Tan Chin Seng and Others v Raffles Town Club Pte Ltd (No 2)
[2003] SGCA 27

Case Number : CA 148/2002

Decision Date : 11 August 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Tan Lee Meng J

Counsel Name(s) : Ms Molly Lim SC, Roland Tong, Ms Wang Shao-Ing (Wong Tan & Molly Lim LLC) for Appellants; K Shanmugam SC, Ms Candace Ler (Allen & Gledhill) for Respondent

Parties : Tan Chin Seng — Raffles Town Club Pte Ltd

Contract – Contractual terms – Implied terms – Rules of club giving discretion to proprietors to admit as many members as they wanted – Whether discretion must be exercised consistent with object of contract

Contract – Misrepresentation act – Statements of intention – Representations made about club while club still under construction – Whether representations actionable

Contract – Misrepresentation act – Whether common law position as to what is actionable misrepresentation changed by s 2(1) Misrepresentation Act (Cap 390, 1994 Rev Ed)

Delivered by Chao Hick Tin JA

1 This appeal is brought by the appellants (10 in all) for themselves, as well as for 4,885 other members of the Raffles Town Club ("the Club" or "RTC" as may be appropriate), against a decision of the High Court dismissing the action which they instituted against the respondent, Raffles Town Club Pte Ltd (RTC Ltd), for misrepresentation and breach of contract.

The background

2 RTC Ltd is a private exempt company. It was incorporated to own and manage the Club as a proprietary club. It erected the Club premises at the junction of Dunearn Road and Whitley Road.

3 In November 1996, while the Club premises were still at the drawing board stage, RTC Ltd initiated an introductory launch to invite selected members of the public to join the Club as founder members at the discounted price of $28,000. A number of financial institutions and other bodies were enlisted as agents to carry out the launch. Each of these agents wrote to its own customers stating, in each instance, that the addressee was specially selected and invited to apply for the founder membership. The invitees were told that after this launch, people would have to pay $40,000 to become members. Enclosed with each invitation letter were the following documents:-

(i) a glossy brochure describing the Club facilities ("the brochure");

(ii) a document containing Questions and Answers to give more information to the invitee ("Q&A sheet"); and

(iii) a Priority Application Form.

The invitation letter and the above three documents will hereinafter be referred to collectively as "the promotional materials".

4 Each of the appellants, having received such an invitation letter, applied for membership, paying a down payment of $3,000, with the balance to be paid in 48 instalments. They duly became founder members.

5 What subsequently upset them was that they learned in March 2001, from the evidence adduced in an unrelated action in the High Court between the shareholders of RTC Ltd, that in total some 18,992 persons had been admitted as founder members and another 56 persons as "ordinary" members, paying the increased membership fee of $40,000, making a grand total of 19,048 members. Before then, while they had experienced crowdedness at the Club premises, they did not know the size of its membership.

6 Relying on certain statements in the brochure and the Q&A sheet, the appellants alleged that they were induced to become founder members by those statements and prayed for a rescission of the contract and the refund of the membership fee they had paid. In the alternative, they averred that there were breaches of contract and asked for damages.

7 At the High Court, Rajendran J ruled that there were no merits in both claims and dismissed the action. He held that there was no actionable representation. While he found that the representations made in the promotional materials that the Club would be a premier club with first class facilities was the basis upon which the appellants had joined the Club and that they were properly to be implied into the contract, he did not think, on the evidence presented, that there was any breach of these implied terms of the contract.

Issues

8 In the light of the submissions made by the parties in their respective Cases, the main issues which arise for the consideration of this court may be categorised as follows:-

(i) Whether any of the statements in the promotional materials constitutes a representation;

(ii) If they are not representations, whether any of the statements would nevertheless form a term of the contract subsequently entered into between the parties; and

(iii) If the answer to (ii) is in the positive, whether RTC Ltd has breached any of the terms of the contract.

These are largely the same issues canvassed in the court below.

The representations

9 The appellants alleged that in the promotional materials, the following express representations were made –

(i) It was planned that the Club would have nearly 600 car park lots for the use of the members;

(ii) "Club members will enjoy unparalleled privilege and facilities.";

(iii) "The Club's exclusive and limited membership will be fully transferable…. the most prestigious private city club … of Singapore.";

(iv) The Club would be constructed to have a total built-up area in excess of 400,000 sq feet

catering for the "business, entertainment, networking, socialising, personal and family leisure requirements" of members. The Club would have "separate formal, casual, sporting, children's and family facilities" for members;

(v) A supplementary card would be issued to the spouse or fiance of each member with full membership privileges and benefits at no additional cost;

(vi) The Club would be "without peer in terms of size, facilities and sheer opulence."; and

(vii) There would be two categories of individual members. First, a limited number of exclusive transferable founder members at the entrance fee of $28,000, who should submit their applications no later than 30 November 1996. Second, the ordinary members and this would include those who should submit their applications after 30 November 1996 at the price of $40,000, as well as those who did not succeed under the initial launch.

10 The appellants contended in their amended Statement of Claim that by these representations, they understood that they would be joining "an exclusive and premier club" and that "the total number of members would be limited such that at any given time no member and the supplementary card-holder would be shut out from or be unable to use the facilities of the Club … in the manner or up to the standard as represented in the prospectus."

Nature of the statements

11 We should, at this juncture, observe that no fraud is alleged against RTC Ltd or its promoters. It is, therefore, necessary to determine the nature of the statements. Do they constitute representations?

12 A representation is a statement which relates to a matter of fact, which may be a past or present fact. But a statement as to a man's intention, or as to his own state of mind, is no less a statement of fact and a misstatement of the state of a man's mind is a misrepresentation of fact: per Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch 459 at 483.

13 The point that a statement as to intention could be a statement of fact was further elucidated by Tudor Evan J in *Wales v Wadham* [1977] 2 All ER 125 at 136,

"A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a misrepresentation of fact in relation to the state of that person's mind."

Although an aspect of the decision in *Wales v Wadham* was overruled by the House of Lords in *Livesey v Jenkins* [1985] AC 424, this statement of Tudor Evan J was upheld and it remains valid to-date.

14 Of course, it will be difficult to prove what was the state of a person's mind at any particular point in time. Nevertheless, that is a matter of proof and it should not be confused with the substantive principles of law.

15 Considerable reliance was placed by counsel for the appellants on the case of *Brown v Raphael* [1958] CH 636 which involved the sale by auction of a certain property, namely, an absolute reversion to the whole of a trust fund on the demise of a certain lady. The sale was subject to all death and other duties which might become payable. The particulars of sale which were prepared by a solicitor's

managing clerk stated that a sum had been set aside to pay an annuity to the lady and that as regards estate duty, which would be payable on the death of the annuitant, it was believed she had "no aggregable estate". The plaintiff, relying on those particulars, entered into the contract to purchase the property. But before completion, the purchaser found that the statement that the annuitant was believed to have no aggregable estate was not true and he sought to rescind the contract of purchase on the ground of misrepresentation. The High Court held that there was an innocent misrepresentation which entitled the purchaser to rescind and this was upheld by the Court of Appeal.

16 In that case it was argued that the statement that it was believed that the annuitant had no "aggregable estate" was a statement of opinion. Lord Evershed, MR, applying the principles enunciated by Bowen LJ that where the vendor's knowledge or means of knowledge was far superior to that of the purchaser, such a statement of opinion could very often involve a statement of material "fact". He said (at p 644):-

> "I am, therefore, entirely of the same opinion as was the Judge, that this is a case in which the representation was not merely confined to the fact that the vendor entertained the belief but also, inescapably, there goes with it the further representation that he, being competently advised, had reasonable grounds for supporting that belief." (Emphasis added).

17 It seems to us clear that the statement in *Brown v Raphael* was quite distinct from that in our present case. So were the circumstances under which it was made. The statement there related to a matter of fact, namely, whether the annuitant had "aggregable estate" though it was expressed with the use of the word "believed". The representation there was that there were reasonable grounds to express that belief. Here, what RTC Ltd had promised the invitees were matters as to the future: a premier club with first class facilities. RTC Ltd has delivered the facilities but the problem lies in it accepting too many founder members.

18 Next, a decision of this court, *Forum Development Pte Ltd v Global Accent Trading Pte Ltd & Anor* [1995] 1 SLR 474, was also cited by the appellants to substantiate their contention that a promise as to future actions could constitute actionable representation. There, the owner of a shopping mall, in negotiating a lease with a prospective tenant, represented that the existing wall in front of the premises to be leased would be demolished and replaced by a glass wall by the end of the year. Based on that representation, the tenant took up a lease of the premises. The wall was never demolished and the tenant vacated the premises and sued for rescission of the lease on the ground of innocent misrepresentation. The employee of the owner who made the representation really thought that the wall would be coming down. This court held that the tenant was entitled to rescission on the ground of innocent misrepresentation. The court found that the employee "had no factual basis for representing that the brick wall would be replaced by a glass wall by December 1990." By making the representation, the employee had, in fact, also represented that plans were in place to carry out the replacement by December 1990 which was not the case. This Court there added that, had the employee taken the trouble to inquire from those who were directly concerned with the planning and programming of the works, she would not have made the representation. This feature distinguishes the position in *Forum Development* from that in our case where the problems came about because RTC Ltd accepted too many people who applied for founder membership.

19 It seems to us quite clear that while some of the statements in the promotional materials are salesman's pitch, the message that came across clearly was that RTC would deliver a premier club with first class facilities. True, at that stage, the Club premises were still on the drawing board. The appellants had not alleged that RTC Ltd, in making those statements, had no honest belief in them or had no intention to fulfill them. Plans were indeed afoot for such a club. What was eventually

delivered, when the Club finally opened its doors to members, some 15 months behind schedule, was a posh and elegant club premises with substantially what RTC Ltd had promised. The trial judge had, in fact, made a visit to the Club premises and inspected the facilities and his conclusion was that they were "opulent". The crux of the appellants' complaint is that RTC had admitted too many people, almost 19,000, as founder members. This, they said, caused a squeeze on the facilities which were available to members and the Club could no longer be considered to be an "exclusive" or "premier" club offering first class facilities. More on this aspect will be touched on later when we come to the third issue on breach.

20 Anson's Law of Contract, 28th Edn states at p. 237 what is an actionable misrepresentation as follows:-

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

21 There is also a need to differentiate between actionable representation and future promise and this is elucidated in *Phang on Law of Contract (2nd Singapore and Malaysia Edn)* as follows (at 444-5):-

> "A representation, as we have seen, relates to some existing fact or some past event. It implies a *factum,* not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something in *futuro*, and produces different legal consequences. This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract. The distinction is well illustrated by *Maddison v Alderson*, where the plaintiff, who was prevented by the Statute of Frauds from enforcing an oral promise to devise a house, contended that the promise to make a will in her favour should be treated as a representation which would operate by way of estoppel. The contention, however, was dismissed, for:
>
> The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts."

22 There is one other aspect which we should address before moving on to the second issue. The appellants have also sought to frame their claim on the basis of s 2(1) of the Misrepresentation Act. We think there is a misconception on the scope and effect of s 2(1). That provision does not alter the law as to what is a representation. This can be seen from its opening words, "where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss …" The change effected by that subsection is that it enables a party who suffers loss on account of a non-fraudulent misrepresentation to claim for damages which he would not be entitled to do under the then existing law, for such a misrepresentation, rescission was the only remedy. However, the subsection allows the representee to claim damages for any non-fraudulent misrepresentation, subject to the proviso that the representor need not pay damages if he could prove that he had reasonable grounds to believe, and did believe, up to the time the contract was made, that the facts represented were true.

23 Thus s 2(1) only alters the law as to the reliefs to be granted for a non-fraudulent

misrepresentation but not as to what constitutes an actionable misrepresentation. *Chitty on Contracts 28th Edition* (at ¶6-001) put the position quite clearly as follows:-

> "Prior to the enactment of the Misrepresentation Act 1967, the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but generally gave him no right to damages unless the misrepresentation was fraudulent, or, in some cases, negligent, or unless the misrepresentation had contractual force. Since the coming into force of the Misrepresentation Act the representee will always be able to claim damages for negligent misrepresentation in circumstances in which he could have recovered damages had the misrepresentation been fraudulent. … The Act of 1967 does not, however, alter the rules as to what constitutes an effective misrepresentation."

Whether statements constituted terms of contract

24 The next question we have to consider is whether any of those statements made in the promotional materials formed a part of the terms of the contract which each appellant has entered into with RTC Ltd.

25 In applying to become a member, each of the appellants filled in and submitted the Priority Application Form. Besides giving personal particulars, the form ended with a number of declarations which each applicant had put his signature to and one of the declarations was the following -

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

26 Rule 6 of the Rules and Regulations ("the Rules") of the Club relates to membership. The relevant portions of that rule read:-

> "6.1 Class: The Club shall comprise Honorary Members, Ordinary Members and Corporate Members …
>
> The Club shall consist of such number of Members as the Proprietor may in its absolute discretion from time to time decide.
>
> 6.2 Other Classes: The Proprietor may from time to time create new classes or categories of membership on such terms and conditions as the Proprietor may determine."

27 The appellants argued that notwithstanding rule 6.1, the statements made in the promotional materials which enticed the appellants to sign on as members should be implied into the contract. The powers conferred upon the proprietors in rule 6.1 should be exercised in a manner consistent with what RTC Ltd had promised, i.e., an exclusive and premier club, with first class facilities. They contended that the test is an objective one. Surely, if at the time any of the appellants were to have asked RTC Ltd whether the latter would exercise the discretion in rule 6.1 so as to maintain at all times the premier status of the Club, the answer would be in the affirmative.

28 However, the counter argument of RTC Ltd is that if any of the statements were to be incorporated into the contract, it would conflict with the Rules. It is wholly unnecessary to imply any

such term in the interest of business efficacy. RTC Ltd contended that "entrepreneurs should be given a broad latitude to test the market with different concepts; if this were not allowed, it would stifle innovation in the club industry." Furthermore, the statements are so vague that they are incapable of being contractual terms.

29 In this regard, RTC Ltd relied upon *Scammell v Ouston* [1941] AC 251 where Lord Wright said that there could be no contract where "the language used was so obscure and so incapable of any definite or precise meaning that this court is unable to attribute to the parties any particular contractual intention." As the language used in the promotional materials was so general, RTC submitted that the statements in those materials were nothing else but puffs: just salesman's talk. As the respondent's expert, Mr Shepherdson said, what was stated in the brochure was just "hype", designed to create a "want".

30 It is not in dispute that the promotional materials did not give any figure as to the number of people whom RTC Club planned to admit as members. As far as the Rules are concerned, they appear to give absolute discretion to the proprietors to determine the number.

31 The case presented for RTC Ltd rests wholly on the Rules which seem to have vested in the respondent complete discretion in all matters pertaining to the Club, e.g., what facilities should be available and how it should be run. Such an approach was rejected by the trial judge, who said (at ¶62 of his judgment):-

> "Rule 6.1 would therefore have to be read subject to the defendants' obligations to provide a club with the qualities promised. This will mean that, in exercising their rights under Rule 6.1 to admit members, the defendants will have to ensure that they do not admit so large a number that their obligation to provide and run a premier club would be compromised. The discretion given to the defendants under Rule 6.1 would, to that extent, be curtailed. To put it in alternative way: to give business efficacy to the contract, I would imply as a term of the contract that the defendants would exercise their discretion under Rule 6.1 in such manner that there would be no breach of the defendants' obligations to provide the sort of club promised in the promotional material."

32 As we see it, the way to test the logic and validity of RTC Ltd's argument is to take it to the extreme, and we would stress that it is often by resorting to extreme examples that one would be able to see whether an argument advanced is reasonable and logical. If it is correct that the discretion vested in the Club proprietor is wholly unfettered, it would mean that even if the respondent were to have provided to members a couple of rooms for members to gather and dine and nothing else, the respondent would still have fulfilled their part of the bargain and would not have breached their obligations. That can hardly be correct. A discretionary power in a contract, such as this, must be exercised in furtherance of its object. Therefore, we entirely agree with the views expressed by the trial judge which we have quoted in ¶32 above.

33 What comes out clearly from the promotional materials is that the public (selected customers of financial institutions who were appointed as agents) were invited to join a club which was to be a premier club, described as "without peer in terms of size, facilities and opulence." That was the central theme. We accept that a term should not be implied unless it is necessary to give the contract business efficacy, or unless it was a term which was so obvious that if any of the appellants were at the time to have asked RTC Ltd whether, notwithstanding the wide discretionary power conferred upon it, it would exercise those powers to ensure that the Club would, at all times, remain a premier club, unequal in size, facilities and opulence, we would have no doubt that the answer given would be in the affirmative. The latter is the officious bystander test propounded by Mackinnon LJ in

Shirlaw v Southern Foundaries [1939] 2 All ER 113. In our view, the answer would also be the same if the business efficacy test were to be applied.

34 In this regard the unreported judgment in *140 Pub Company Ltd v Hoare & Anor* (Ch Div and delivered on 21 March 2001) is germane. There the lessors of a public house which was subject to a "beer tie" granted a licence to assign the lease of the premises to the defendants who later became the lessees of the premises. In the licence to assign, the lessees covenanted to comply with all the terms of the lease, including the beer tie. The defendants claimed that, in consideration of their taking an assignment, there was an agreement on the part of the lessors that the premises would be released from the tie by a certain date and that this agreement was made during the negotiations prior to the giving of the license to assign. The evidence showed that during the negotiations, the lessors' representative produced a brochure and went through it with the defendants. Two sentences in the brochure were particularly significant: "After March 1998, the entire (lessors') estate will be completely free to purchase all products from any supplier." and "By the end of March 1998 all properties owned by the (lessors) will be totally free to purchase all products from any supplier." However, in the brochure it was also provided that, in the event of any inconsistency between what was stated in the brochure and "the current legal documents", the latter shall prevail. This proviso notwithstanding, Sir Oliver Popplewell held that the representations in the brochure relating to the release of the beer tie was a term of the contract. He said (at ¶28):-

> "I look at the totality of the evidence and ask what a reasonable outside observer would infer from all the circumstances. The Claimants are, of course, entitled to take advantage of any legal point but I cannot help but think that an outside observer would think their conduct somewhat shabby. It is not necessary, having regard to the document, to trash around in the undergrowth nor was there some 'chance remark', to quote Lightman J. This was part and parcel of a well presented sales pitch relating to important terms of contract and intended to form part of the contract. I am satisfied that the Claimants, through Mr Hughes and the brochure, did give the promises and assurances; did intend that the Defendant should act on them; did intend them to be part of the contract and the Defendants did act on them. They would not otherwise have entered into the contract. The fact that others may also have been the object of the sales pitch seems not to make the slightest difference."

35 In our present case, while we recognise that the term "premier" is not one which can be defined with precision, we do not think it so obscure and vague a term that it should not be implied. It does convey the sense that it will be a club of distinction and pre-eminence, contrasting it to that of a run-of-the-mill type. It differentiates such a club from the ordinary club.

36 Admittedly, what is "premier" could give rise to a difference of opinion. But it hardly follows that just because such a term could generate differences of view that it should thereby be inoperative or of no effect and should not be implied. Even the most common word in the law, the term "reasonable", is not a term which can be defined with precision and the answer would depend very much on the particular circumstances of each case.

37 In our judgment, it must be implied into the contract which each appellant entered into with RTC that the Club would be a premier club, with first class facilities and that the discretion vested in RTC Ltd by the Rules would always be exercised in a manner consistent with the maintenance of the Club as a premier club.

Was there a breach?

38 We now turn to the third issue as to whether RTC Ltd had breached its contract of providing a

"premier" club for its members. We accept that the 19,000 people whom the respondent admitted as members does not *per se* prove a breach. The real question is whether the Club has, by admitting so many members, ceased to be an "exclusive" or "premier" club, having regard to the dimensions of the facilities available.

39 The trial judge, having viewed the physical facilities of the Club said that:-

> "The Club was spacious and its facilities … up market … there can be no doubt that the physical facilities, and ambience matched the adjectives 'opulent' and 'lavish' used in the promotional materials" (paragraph 63).

40 He also noted that when the Club was eventually opened, after some fifteen months' delay, "large numbers of members/guests turned up at the Club during the initial weeks and months", resulting in overcrowding and congestion. The bulk of the complaints of the appellants related to this initial period. But this was not to say that there was no evidence of overcrowding after the initial period, such as during the weekends/public holidays and festive seasons. Nevertheless, after reviewing all the evidence adduced on the issue of usage, the trial judge came to the conclusion that –

> "the demands on a number of facilities at the Club (especially the Café & Terrace; the Chinese Restaurant; the swimming pool; the gym; and the bathing/sauna facilities) were, at times, such that there was considerable pressure on the defendant to cope. This pressure arose because the available facilities had to serve the needs of the large membership of 19,000 persons (and their spouses and their guests)…. (However) I do not find that that pressure was such that it crossed the line where it could be said that the Club was no longer the premier club that was promised. I would also add, in case the defendants are inclined to admit even more members, that the pressure was very close to that line. Admission of more members can easily result in that line being crossed. In my view, the membership of the Club, as it now stands, is just about the very maximum permissible to sustain the Club as a premier club."

41 First, we will consider the evidence of the experts. Mr Shepherdson, who was called by RTC Ltd, said that a benchmark guide used by the club industry is one seat for every ten members. He drew a table comparing the food and beverage ("F&B") outlets of RTC with those of four other similar social clubs in Singapore. The table is as follows:-

	No. of seats	No. of members	Members per seats
Raffles Town Club	1,540	17,000	11.0
Singapore Recreation Club	600	5,500	9.2
Tower Club Singapore	260	1,500	5.8
Singapore Cricket Club	450	8,000	17.7

NUSS Guild House	800	12,000	15.0

42 We would, however, make three observations on the figures set out in the table in respect of RTC. First, the membership of RTC taken by Mr Shepherdson in preparing these figures, at 17,000, is 2,000 short of the actual number. He gave some explanation on why the number 17,000 was chosen ("to make mathematics easier"; "trying to give some indications rather than any precise numbers"). Still, we fail to understand why the correct number of 19,000 was not taken. Second, the number of sears which is recorded as available at RTC includes 400 seats in the ballroom (which has a full capacity of 800). However, a witness for RTC (DW11) told the court that the ballroom was utilized only for special functions or festive seasons such as Chinese New Year. Therefore, it was not normally opened, whether weekdays or weekend, except for special events of the Club or its members, e.g., weddings. When there is such a special event like a wedding, the guests will be relatives and friends of the bride and groom and their families; most guests will probably have nothing to do with the Club. Third, if we should remove the 400 seats in the ballroom from the computation of the seating capacity of RTC, as we think they should be, and adopt the correct membership figure of 19,000, it would give a ratio of 16.66 members to 1 seat. While, it is still better than the position of the Singapore Cricket Club, it is way below what Shepherdson said is the benchmark - one seat to ten members. It must be borne in mind that here we are referring to a "premier" club. In this regard, there is one other aspect which we thought is peculiar. The café has an indoor capacity of 136 seats. Yet, the outdoor section (poolside) is said to have a capacity of 420 seats. Of that figure of 420, 70 are deck chairs and 193 seats are without shelter. We are in the tropics where air-condition comfort is vital. The ratio between the indoor and outdoor seats is completely out of proportion.

43 Evidence was tendered by Mr Sexton (who was called by the appellants) where he compared the essential facilities available at RTC with those of Pinetree Club, a very similar sort of town club. Both these clubs are located in the same area, as the distance between them is only half a kilometre apart.

	RTC	Pinetree
Gym	354 sq m	332 sq m
Coffeeshop (indoor)	235 sq m	n/p*
Poolside café	420 seats	n/p*
Chinese restaurant	266 sq m	330 sq m
Japanese restaurant	213 sq m	162 sq m
Western restaurant	277 sq m	243 sq m
Bowling	10 lanes	10 lanes
Swimming pool	345 sq m	680 sq m

(* not provided in evidence)

44 The three fine dining restaurants (Chinese, Japanese and Western) at RTC have a capacity of 504, which is very close to that of Pinetree at 490. RTC has a café, with 136 seat (air-conditioned) and

another 420 seats at poolside. Here, we would reiterate our point about the large percentage of outdoor seats mentioned above. Though it was not provided in evidence, Pinetree, in fact, also has a café, with an open section by the poolside. Turning to the swimming pool, the pool at RTC is a resort-style pool and has a capacity for only 138 swimmers while that at Pinetree can accommodate 272 swimmers. Bearing in mind that RTC's membership is almost four times the number of Pinetree and its pool size is only about half that of Pinetree, it is clear that the swimming pool facilities are grossly inadequate. Here, we would like to quote what Shepherdson said as to how the pool could cope with the high demand on weekend:

> "Assuming a busy Saturday has people using the pool from 10.00 am until 7.30 pm with an average stay of 75 minutes, the pool can accommodate over 3,000 users (9.5 hours x 60 minutes = 570 minutes ÷ 75 = 7.6 x 400 = 3,040."

Mathematically, the sums are correct. But this assertion assumed two things. First, that members and their family would turn up evenly spread from morning 10.00 am to 7.30 pm in the evening. Second, it assumed that 400 swimmers could be in the pool at any one time. The pool would be packed the whole day. We can understand this being the condition in a public swimming pool but not at a premier club.

45 When one turns to look at the gym and the bowling alley, RTC has much the same facilities as Pinetree. Its gym is larger than that of Pinetree by only 22 sq metres and it has the same number of bowling lanes as Pinetree. But its membership is four times more.

46 In this regard, usage statistics were furnished by RTC covering the period from March 2000 to May 2002. Charts were plotted showing, in particular, the extent of usage of the Chinese restaurant, with a graph showing the usage on a monthly basis and another on a weekend basis. The difference between the charts of the two parties lies in the fact that the appellants' charts are based on 75% capacity whereas RTC's charts are based on 100% capacity. It seems to us, as between the two bases for plotting the charts, that the basis adopted by the appellants is more likely to be correct. The reason is simple. Take a table meant for ten person. If 8 persons should show up as a group, they will be occupying the table for 10. Similarly, if a table is meant for 4 persons and if only three persons come, they will occupy the table for 4. While it could be said that taking 75% as equivalent to full capacity may be a little on the low side and a more accurate estimation might well be 85%, we would add that even Mr Shepherdson's computation was based on 75% capacity. He stated that, if 75% of the seats in an F&B outlet were taken, it was deemed to be operating at 100% capacity. Lastly, we acknowledge that it is possible for tables to be shared. But the fact is that according to RTC's witness (DW7), he had never come across an instance where members were willing to share a table.

47 Furthermore, usage statistics are useful only to an extent as they only show that a certain number of people visited the outlet during the operating hours. But the data do not capture the number of people who visited the facility during the peak hours, 12.00 noon to 2.00 pm and 7.00 pm to 9.00 pm, which are critical. Mr Sexton gave what we thought is a pertinent illustration. A food outlet "with 100 seats which has nobody from 12.00 pm to 6.00 pm and 300 persons between 7.00 pm and 9.00 pm may be under the daily capacity but still be an unsatisfactory dining experience for the members."

48 It stands to reason that as far as social clubs are concerned, the test as to the adequacy of their facilities, lies in the evening on weekdays and also over the weekend, as those would be the periods when most members would have the leisure time to enjoy club facilities. The weekend chart of the appellants does indicate that the demand for the Chinese restaurant, more often than not,

exceeded or hovered at the optimum capacity of the restaurant. In this regard, there is one other important factor which must be brought into the equation. Many of the appellants averred that because of the crowded condition they encountered at the Club, at some point they ceased to visit the Club. This attitude would be unlikely to be peculiar only to these appellants. It would hardly surprise us if there were other members who had also ceased to turn up at the Club because of similar bad experiences. Thus, the usage data may not correctly reflect the adequacy of the facilities. This was also the view advanced by Mr Sexton - that usage may not necessarily reflect adequacy.

49 Mr Shepherdson accepted that in considering the question of the adequacy of the facilities, membership size cannot be viewed in isolation but must be related to the size of the facilities. He referred to the Hong Kong Jockey Club ("HKJC") which has 18,000 members, a figure only slightly less than that of RTC, as a comparison. The size of its main clubhouse is only 20,000 sq metres whereas at RTC it is about 38,000 sq metres. But we must point out that this 38,000 sq m includes some 19,000 sq m of basement car-park plus rest-rooms, and another 2,000 sq m for 22 suites. The overall facilities of HKJC are clearly larger than those of RTC and spread over three locations. It has, in terms of facilities which members can enjoy, *inter alia*:-

2 race courses;

12 restaurants; and

3 swimming pools.

50 Bearing in mind that we are here concerned with a "premier" club, it is clear that its facilities are inadequate to cater for the need of 19,000 members (plus their spouses, families and guests) in three major areas, the food outlets, the swimming pool and the gym; and probably also the bowling alley. The test of a premier club must surely be, besides the physical aspect, the ease with which members could gain access to facilities. While the occasional wait, such as on festive seasons, is acceptable, it should not be a regular feature on weekends and public holidays. It is plain logic that where you have a large number of members, the pressure on facilities will naturally increase, even though members may not turn up all at the same time or at the same regular intervals.

51 At 19,000 members, RTC is the biggest club in Singapore and the next biggest club trails very much behind at 11,000 to 12,000. By failing to control the number of people RTC Ltd had admitted as members, it has breached its obligation of delivering a premier club to those who are admitted. Even the most luxurious of facilities will be turned into a "noisy market place", in the words of some witnesses, if the number of members are just too large. The visit by the trial judge to the Club was on a weekday during office hours where quite naturally the number of members present would be less and it was also after battle lines in the present case had been drawn.

52 We will end the point with two illustrations which are close to the hearts of Singaporeans. While we recognise they are not on all fours with the present dispute, nevertheless they capture the essence of what has led us to think that RTC Ltd has failed to deliver on what it had promised. The first relates to an apartment. It may be very nice and comfortable for four persons but if you should add another four or eight persons into it, it will cease to be so even though the apartment could still physically accommodate all of them (e.g., with double decker beds, etc). It is the feel of "space" which is vital. The second example is air travel. Whether one travels in the economy-class cabin or the first class cabin, one gets to the same destination at the same time. The difference lies in the fact that the first class cabin is not crammed with so many seats like the economy-class cabin. Here again, passengers pay more for the feel of space and comfort.

53 Overcrowding or a constant "full house" spoils the ambience which a premier club should have. It is the "quality" in the broadest sense which marks a premier club apart from the ordinary.

54 We appreciate that the finding of the trial judge, that there was no breach, is a finding of fact. However, it is not a finding based on the veracity or credibility of witnesses. It is a finding based largely on inference and perception, an exercise which this court is in as good a position as the trial judge to undertake. It is also clear to us that the trial judge in coming to his conclusion did not reach it with great ease. He had hesitated over it.

Judgment

55 Accordingly, we hold that RTC Ltd is in breach of contract even though we recognise that there could be some practical difficulties flowing from this finding. Damages would have to be assessed later and this is a matter that could pose some difficulties, though not insurmountable. Let us explain. In 1996, when the invitation to join RTC was extended, the market for club membership was high. Evidence was adduced showing that while the market price for RTC membership had dropped in 2002 to the level of $11,000, other clubs prices had also similarly fallen. As an example, in 1996/7 the SRC membership in the open market fetched some $40,000. But by 2002 its market price was only $13,000. The second is the Fort Canning Country Club where the public signed on at the price of $30,000 and by 2002 it was already in receivership. Of course, the depreciation in the price of RTC membership which is due to the dip in the general market condition will not be recoverable as against RTC Ltd.

56 Another consequence which the appellants will have to address is what follows after damages have been assessed. The net result might well be the winding up of RTC Ltd, thus affecting even the interests of those members who have not joined in in this action. The appellants would no doubt assess whether they would get a better return from winding-up RTC Ltd or selling their memberships in the open market, even at current prices, after reckoning for the transfer fee payable.

57 This judgment does not seek to stifle enterpreneurship or innovation; neither should it. What we seek to ensure is that enterpreneurs who make promises should deliver them. The appellants subscribed to a "premier" club; they should get a "premier" club.

58 On the question of costs, as the appellants have not succeeded on the claim of misrepresentation, they should not be awarded costs for that and taking a broad view of things we rule that they should only be awarded 2/3 costs, here and below. The security for costs, together, with any accrued interest thereon, shall be released to the appellants' solicitors.