action has its origins in two separate actions, namely, Originating Summons No 309 of 2012 ("OS 309"), filed by the Plaintiff against the Club on 28 March 2012, and Suit No 510 of 2012/X ("Suit 510"), filed by the Club against the Plaintiff on 18 June 2012. Pursuant to orders made

by an Assistant Registrar on 27 July 2012, OS 309 was converted into a writ action and consolidated with Suit 510 to comprise the present suit, Suit No 634 of 2012 ("Suit 634").

58 In Suit 634, the Plaintiff makes three principal claims for relief:

(a) a declaration that the Indemnity Resolution is valid and binds the Club;

(b) a declaration that the EOGM Resolutions are ineffectual to vary and/or alter the Plaintiff's right to be indemnified under the Indemnity Resolution for costs and damages incurred by him in respect of Suit 33 and its related actions; and

(c) an order that the Club pay the Plaintiff the sum of $248,900.91 and the costs and expenses of defending OSB 35 (see [55] above) pursuant to the Indemnity Resolution.

The sum of $248,900.91 in item (c) above comprises sums which the Plaintiff personally paid in respect of his legal costs and damages in Suit 33 and its related proceedings, that is, $41,010.50 in legal fees paid to Bajwa & Co and $200,000 in damages paid to the Suit 33 plaintiffs plus interest at $7,890.41.

59 The Club denies that the Plaintiff is entitled to the relief he claims. In addition, the Club counterclaims for the sum of $1,520,685.44 (and pre-judgment interest on this sum at 5.33% per annum from 18 June 2012) comprising:

(a) $1,033,810.35 paid prior to the CA Judgment delivered on 21 November 2011; and

(b) $486,875.09 paid after the CA Judgment delivered on 21 November 2011.

These comprise various sums paid by the Club in respect of the Plaintiff's legal costs in Suit 33 and its related proceedings.

Issues

60 Based on parties' arguments, the issues before me broadly are as follows:

(a) the effect of the EOGM Resolutions on the Indemnity Resolution;

(b) whether the Indemnity Resolution is void or voidable for material non-disclosure;

(c) whether the Indemnity Resolution is voidable for breach of fiduciary duties by the Plaintiff and/or the other MC members; and

(d) whether the Club had paid the Plaintiff's legal costs under a mistake.

The Effect of the EOGM Resolutions on the Indemnity Resolution

The legal character of the Indemnity Resolution

61 Before turning to the parties' arguments proper, there is a preliminary issue which needs to be addressed. This concerns the legal character of the Indemnity Resolution, and more specifically, whether the Indemnity Resolution is a contract as between the Plaintiff and the Club. Neither party addressed this issue squarely; although both parties at some point in submissions seemed to suggest that the Indemnity Resolution did have contractual force.

62 As will become evident below, the legal character of the Indemnity Resolution is important in two respects:

(a) The first relates to whether the Club could revoke the Indemnity Resolution by way of the EOGM Resolutions.

(b) The second relates to the principles to be applied in the interpretation of the Indemnity Resolution.

63 In analysing this preliminary issue, it is helpful to first consider the Club's legal personality.

64 The Club is an unincorporated association and it is not a legal entity in and of itself. The Club is instead a creature of the contract as between its members, and which is encapsulated in the Club's Rules: see *In re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51 at 60; *McGuire Graeme and others v Rasmussen John and others* [1998] 1 SLR(R) 892 at [13]; *Petrie Christopher Harrisson v Jones Alan and others* [2005] 2 SLR(R) 387 ("*Petrie Christopher Harrisson*") at [18]. The Club's Rules govern the relationship between the members and define their rights, duties and liabilities.

65 Given the private nature of the contract between the members, it has been observed that an unincorporated association is run by the members for the members, with no outside control: see David Ashton and Paul W Reid, *Ashton and Reid on Club Law* (Jordans, 2005) ("*Ashton and Reid on Club Law*") at para 1-09. However, it is commonly the case that the general management and the day-to-day operations of an unincorporated association are left to a committee. Taking the example of the present case, the MC manages the Club pursuant to Rule 21(a)(i) of the Club's Rules. Rule 21(j), in turn, defines the MC's powers in the following terms:

> The Management Committee shall have the power to set and decide on all policies and matters relating to the Club. The Management Committee may not act contrary to the decisions of the General Meeting made in accordance with the rules in this Constitution and always remains subordinate to the General Meetings. The day-to-day administration of the Club shall be delegated to the General Manager and his Management Team.

66 In this regard, the power exercised by the committee of an unincorporated association is a *delegated power*. In other words, the right of each and every voting member to decide how the unincorporated association is to be managed and run is vested in the committee. To this end, committee members are considered to be agents or servants of their associations, and therefore, responsible to and subject to the control of the members of the association. Flowing from this, it is axiomatic that the committee is to exercise its powers for the benefit of the unincorporated association as a whole: *Woodford and another v Smith and another* [1970] 1 WLR 806 at 816. I should also note that it was common ground in these proceedings that the MC owes fiduciary duties to the Club's members.

67 Against this background, I return to the issue I had raised earlier, that is, whether the Indemnity Resolution is a contract as between the Plaintiff and the Club. This turns on the more general issue of what is the legal effect of resolutions passed by committees or members of unincorporated associations. Surprisingly, there seems to be little clear authority on the issue.

68 In its simplest form, a resolution may be defined a "formal determination by an organised meeting": see N E Renton, *Guide for Meetings and Organisations Volume 2: Guide for Meetings* (LBC

Information Services, 7th Ed, 2000) at para 4.1. In other words, resolutions are formal decisions of an entity, be it a company or some other association of persons. Importantly, however, it is also observed in Tan Cheng Han ed, *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 6.69, albeit in the context of resolutions passed by the organs of a company, that whilst "a resolution may be a decision of the company, it does not *ipso facto* amount to a contract". The authors cite two cases as authority for this proposition, to which I now turn to consider in some detail.

69 The first is the decision of the Malaysian High Court in *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405 ("*Lam Eng Rubber*"). In that case, the plaintiff company claimed repayment of various sums of money that it had allegedly advanced to the defendants, who were shareholders of the plaintiff. In this regard, the plaintiff relied on a directors' resolution to the effect that the company would advance sums totalling RM 360,000 to the defendants as interest-free loans. The plaintiff contended that the resolution amounted to a contract in writing and therefore, under s 91 of the Malaysian Evidence Act 1950 (Act 56), extrinsic evidence could not be admitted to contradict its terms. In rejecting this argument, KC Vohraj J observed as follows at 409:

> *I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders*. That the document shows that it is a resolution signed by three directors stating that the company `do hereby make an advance` to the directors and shareholders does not indicate that it is a contract. *Nowhere in [the resolution] is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants*. More specifically, there is nothing in the resolution which shows that `at the request of the defendants the plaintiff advanced and the defendants borrowed ...` certain sums of money as averred in para 5 of the statement of claim. I fail to see how either s 91 or s 92 of the Evidence Act 1950 can be invoked.[emphasis added]

70 This aspect of *Lam Eng Rubber* was subsequently approved by the Malaysian High Court in *EON Bank Bhd v KSU Holdings Bhd* [2011] 8 MLJ 498. There, the plaintiff bank claimed against the defendant company for specific performance of a corporate guarantee which the defendant had allegedly given to the plaintiff. Although a guarantee document had been sent to the defendant, this was never executed. Instead, the plaintiff relied on a board resolution of the defendant authorising it to provide the guarantee as evincing the relevant contract. Hanipah Farikullah JC found that such reliance was misplaced as the resolution was not a contract. Having cited the above passage in *Lam Eng Rubber*, Farikullah JC continued (at [57]–[59]):

> [57] Applying the decision in [*Lam Eng Rubber Factory (M) Sdn Bhd*], it is clear that *the resolution is an internal document of the defendant authorising and empowering the defendant to do and carry out matters stipulated therein*. It does not however require or compel the defendant to do or carry out any of the matters stated therein.
>
> [58] Thus, it would therefore be clearly *wrong in law for this court to accept the plaintiff's contention that the resolution is an undertaking given by the defendant to the plaintiff capable of being specifically enforced*…
>
> [59] By law the resolution has no legal binding effect *vis-a-vis* the company, the defendant in this case, and a third party, the plaintiff in this case. *It does not create any legal relationship between the plaintiff and the defendant*.
>
> [emphasis added]

71 The second decision cited in *Walter Woon on Company Law* is that of the Singapore High Court in *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 ("*Goh Kim Hai Edward*"). The issue in that case was whether the plaintiff's employment contract with the defendant company had been renewed by a board resolution in the following terms:

> That the employment contract of the chairman, Mr Edward Goh, subject to the terms and conditions and amendments as contained therein, renewed for another two years be and is hereby confirmed and ratified.

72 Judith Prakash J was of the view that it had not. She observed as follows (at [57]–[58]):

> 57 From my reading of the resolution, it is clear that, at the least, what the board did was to accept the SERC's recommendation that the plaintiff's contract be extended on the terms which they had proposed, ie the original terms plus a modification of the bonus clause. *The acceptance of the recommendation did not, however, of itself constitute the new contract between the plaintiff and the defendants*. It could not do so despite the somewhat peculiar way the resolution was worded and the use of the word "ratified'. In fact, as the plaintiff himself agreed there was nothing there to ratify since in January 1992 the SERC presented a recommendation rather than a purported contract as it had done in October 1989. Also the board was advised by its solicitors at the meeting held on 27 March 1992 that in the context of the resolution the word "ratified" meant no more than "confirmed" and added nothing to the effect of the resolution. This advice was accepted by the board (including the plaintiff and Mr Pang) without demur and led to Mr Rohan withdrawing his prior demand for the correction of the resolution by the deletion of the words "and ratified" based on his stand that he could not have agreed to have ratified what he had not seen.
>
> 58 As the defendants submitted, *the relevant resolution did not, and could not, fall within the category of resolutions which have an immediate legal effect*. Rather it was the *more usual sort of resolution which requires communication or some other act in relation to it to be done before it becomes part of a transaction which is legally binding*. That this was so was recognised by the plaintiff's submission that Mr Pang had been authorised to implement the decision and had done so by way of the renewal letter. If the resolution itself had been capable of constituting the contract there would have [been] no necessity to authorise anyone to take any implementation action.
>
> [emphasis added]

73 Finally, reference may be made to the decision of the New South Wales Court of Appeal in *Ex parte Forster; Re University of Sydney* [1964] NSWR 1000. There the view was stated that:

> A resolution may serve to define, *'for the time being'* at any rate, *a policy or principle intended to be followed in dealing with some class of subject matter*. We say 'for the time being' because, *unlike a by-law or regulation, a resolution may be rescinded or varied by another resolution.* [emphasis added]

74 I agree with the observations made in the above authorities. In my view, the authorities can be distilled into the following set of principles:

(a) resolutions are formal decisions made by an entity;

(b) resolutions do not have legal effect *in and of themselves*:

(i) a resolution is not a contract as between the members of the entity themselves or between the entity and third parties;

(ii) a resolution may however be binding as between the members if the constitutional documents of the entity or a statutory provision provides it to be so;

(iii) legal rights and obligations may be independently created if the entity acts pursuant to the resolution and enters into legally binding transactions; and

(c) resolutions, unlike a contract, may be rescinded or amended at any time.

75 Applying these principles to the present case, I am of the view that the Indemnity Resolution did not have contractual force as between the Plaintiff and the Club so as to entitle the Plaintiff to an *irrevocable* right to be indemnified by the Club for the legal costs and damages he had incurred in Suit 33 and its related proceedings. Rather, the Indemnity Resolution was a statement of the Club's policy and intent to defend its office bearers against legal proceedings brought against them in relation to acts done in the discharge of their duties as office bearers. This is borne out by the following facts:

(a) In the minutes of the 14 January 2009 MC Meeting it was recorded that:

(c) … [The Plaintiff] was being sued for what he did and said as President of the Club and Chairman of the MC meeting. As such the Club is duty bound to defend its elected officers who are being sued for discharging their duties as elected officers without which no member would serve in the MC or any of its Sub Committees.

(d) [Eric Ng] also explained that the Club bought the [insurance policy] to cover its Management Committee, executive staff and sub committee members to mitigate its losses in the event of such liabilities occurring. However if for any reason such liability insurance cover is not available, the Club would still have to defend its officers

(b) Likewise, the minutes of the 17 February 2009 MC meeting record that:

(c) [Gary Oon] was reminded that at the last MC meeting, barely a month ago, the MC had unanimously agreed on the policy to indemnify all MC, Sub Committee and Disciplinary Committee members for any legal proceedings against them while acting in the interest of the Club in the discharge of their responsibilities and duties for the Club…

(c) Finally, during the 2009 AGM, the Plaintiff explained to the members that it had always been the practice and policy of the Club that Club funds be used to defend its MC and other committee members if they were sued in the course of discharging their duties and responsibilities.

76 In my judgment, it is clear from the above that the Indemnity Resolution, *by itself*, did not give the Plaintiff an irrevocable contractual right to be indemnified by the Club.

Payments made by the Plaintiff after the EOGM Resolutions were passed

77 In closing submissions, Mr Seah submitted that the EOGM Resolutions do not vary the Club's obligation to indemnify the Plaintiff. Mr Seah submitted that since delegated power had been exercised by the 2008 MC in passing the Indemnity Resolution, its decision cannot be challenged in the absence of special provision in the Club's Rules. In this regard, Mr Seah relied on a passage in

Madeline Cordes *et al, Shackleton on the Law and Practice of Meetings* (Sweet & Maxwell, 12th Ed, 2011) ("*Shackleton*") where the view is stated at para 9-04 that:

> General or executive committees are those appointed by bodies such as clubs and associations to manage their affairs and to deal with all matters which it would not be appropriate to deal with in a general meeting, and are similar to boards of directors of companies. Executive committees of companies tend to deal with the day-to-day running of the business, department heads often being members of such committees, with the board of the company dealing with more strategic matters. *Having been appointed as a governing body and generally given full powers to deal with all matters delegated to them, their decisions cannot, in the absence of special provision in the constitution, be varied or set aside by a general meeting of the parent body*. [footnotes omitted and emphasis added]

78 In my judgment, insofar as Mr Seah was contending that the Club is obliged to pay the Plaintiff's legal costs and damages in Suit 33 notwithstanding the EOGM Resolutions, the above passage in *Shackleton* does not assist his case. First, as was discussed at [61]–[76] above, the Indemnity Resolution is not a contract as between the Plaintiff and the Club. To put this in simple terms, the Indemnity Resolution, by itself, does not contractually oblige the Club to pay the Plaintiff's legal costs and damages.

79 Second, it is clear from the passage in *Shackleton* that the general proposition that the decisions of a committee cannot be set aside by the general meeting is subject to any contrary provision in the constitutional documents. In the present case, such a provision exists by virtue of Rule 21(j) of the Club's Rules (see [65] above). Rule 21(j) provides that the MC "may not act contrary to the decisions of the General Meeting" and is always "subordinate to the General Meeting". These phrases speak for themselves. In the absence of a binding indemnity contract between the Club and the Plaintiff, I am of the view that the Club was entitled to change its mind and resolve to cease paying the Plaintiff's legal costs and damages after the EOGM Resolutions were passed. The MC could not thereafter act contrary to those EOGM Resolutions.

80 Mr Seah raised an alternative submission that the Club is estopped from denying that the Plaintiff is entitled to rely on the Indemnity Resolution. To the extent that Mr Seah sought to rely on the doctrine of estoppel (whether by representation or by convention) to buttress his claim that the Plaintiff has a right to be reimbursed for payments which the Plaintiff made personally after the EOGM Resolutions were passed (as opposed to being used as a defence to the Club's claim for the recovery of the payments which the Club had made), his contentions do not hold water.

81 As I observed earlier, the Plaintiff does not have a contractual right to be indemnified by the Club. Hence, to allow him to rely on the doctrine of estoppel in the manner which he proposes would be tantamount to the use of the doctrine as a sword in the sense of a free-standing cause of action and not merely as a shield. So far, the Singapore courts have not accepted that the doctrine of estoppel may be used in this way (see for example *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 at [23]; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 at [72]; *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [52]).

Payments made by the Club before the EOGM Resolutions were passed

82 The Plaintiff's arguments however, stand on firmer ground in relation to the Club's ability to recover sums which it had already paid towards the Plaintiff's legal costs. In that situation, the Club, through the MC, had acted pursuant to the Indemnity Resolution and made such payments on the

Plaintiff's behalf. Even though the Indemnity Resolution does not have contractual force as between the Plaintiff and the Club, and to that end, the Club had paid the Plaintiff's legal costs voluntarily, as a matter of both principle and policy, I do not see how the Club can simply change its mind about having made those payments and recover those payments through its own private act, by passing the EOGM Resolutions. In my view, the Club must go further and establish a distinct cause of action at law which permits the recovery of sums which it had already paid towards the Plaintiff's legal costs. It follows from the analysis above that the EOGM Resolutions do not automatically entitle the Club to recover such sums.

Grounds for Recovery

The Club's case

83 I now turn to consider the Club's arguments as to why it is entitled to recover the sums it paid pursuant to the Indemnity Resolution. In closing submissions, Mr Tan made three principal arguments.

84 First, Mr Tan submitted that the Plaintiff and his "cronies" in the 2008 MC had concealed the 14 January 2009 Members Letter, and the fact that the Plaintiff's defence in Suit 33 fell under the Insured v Insured Exclusion in the Club's insurance policy, from the other 2008 MC members at the 14 January 2009 MC Meeting. According to Mr Tan, the Indemnity Resolution was passed under a fundamental mistake arising from the deception of the Plaintiff and his "cronies" in the 2008 MC, and therefore, the Indemnity Resolution is void or voidable at the Club's instance. Alternatively, Mr Tan submitted that the Indemnity Resolution should be voidable at the Club's instance given the Plaintiff's "sharp practice" in procuring the Indemnity Resolution.

85 Second, Mr Tan submitted that the Indemnity Resolution was voidable due to various breaches of fiduciary duties on the part of the Plaintiff and his "cronies" in the 2008 MC. In particular, it was alleged that:

(a) at the 14 January 2009 MC Meeting, the Plaintiff had actively participated and influenced the 2008 MC in passing the Indemnity Resolution, in breach of the Club's Rules and the Plaintiff's fiduciary duties;

(b) the Plaintiff and his "cronies" had a vested interest in passing the Indemnity Resolution. The Indemnity Resolution was passed to cover the Plaintiff's liabilities in Suit 33. Further, the Plaintiff's "cronies" may also have been implicated in the defamatory statements as they were present during the MC meetings when the defamatory statements were made. Therefore, the Indemnity Resolution was not passed in the Club's interests;

(c) the Plaintiff and his "cronies" had breached their fiduciary duties to the Club in re-affirming the Indemnity Resolution even after the Court of Appeal had found, in the CA Judgment, that the Plaintiff had acted with malice in making the defamatory statements; and

(d) the Plaintiff had breached his fiduciary duties by procuring payment of his legal costs despite knowing that he would not be covered by the Indemnity Resolution because of his own malice.

86 Third, Mr Tan submitted that even if the Indemnity Resolution remains valid, it was only intended to cover office bearers acting in the proper discharge of their duties. In this regard, Mr Tan submitted that because the Plaintiff had acted with malice when he made the defamatory statements, he cannot be said to have acted in the proper discharge of his duties and he is therefore

not entitled to rely on the Indemnity Resolution. Hence, Mr Tan said, the Club had paid the Plaintiff's liabilities in respect of Suit 33 under a mistake and is entitled to restitution of the sums it paid under the law of unjust enrichment.

87 Two preliminary observations should be made at this juncture.

Consistency with the Club's pleaded case

88 First, it seems to me that the Club's case in closing submissions was different from its pleadings. To begin with, it is not apparent from the Club's Defence and Counterclaim that its core case is that the Plaintiff and his "cronies" in the 2008 MC had breached their fiduciary duties when passing the Indemnity Resolution in the various ways which the Club had alleged in closing submissions. Instead, the Club's pleaded position was narrower and simply that the other members of the 2008 MC had a vested interest in passing the Indemnity Resolution because of the risk of them being implicated in Suit 33; and further, that the Plaintiff had breached his fiduciary duties by procuring payments of his legal costs when he knew that he was not covered by the Indemnity Resolution because of his malice.

89 In the Club's Counterclaim, there was also no prayer for a declaration that the Indemnity Resolution was void or voidable, whether for mistake, unconscionability or for breach of fiduciary duties, nor was there a prayer for relief in the form of equitable rescission (of the Indemnity Resolution and the payments made pursuant to it). Rather, the Club's Counterclaim was ostensibly pleaded solely as a claim in unjust enrichment for restitution of payments made by the Club. I will return to the specific issues arising from the Club's pleadings later in these grounds.

The Club's allegation that certain members of the 2008 MC and the 2011 MC were the Plaintiff's "cronies"

90 Next, a common thread running through the Club's closing submissions is that certain members of the 2008 and 2011 MC were the Plaintiff's "cronies". In particular, the impression which this seeks to convey is that these MC members had acted in concert with the Plaintiff and had advanced his interests over the interests of the Club. In my view, the Club's position is untenable for the following reasons.

91 First, the Club did not plead this as a fact. Instead, the Club only pleaded that the other 2008 MC members had a vested interest in passing the Indemnity Resolution because of the risk of them being implicated in Suit 33. In my view, there is a fundamental difference between saying that the other 2008 MC members had a vested interest in passing the Indemnity Resolution in this sense, and saying that they were acting in concert with the Plaintiff and advancing his interests.

92 Second, the Club did not identify in closing submissions who these alleged "cronies" were; and more importantly, whether these MC members were in fact the Plaintiff's "cronies". I note in this regard that seven of the 12 members of the 2008 MC were not called as witnesses in this Suit 634. Without their evidence, I am not in a position to impute any sinister motives in passing the Indemnity Resolution to each and every one of them.

93 Third, the Club's submissions largely gloss over the fact that the composition of the 2011 MC, which had re-affirmed the Indemnity Resolution at three separate MC meetings after the CA Judgment (see [46] – [51] above), was different from the composition of the 2008 MC which had passed the Indemnity Resolution. This is significant because:

(a) there were five newly elected members of the 2011 MC who were not members of the 2008 MC. These new 2011 MC members would have no fear of being implicated in Suit 33, and they would not have had a vested interest in ensuring that the Indemnity Resolution remained in force to protect the Plaintiff; and

(b) the Club has not proven that the members of the newly constituted 2011 MC were also the Plaintiff's cronies. In this regard, I do not think it is open to the Club to barely assert (without any evidence), as it has done in closing submissions, that the new members of the 2011 MC had a vested interest in protecting the Plaintiff and the rest of the 2008 MC because of their close relationships with the 2008 MC members who had nominated them.

94 Along the same lines, the Club also submitted that the minority in the 2008 MC were bullied and intimidated into agreeing with the Plaintiff and his "cronies" at MC meetings. To make good this submission, the Club relied on statements made by Theresa Kay and Gary Oon at the 2009 AGM, which were recorded in the minutes of this AGM.

95 As regards Theresa Kay's statement, I find that it is inadmissible hearsay as she was not called as a witness at trial and I therefore say nothing further on it.

96 As for Gary Oon's statement, the minutes of the 2009 AGM record it as follows:

> 16.13 [Gary Oon] pointed out that it was clear he and Ms Theresa Kay were under undue duress to agree to allow [the] Club's funds to be used. He asked was it so wrong to express what he thought was right for the Club. He said that the atmosphere at MC meetings ever since the start of this MC being on board had been acrimonious and often times discussions were very heated and voices were raised, which was uncalled for, and on occasions even he felt intimidated. In that sort of circumstances, when a vote was called for surely the majority would win. However, as a MC member he owed a fiduciary duty to act in the best interest of the Club, and agreeing to allow Club's funds for use for the defense [sic] of its President in an alleged defamation was certainly not acting in the interest of the Club…

97 I am mindful that Gary Oon's statements at the 2009 AGM were made in response to the motion to censure him at this AGM (see [34] above), for not consulting with the 2008 MC before replying to the 14 January 2009 Members Letter. His statements at this AGM may therefore have been motivated by self-preservation.

98 Moreover, the evidence does not support Gary Oon's assertion that he was under "undue duress" to agree to the Indemnity Resolution. The agreed transcripts of the 14 January 2009 MC Meeting show the 2008 MC freely discussing the Indemnity Resolution at some length. Pertinently, they show Gary Oon actively participating in the discussion and enquiring whether the law allowed the 2008 MC to pass the Indemnity Resolution. Furthermore, Gary Oon did not object to the Indemnity Resolution when it was passed. Instead, he only did so belatedly, after receiving the 14 January 2009 Members Letter. In cross-examination, Gary Oon conceded that he had *changed his mind* because of the 14 January 2009 Members Letter:

> Q: Mr Oon, if I understand you correctly, what you are essentially saying here is you would have changed your mind, maybe made an objection to the [Indemnity Resolution] if you had seen the letter, correct?
>
> A: Yes.

Q: What is clear from this exchange is that you knew full well that the [2008 MC] was asked if anyone had an objection, and you did not have an objection. Correct?

A: At that point, yes.

99 In his affidavit, Gary Oon also referred to a 2008 MC meeting on 17 February 2009 ("the 17 February 2009 MC Meeting") and a chain of emails which preceded that MC meeting as an instance where he was "overwhelmingly shot down" by the other members of the 2008 MC. The difficulty with Gary Oon's evidence in this respect is that it ignores the reasons why the other 2008 MC members had expressed irritation with him. In this regard, Gary Oon had sought to amend the minutes of the 14 January 2009 MC Meeting to read that:

(a) no votes were taken on the Indemnity Resolution and it thus could not be said that the 2008 MC had unanimously agreed to it;

(b) making defamatory allegations was the responsibility of the MC member concerned and the Club should not be responsible for it; and

(c) Gary Oon had disagreed that the Club should assume all liability in the defence of such cases.

100 During the 17 February 2009 MC Meeting, Gary Oon likewise objected to the confirmation of the minutes of the 14 January 2009 MC Meeting on the basis that the Indemnity Resolution was not passed unanimously.

101 In my view, Gary Oon was attempting to re-write history by raising the technical objection that the Indemnity Resolution was not passed unanimously as no vote had been taken, and instead, the 2008 MC members had been asked whether they had any objections to the Indemnity Resolution. This informal manner of voting accorded with past practice at MC meetings and Gary Oon knew this. It is plain on the evidence that Gary Oon did not object to the Indemnity Resolution at the 14 January 2009 MC Meeting. In the circumstances there was no reasonable basis for Gary Oon to claim during the 17 February 2009 MC Meeting that the Indemnity Resolution was not passed unanimously. Pertinently, in cross-examination, Gary Oon accepted that the other MC members were irritated with his attempts to amend the minutes of the 14 January 2009 MC Meeting to reflect statements which he had not made during that meeting, and when he could have properly raised these matters later in the 17 February 2009 MC Meeting under "matters arising" and not in the confirmation of the previous meeting's minutes:

Q: What is the purpose of minutes of a meeting, Mr Oon?

…

A: It is to record what goes on at the meeting.

Q: Indeed. If you have never said anything of this sort, it should have no place in the minutes of the meeting, correct?

A: Well, yes, you can.

Q: That is why the rest of the MC members were very irritated with you, correct?

A: Yeah, if that's how they feel.

Q: Then there was an exchange of emails that followed this amongst the [2008 MC]…

…

Q: I will not go through all of them, but you would agree with me that generally they express surprise and irritation at your proposed amendments?

A: Yes.

Q: I just wanted to show you one of the responses, at page 152, it is from Mr Tan Wee Tin.

He says:

"Gary.

Having acted as secretary of both public-listed and private corporations, one does not need to refer to Shackleton law for a start.

A member attending and speaking at any meeting is entitled to amend by adding or deleting words from his statements to render clarity or eliminate ambiguity.

Procedurally, going beyond is unacceptable whether coming from hindsight or whatever side you may wish to put forth.

Of course the attendee concerned can voice his views under "Matters arising" at this meeting.

All is therefore not lost."

Mr Tan is simply saying that you should not be putting forth your views in minutes. If you want to, you can brick [sic] them up in – bring them up in matters arising, correct?

A: Yes.

Q: That is a perfectly reasonable thing to say, correct?

A: Yes.

Q: And you should have no reason to be angry with Mr Tan for saying this?

A: No I am not angry, that's why I didn't reply.

Q: *Thank you. You see, this series of emails is not an attempt by the [2008 MC] to gang up on you and shut you out. They were simply calling you to order because you were trying to insert things into the minutes that you did not say at the last meeting. Do you agree or disagree?*

A: I agree.

Q: And when you got into a little quarrel with them at the start of the next meeting on this subject, they were also irritated that you – at you because you tried to insert these things

into the minutes. Agree?

A: Perhaps that's how they feel.

[emphasis added]

102 In the circumstances, I find that the Club has not proven its claim that the minority in the 2008 MC were bullied and intimidated into passing the Indemnity Resolution by the Plaintiff and his "cronies" in the 2008 MC.

Whether the Indemnity Resolution was passed under a fundamental mistake or procured by sharp practice

103 I turn to the Club's first ground for the recovery of payments the Club had made for the Plaintiff's legal costs. This is that the Plaintiff and his "cronies" had concealed the 14 January 2009 Member Letter and the Insured v Insured Exclusion from the other 2008 MC members at the 14 January 2009 MC Meeting. In effect, the Club's case was that the Indemnity Resolution was passed by the 2008 MC under a fundamental mistake, or alternatively, the Indemnity Resolution was procured by sharp practice or unconscionable conduct on the Plaintiff's part. Therefore, the Club submitted, the Indemnity Resolution was void, or alternatively, voidable at the Club's instance.

104 As previously noted at [88] and [89] above, it is not clear from the Club's Defence and Counterclaim that the Club was seeking to have the Indemnity Resolution, and the payments made pursuant to it, invalidated on this ground. In particular, the Club only pleaded that the Plaintiff did not bring the 14 January 2009 Members Letters and the Insured v Insured Exclusion to the attention of the other 2008 MC members when he had knowledge of these matters. The Club did not further plead an operative mistake on the part of the other 2008 MC members in passing the Indemnity Resolution. Nor did the Club furnish particulars of unconscionable conduct on the part of the Plaintiff and his "cronies". Moreover, the Club's Defence and Counterclaim did not pray for relief in the form of equitable rescission. Be that as it may, I need not say more on this point of pleading because I find the Club's contentions untenable on substantive grounds (see [124]–[153] below).

Res judicata

105 As a preliminary objection, Mr Seah submitted that the Club was precluded from raising the factual issues of the Plaintiff's failure to disclose the 14 January 2009 Members Letter and the Insured v Insured Exclusion during the 14 January 2009 MC Meeting, by the doctrine of issue estoppel, or alternatively, the extended doctrine of *res judicata*.

The law on *res judicata* and issue estoppel

106 The doctrine of *res judicata* comprises two related concepts. The first is cause of action estoppel, which, broadly speaking, prevents re-litigation of the same cause of action between the same parties. Cause of action estoppel did not feature in the proceedings before me. I therefore say nothing further on it.

107 The proceedings before me concerned the second concept of issue estoppel instead. Issue estoppel may arise even if the earlier decision did not determine the same cause of action being sued upon in the later proceedings; issue estoppel applies so long as the earlier decision determined *an issue* that was an essential step in the reasoning of that earlier decision. Should this issue prove to be relevant in later proceedings between the same parties, further consideration of that issue may be

foreclosed: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [18].

108 Four requirements must be met before issue estoppel will arise (*Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") at [14]–[15]):

(a) there must be a final and conclusive judgment on the merits;

(b) that judgment must be of a court of competent jurisdiction;

(c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity of subject matter in the two proceedings.

109 In the present case, parties did not dispute that the first two requirements were met and their arguments centred on the third and fourth requirements instead. I will therefore only set out the principles in relation to the third and fourth requirements.

110 With regard to the third requirement, namely, identity between the parties, the courts have not taken a narrow view of what this means. Instead, the courts have looked past the form to consider whether, in substance, the parties involved in the two sets of proceedings were effectively the same (see *Lee Tat at [14] and Goh Nellie* at [33]). As Lord Diplock observed in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541, issue estoppel may arise in civil actions between "the same parties or their privies".

111 As for the fourth requirement of identity of subject matter, this turns on two factors. The first is that the issue in question must have been raised and argued in the earlier proceedings (*Goh Nellie* at [38]). The second is whether the previous determination of the issue in question was fundamental (and not merely collateral) to the previous decision so that the previous decision cannot stand without that determination (*Goh Nellie* at [35]).

112 If issue estoppel does not arise, because there is no identity between the parties or the subject matter of the earlier decision and the later proceedings, a party may also rely on the extended doctrine of *res judicata*, which is otherwise known as the defence of an abuse of process (see *Goh Nellie* at [19] and [23]).

113 The extended doctrine of *res judicata* is a matter of weighing competing interests. The courts are concerned with ensuring finality in judicial decisions and preventing a party from being unjustly hounded given the earlier history of the matter. The question is whether the issue ought to have been raised with reasonable diligence in the previous proceedings. However, the mere fact that the issue was not raised in the earlier proceedings does not necessarily render raising the issue in the later proceedings abusive. Thus the courts must consider whether it is in fact an abuse of process to raise the issue only at the later proceedings (see generally *Goh Nellie* at [52]).

Application to the present case

114 With regard to the third requirement of issue estoppel, which is identity between the parties, I am of the view that the parties to OS 469 and to this Suit 634 were different. First, Poh Pai Chin is not a party to Suit 634. Second, and more importantly, the Club took a position in OS 469 which was aligned with its co-defendant, the Plaintiff, against a member of the Club. Affidavits had been filed on behalf of all the defendants in OS 469 and they stated, amongst other things, that the Indemnity

Resolution was valid and *intra vires* the Club's Rules, and that the 2008 MC and the Club could authorise the payment of the Plaintiff's legal expenses. The undercurrent running through the affidavits filed by the defendants was that the Club, through the 2008 MC, had intended to pay the Plaintiff's legal expenses.

115 In this Suit 634, however, the Club's interests and the Plaintiff's interests are diametrically opposed. While the Plaintiff is seeking to uphold the Indemnity Resolution, the Club is now opposing it in view of the EOGM Resolutions. The Club no longer wants to pay the Plaintiff's legal expenses, and is further attempting to claw back payments it had already made. In effect, the Club has adopted an opposing position because the Club is now run by a different MC from the 2008 MC. The privies of the Club are different, and hence the position the Club now adopts is different too. I am not convinced that, *in substance*, there is identity between the Club in OS 469 and the Club in this Suit 634. Therefore, the third requirement to establish issue estoppel is not met.

116 With regard to the fourth requirement of issue estoppel, which is identity in subject matter, I am also not satisfied that this is made out. The central issue in OS 469 was whether the Indemnity Resolution was *intra vires* the Club's Rules. In other words, OS 469 turned on whether it was within the 2008 MC's power, as derived from the Club's Rules, to pass the Indemnity Resolution in the first place. Poh Pai Chin had relied on the 14 January 2009 Members Letter to argue that point.

117 The issue in this Suit 634 is different. Here, no question of *ultra vires* arises. The Club accepts that it was within the 2008 MC's power, under the Club's Rules, to pass the Indemnity Resolution. However, the Club argues that the 2008 MC's decision to do so has been vitiated on the grounds of mistake or unconscionability. The Club relies on the 14 January 2009 Members Letter and the Insured v Insured Exclusion to make out its case on these grounds.

118 I am mindful that it was disputed in the affidavits filed in OS 469 whether the 14 January 2009 Members Letter had been disclosed to the 2008 MC during the 14 January 2009 MC Meeting. Poh Chai Chin and Gary Oon deposed that it was not whilst Ashok Sharma and BB Khoo deposed that it was. However, based on the outcome in OS 469, it is unclear whether the 14 January 2009 Members Letter was fundamental to the decision there, such that the decision could not stand without that determination (see *Goh Nellie* at [35]).

119 As mentioned earlier, OS 469 was centred on the issue of *ultra vires*. In that context, it may be surmised that the interpretation of the Club's Rules would have been the foremost issue. The 14 January 2009 Members letter would only become a relevant consideration if the Club's Rules required the 2008 MC to take the 10 members' wishes into account. Because OS 469 was dismissed without written grounds being delivered, it is unclear how the court arrived at its decision. There are two possibilities:

(a) the court may have found that the 2008 MC was not required to take members' wishes into consideration. In that case, the court could have dismissed OS 469 on the basis that the 2008 MC was acting within its power in passing the Indemnity Resolution – no finding on the 14 January 2009 Members Letter would have been necessary; or

(b) the court may have found that the 2008 MC was required to take members' wishes into consideration. The court would then have also had to find that the 14 January 2009 Members Letter was in fact disclosed and considered by the 2008 MC before passing the Indemnity Resolution.

As the decision in OS 469 could have been arrived at in either of the two scenarios above, I cannot

be satisfied that the issue of whether the 14 January 2009 Members Letter had been disclosed during the 14 January 2009 MC Meeting was fundamental to the court's decision.

120 In any event, the Insured v Insured Exclusion was not even raised and argued by Poh Pai Chin in OS 469 as a basis for invalidating the Indemnity Resolution (see *Goh Nellie* at [38]).

121 In the circumstances, I am not satisfied that the requirement of identity of subject matter is met. It follows that the Plaintiff's contentions regarding issue estoppel must fail.

122 The question then is whether it would nonetheless be an abuse of process for the Club to be allowed to raise the non-disclosure of the 14 January 2009 Members Letter and the Insured v Insured Exclusion in this Suit 634, such that it would engage the wider doctrine of *res judicata*. In my judgment, there is no abuse of process because:

(a) the Club is now prosecuting an action which involves allegations by the Club of wrongdoing by its previous MC. The fact is that the 2008 MC may have caused the Club to take positions in OS 469 which were aligned with their own interests;

(b) OS 469 was an action commenced by an individual member of the Club and not the Club itself. Poh Pai Chin elected to run his case to invalidate the Indemnity Resolution on the basis of *ultra vires* alone. Poh Pai Chin's election to do so should not be held against the Club. Further, even if Gary Oon should reasonably have raised the non-disclosure of the Insured v Insured Exclusion as a basis for invalidating the Indemnity Resolution in OS 469, this should not preclude the Club from doing so now; and

(c) it is impossible to ascertain precisely what was determined in OS 469 in the absence of written grounds.

123 In my view, therefore, the Club is not precluded from canvassing these issues of fact in this Suit 634. I will now turn to consider each of these issues, starting with the Insured v Insured Exclusion.

Was the Insured v Insured Exclusion discussed at the 14 January 2009 MC Meeting?

124 Based on the agreed transcripts of the 14 January 2009 MC Meeting, it would appear that the meeting proceeded without any mention of the Insured v Insured Exclusion. Reference to the Club's insurance policy during the discussion on the Indemnity Resolution was made in a different context. The following points summarise the 14 January 2009 MC meeting in this regard:

(a) the Plaintiff was being sued for defamation and although the claim was against him personally, the statements had been made in his capacity as the President of the Club;

(b) as a matter of Club policy, all MC members should be protected by an indemnity from the Club for acts done in their discharge of their duties to the Club by virtue of their positions;

(c) the insurance policy obtained by the Club was in furtherance of such a Club policy, and, *even if* the insurance policy did not cover certain acts, the Club should nevertheless provide coverage for MC members;

(d) the indemnity by the Club would be for any sort of action that could be brought against the MC members and not just defamation actions;

(e) there was nothing, legally, that prevented the MC from passing an indemnity resolution and it would be for the MC to decide; and

(f) the Club's funds would be used for this indemnity.

125 Eric Ng also testified at trial that the discussion was conducted in such a manner so as to focus on the Indemnity Resolution and not the Club's insurance policy. Because of that, the Insured v Insured Exclusion was not specifically mentioned. Eric Ng had proceeded on the basis that in the event the Club's insurance policy did not apply, all office bearers would nevertheless be covered by an indemnity from the Club. This was repeated to the 2008 MC members at the 14 January 2009 MC Meeting more than once.

126 This is corroborated by what the Plaintiff had said in relation to insurance coverage (or the lack thereof) at the 14 January 2009 MC Meeting:

Eric Ng:	… we are talking about the Club defending the MC for -- when they are being sued in the course of executing their duties and responsibilities.
[the Plaintiff]:	You see, here we might not get insurance coverage, all right.
Eric Ng:	Yah.
[the Plaintiff]:	So you are now implying that because we have insurance coverage, we are covered.
Eric Ng:	Yah, correct.
[the Plaintiff]:	What if we are faced with a situation, come renewal, they say, "I'm sorry, I don't want to insure Singapore Swimming Club" --
Eric Ng:	I --
[the Plaintiff]:	-- but the Club still has to cover the MC, whoever the MC, it may not be me. It could be, you know, Mr A, Mr B, who comes to the MC.

Based on my reading of the evidence, the Plaintiff was effectively saying that the Club should still cover the costs of defending MC members whether or not there was insurance coverage.

Was the 2008 MC aware of the Insured v Insured Exclusion?

127 It is crucial to the Club's case that the other 2008 MC members, apart from the Plaintiff and Eric Ng, did not know about the Insured v Insured Exclusion. If they knew about the Insured v Insured Exclusion but did not mention it, then the Insured v Insured Exclusion could not have been material to, or have affected, their decision making. This point was not made explicitly clear by the Club. On the other hand, the Plaintiff argued that the other 2008 MC members knew of the Insured v Insured Exclusion on or before the 14 January 2009 MC Meeting.

128 In my view, the respective cases of both parties were lacking in one key respect: the evidence of *all* 2008 MC members. This is not a case where the objective evidence from the agreed transcripts and the meeting minutes speak for themselves. On its face, the objective evidence did not reveal any discussion on the insurance policy's limitations or, more specifically, the Insured v Insured Exclusion. Yet, it seemed to me at the same time during the trial that at least some 2008 MC Members knew about the Insured v Insured Exclusion by the time of the 14 January 2009 MC Meeting. In any event,

I propose to say no more on this given my conclusion below that the Insured v Insured Exclusion was not material to the passing of the Indemnity Resolution, and that the Indemnity Resolution was not passed under a fundamental mistake.

Was the 14 January 2009 Members Letter disclosed at the 14 January 2009 MC Meeting?

129 The Club also asserted that the 14 January 2009 Members Letter was not disclosed to the members of the 2008 MC at the 14 January 2009 MC Meeting.

130 The 14 January 2009 Members Letter was not mentioned in the agreed transcripts or the minutes of the 14 January 2009 MC Meeting. This is also corroborated by the agreed transcripts for the subsequent 17 February 2009 MC Meeting where Gary Oon asked why the letter had not been circulated at the 14 January 2009 MC Meeting and BB Khoo had confirmed that the letter had not been circulated. At this juncture, it is pertinent to note that BB Khoo was the recipient of the said letter and the non-disclosure of the said letter is thus attributable to him. In this regard, I observe that there is no evidence that the Plaintiff or Eric Ng had directed him to not disclose the said letter at the 14 January 2009 MC Meeting.

131 In my judgment, it is plain on the evidence that the 14 January 2009 Members Letter was not disclosed at the 14 January 2009 MC Meeting. I also note that Mr Seah did not assert the contrary in closing submissions.

Were the non-disclosures material?

132 I now come to the materiality of the non-disclosures. As seen from above, the 14 January 2009 Members Letter and the Insured v Insured Exclusion were not disclosed or discussed by the 2008 MC at the 14 January 2009 MC Meeting. However, for the Club to prove its case that the Indemnity Resolution is void or voidable, the Club must go further and prove that the non-disclosures were material to the passing of the Indemnity Resolution.

133 I will first consider the materiality of the Insured v Insured Exclusion to the passing of the Indemnity Resolution. As I had mentioned above, I could not determine whether all the 2008 MC members knew (or did not know) about the Insured v Insured Exclusion by the time they attended the 14 January 2009 MC Meeting. However, based on the evidence before me, I am of the view that the 2008 MC members must have known about the Insured v Insured Exclusion and its effect by the time Ashok Sharma's affidavit was filed in OS 469, that is, by 12 June 2009. This was an affidavit filed on behalf of the 2008 MC members (excluding Theresa Kay, Mike Chia and Gary Oon) and these 2008 MC members must therefore be taken to have known of its contents. As for Gary Oon, he testified in cross-examination that he had found out about the Insured v Insured Exclusion sometime in May 2009.

134 In his affidavit filed in OS 469, Ashok Sharma deposed that the Insured v Insured Exclusion was one of the reasons why the Indemnity Resolution was passed. Pertinently, none of the other 2008 MC members who were involved in OS 469 had raised any objection to this aspect of Ashok Sharma's affidavit or contended that they did not know that the Insured v Insured Exclusion would exclude Suit 33 from insurance coverage. I also note that apart from Gary Oon, no 2008 MC member raised any such objection at any MC meeting at any time after 12 June 2009 or for the purpose of this Suit 634, or in any other forum. As for Gary Oon, even though he found out about the Insured v Insured Exclusion earlier, in May 2009, he did not mount any objections to the Indemnity Resolution on this basis, and further, he did not address the issue of non-disclosure of the Insured v Insured Exclusion in OS 469 or at the EOGM. Rather, the first time Gary Oon raised the issue was in this Suit 634.

135 Furthermore, it should be emphasised that the Indemnity Resolution was purportedly passed by the MC 2008 to affirm the Club's policy of indemnifying its office bearers when they were sued in the course of executing their duties and responsibilities. In that regard, the insurance policy was relevant in the sense that the insurance policy was a means, but certainly not the sole means, of giving effect to the Club's policy. Where insurance cover was absent or lacking for certain liabilities, the Club would nevertheless still indemnify its office bearers. Pertinently, none of the 2008 MC members discussed limitations to the Club's indemnification. On the contrary, the Indemnity Resolution was intentionally worded to cover all MC members, present or future, for all acts of the MC members done in the discharge of their duties, and for any amount.

136 In the premises, I do not think that the disclosure of the Insured v Insured Exclusion at the 14 January 2009 MC Meeting would have materially affected the 2008 MC members' decision in passing the Indemnity Resolution.

137 The observations above are similarly applicable to the 14 January 2009 Members Letter. I note Gary Oon's evidence that he would have objected to the passing of the Indemnity Resolution if the 14 January 2009 Members Letter had been disclosed to him at the 14 January 2009 MC Meeting. Because of his objections, it was eventually recorded in the minutes of the 17 February 2009 MC Meeting that "at his own behest the [insurance policy] coverage would not include [Gary Oon] for all defamation suits. An amendment would be made to the insurance policy". However, even if Gary Oon had objected, his objection would not have been material to the passing of the Indemnity Resolution as it was only one member's objection in the face of the majority of the 2008 MC, all of whom did *not* raise similar objections to the passing of the Indemnity Resolution at the 17 February 2009 MC Meeting, even though they all knew about the existence of the 14 January 2009 Members Letter by that time.

138 The following observations also inform my conclusion that the non-disclosure of the 14 January 2009 Members Letter was not material to the passing of the Indemnity Resolution.

139 First, the points that were made in the 14 January 2009 Members Letter had already been canvassed in the 14 January 2009 MC Meeting. The said letter made the following points:

(a) the Plaintiff was being sued in Suit 33 for defamation;

(b) unincorporated associations like the Club could not be liable for the tortious acts of its officials or committee members;

(c) therefore, and in the interest of the Club, the members requested that Club funds would not be used to finance the Plaintiff's defence as doing so would be improper; and

(d) if funds had been used, steps ought to be taken to recover the monies.

140 Comparing the points made in the 14 January 2009 Members Letter (see [139] above) to what had been discussed above at the 14 January 2009 MC Meeting (see [124] above), points (a) and (b) of the letter had been raised at the meeting: the 2008 MC members knew that the Plaintiff was being sued for defamation and, additionally, took the view that the Club could pass resolutions to indemnify MC members if they so wished to. As a result of the view that the 2008 MC had adopted, points (c) and (d) of the said letter did not arise for discussion. In my view, no new points were raised in the 14 January 2009 Members Letter that had not been considered by the 2008 MC at the 14 January 2009 MC Meeting, apart from the fact that 10 members of the Club were objecting to the Indemnity Resolution being passed.

141 Second, at the 17 February 2009 MC Meeting, Gary Oon had made a separate point that defamation was a "voluntary act", so "the person should be responsible for what he says". In effect, Gary Oon's point was that the capacity in which the MC member had made the statements did not matter and that all liability arising pursuant to a defamation suit should be borne by that member personally. However, this point was not made by Gary Oon at the earlier 14 January 2009 MC Meeting, whilst Eric Ng had made it abundantly clear that the capacity of the person did matter as the Club would only cover liability that occurred in the discharge of the MC member's duties and responsibilities (see [124] above).

142 Third, Gary Oon's real objection to the Indemnity Resolution after the disclosure of the 14 January 2009 Members Letter was to having the Indemnity Resolution cover defamation actions. Although he had tried to argue that the passing of the Indemnity Resolution was not unanimous, the basis for his objection was having the Indemnity Resolution cover defamation actions and not that the Indemnity Resolution should be revoked in its entirety. In other words, Gary Oon still wanted to have an indemnity from the Club for other acts undertaken as an MC member. This is evident in the minutes of the 17 February 2009 MC Meeting where he was excluded, at his request, "for all defamation suits" and at the 2009 AGM where he once again made the point that the Club funds should not be used for defamation suits. The 14 January 2009 Members Letter thus swayed Gary Oon's original decision in passing the Indemnity Resolution in so far as it covered defamation actions, but it did not change his decision that an Indemnity Resolution should still be adopted by the 2008 MC, albeit in a more limited manner.

143 Fourth, as discussed at [67]–[76] above, the Indemnity Resolution could have been rescinded at any time so long as the requisite majority of the 2008 MC members voted to do so at a subsequent MC meeting. However, this step was never taken by the 2008 MC even though the 2008 MC would have had known of the 14 January 2009 Members Letter by 17 February 2009 at the latest.

144 In conclusion, I find that the non-disclosure of the 14 January Members Letter was immaterial to the outcome of the Indemnity Resolution. From the evidence, it was material to only one person in the 2008 MC (Gary Oon) and even then, Gary Oon only sought to limit the scope of the Indemnity Resolution and not to have it revoked in its entirety. No action was taken by any other member of the 2008 MC to move for the revocation of the Indemnity Resolution. Furthermore, a single member's opposition to the Indemnity Resolution would have made no difference to the Indemnity Resolution being passed.

Were the 2008 MC members deceived?

145 The Club made the further point that the Plaintiff and Eric Ng had procured the passing of the Indemnity Resolution through sharp practice and unconscionable conduct. In this regard, however, the Club's case remained premised upon the 2008 MC having passed the Indemnity Resolution on a mistaken basis. The Club did not rely on a free-standing doctrine of unconscionability, which in any event, I note it did not plead. As the Club has failed to prove that the non-disclosures were material to the passing of the Indemnity Resolution, the Club's arguments based on unconscionability similarly have no traction. Nevertheless, I make the following brief observations.

146 First, the Club relied on the question posed by Theresa Kay during the 14 January 2009 MC Meeting to argue that Eric Ng and the Plaintiff had misrepresented to the other 2008 MC members that there were no exclusions applicable to Suit 33 under the Club's insurance policy:

Theresa Kay:	Chairman, can I just confirm? The -- I think we renewed the policy this year, right, I think there's some exclusion for some of the MC, right?
Eric Ng:	No, there is not.
…	
Theresa Kay:	All are covered?
Eric Ng:	Yes, yes.
…	
Eric Ng:	All MC are covered. Why I said that – there's no exclusion.
[The Plaintiff]:	It was agreed that those who are involved in the Suit against the Club in the last one, if they take out the suit again, then it's not covered.

147 I do not think that the Plaintiff and Eric Ng were trying to give the impression that the insurance policy would cover every situation, including a defamation claim by former MC members (as was the case in Suit 33). Such a reading takes the evidence out of context. Theresa Kay was referring to the 'Specific Matters Exclusion' clause in the insurance policy where defamation claims brought by members *specifically named* in the clause against the Club were excluded from any insurance coverage. The Plaintiff in response clarified that if those same persons sued the Club again, the Club would not be covered by the insurance policy. This was corroborated by Eric Ng's testimony at trial.

148 Second, the Club argued that the Plaintiff told the 2008 MC that the Insured v Insured Exclusion applied only in a situation where a current MC member commenced proceedings against another. In this regard, they relied on the Plaintiff's statement during the 17 February 2009 MC Meeting that the insurance policy "does not cover MC members versus MC members… that means you versus me is not covered". The Club argued that this was a misrepresentation as the Insured v Insured Exclusion also extended to claims brought by past MC members. I am unable to accept the Club's submission, which I note, was actually Gary Oon's interpretation of what the Plaintiff had said. The Plaintiff's actual words do not seem to me to bear such a meaning.

149 Third, the Club argued that Michael Ngu thought that one of the reasons why the 2008 MC passed the Indemnity Resolution was because there was insurance coverage in respect of Suit 33 and the Club would therefore not be exposed to excessive costs and/or damages. The Club sought to rely on Michael Ngu's affidavit (but filed on the Plaintiff's behalf) in OS 309, where he said:

> Our view was that funding the defamation suit was not harmful to the interests of the Club. This is because [Eric Ng] explained to the MC at the MC meeting that the Club had purchased directors and officers insurance to cover the MC, its executive staff and sub-committee members. It was noted that the Club should still be responsible even if such insurance was unavailable.

150 I do not agree with the Club's interpretation of Michael Ngu's affidavit. While Michael Ngu did say that the Club had purchased an insurance policy, he had added that the Club would still be responsible even if such insurance was unavailable. I do not think that the words here mean that the 2008 MC were under the impression that the Club would only be paying the excess over and above

what the insurance policy was covering. The last sentence of the quote speaks for itself. I therefore do not accept the Club's interpretation.

151 Fourth, the Club argued that the Plaintiff gave the impression that the Club was only exposed to liability for $50,000, which was the deductible under the insurance policy. I accept that the Plaintiff did mention that there was a $50,000 deductible at the 14 January 2009 MC Meeting. However, the Plaintiff's comment must be read in context of the discussion. First, it should be noted that the issue of the deductible was raised in relation to Ashok Sharma's query as to whether the MC could (by passing the Indemnity Resolution) exceed the indemnity provided by the insurance policy. Immediately after the issue of the deductible was raised, there was the following exchange:

[The Plaintiff]:	Yah, so what [Eric Ng] says is that even the 50,000, the Club has to bear it.
Ashok Sharma:	I agree, but because you are doing it in the execution of your official duties –
…	
Ashok Sharma:	Even if there was no D&O for a fee, the Club is liable to protect you for any defamation suit that are [sic] brought against you in the execution of your duty.
…	
Eric Ng:	Yah… you know, we make it very clear, that this MC recognises the fact, so that, you know, we all know that if the next time or anyone gets sued, you know that you are protected by the Club. That's what this is, this Club gives reaffirmation in, that's all.

It is clear from the above exchange that the Plaintiff was only saying that the Club would still have to pay $50,000 even if the insurance policy applied. His statement did not go so far as to imply that this was the only payment that the Club would be responsible for. On the contrary, it is clear from the exchange that followed that the Club remained liable to indemnify MC members even where no insurance coverage was available.

152 Fifth, the Club alleged that the Plaintiff had decided to conceal the Insured v Insured Exclusion after seeking legal advice on it. At this juncture, I think it apposite to set out the chain of events that followed the Club's receipt of the insurer's letter on 13 January 2009, which stated that the insurance policy would not cover Suit 33 (see [25] above). On the same day but prior to the 14 January 2009 MC Meeting, the Plaintiff sought advice on this issue from Legal Solutions LLC, a law firm on the Club's panel of lawyers. Legal Solutions LLC replied on the following day, opining that the Insured v Insured Exclusion would apply to Suit 33. On 17 January 2009, BB Khoo replied to Acclaim (the insurance broker), copying the Plaintiff, Eric Ng and other persons, stating that the Club did not agree with the insurer's interpretation of the Insured v Insured Exclusion and would seek a legal opinion on the correct interpretation. On 18 January 2009, the Plaintiff replied to Legal Solutions LLC stating that the Club had taken the view that the insurance policy would cover Suit 33 and that the Club looked to Legal Solutions LLC "to obtain the insurer['s] concurrence of the same".

153 Essentially, the Club's argument is that because the Plaintiff had disagreed with Legal Solutions LLC, the insurer and Acclaim on the interpretation of the Insured v Insured Exclusion, this was consistent with his alleged intention to conceal the lack of insurance coverage from the other 2008

MC members. I do not see how the Club's argument advances its case. As noted above, the Club's case on the issue of mistake turns, *primarily*, on whether the non-disclosure of the Insured v Insured Exclusion was material to the passing of the Indemnity Resolution and not on the Plaintiff's motivations in failing to disclose the Insured v Insured Exclusion at the 14 January 2009 MC Meeting.

154 As mentioned earlier, the discussion during this MC meeting was focused on the role of the Indemnity Resolution in affirming the Club's policy to indemnify MC members for liabilities arising in connection with the performance of their duties and responsibilities as office bearers. The scope of the insurance coverage therefore carried less significance. Further, I note that at no time did Eric Ng or the Plaintiff represent that the insurance policy would cover each and every action of MC members. On the contrary, they were concerned with emphasising that the Club should cover all MC members regardless of whether the insurance policy similarly did so.

Conclusion

155 In the circumstances, I find that the non-disclosures were not material to the passing of the Indemnity Resolution. There is therefore no basis for me to find that the Indemnity Resolution is void or voidable on the basis of fundamental mistake or unconscionability.

Whether the Indemnity Resolution is voidable for breach of fiduciary duties

156 I come to consider the Club's next ground for the recovery of payments made pursuant to the Indemnity Resolution. This is that the Indemnity Resolution is voidable for various breaches of fiduciary duties by the Plaintiff and the other 2008 MC members. To recapitulate, the Club's submissions on the point are as follows:

(a) the Plaintiff breached his fiduciary duties, as well as Rule 31 of the Club's Rules, by participating in the discussion on the Indemnity Resolution at the 14 January 2009 MC Meeting, when he had a vested interest in the Indemnity Resolution;

(b) the Indemnity Resolution was passed to cover the Plaintiff's liabilities in Suit 33. The Plaintiff's "cronies" also had a vested interest in the Indemnity Resolution because there was a real risk of them being implicated in Suit 33. Hence, the 2008 MC passed the Indemnity Resolution in the Plaintiff's interests, as well as their own interests, and not in the Club's interests;

(c) the 2011 MC re-affirmed the Indemnity Resolution in self-interest and not the Club's interest; and

(d) the Plaintiff breached his fiduciary duties by procuring payments of his legal costs when he knew he was not covered by the Indemnity Resolution because of his own malice.

157 This is an opportune juncture to reiterate my earlier observation (at [88]–[89] above) that it is not evident from the Club's Defence and Counterclaim that the breaches of fiduciary duties it now alleges were a central plank of its case, as they now appear to be in closing submissions. In particular, it is not apparent from the Club's pleadings that the Club was relying on the alleged breaches of fiduciary duties as a basis for invalidating the Indemnity Resolution, and the payments made pursuant to it, if at all. Be that as it may, I will consider each of the Club's arguments in turn and deal with specific issues relating to the Club's pleadings where they arise.

The Plaintiff's participation in the discussion on the Indemnity Resolution

158 The Club's pleadings made absolutely no mention of the allegation that the Plaintiff had breached his fiduciary duties and Rule 31 of the Club's Rules by participating in the discussion on the Indemnity Resolution. The material part of Rule 31 reads as follows:

> The President, Vice-President or any member elected as Chairman of a meeting of general members, Management Committee, Sub-Committee, Ad Hoc Committee, shall not preside over the discussions, participate or vote on any resolution of which he is personally involved in any way whatsoever.

159 In this regard, Mr Seah had objected to Mr Tan leading evidence on this point at trial as a basis for invalidating the Indemnity Resolution. In response, Mr Tan indicated that he was not relying on the point to challenge the validity of the Indemnity Resolution but rather, he was relying on it to establish a conspiracy between the 2008 MC members to pass the Indemnity Resolution. It is therefore surprising that the Club has taken the point in closing submissions in the manner which it has. In my view, the Club is precluded from doing so.

The 2008 MC's vested interest in the Indemnity Resolution

160 In its Defence and Counterclaim, the Club pleaded that the 2008 MC were in a position of conflict of interest when they passed the Indemnity Resolution. This was because they had all been present at the 2008 MC meetings where the Plaintiff had made the defamatory statements and may therefore be seen as having indirectly endorsed the statements. Furthermore, the 2008 MC was also involved in the subsequent investigations into the new water system purchased by the 2007 MC which formed the basis of the Plaintiff's defence of justification in Suit 33.

161 In closing submissions, on the other hand, the Club submitted that the Plaintiff and his "cronies" had passed the Indemnity Resolution in the Plaintiff's interests, as well as their own interests, and not in the Club's interests.

162 It seems to me that the Club's closing submissions represent a deviation from its pleaded case. The Club's pleaded case appeared to be premised upon the 2008 MC being in a potential conflict of interest position when they passed the Indemnity Resolution because they each stood to personally benefit from it. The Club did not plead that the members of the 2008 MC had actually preferred their own interests, or the Plaintiff's interests, over those of the Club when they passed the Indemnity Resolution. If they had, the Club did not identify which members had done so in its pleaded case.

163 In any event, I am not satisfied that the Club has discharged its burden of proving that the 2008 MC had passed the Indemnity Resolution in self-interest or in the Plaintiff's interest. In this regard, it is striking that the Club's own witness, Gary Oon gave the following evidence in his affidavit of evidence in chief ("AEIC") as to the 2008 MC's motivations in passing the Indemnity Resolution:

> 21. I recall [Eric Ng] explaining to the MC members that the nature of Suit 33 was effectively against Freddie's office, as he was exercising his duties and responsibilities as an MC member. Therefore, at that time during the discussion, the MC members were working under the assumption that the Defamatory Statements were made in the proper discharge of Freddie's duties as President of the Club and Chairman of the MC meeting.
>
> 22. In my mind, the Indemnity Resolution was thus to protect MC members when properly discharging their duties and responsibilities as an MC member. In stating that the Club should defend an MC member being sued for executing his duties and responsibilities as an MC member, [Eric Ng] also stated that this was different if an MC member was being sued for a

personal reason.

This is far removed from the Club's allegations in closing submissions that the 2008 MC had passed the Indemnity Resolution in bad faith to advance the Plaintiff's interests as well as their own interests.

164 Further, I note again that seven of the 12 members of the 2008 MC were not called as witnesses in these proceedings. Without their evidence, I am in no position to decide what were their motivations in passing the Indemnity Resolution. This effectively leaves the Club's case hanging on its case theory in closing submissions that certain members of the 2008 MC were the Plaintiff's cronies, and together with the Plaintiff, they had intimidated and hoodwinked the remaining 2008 MC members into passing the Indemnity Resolution. As I found above (at [90]–[102]), this case theory does not hold water.

165 I am mindful, however, that even if the 2008 MC did not actually prefer their own interests or the Plaintiff's interests over the Club's interests when they passed the Indemnity Resolution, they may nevertheless have been in a position of conflict of interest because they each stood to benefit from the Indemnity Resolution (see in this regard, the discussion at [172]–[173] below). I raised this issue with the parties during the course of oral submissions on 21 July 2014 and I invited parties to file further submissions on this narrow point. Both parties did so.

166 In these further submissions, Mr Seah conceded that as fiduciaries, the 2008 MC members owed a duty to the Club not to put themselves in a position where their interest *might* conflict with those of the Club. However, Mr Seah said that it does not follow that the Indemnity Resolution should be voidable at the Club's instance. Mr Seah submitted that the passing of the Indemnity Resolution was analogous to the MC deciding to purchase a directors and officers liability policy for the Club in order to cover liabilities that had been incurred by the MC in the discharge of their duties and responsibilities. In both cases, the MC members would be in a potential conflict of interest position as they stood to benefit from the expenditure of Club funds. Mr Seah pointed out that it had always been the Club's practice to authorise the MC to purchase insurance to cover the liabilities of office bearers. According to Mr Seah, the Club's practice in this regard would similarly apply to the MC passing a resolution which permitted Club funds to be used to defend MC members who were sued for acts done in the discharge of their duty.

167 Mr Tan likewise agreed that no conflict of interest would ordinarily arise if the MC passed a resolution indemnifying MC members acting in the proper discharge of their duties. However, Mr Tan submitted that the present case was different because the entire 2008 MC might have been implicated in the Plaintiff's defamation of the Suit 33 Plaintiffs. In *that* sense, Mr Tan said that the 2008 MC stood to benefit from the Indemnity Resolution and a conflict of interest did arise.

168 With respect, I am unable to agree with either party's submissions. To begin with, I do not follow Mr Seah's analogy between the MC passing the Indemnity Resolution and the MC purchasing insurance. In the case of insurance, the Club's liability would be clearly defined and limited. Conversely, the Indemnity Resolution entailed the possibility of the Club being liable to pay the legal costs and damages of its office bearers without limitation. In my view, the Club's past practice of authorising the MC to purchase insurance for MC members using Club funds cannot be construed as similarly giving the MC the authority to pass the Indemnity Resolution.

169 At the same time, I do not agree with the distinction which Mr Tan purports to draw in his submissions. In my view, both factual scenarios posited by Mr Tan would involve a potential conflict of interest. The difference is one of degree. In this regard, it should be noted that the rule prohibiting conflicts of interest is an inflexible one; the rule prohibits both actual and potential conflicts of

interest. If the fiduciary wishes to avoid being liable to his principal, he must obtain his principal's fully informed consent.

170 This aspect of the prohibition against a fiduciary placing himself in a position of conflict of interest is apparent from *George Bray v John Rawlinson Ford* [1896] AC 44 where Lord Herschell stated (at 51):

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, *there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect*. It has therefore been deemed expedient to lay down this positive rule. [emphasis added]

171 The following passage in Nicholas Briggs *et al*, *Modern Law of Meetings* (Jordans, 3rd Ed, 2013), in respect of a director's duty to the company (but equally applicable to the present situation) also highlights the strictness of the prohibition (at para 12.83):

> Directors stand in a fiduciary relation to the company, and under the general rules relating to such a relationship a director cannot (in absence of express provisions in the articles) have a personal interest, whether director or indirect, in any actual or proposed transaction or arrangement to be entered into by the company without the sanction of the company in general meeting or under some dispensation in the articles. So a director is precluded from dealing on behalf of the company with himself, and from entering into any engagement in which he has a personal interest that conflicts (*or may possibly conflict*) with the interest of the company unless certain conditions are satisfied. [emphasis added]

172 In the course of further submissions, Mr Seah referred to *Goh Kim Hai Edward* where Judith Prakash J observed (at [114]):

> … The purpose of a director's action must be to benefit the company and not any particular individual. If the action does benefit both the company and an individual, the action is not a breach of duty as long as the considerations which led to its enactment were chiefly considerations of the interests of the company. If, however, the main consideration is benefiting the individual, then the action is taken for an improper purpose.

Mr Seah argued that the 2008 MC's chief consideration in passing the Indemnity Resolution was to protect office bearers acting in the discharge of their duties, so as to encourage people to serve on the MC. The 2008 MC members therefore did not breach their fiduciary duties in passing the Indemnity Resolution.

173 Even if I were to accept Mr Seah's assertion as to the 2008 MC's motivations in passing the Indemnity Resolution, the above cited passage in *Goh Kim Hai Edward* does not assist his case. There, Prakash J was discussing a director's (or more generally, a fiduciary's) duty to act honestly, in the company's best interest and for a proper purpose. Although there is some overlap between this duty and a director's duty to avoid conflicts of interest, it is important to remain cognisant of the differences between the two. On this point, the following passage in *Walter Woon on Company Law* at para 8.39 is instructive:

> [The rule prohibiting conflicts of interest] is related to the rule that a director must act in the interest of the company. *The two often overlap, for when a director makes his interests paramount, invariably he will not be acting in the best interests of his company*. For practical purposes, the rule can be simply stated: unless he has provided full disclosure and obtained the informed consent of the company, a director who acquires a benefit in connection with his office is accountable to the company for that benefit. [emphasis added]

From this it is evident that whilst a fiduciary who actually prefers his self-interests will not be acting in his principal's interests, it is not the case that a fiduciary who acts in his principal's interests will never be in a conflict of interest position. The prohibition against conflicts of interest (real or otherwise) seeks to protect against the danger (or possibility) of fiduciaries being swayed by self-interest. It need not also be established that the fiduciary had *actually* preferred his own interests over those of his principal.

174 I am therefore of the view that the 2008 MC was in a position of conflict of interest when they passed the Indemnity Resolution because they each stood to benefit from the Indemnity Resolution. There was also nothing in the Club's Rules permitting the 2008 MC to pass the Indemnity Resolution, such as might have signified the members' consent to the 2008 MC passing such a resolution. In the circumstances, both principle and prudence required the Indemnity Resolution to be put before a general meeting of the Club's members, for approval by the members, or ratified by them, after it was passed by the 2008 MC.

175 In my judgment, however, it does not follow that the Indemnity Resolution should be voidable at the Club's instance on this ground based on conflict of interest because I find that the Club had impliedly affirmed the Indemnity Resolution through its inaction over the intervening years. In this regard, the following facts (which have been narrated in greater detail at [29]–[43] above) merit mention:

(a) The minutes of the 14 January 2009 MC Meeting, which set out the Indemnity Resolution, were posted on the Club's notice board for dissemination to all Club members.

(b) On 22 April 2009, a member of the Club, Poh Pai Chin, filed OS 469 against the Club to challenge the validity of the Indemnity Resolution.

(c) The Indemnity Resolution and OS 469 came up for discussion by the members during the 2009 AGM. During the 2009 AGM, the Plaintiff informed the Club's members that it was always the Club's practice and policy to use Club funds to defend its MC members if they were sued in the course of discharging their duties as office bearers.

(d) The Indemnity Resolution was again discussed by the Club members during the 2010 AGM. This arose from a request by two members for a breakdown of an item in the Club's audited accounts for the financial year ending 31 January 2010 which showed that $508,000 had been spent on legal and professional fees. During the 2010 AGM, Tan Wee Tin explained to the members that: (a) a further $350,000 had been set aside for Suit 33 in the Club's budget for the year ending 31 January 2011; (b) in the event that the Club lost, the Club would have to bear the total costs and damages itself because it was not covered by insurance; (c) the total costs of the Plaintiff's defence would be difficult to predict. After this discussion, the Club's members confirmed and adopted the audited accounts for the year ending 31 January 2010 without objections.

(e) In the Club's 2010/2011 Annual Report, Tan Wee Tin updated the members on the legal

costs the Club had incurred in respect of Suit 33. It was noted that the Plaintiff's defence in Suit 33 had cost the Club $920,370 up to 31 January 2011. The Club's audited accounts which were exhibited in the Annual Report indicated that the Club had spent $551,000 on legal and professional fees during that year. The Club's members confirmed and adopted the audited accounts for the financial year ending 31 January 2011 at the 2011 AGM without objections.

There was no merit in the Club's allegation that payments of the Plaintiff's legal costs were surreptitiously hidden under the item "office administration" in the Club's audited accounts. Jennifer Wee testified in cross-examination that this was always Club practice. Further, and in any event, this did not prevent two members from asking for a breakdown of the expenditure during the 2010 AGM.

176 The nature of the EOGM Resolutions also bears discussion here. To recapitulate, the EOGM Resolutions were as follows:

(a) that the Club seeks return from the Plaintiff of all monies paid by the Club including legal costs and expenses arising out of or in connection with Suit 33 and the Suit 33 Appeals;

(b) that no Club funds be authorised to pay for the legal costs, expenses and/or damages arising out of or in connection with Suit 33 and the Suit 33 Appeals; and

(c) that the members have no confidence in the Plaintiff as the Club's President.

177 Notably, the EOGM Resolutions did not purport to revoke the Indemnity Resolution, even though it may have been obvious to the Club's members that the Plaintiff and the rest of the 2008 MC were in a conflict of interest position when they passed the Indemnity Resolution. Indeed, during the EOGM, a member of the Club, Chew Swee Leng, expressed doubts about the validity of the Indemnity Resolution because he regarded the Indemnity Resolution as having been passed by the 2008 MC in self-interest. The minutes of the EOGM record Chew Swee Leng as saying that "it was common sense that [the 2008 MC members] are disqualified from voting the same resolution where they have an interest".

178 In cross-examination, Chua Hoe Sing, the Club's current President, also agreed that the Indemnity Resolution *remained valid* notwithstanding the EOGM Resolutions, provided there was a proper discharge of duty by the MC member concerned. This is consistent with the Club's pleaded case that the Plaintiff's malice in defaming the Suit 33 Plaintiffs took him outside the scope of the Indemnity Resolution and that the Club had paid his legal costs under a mistake.

179 I note that on re-examination, Chua Hoe Sing sought to backtrack from his earlier position by claiming that the Indemnity Resolution was invalid because the Plaintiff had failed to disclose the Insured v Insured Exclusion. When I gave him the opportunity to clarify the apparent inconsistency in his evidence, his explanation was as follows:

COURT:	But is it your position or is it not your position that the indemnity resolution applies to this day.
A:	Oh, I mean, if, based on all these documentation, because there were nondisclosure on the exclusion, exclusion clauses. So when MC agree on this indemnity resolution, they're not fully aware of all this exclusion -- exclusion terms. So in that respect, I think that the resolution is not valid.

COURT:	No. If you, in your proper exercise of your duties as president, were to be sued today, will you rely on the indemnity resolution?
A:	Sorry, if in my capacity I've been sued --
COURT:	Yes.
A:	--will I rely on the indemnity resolution?
COURT:	Yes.
A:	But as I said, *if that exclusion clause, insurance coverage everything is very, very clear, yes, I will rely on it, as a proper discharge of my duty*.

[emphasis added]

I do not find Chua Hoe Sing's explanation to be satisfactory. In my view, Chua Hoe Sing was shaping his evidence in re-examination to re-align it with the Club's case at trial.

180 It seems to me that by the 2010 AGM at the very latest, the Club's members:

(a) knew of the Indemnity Resolution;

(b) knew that the Indemnity Resolution had been passed by the 2008 MC in circumstances where they stood to benefit from it;

(c) knew that Suit 33 was excluded from the Club's insurance coverage; and

(d) knew that the Club's funds were being used to pay the Plaintiff's legal costs in Suit 33.

Despite this knowledge, the members *took no steps* to revoke the Indemnity Resolution on the ground of conflict of interest although they undoubtedly had the right to do so. In my judgment, the Club's members had impliedly affirmed the Indemnity Resolution even if the circumstances were such that the 2008 MC was in a position of conflict of interest when the Indemnity Resolution was passed. I therefore hold that the Club is precluded from now asserting that the Indemnity Resolution should be rescinded on the ground of conflict of interest.

181 In this regard, I find the decision of the English Court of Appeal in *Re Conveyances Dated 13th June 1933, 17th August 1933 and 2nd September 1950; Abbatt v Treasury Solicitor and Others* [1969] 3 All ER 1175 ("*Abbatt*") to be instructive. In *Abatt*, the club's rules did not contain a power to amend or change the rules. Over the years, the club purchased several pieces of land which were held for the members by trustees. Subsequently, the club changed its name and adopted a new set of rules. The new rules were sent to all the then members and no one objected to the new set of rules. The club carried on in the same way although its membership widened. Some years later, the trustees sought to sell a portion of the land which they held on trust for the club and an issue arose as to title, *ie*, whether the property held on trust belonged only to the then members of the club prior to its name change and the adoption of a new set of rules or whether it belonged to the new members of the club. The trial judge held that the property belonged to the old members because there had been a fundamental change in the club's constitution and the new club was a different entity from the old one.

182 In overturning the trial judge's decision on the issue, Lord Denning MR held (at 1177):

> In the second place, the association of persons who formed the club was the same immediately after the change as it was before. It was the same unincorporated, indeterminate, loose association of people who enjoyed the benefits of the club in the same way. It took to itself a different name and dressed itself up in different clothes. But, flesh and bones, it was the same body. Soon afterwards it put on weight. It expanded its membership. But all of them, new members and old, continued it as before, living the same life. The property was held for the benefit of the new members just as much as the old. There was no fundamental change. It is true that the old rules contained no express power to amend or alter them. But I should have thought it was implied that the members could, on notice, by a simple majority in general meeting, amend or alter the rules. ***In any event, however, if at such a meeting a majority purport to amend or alter the rules, and the others take no objection to it—but instead by their conduct acquiesce in the change*** —then those rules become binding on all. It is like partners who by conduct acquiesce in a change of their partnership deed…or shareholders who by their conduct assent to an act done by the directors beyond their powers... ***It may be impossible to show that every member of the club knew of the change of rules, but that does not matter*** . As Brett J said in [*Phosphate of Lime Co. v. Green* (1871), LR 7 CP at 63]:
>
> " ***It is sufficient to shew the facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction*** ."
>
> In this case the ***new rules were sent round to all the members of the British Legion club. If any of them wished to object, they ought to have objected then. No one did. No one has objected from that time to this. No one objects now*** . In those circumstances there has been quite clearly assent by all the members to the change. I hold that the title to these properties is validly vested in the trustees as named in the present deed of trust, not in trust for the old British Legion members of 1954, but in trust for all the present members of the Old Castle Club of Ludgershall. I think the judge was in error. I would allow the appeal accordingly.
>
> [footnotes omitted and emphasis added in bold italics]

183 Applying the above reasoning to the present case, even if the 2008 MC was in a conflict of interest position when they passed the Indemnity Resolution, I find that the members of the Club had nevertheless affirmed the Indemnity Resolution through their subsequent inaction.

The re-affirmations of the Indemnity Resolution after the CA Judgment

184 In closing submissions, Mr Tan submitted that the 2011 MC had breached their fiduciary duties to the Club when they re-affirmed the Indemnity Resolution at three separate MC meetings after the Court of Appeal delivered its judgment in Suit 33 (see [46] – [51] above). Given the Court of Appeal's finding that the entire 2008 MC was determined to embark on a "witch-hunt" against the Suit 33 Plaintiffs, Mr Tan argued that the risk of the 2008 MC being implicated became more real. Accordingly, the 2011 MC had re-affirmed the Indemnity Resolution in self-interest and not the Club's interest.

185 In my view, there are three main difficulties with Mr Tan's submissions:

(a) The Club did not plead that the *2011 MC members* had breached their fiduciary duties by re-affirming the Indemnity Resolution.

(b) Without the evidence of the other members of the 2011 MC, it is difficult, if not impossible, for the Club to prove the 2011 MC's intention in re-affirming the Indemnity Resolution.

(c) I go back to several points I had made earlier in relation to the 2011 MC (see [93] above). These relate to the fact that the composition of the 2008 MC was different from the composition of the 2011 MC; five of the 11 members of the 2011 MC were not members of the 2008 MC. These five members had no fear of being implicated in Suit 33. Yet, they had voted in favour of re-affirming the Indemnity Resolution. In this regard, the Club's assertion that the five new members of the 2011 MC had a vested interest in protecting the Plaintiff and the rest of the 2008 MC because of their close relationships with the 2008 MC members who had nominated them is a bare assertion that was not proven by any evidence.

186 Therefore, even if the Club is permitted to rely on these unpleaded matters, which I find that it is not, the Club has not, in my view, discharged its burden of proving that the 2011 MC had re-affirmed the Indemnity Resolution in self-interest. In the circumstances, the Club's contentions on this issue must fail.

The Plaintiff's breach in procuring payment of his legal costs

187 This brings me to the Club's contention that the Plaintiff had procured payment of his legal costs in breach of his fiduciary duties to the Club. In this regard, the breach was said to lie in the fact that the Plaintiff had procured the payments knowing that they did not fall within the scope of the Indemnity Resolution because of his own malice.

188 To prove its claim, the Club primarily relied on Jennifer Wee's evidence. Jennifer Wee deposed in her AEIC that under the Club's FOM, the Club's President and Honorary Treasurer were responsible for supervising the day to day financial management of the Club. She said that when payments for the Plaintiff's legal costs were to be made, the Plaintiff would provide her with the relevant invoice, together with "instructions" that payment be made. She would then prepare the necessary payment voucher and cheque or cashier's order for Tan Wee Tin's approval as Honorary Treasurer. She claimed that she had acted without further instructions from Tan Wee Tin because he was already copied on the Plaintiff's emails to her. She also claimed that none of the payments made in this manner were questioned by Tan Wee Tin. Jennifer Wee's AEIC therefore gave the impression that the decision to make payments of the Plaintiff's legal costs was effectively made by the Plaintiff himself. However, the evidence in Jennifer Wee's AEIC did not cohere with the evidence which emerged at trial.

189 First, it is apposite to briefly set out the procedure for payments made by the Club. For payments made before 12 April 2011, cl 4.3.2 of the Club's previous FOM provided that:

> 4.3.2 All cheques shall be signed by the General Manager or in his absence, the Head of Finance and countersigned by the Hon. Treasurer or in his absence, the President, or in his absence, the Vice-President.

For payments made on or after 12 April 2011, cl 4.3.2 of the Club's revised FOM provides:

> 4.3.2 All cheques shall be jointly signed in accordance to the bank mandate of one signature each from [the Club's Manager and Financial Controller] and one signature from [the Club President, Vice-President, Honorary Treasurer or one specified MC member].

It is not disputed that the Plaintiff did not sign the cheques for payment of his legal costs; the cheques were signed by Jennifer Wee and Tan Wee Tin instead. Hence, it is clear that the Plaintiff did

not have *de jure* control over payment of his legal costs.

190 The evidence also does not support the inference that the Plaintiff nonetheless retained or exercised some form of *de facto* control over the decision to pay his legal costs. In this regard, Jennifer Wee suggested in her AEIC that the Plaintiff had instructed her to make the payments in emails he sent to her. However, a plain reading of the language used in the Plaintiff's emails contradicts Jennifer Wee's assertions. For example:

(a) On 16 July 2009, the Plaintiff sent Jennifer Wee an email attaching an invoice from D&N which said "Dear [J]ennifer, Attached is the invoice from [D&N] for you to follow up".

(b) On 27 March 2010, the Plaintiff sent Jennifer Wee an email regarding the payment of the fees of his expert witness in Suit 33 which said, "Dear Jennifer, Please get the approval to pay Mr Yeo for his expert services in regards to the suit S33/2009".

(c) On 8 July 2010, the Plaintiff forwarded to Jennifer Wee an email from D&N, regarding a payment due to the Suit 33 Plaintiffs, and said, "Dear Jennifer, The enclosed email is self-explanatory. Please do the necessary and advise D&N accordingly".

(d) On 25 August 2010, the Plaintiff again forwarded to Jennifer Wee an email from D&N regarding the payment of D&N's fees and said, "Dear Jennifer, Please take note".

(e) On 25 November 2010, the Plaintiff sent an email to Tan Wee Tin which said, "Dear Wee Tin,…The MC have agreed (with the exception of TJ) who is out of town, that I instruct [D&N] to proceed with filing of the Notice of Appeal as advised by them in the Email below. Please arrange for the security deposit of $20,000 to be remitted to [D&N] ASAP".

(f) On 5 January 2012, the Plaintiff forwarded to Jennifer Wee, an email from D&N regarding the payment of D&N's fees and said "Please action".

(g) On 16 January 2012, the Plaintiff forwarded to Jennifer Wee an email from D&N regarding the payment of D&N's fees, and said "Fyi and follow up please".

(h) On 26 January 2012, the Plaintiff forwarded a copy of Bajwa & Co's bill to Jennifer Wee and said "Pse do e necessary".

191 I do not see how the Plaintiff's emails to Jennifer Wee can be construed as the Plaintiff instructing or approving payments of his legal costs. Instead, they support the Plaintiff's position that he was only forwarding invoices to Jennifer Wee requesting her further action. Jennifer Wee agreed with this proposition when it was put to her in cross-examination:

Q: I'm going to put something to you, Ms Wee, and you can agree or disagree. I'm going to put to you that it is not quite accurate to say that Freddie Koh gave you express instructions to make payments to his lawyers. Agree or disagree?

A: *Express as in writing, because it's implied or express*. So when email say "Please do the necessary", it's an email, *it's an email in writing*.

Q: That's what you mean by express instructions?

A: Yes.

Q: I put to you that in almost all circumstances what he did was actually simply forward to you an invoice or payment notice to you for your action.

A: Yes, but what other action is other than make payment and booking in the expenses?

Q: This action included getting a payment voucher done and then getting Mr Tan's approval for the payment voucher.

A: Yes.

Q: It involved getting Mr Tan to approve the invoice.

A: Yes.

Q: It also involved Mr Tan countersigning a cheque?

A: Yes.

Q: Or instructions for cashier's order?

A: Yes.

Q: And again, *you would only have done all of this because there was -- in your mind -- a standing order that came from the indemnity resolution*.

A: *Yes.*

Q: In fact, for most of the payments that I've shown you -- let me say "most" to be very clear -- for quite a few of the payments I've shown you, the MC had actually given express approval, correct?

A: Yes.

[emphasis added in italics]

192 It is also pertinent to note that Jennifer Wee (as well as Tan Wee Tin) did provide an explanation as to why the Plaintiff did not approve payments for his own legal costs. They explained that the Plaintiff would have been in a conflict of interest position if he did so and that this was not permitted under cl 4.1 of the Club's FOM (which remained unchanged). Clause 4.1 reads:

4.1 No person, whether employee or official of the Club shall approve any payments of any amount for himself.

193 In my judgment, it is clear on the evidence that both Jennifer Wee and Tan Wee Tin had relied on the Indemnity Resolution, and not any purported instructions from the Plaintiff, when approving payments of the Plaintiff's legal costs. Moreover, in the following instances, the MC had expressly discussed and/or approved the payment of specific legal costs:

(a) On 18 August 2010, the 2010 MC approved payment of the sums of $25,613.51, $100,386.49 and $127,613.03 to D&N for work done.

(b) On 24 November 2010, the 2010 MC approved payment of the sum of $20,000, being the

security deposit for the filing of a notice of appeal in Suit 33.

(c) On 24 August 2011, the 2011 MC approved the payment of the sum of $20,000 to D&N as partial payment for work done. The MC also noted that the Club had previously paid the sum of $50,000 to D&N as a deposit.

(d) On 28 September 2011, the 2011 MC approved payment of D&N's bill of $120,000 without having it taxed.

(e) On 14 December 2011, the 2011 MC decided to appoint Bajwa & Co to act for the Plaintiff in the taxation of costs in Suit 33, the assessment of damages in Suit 33 and in a new suit commenced against the Plaintiff by former MC members of the Club. Pursuant to the 2011 MC's decision, the Club paid the sums of $15,000, $30,000 and $6,000 to Bajwa & Co.

(f) On 4 November 2011, the 2011 MC members were asked for their approval for the amounts of $15,000 and $15,925.88 from the deposit held by D&N to be off-set against D&N's bills. Thereafter, there was some discussion between the 2011 MC members as to whether such approval was required for payment of disbursements.

194 In this regard, I note that Jennifer Wee's evidence on the issue was evasive. During cross-examination, she said on several occasions that the Indemnity Resolution did not constitute a blanket approval for payment. At other times however, Jennifer Wee agreed that the Indemnity Resolution was, in her mind, a standing order when she had caused the Club to make payment. In my view, Jennifer Wee was shaping her evidence to fit the Club's case whilst attempting to avoid putting herself in the invidious position of being in breach of her duties to the Club as its financial controller by blindly approving payments of the Plaintiff's legal costs on the basis of the Plaintiff's instructions *alone*.

195 In closing submissions, the Club also alleged that Tan Wee Tin had taken a "back-seat" when it came to making payments of the Plaintiff's legal costs. Mr Tan contended that since Tan Wee Tin had not given instructions for payments to be made, the only other person who could do so was the Plaintiff. Mr Tan said that the evidence showed that the Plaintiff had in fact done so.

196 In my judgment, the Club's contentions are untenable. As discussed at [189]–[194] above, the evidence establishes that the Plaintiff had neither instructed nor approved the payment of his legal costs. Instead, Jennifer Wee and Tan Wee Tin had caused the Club to make the payments in reliance on the Indemnity Resolution, and on some occasions, specific MC approvals. Furthermore, the Club did not plead or adduce any evidence at trial to prove that Tan Wee Tin or Jennifer Wee were acting at the Plaintiff's behest when they caused payments to be made for the Plaintiff's legal costs.

197 I should also note that the Club's pleaded case was that the Plaintiff had breached his fiduciary duties to the Club in procuring payment of his legal costs because he knew that he was not covered by the Indemnity Resolution (because of his malice in making the defamatory statements). It was therefore incumbent upon the Club to additionally show that the Plaintiff did not *honestly believe* that he was entitled to rely on the Indemnity Resolution when he had "procured" payment of his legal fees. The Club's closing submissions were strangely silent on this point.

198 Another important plank of the Club's case on this issue of the Plaintiff's alleged procurement of payment of his legal costs concerns the sum of $1,021,793.48 which the Club had paid on 14 February 2012 to the Suit 33 Plaintiffs for their costs in Suit 33 and the Suit 33 Appeals. The facts leading to this payment of $1,021,793.48 were not really disputed at trial. They have been

summarised at [52] above.

199 This payment was made after the Club had received the requisition for the EOGM on 18 January 2012 but before the EOGM on 4 March 2012. Mr Tan submitted that the Plaintiff had procured the payment with haste, in a bid to circumvent the impending EOGM Resolutions. In this regard, the Club contended that the Plaintiff had instructed Jennifer Wee to make the payment of $1,021,793.48 and relied in particular on a sentence in the Plaintiff's email to Jennifer Wee on 13 February 2012 where the Plaintiff said, "we should take the lawyer's advice and settle the amounts payable now to avoid accruing interest".

200 I do not agree with the Club's contention that this sentence should be construed as an instruction from the Plaintiff to Jennifer Wee to make payment. To do so would be to completely ignore a later sentence in the same email where the Plaintiff added:

> "[P]lease consult with the Treasurer on this matter and if payment is to be made, on booking into which account payment since the payment was due on 31 January 2012, ie in the last financial year"

201 In cross-examination, Jennifer Wee agreed that the Plaintiff was not giving instructions for payments to be made in this email. Rather, he was asking her to consult with Tan Wee Tin as to whether the Club wished to pay. When seen in this light, I do not see how the Club can contend that the Plaintiff had procured or caused payment of the $1,021,793.48.

202 It is therefore not surprising that the Club's focus in closing submissions was Tan Wee Tin's motivations in having the $1,021,793.48 paid. During cross-examination, Tan Wee Tin gave three reasons why he had approved the payment in the face of the impending EOGM:

(a) the Indemnity Resolution conferred authority to make the payment and there was nothing at the relevant time against it;

(b) interest was running on the Suit 33 Plaintiffs' demand for costs and he had relied on Bajwa & Co's explicit advice in making the payment (see [52(b)] above); and

(c) the EOGM was an issue of Club politics and it was not clear whether the proposed EOGM Resolutions would be passed.

203 Mr Tan submitted that each of Tan Wee Tin's reasons were untenable. In my judgment, even if this were the case and Tan Wee Tin had breached his fiduciary duties in approving payment of the $1,021,793.48 (which I note was not pleaded), this would not have advanced the Club's pleaded case which was that *the Plaintiff* had breached his fiduciary duties to the Club by procuring payments of his legal costs. I do not see how Tan Wee Tin's alleged breach of fiduciary duties to the Club would mean that the Plaintiff had also breached his fiduciary duties, unless the Club could prove that Tan Wee Tin was directed by the Plaintiff to make the payment. The Club had clearly not done so as a matter of evidence. I therefore find the Club's collateral attack on Tan Wee Tin's reasons for approving payment of the $1,021,793.48 to be irrelevant to the issues at hand.

204 In the circumstances, I find that the Club has not proven its case that the Plaintiff had breached his fiduciary duties to the Club by procuring payment of his legal costs.

Conclusion

205 For the reasons stated above, the Club has not established that the Indemnity Resolution is voidable on the basis of the various breaches of fiduciary duties which it had alleged.

Mistake

206 It remains for me to consider the Club's contention that it is entitled to restitution of sums paid towards the Plaintiff's legal costs under the law of unjust enrichment, because it had paid these sums under a mistake as to the Plaintiff's entitlement to rely on the Indemnity Resolution.

The law on unjust enrichment

207 Before turning to the parties' arguments in greater detail, I shall first consider the principles applying to a claim in unjust enrichment.

208 In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*"), the Court of Appeal recognised a cause of action in restitution based on the doctrine of unjust enrichment. The Court of Appeal held (at [98]) that three elements had to be proven for such a cause of action to be made out:

(a) a benefit or enrichment accruing to the defendant;

(b) the benefit or enrichment must be at the claimant's expense; and

(c) the defendant's enrichment must be "unjust".

Once these three elements are made out, the defendant is *prima facie* liable to make restitution unless he can establish one of the recognised defences to such a claim.

209 As for the requirement that the defendant's enrichment must be "unjust", it should be noted the court does not order restitution based on broad notions of what is fair or just. Instead, the availability of a restitutionary cause of action will depend on whether a recognised "unjust factor" at common law exists on the facts: *Anna Wee* at [130] and [134]. It is also apposite to note in this context that the law of unjust enrichment is not premised upon a defendant's wrongdoing, but rather, the injustice of depriving a claimant of a benefit that he has conferred upon the defendant: *Anna Wee* at [108].

210 To this end, it is not difficult to see why mistake is a recognised unjust factor: *Anna Wee* at [132]–[133]; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [134]–[138]. As explained in K Mason *et al*, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd Ed, 2008) at para 403:

> …The receipt of the money benefits the payee. A mistaken payment is unofficious, almost by definition. *The destruction of the basis upon which payment was made, through negating the payee's intention to pay in light of the true facts*, leaves the payee as the unintended recipient of a windfall whose amount corresponds directly to the countervailing detriment of the mistaken payer. *The payee's receipt due to the payer's mistake makes the payee's enrichment unjust*… [emphasis added]

211 The law permits recovery for both mistakes of fact and mistakes of law. In this regard, the principles governing the recovery of mistaken payments are conveniently summarised in Charles Mitchell *et al* (eds), *Goff & Jones, The Law on Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) at

para 9-31 as follows:

(a) the claimant must prove as a threshold issue that he made a mistake, *ie*, that he believed the true facts or the true state of the law to be otherwise that they in fact were;

(b) the claimant's mistake must have caused him to make the payment to the defendant, or in other words, the mistake must be a causative one;

(c) even if a causative mistake can be shown, the claimant may be denied relief if he responded unreasonably to his doubts or unreasonably ran the risk of error; and

(d) a claimant who had doubts may be denied relief if he has compromised or settled with the defendant or if he is estopped from pleading the mistake.

212 In relation to the meaning of "mistake", the High Court of Australia had also suggested in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 133 at 369 that a mistake is not confined to a positive belief in the existence of a state of affairs. Rather, it can include "sheer ignorance of something relevant to the transaction at hand".

Application to the present case

213 It will be apparent from the above discussion that the issue of mistake in the present case turns on the 2008 MC's intention in passing the Indemnity Resolution and thereafter, paying the Plaintiff's legal costs pursuant to the Indemnity Resolution. It also turns on the 2011 MC's intention in re-affirming the Indemnity Resolution on three separate occasions. In particular, the issue is whether the intention of the 2008 MC, and that of the 2011 MC, to make payment had been vitiated on the facts of the case.

214 As framed, Mr Tan's submissions on the issue of mistake entailed the following set of propositions:

(a) the Indemnity Resolution was only intended to cover claims against MC members arising from acts done or omitted to be done in the proper discharge of their duties;

(b) in Suit 33, the Court of Appeal found that the Plaintiff acted with malice when he made the defamatory statements;

(c) it necessarily followed from the Court of Appeal's finding of malice that the Plaintiff had acted outside the scope of his duties when he made the defamatory statements;

(d) the Plaintiff was therefore not covered by the Indemnity Resolution; and

(e) the Club had made the payments under a mistake.

215 On the evidence, I am unable to agree with Mr Tan's submissions.

216 As a preliminary point, I should note that seven of the 12 members of the 2008 MC and seven of the 11 members of the 2011 MC were not called as witnesses in these proceedings. In cross-examination, Chua Hoe Sing also testified that the Club had not interviewed these MC members as to their intentions in passing and/or reaffirming the Indemnity Resolution. In my view, this substantially weakens the Club's case on the issue of mistake because, as mentioned at [210] above, recovery of mistaken payments depends on proof that the *subjective intention* of the payer has been vitiated.

217 As regards the 2008 MC's intention in passing the Indemnity Resolution, both parties made submissions to the effect that the Indemnity Resolution should be interpreted as if it were a contract. Given my earlier conclusion (at [75] above) that the Indemnity Resolution is not a contract, I will briefly comment on this submission. In my view, whilst there are parallels between the interpretation of a contract and the interpretation of a resolution, in the sense that both turn on the issue of the parties' intention to be determined in the light of the relevant factual matrix, it is important to be mindful of the following observations in A D Lang, *Horsley's Meetings*: *Procedure, Law and Practice* (LexisNexis Butterworths Australia, 6th Ed, 2010) (at para 11.3):

> …Resolutions are for the most part (as their wording often evidences) formulated on the spur of the moment; ***it is essential therefore to look at the circumstances in which the resolution or proposition was made if it is to be given its fair and natural meaning*** . It would, accordingly, be misleading to rely only on the bare words of a resolution disengaged from the events that led to, and result from, its being passed and to look for unreason rather than for reason… [emphasis added in bold italics]

See also *Myer Queenstown Garden Plaza Pty Ltd and Myer Shopping Centres Pty Ltd v Corporation of the City of Port Adelaide and the Attorney General* (1975) 11 SASR 504 at 520; *Kenros Nominees Pty Ltd and others v Tipperary Group Pty Ltd and others* [2009] VSC 524 at [63].

218 Bearing this in mind, I am not satisfied that the Club has proven that it had paid the Plaintiff's legal costs under a causative mistake.

219 First, the Indemnity Resolution was passed against a backdrop which suggests that the 2008 MC had intended to cover the Plaintiff's legal costs and damages in Suit 33. It was not disputed that although the Indemnity Resolution applied to all MC members, it was precipitated by Suit 33 and D&N's requirement that the Club indemnify the Plaintiff for his legal costs before D&N would act for the Plaintiff.

220 Second, the evidence suggests that the 2008 MC did not intend that the Plaintiff's entitlement to an indemnity from the Club was in any way contingent upon the outcome of Suit 33. Instead, during the 14 January 2009 MC Meeting, the 2008 MC had grappled with the policy of the Club *defending* its MC members. This is reflected in the following statements made by Eric Ng during the 14 January 2009 MC Meeting:

> I'm not using "covered", I said " ***will be defended by the Club*** ", okay. Even if there was no insurance policy, the Club ***will still have to defend*** , so we are talking about, yah, ***we are talking about the Club defending the MC*** for -- when they are being sued in the course of executing their duties and responsibilities.
>
> [emphasis added in bold italics]

221 Likewise, Eric Ng deposed in his AEIC that the MC's intention in passing the Indemnity Resolution was to cover the Plaintiff, even if a court subsequently found that his statements constituted libel or slander. The Club did not dispute this part of Eric Ng's evidence in closing submissions. However, Mr Tan maintained that the Indemnity Resolution did not cover malice in the sense found by the Court of Appeal in Suit 33 because *this* would not have been a proper discharge of duties.

222 In cross-examination, Mr Tan also put to Eric Ng and Loreen Teo that the Indemnity Resolution

was only intended to cover MC members acting in the proper discharge of their duties. They both agreed with this proposition. Mr Tan used their concessions as a springboard for his case that the MC members did not intend for the Indemnity Resolution to cover malice.

223 I do not agree with Mr Tan's submission because it glosses over other important aspects of the evidence. The first, as I had just mentioned, is that the evidence before me suggests that the 2008 MC did not intend that the Plaintiff's entitlement to an indemnity from the Club was in any way contingent upon the outcome of Suit 33.

224 Second, whilst the Indemnity Resolution was passed to cover acts carried out by MC members in the "discharge of their duties", the evidence before me suggests that the 2008 MC had intended the phrase to bear a broad meaning, rather than the narrow meaning as argued by Mr Tan. The distinction drawn by the 2008 MC was between acts done in a personal capacity and acts done in the capacity of an MC member. As Eric Ng said during the 14 January 2009 MC Meeting:

> So now is the – the reason why this is being brought up is to ensure that the MC knows exactly the position we are in, that *even though we are sued individually, as an individual, but because you are sued by virtue of your position here, the Club should cover the cost of defending the MC member*, regardless of who he is.
>
> So I will recommend that the Club should, I think in principle and practice, always defend an MC member if that member is being sued for executing his duty and responsibility as MC member. *If you are sued for your own personal reason, because you called someone a wrong name, that's too bad. Even though you are MC member, but you are not sued because you were exercising your duty as the MC member*.
>
> [emphasis added in italics]

Therefore, the 2008 MC's decision to defend the Plaintiff in Suit 33 and indemnify him for his legal costs and liabilities was because he was sued for statements he had made in his capacity as President of the Club. There was no suggestion that the 2008 MC had also intended to qualify their decision to indemnify the Plaintiff by reference to the outcome of Suit 33 and the findings made therein.

225 Further, both Eric Ng and Loreen Teo testified that the 2008 MC believed that the Plaintiff was acting in course of his duties when he made the defamatory statements. In this regard, Eric Ng's evidence in re-examination is significant:

> Q: Can you tell us, Mr Ng, why after the Court of Appeal has given their judgment, did you reaffirm the resolution?
>
> A: …The intent of the indemnity resolution is to indemnify the members…And, as far as we were concerned, the statements were made in the context of a meeting where he was the chairman, and his job was to summarise the discussion, and, in the process of the summary, he used the words that were deemed to be defamatory.
>
> That's within the context of the meeting. It has been the club's practice to put up all minutes on the notice board, to let the members know, that's an act of transparency in the club's management, and that's where it became defamatory. So, as far as the MC members were concerned, at the time when the statement was made, he was doing his job as president of the club. I mean, notwithstanding the court's decision, but our view was he was doing his job as the

president of the club when --…

This was Eric Ng's, and also Loreen Teo's, explanation as to why the 2011 MC had re-affirmed the Indemnity Resolution after the Court of Appeal's judgment in Suit 33 and why the Club had continued to pay the Plaintiff's legal costs. In this regard, the 2011 MC's decision to re-affirm the Indemnity Resolution and continue paying the Plaintiff's legal costs after the CA Judgment was delivered also goes against the notion that the Club had made previous payments under a *causative* mistake.

226 In closing submissions, Mr Tan submitted that the Court of Appeal's finding of malice should be determinative of whether the Plaintiff had properly discharged his duties, and therefore, whether the Plaintiff was entitled to rely on the Indemnity Resolution. Mr Tan said that the MC members should not be entitled to substitute their own subjective and erroneous views for the Court of Appeal's clear finding of fact. Mr Tan further submitted that little weight should be given to the 2011 MC's re-affirmations of the Indemnity Resolution because they were made in bad faith and motivated by self-interest.

227 With respect, I do not agree with Mr Tan's submissions. The Club's decision to defend the Plaintiff and cover his legal costs pursuant to the Indemnity Resolution was a private arrangement between the Club and the Plaintiff. Before the Court of Appeal delivered its judgment in Suit 33, the MC was entitled to decide for itself whether the Plaintiff was acting in the discharge of his duties as an MC member when he made the defamatory statements. Likewise, after the CA Judgment was delivered, the MC was entitled to take a view on the Plaintiff's actions which was different from that of the Court of Appeal in Suit 33.

228 Furthermore, even if the 2011 MC had re-affirmed the Indemnity Resolution and continued to pay the Plaintiff's legal fees in bad faith, it did little to assist the Club's case of mistake. If anything, it undermined it.

229 In this regard, I wish to observe that in closing submissions, the Club shifted away from its pleaded case of mistake and instead alleged various breaches of fiduciary duties by the Plaintiff and his "cronies", in the 2008 MC and the 2011 MC, as a basis for invalidating the Indemnity Resolution and the payments made pursuant to it. In fact, the Club went as far as to assert (at para 160 of its closing submissions) that "the purpose of the Indemnity Resolution was to cover the Plaintiff's liabilities in Suit 33. The primary purpose of the Indemnity Resolution was therefore to protect the Plaintiff's interests and not for the purposes of protecting the interests of the Club". In my view, the Club's new case on breach of fiduciary duties is at odds with its pleaded case of mistake because the new case suggests that the 2008 MC and the 2011 MC intended to protect the Plaintiff in any event. Ultimately, the Club elected to run both arguments as alternatives and in doing so, ran the risk of each weakening the other.

230 I also note Mr Seah's point that the 2008 MC had adopted the Indemnity Resolution with first-hand knowledge of the facts and circumstances in which the Plaintiff had made the defamatory statements. The Club did not lead evidence to contradict this and buttress its case on the issue of mistake. Instead, the Club premised its case on mistake almost entirely on the Court of Appeal's finding of malice in Suit 33. Had the Court of Appeal not found that the defence of qualified privilege was defeated by the Plaintiff's malice, the Club's case on mistake would have no legs to stand on. In my view, it would be both artificial and contrary to principle to find that the Club had paid the Plaintiff's legal costs under a mistake merely because the Court of Appeal had drawn its own inferences from the same set of facts known to the 2008 MC, and had attached the legal label of malice to the Plaintiff's conduct.

231 In the circumstances, the Club's claim for restitution on the basis of mistake fails.

Conclusion

232 For all the reasons stated above, both the Plaintiff's claim and the Club's counterclaim in Suit 634 are dismissed.

233 After delivering my oral judgment on 12 December 2014, I heard counsel's submissions on costs. I have considered these submissions. In my view, it would be fair for each party to bear its own costs given my findings of fact, as well as the outcome in these proceedings.

234 There is a final question as to costs thrown away. In the middle of cross-examination, the Plaintiff's witness, Loreen Teo, claimed that the Insured v Insured Exclusion was discussed during an earlier part of the 14 January 2009 Meeting which had not been transcribed. Although Mr Seah was in the midst of having the recording of this earlier part of the 14 January 2009 MC Meeting transcribed, he did not inform the Court or his opponent of this. This caught both the Club, as well as the Court, by surprise when Loreen Teo raised the point in cross-examination. Proceedings had to be adjourned for both sets of counsel to review the recordings and the new transcripts. This was a matter which should have been resolved earlier and not late in the day, in the middle of trial. The adjournment and the additional work necessitated were disruptive to the proceedings. I will therefore order that the Plaintiff pay the wasted costs to the Club, fixed at $20,000 inclusive of disbursements.