Sim Yong Teng and another
v
Singapore Swimming Club

[2016] SGCA 10

Court of Appeal — Civil Appeal No 88 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Chan Sek Keong SJ
2 November 2015

Administrative law — Disciplinary tribunals

Administrative law — Natural Justice

17 February 2016

Chan Sek Keong SJ (delivering the grounds of decision of the court):

1 The appellants are husband and wife, and have been members of the Singapore Swimming Club ("the Club"), the respondent, since 1974 or 1975. The husband, Sim Yong Teng ("Sim"), was convicted on 12 October 2012 of several offences under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") including the offence of insider trading under s 218(2) of the SFA.

2 They appealed against the decision of the High Court Judge ("the Judge") in Originating Summons No 144 of 2014 ("OS 144/2014") in dismissing their application to set aside the decision of six members of the management committee of the Club for 2013/2014 made on 8 October 2013 ('the 8/10/2013 Decision") which suspended their membership of the Club

pursuant to rule 15(d) of the Rules of the Singapore Swimming Club ("the Club Rules").

3 At the conclusion of the hearing of the appeal on 2 November 2015, we allowed the appeal on the ground that the Judge erred in law in affirming the 8/10/2013 Decision. We now give our reasons for allowing the appeal.

Background

4 The 8/10/2013 Decision was made pursuant to rule 15(d)(i) of the Club Rules which provided as follows:

> **RULE 15 CESSATION OF MEMBERSHIP**
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> …
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> (d) In the event that a member:-
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> (i) Has been convicted in a court of law of competent jurisdiction of any offence which involves an element of dishonesty or moral turpitude; and which in the opinion of the Management Committee would if such member were permitted to remain as a member place the Club in disrepute or embarrass the Club in any way;
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> (ii) Flees the country to escape criminal proceedings; or
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> (iii) Has become an enemy alien
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> then the membership of such member shall be suspended from the date of the occurrence of such event and the member shall forfeit all rights and claims upon the Club, its property, and funds.
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> Notwithstanding the foregoing, the member shall have a grace period of 6 months to transfer his membership to a third party pursuant to Rule 7. In the event that the member fails to transfer his membership within the 6 months grace period, his membership shall cease on the expiry of the said period and he shall not be entitled to transfer his membership nor will he have any membership rights.

[emphasis added]

The 3 April 2013 Decision

5 In a letter dated 19 October 2012,[1] one Gary Oon ("Oon"), a member of the Club, notified the Club of Sim's conviction for insider trading and alleged that the offence involved an element of "moral turpitude" under rule 15(d)(i) of the Club Rules. Acting on this complaint, the then management committee of the Club ("MC 2012/2013") called on Sim to explain why his insider trading conviction did not warrant a suspension of his membership with the Club under rule 15(d)(i). Sim's response was that the offence of insider trading, being a strict liability offence, did not involve moral turpitude, and further that the offence had been committed by him inadvertently without any intention to make an unlawful gain.

6 MC 2012/2013 initially had a full complement of 11 elected and two co-opted members as permitted by the Club Rules. However, when it convened a meeting on 26 December 2012 to consider the complaint against Sim, two of the elected members had already resigned. Hence, only the remaining nine elected and two co-opted members attended that meeting.

7 Between 26 December 2012 and 27 March 2013, another three elected members of MC 2012/2013 resigned, leaving six elected members and two co-opted members on MC 2012/2013. Prior to the 27 March 2013 meeting, MC 2012/2013 obtained from the Club's solicitors a legal opinion stating that the offence of insider trading involved an element of moral turpitude. On 27 March 2013, seven (five elected and two co-opted) of the remaining nine

[1] Record of Appeal Vol III (Part C), pp 134–135.

members met to discuss the matter. The president of MC 2012/2013, Chua Hoe Sing ("Chua"), invited the members present to consider Oon's complaint and Sim's defence, and also the legal opinion of the Club's solicitors, in preparation for the hearing scheduled for 3 April 2013.[2]

8 At the 3 April 2013 hearing, MC 2012/2013 consisted of six members (four elected and two co-opted), including Chua. We will hereafter refer to the six-member committee as "MC1". After hearing Sim's representations, MC1 unanimously decided that Sim's conviction for insider trader involved moral turpitude, and therefore, fell within rule 15(d)(i) of the Club Rules. MC1 ordered that Sim's membership and that of his wife be suspended as their memberships came under the category of "family membership" under the Club Rules which required the wife's membership be suspended automatically upon the suspension of the husband's membership.[3]

The appellants' application in OS 572/2013

9 Dissatisfied with MC1's decision of 3 April 2013 ("the 3/4/2013 Decision"), Sim and his wife commenced court proceedings in Originating Summons No 572 of 2013 ("OS 572/2013") on 28 June 2013 to set aside the 3/4/2013 Decision on the ground that it was null and void for, *inter alia*, a lack of quorum as required under rule 21(c) of the Club Rules. Rule 21(c) provided as follows:

> A quorum for a meeting of the Management Committee shall not be less than one half of the total members in the Management Committee.

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[2] Record of Appeal (Vol III Part C), pp 178–179.

[3] Record of Appeal (Vol III Part A), p 189.

MC1 was constituted with only four out of the nine elected members who heard Sim on 26 December 2012.

10 OS 572/2013 was also heard by the Judge and he reserved judgment. Before he delivered his judgment for OS 572/2013, a new management committee of the Club ("MC 2013/2014") was constituted comprising namely: (1) Chua Hoe Sing, (2) William Lum, (3) Jonathan Wang, (4) David Chung, (5) Philip Chua, (6) Michael Ho, (7) Gope Ramchand, (8) Samuel Chong, (9) Joyce Chan, (10) Gerad Loo, (11) Krishnan Kashyap and (12) Gary Oon. Five members (listed Nos 1–5 above) were also members of MC1. Out of the twelve members, two were co-opted into MC 2013/2014 whereas the other ten were elected.

11 After MC 2013/2014 was constituted, Chua approached some members for their views on the 3/4/2013 Decision. Eight members of MC 2013/2014 (listed No 4–11) gave their views in letters signed by them dated 25 July 2013 ("25/7/2013 Letters"). All of them signed identical letters, except that paragraph 1 of Krishnan Kashyap's letter was slightly different, indicating a common source with a common objective. Each statement read:[4]

> 1. I am a member of the current Management Committee (MC). I was elected into office at the AGM held on 19 May 2013.
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> 2. I am aware that Mike Sim has alleged that a decision taken by the MC on 3 April 2013 to suspend his membership pursuant to Rule 15(d)(i) is improper as the MC comprised less than 6 elected members at that time.
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> 3. I have since reviewed the relevant documents in Mike Sim's case, including:

[4] Appellants' Core Bundle (Vol II), pp 110–116.

> a. the documents submitted by Mike Sim and his lawyers pertaining to his conviction of insider trading and other offences under the Companies Act and Security and Futures Act;
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> b. Mike Sim's explanation;
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> c. the confidential minutes of the MC meetings on 26 December 2012, 26 March 2013 and 3 April 2013; and
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> d. the legal opinion from the Club's lawyers.
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> 4. Having considered the matter, I agree with the MC's decision that his conviction for insider trading does involve an element of moral turpitude, and that the Club will be placed in disrepute or embarrassment should he remain as a member. As such, I agree with the MC's decision to suspend Mike Sim's membership pursuant to Rule 15(d)(i).

12 Krishnan Kashyap's letter also contained an additional paragraph 3 which stated:

> 3. I had had attended the MC meeting on meeting on 26 December 2012 and 27 March 2013. As such I had heard Mike Sim's explanation in person at the MC meeting of 26 December 2012."

13 After obtaining these letters, Chua filed an affidavit dated 26 July 2013 in OS 572/2013 which annexed the 25/7/2013 Letters as exhibits. At para 30 of his affidavit, Chua stated:

> In any event, I have asked the newly elected [MC 2013/2014] members as to what their decision would be having now reviewed the relevant documents in [Sim's] case. Each of the newly elected [MC 2013/2014] members has confirmed that, having reviewed the records, he/she agrees with the [3/4/2013 Decision]. I have also asked Mr Krishan Kashyap, who has been part of the [MC 2012/2013] from May 2012 to date, but had not been present at the 3 April 2013 meeting, as to what his decision would be having reviewed the relevant documents, and also heard Sim in person at the [MC 2012/2013] meeting of 26 December 2012. He has also agreed with the [3/4/2013 Decision]. Copies of [the 25/7/2013 Letters] are annexed hereto and marked as "**CHS-4**". [emphasis added]

14 Chua's initiative was of no avail. The Judge delivered judgment on 1 April 2015 in OS 572/2013 and declared the 3/4/2013 Decision null and void and set it aside on the ground that there had been a breach of natural justice.

The 8 October 2013 Decision

15 After judgment in OS 572/2013 was delivered, MC 2013/2014 held a meeting on 12 September 2013 and decided to rehear the complaint against Sim. MC 2013/2014 also decided that those who were current members and who were also members of MC1 would not be part of the quorum of MC2.[5] Oon was also to be excluded since he was the complainant in the matter. This decision left six elected members eligible to sit as MC2, and they were as follows: (1) Michael Ho; (2) Gope Ramchand; (3) Samuel Chong; (4) Joyce Chan; (5) Gerad Loo; and (6) Krishnan Kashyap. It was also agreed that Krishnan Kashyap would be a member of MC2 as although he was involved in the prior proceedings, he was not part of MC1 which was directly involved in the 3/4/2013 Decision. All six members of MC2 had signed the 25/7/2013 Letters submitted to the court in OS 572/2013.

16 By a letter dated 17 September 2013, MC 2013/2014 informed Sim of its decision to rehear the complaint against him on 30 September 2013. Sim was requested to bring with him such materials that he might wish to rely on in answer to the complaint. Due to Sim's unavailability on 30 September 2013, the hearing was postponed to 8 October 2013.

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[5] Minutes of 12 September 2013 Meeting, Record of Appeal (Vol III Part C), pp 88–90.

17 On 8 October 2013, Sim attended the hearing and submitted a written statement for MC2's consideration which stated, *inter alia*, as follows:[6]

> Thank you for the opportunity to attend this MC hearing. Before I begin, and further to my previous letters on the matter, I wish to reiterate the following:-
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> 1) My attendance is without prejudice to my position that the MC should not hear the matter as it has already prejudged my case. Accordingly, my attendance is not to be construed as a waiver of my position or in any way taken as acquiescence or acceptance of the MC be *sui juris* when it is clearly not
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> …

The rest of the statement stated that Sim had been a useful member of the Club, that he had a clean track record with the Club, and that Oon's complaint against him was discriminatory in nature because no complaint had been made against other members (whom he named in the statement) who had been convicted of far more serious offences. A substantial part of the statement reiterated the case he had made to MC1. The statement concluded that if it was still the Club's stand that his membership of the Club should be suspended, he requested the Club to treat his statement as a formal complaint against those members he had named for the purpose of rule 15(d) of the Club Rules.

18 At the conclusion of the rehearing, MC2 deliberated for about an hour, and decided: (a) unanimously that the offence of insider trading involved moral turpitude; and (b) by a 5-1 majority (Krishnan Kashyap dissenting) to suspend Sim's "family membership" (which included his wife's membership) pursuant

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6 Affidavit of Sim Yong Teng dated 20 February 2014, Record of Appeal (Vol III Part A), p 272.

to rule 15(d) of the Club Rules. In the circumstances, Sim was given six months to transfer his "family membership" to a third party.

19 Dissatisfied with MC2's decision, Sim and his wife commenced court proceedings on 20 February 2014 in OS 144/2014 for a declaration that the 8/10/2013 Decision was made in breach of the rules of natural justice, in that MC2 had prejudged the complaint against Sim as evidenced by their 25/7/2013 Letters.

20 As summarised by the Judge (at [29]–[31] of the judgment below, reported as *Sim Yong Teng and another v Singapore Swimming Club* [2015] 3 SLR 541 (the "Judgment")), the appellants advanced three arguments before him:

> (a) that moral turpitude involved "conduct that shocks the public conscious [*sic*] as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general"; that the insider trading offence for which he was convicted was a strict liability offence and that his mitigation showed that his offence was due to a genuine oversight, absent any evil intent, and not for dishonest financial gain; that accordingly his conviction involved no moral turpitude;
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> (b) that the members of MC2 should have disqualified themselves from hearing the complaint against him as they had prejudged the complaint against him by their 25/7/2013 Letters, and that in any case, the 8/10/2013 Decision was made in breach of the rules of natural justice since all six members of MC2 had prejudged the complaint against him; and

(c) that, in any case, the membership of Sim's wife was separate and distinct from Sim's membership, that his wife was an ordinary member in her own right, and that the suspension of his wife's membership was in breach of the Club Rules.

21 The Club advanced the following arguments before the Judge (Judgment at [33]–[37]):

(a) that whether or not the offence of insider trading involved moral turpitude was an issue for MC2 to decide, and the court should not disturb it unless it was made in breach of the rules of natural justice or in bad faith;

(b) in any event, that the offence of insider trading involved moral turpitude as it referred to conduct falling below the required standards of integrity, probity and trustworthiness; that moral turpitude was present in relation to Sim's conviction as he had abused his fiduciary position in the relevant company by misusing confidential price-sensitive information;

(c) that MC2 did not breach the rules of natural justice as MC2 was specifically constituted to exclude members of MC1 who might have been placed in a position of conflict of interest; that MC2 reheard the case with an open mind, and that MC2 did not collude with MC1;

(d) that the quorum for MC2 for the 8 October 2013 hearing was constituted out of necessity; without those six members, no quorum could be formed as there were no other available members—for that reason, MC2 was not disqualified from hearing the complainant against Sim; and

(e) that the suspension of Sim's "family membership" was in accordance with the Club Rules.

The issues before the Judge

22 The Judge formulated the following issues for decision, *ie*, whether:

(a) the members of MC2 should have disqualified themselves because of the 25 July Letters;

(b) the principle of necessity was applicable to the facts of the case;

(c) the 8/10/2013 Decision was made *bona fide* and in observance of the rules of natural justice;

(d) the court should disturb MC2's finding that Sim's insider trading conviction involved moral turpitude;

(e) the court should disturb MC2's opinion that permitting Sim to remain as a member would place the Club in disrepute and embarrass the Club; and

(f) the suspension of Sim's membership would affect his wife's membership of the Club.

23 Before deciding these issues, the Judge discussed the principles of natural justice applicable to social clubs by reference to *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 ("*Kay Swee Pin*") and other cases.

24 The Judge pointed out that in the present case, unlike in the cases of *Kay Swee Pin* and *Khong Kin Hoong Lawrence v Singapore Polo Club* [2014] 3

SLR 241 ("*Lawrence Khong*"), MC2 was not sitting as a disciplinary committee under rule 13 of the Club Rules. The facts involving Sim's conviction for insider trading had already been ascertained and the only questions were: (1) whether the conviction carried an element of moral turpitude; and (2) whether, in the opinion of MC2, Sim's continued membership of the Club would place the Club in disrepute or embarrass it. In his view, these were inferences to be drawn from known or decided facts rather than findings of disputed facts *per se*.

25 The Judge also observed that when the management committee made a positive determination of these two required elements under rule 15(d)(i), it had no discretion but to suspend the membership of the offending member under rule 15(d)(i) and to grant a grace period of six months for that member to transfer the membership to some other person. The Judge held that the six months' grace period to sell the membership would not "result in a severe reduction in the economic value of the membership" (Judgment at [47]). At the most, Sim would suffer a loss of the social value that came with the membership of the Club. Therefore, while the rules of natural justice were applicable to a determination made under Rule 15(d)(i), they were not to be applied with the same rigour as they were in *Kay Swee Pin* and *Lawrence Khong*.

26 Based on these general principles, the Judge proceeded to consider the issues listed above (at [22]).

Issues (1) and (2) – Whether the six members of MC2 were disqualified from hearing the complaint against Sim, and whether the principle of necessity applied in the circumstances

27 The Judge considered first the principle of necessity. He referred to the statement of the law (cited in *Lawrence Khong* at [42]–[43]) as follows:

> 42 The principle of necessity in administrative law is described in *Halsbury's Laws of Singapore* vol 1 (LexisNexis Singapore, 2012) at para 10.056:
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> > A person subject to disqualification at common law may be required to decide the matter if there is no competent alternative forum to hear the matter or if a quorum cannot be formed without him. Thus, if all members of the only tribunal competent to determine a matter are subject to disqualification, they may be authorised and obliged to hear and determine the matter by virtue of necessity.
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> 43 The rule of necessity was considered in *Anwar Siraj v Tang I Fang* [1981-1982] SLR(R) 391. It was unsuccessfully invoked because the relevant legislation provided for an alternative individual to act in the place of the disqualified arbiter. A P Rajah J had, in that case, impliedly accepted that the rule applied in Singapore. However, that case seems to indicate that the rule of necessity is more applicable to public bodies rather than private disciplinary tribunals. In [*Laws v Australian Broadcasting Tribunal* [1990] 170 CLR 70], Mason CJ and Brennan J described the underlying rationale of the rule of necessity at 89 as such:
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> > … The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. Those rules may be excluded by statute. …

28 The Judge noted that the principle of necessity was held to be inapplicable in *Lawrence Khong* for various fact-specific reasons (Judgment at [50]); see also [83] below). He also noted that in *Chiam See Tong v Singapore Democratic Party* [1993] 3 SLR(R) 774 ("*Chiam See Tong*"), Warren L H Khoo J applied the principle of necessity to enable the central executive committee ("CEC") of the Singapore Democratic Party ("SDP") to sit as a disciplinary committee despite the plaintiff's allegations of bias against nine members of the CEC. *Chiam See Tong* is further discussed below (at [76]–[80]).

29 Following the decisions in *Chiam See Tong* and *Lawrence Kong*, the Judge held that the principle of necessity was applicable to social bodies such as the Club, and that the principle was not restricted to tribunals exercising statutory functions (although the threshold to invoke it was high). In the Judgment (at [53]–[56]), the Judge held:

> 53 I find that [MC2] may avail itself of the principle of necessity in the circumstances of the present case. Unlike *Lawrence Khong*, co-opting members onto the MC is not a viable alternative because the co-opted members do not have the power to vote at MC meetings under rule 21(a)(vii). More importantly, the power of [MC2] under Rule 15(d) is non-delegable. Rule 15(d) expressly refers to "the opinion of the Management Committee". … Therefore, unlike the situation in *Lawrence Khong*, [MC2] here could not delegate its power under Rule 15(d) to any other committee.
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> 54 Finally, I am also of the view that [MC2] had done everything in its power to reduce, as much as was practicably possible, any bias including any suspicion or apprehension of bias when it decided on the [elected] members to make up [MC2] to hear and decide the matter. [MC 2013/2014] specifically decided at the 12 September Meeting to exclude members who were part of the [3/4/2013] Decision and to exclude the complainant, Gary Oon. The six members that were left were necessary to form a valid quorum. Although they had written the [25/7/2013] Letters, these six members were the least susceptible to allegations of bias, real or apparent. The MC had thus gone down the route which can be said to be the least of all evils in the circumstances of the case.
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> 55 If all these six remaining [elected] members were also required to disqualify themselves, there will be no available MC with the necessary quorum to deal with the matter. This will frustrate the Club's ability under the Club Rules (which all the members have agreed to at the point of joining the Club) to ensure that its members do not cause embarrassment or bring disrepute to the Club in any way, and should they do so by reason of having been convicted of an offence in a court of law involving dishonesty or moral turpitude, to remove them as members under the Club Rules in order to safeguard and preserve the reputation of the Club. For the purpose of constituting the MC to enable it to deal with such an important matter concerning the reputation of the Club, the doctrine of necessity must prevail over and displace the rules of natural justice to the extent necessary for this purpose to be achieved

> (see *Laws* v *Australian Broadcasting Tribunal* [1990] 170 CLR 70 at 96).
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> 56 Taking [Sim's and his wife's] case at its highest and assuming that the only fact that was before me was the presence of the [25/7/2013] Letters which expressed the individual views of the [6 elected members of MC2] in regard to the correctness of the [3/4/2013] Decision, I am prepared to accept that there could be some form of apparent bias. It must be stressed that this is solely on the basis of the [25/7/2013] Letters while disregarding all other facts from the 12 September Meeting (where the constitution of the [8 October 2013 hearing] was decided) leading up to the [8/10/2013] Decision. Even on this basis, I hold that the principle of necessity as an exception to the disqualifying effect of the rule against apparent bias applies. Not to allow the operation of the principle of necessity would be detrimental to the interest of the Club in safeguarding its reputation in accordance with the Club Rules. Accordingly, the members of the MC did not have to disqualify themselves in the particular circumstances of this case.

Issue (3) – Whether the 8/10/2013 Decision was made without bona fides *and in breach of the rules of natural justice*

30 With respect to this issue, the Judge found as follows (Judgment at [58]–[59]):

> (a) Sim merely asserted (on the basis of the 25/7/2013 Letters) that there was prejudgment on the part of MC2 "without clearly detailing any specific facts" on how: (a) the 8/10/2013 Decision was not made *bona fide* and had involved prejudgment; or (b) MC2 had been overly dictated by their prior views as articulated in the 25/7/2013 Letters more than two months before the 8/10/2013 Decision, such that MC2 had not considered afresh or with an open mind, all the relevant materials and submissions presented by Sim.
>
> (b) MC2, on the other hand, alluded to the following facts to show that MC2 had acted fairly and that apparent bias had not been made out on the totality of the facts:

(i) Members who were or might be potentially in a position of conflict of interest were excluded.

(ii) The hearing was rescheduled to give Sim a full opportunity to be heard.

(iii) MC2 heard Sim's explanation for an hour and engaged him on the issues in question.

(iv) MC2 took into account the new documents tendered by Sim.

(v) MC2 deliberated for half an hour before making its decision.

(vi) MC2 did not consider itself bound by the 25/7/2013 Letters. In fact, one member changed his mind, and voted against the finding that Sim's conviction would bring disrepute to the Club if Sim were allowed to remain as a member.

31 On the basis of these findings, the Judge concluded that there was insufficient evidence to show that the six members of MC2 had "in fact "closed their mind" during the hearing" or that they were "in fact separately biased towards [Sim and his wife] in some way" (Judgment at [64]), and that "[i]n fact, much of the evidence placed before [him] appears to indicate the contrary" (Judgment at [65]).

32 The Judge also dismissed Sim's allegation that MC 2013/2014 had colluded with MC 2012/2013 in the submission of the 25/7/2013 Letters to the Judge for consideration in order to support MC1's decision to suspend Sim and his wife as family members of the Club. The fact that the members of MC2 had

expressed support for the 3/4/2013 Decision was insufficient proof of a serious allegation of collusion.

The test for apparent bias

33 The Judge next discussed the test for apparent bias as applied by our courts in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Shankar*"), *Lawrence Khong, Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 ("*Tang Kin Hwa*"), *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576, *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 and *De Souza Lionel Jerome v Attorney-General* [1992] 3 SLR(R) 552. He also considered the decisions of courts in other jurisdictions in *Regina (on the application of PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 ("*Pinochet (No 2)*"), *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 and *Locabail (UK) Ltd v Bayfield Properties and another* [2000] QB 451 ("*Locabail*").

34 After referring to these decisions, the Judge held that the applicable test was that, without referring to *Porter v Magill* [2002] 2 AC 357 ("*Porter v Magill*"), set out in that decision. (Judgment at [71]):

> 71 In sum, the test is whether a reasonable and fair minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion or apprehension that a fair trial is not possible. … It is an objective test from the perspective of a reasonable member of the public and not the court (*Shankar* at [82]). …

35 Applying this test, the Judge held that (Judgment at [71]–[72]):

> 71 … Here, the relevant facts that the reasonable person would be apprised of would be all the circumstances of the case (see [59] and [70] above) including the correspondence between [Sim] and [MC2] and even the context in which the 25/7/2013 Letters were made. The further gloss added to this is that "the test of apparent bias relating to predetermination is an extremely difficult test to satisfy" (see emphasis above in [63]). This, in addition to the fact that the rules of natural justice are not to be applied in their full rigour in the present case, would make the hurdle of establishing apparent bias in the form of apparent predetermination not so easily jumped over.
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> 72 … I am prepared to accept that a reasonable suspicion or apprehension would be aroused in the mind of a reasonable and fair minded person reading the [25/7/2013] Letters and who was then later told of the fact that the [MC2] members who wrote those letters would be deciding the very matter that they gave their views on. There are good reasons for this suspicion or apprehension. Firstly, it is part of human nature that a person would be slow to change their prior views in the absence of anything new. The integrity of the decision maker would depend on consistency with prior decisions and for this purpose it is generally more difficult to change one's view than to maintain it when the facts and circumstances have not changed. It may thus lead to a refusal to re-examine the matter afresh with an open mind. This, however, is not an immutable rule of human behaviour since accepting that one's prior view was wrong is also seen as a virtue. Secondly, suspicion or apprehension would also be aroused since the [25/7/2013] Letters were given in support of a decision made by the former [MC1], of which some members are on the current [MC 2013/2014] and thus colleagues of those who made the [8/10/2013] Decision. This is not to say that there was in fact collusion, but the mere presence of the possibility would arouse suspicion or apprehension in the reasonable and fair minded person that [MC2] could be biased against [Sim].

36 After expressing these reservations, the Judge nonetheless found (Judgment at [73]):

> 73 Having said that, I am of the view that there are other relevant facts that the reasonable and fair minded person would take into account. These are, firstly, the context in which the [25/7/2013] Letters were written. The [MC2] members did not initiate the writing of the [25/7/2013] Letters. They were approached by the former [MC1] to provide their views. Furthermore, these views were given even before the [3/4/2013] Decision was declared to be null and void. They

> were given without any inkling that they would have to decide the matter again. The allegation made here is in respect of the [8/10/2013] Decision. When the [25/7/2013] Letters were written, the [8/10/2013] Decision was not contemplated by any of the [MC2] members. The suspicion or apprehension of a potential predetermination or bias would be much stronger if the [MC 2] members had volunteered to give their views knowing they would have to sit and decide the matter again. Another relevant fact for the reasonable and fair minded person to take into account is that these six MC members were selected out of necessity to form the MC to hear the matter. If other options were in fact available, they would not have sat on the MC to determine the first plaintiff's case.

37 The Judge made an additional finding (Judgment at [74]) that the matters set out at above (at [30(b)]) showed that the members of MC2 had heard Sim's submissions and considered the evidence with an open mind.

Issue (4) – Should the Court disturb MC2's opinion that Sim's insider trading conviction involved an element of moral turpitude

38 On this issue, the Judge stated that since a court was slow to disturb the findings of a disciplinary tribunal as it did not sit on appeal from the decision of that tribunal (citing *Kay Swee Pin* at [2], and *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506), there was no basis for him to disturb MC2's finding that Sim's insider trading conviction involved moral turpitude.

Issue (5) – Should the Court disturb MC2's opinion that Sim's continued membership would bring disrepute to and embarrass the Club

39 On this issue, the Judge held that MC2 was in a much better position than the court to determine whether the standing and reputation of the Club would have been adversely affected if Sim were permitted to continue as a member of the Club. Given that there was no evidence of bias or a lack of *bona fides* on the part of MC2, the Judge upheld the finding of MC2.

Issue (6) – The "family membership" issue

40 The Judge held that, on the proper construction of the relevant Club Rules, *ie*, rules 4 (interpretation), 5(f)(i) and 7(f), MC2 was entitled to suspend Sim's "family membership", which included that of his wife, on the basis of Sim's conviction for insider trading.

The Parties' submissions on appeal

The appellants' submissions

41 The appellants' submissions, as set out in the Appellants' Case, were as follows:

(a) As regards Issues (1), (2) and (3):

(i) The six members of MC2 should have disqualified themselves from hearing the complaint against Sim on 8 October 2013 as they had prejudged the matter by writing the 25/7/2013 Letters.

(ii) Any objective person, if informed of these circumstances, would reasonably conclude that the MC2 members had made up their minds conclusively and were in total agreement with MC1's decision. The rules of natural justice require not only justice to be done but seen to be done. The rules do not allow a person who has already considered the matter and pronounced his judgment to say that he will rid his mind of the prejudgment and start with an open mind. The Judge's holding that there was no apparent prejudgment or apparent bias was wrong in law and in fact.

(iii) There was collusion between the MC1 and MC2 members to show a united front to the court and that the lack of a quorum in MC1 was inconsequential.

(iv) The Judge was wrong in holding that because a rule 15(d) proceeding was not a disciplinary proceeding, the rules of natural justice were not to be applied with the same rigour to such proceedings.

(v) The principle of necessity was not applicable to excuse the MC2 members from disqualification for bias. The purpose of the principle is to prevent a failure of justice (see Gillard J in *Metropolitan Fire and Emergency Services Board v John William Churchill* [1998] VSC 51 at [154]–[160]). Here, there would be a failure of justice because MC2 had prejudged the complaint against Sim by their voluntary collateral act of signing the 25/7/2013 Letters.

(vi) The principle of necessity would not apply if actual bias is shown: *Anwar Siraj v Tang I Fang* [1981-1982] SLR(R) 391 ("*Anwar Siraj*").

(vii) The complaint against Sim could have been referred to the general body of members of the Club for a decision in view of the prejudgment on the part of MC2. The general body could do all such acts as MC2 could have done since MC2 derived its powers from the general body.

(viii) The Judge was also wrong in finding that there was no breach of natural justice on the facts of the case.

(b) As regards Issue (4):

(i) There was no element of moral turpitude attached to Sim's conviction for insider trading as he had committed the offence by mistake. The offence of insider trading under s 218 (read with s 220(1)) of the SFA, on which Sim was charged and convicted, is a strict liability offence as it is not necessary for the prosecution to prove any intention to use the inside information.

(c) As regards Issue (6):

(i) The Judge was wrong in suspending Sim's wife's membership. Rule 15(d) targets an offending member, which she was not. As an ordinary member she was entitled to enjoy all the privileges as such member until the family membership was transferred under the Club Rules.

The Club's Submissions

42 The Club's submissions essentially supported the Judge's decision and reiterated all the reasons given by the Judge for dismissing the Appellants' application in OS 144/2014. The Club also argued that Sim, by voluntarily appearing before MC2, had waived any objections to MC2 hearing the complaint against him.

Our decision

43 At the conclusion of the hearing of the appeal, we allowed the appeal. We were of the view that the Judge should have disqualified all six members of MC2 from hearing the complaint against Sim on the ground that they had prejudged the complaint against Sim, and that the principle of necessity had no application in the circumstances of the case. We reserved our views on whether, as a matter of law, the principle of necessity is applicable to private associations,

such as the Club. We also rejected the Club's submission that Sim, by attending the hearing, had waived his objection to MC2 hearing the complaint.

44 We set out below the reasons for our findings on these matters, starting with the issue of prejudgment.

Prejudgment

Actual and apparent bias

45 The rules of natural justice include the rule against bias. In *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, it was held (at [90]):

> 90 … the word "bias" should be understood as denoting both actual bias and apparent bias since the legal objection to apparent bias applies a fortiori to actual bias, especially bias that amounts to a predetermination of the relevant matter to be decided. …

46 In *Locabail*, the Court of Appeal of England said (at [3]):

> 3 … The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

For this reason, aggrieved applicants usually rely on apparent bias as the basis for setting aside an administrative decision for breach of natural justice.

47 In the present case, the appellants argued their case on the ground of predetermination or prejudgment (the term we use in these grounds of decision) in the form of the 25/7/2013 Letters, without explicitly distinguishing whether it amounted to actual or apparent bias. However, the tenor their submissions showed that they had proceeded on the basis of apparent bias. Consequently,

the Judge's decision was based on apparent bias. Accordingly, our analysis is based on the allegation of apparent bias.

48 In *Webb and Hay v The Queen* (1994) 181 CLR 41, Deane J stated (at 74) that:

> The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first (e.g., a case where a dependent spouse or child has a direct pecuniary interest in the proceedings.) and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third (e.g., a case where a judge is disqualified by reason of having heard some earlier case: see, e.g., *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288; *Australian National Industries v. Spedley Securities* (1992) 26 NSWLR 411.), and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

49 In the present case, the appellants' case was based on the conduct of the members of MC2 in writing and agreeing to have the 25/7/2013 Letters in support of the decision of MC1 submitted to the Judge for consideration in OS 572/2013.

Prejudgment as actual bias

50 The rule against prejudgment prohibits the reaching of a final, conclusive decision before being made aware of all relevant evidence and

arguments which the parties wish to put before the arbiter (*per* Jacob LJ in *Lanes Group Plc v Galliford Try Infrastructure Limited T/A Galliford Try Rail* [2012] Bus LR 1184 ("*Lanes*") at [56]). While the rule may in some way overlap with the *audi alteram partem* principle (as a result of a failure to give parties an actual opportunity to be heard), the primary objection against prejudgment is "the surrender by a decision-making body of its judgment" (*per* Sedley J (as he then was) in *Regina v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 317) such that it approaches the matter with a closed mind (*per* Pill, Rix and Longmore LJJ in *Regina (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83 ("*RCBC*") at [10], [89] and [107] respectively).

Apparent bias and predetermination

51 The Judge cited a passage from Christopher F Forsyth, *Wade & Forsyth: Administrative Law* (Oxford University Press, 11th Ed, 2014) ("*Wade & Forsyth*") (at p 394) which explains the distinction between prejudgment amounting to actual bias or apparent bias:

> The appearance of bias and predetermination are distinct concepts. Predetermination consists in 'the surrender by a decision-making body of its judgment', for instance, by failing to apply his mind properly to the task at hand or by adopting an over-rigid policy. The decision is unlawful but not because it may appear biased (although in many cases it will). On the other hand, a decision-maker may apply his mind properly to the matter for decision and make a decision that is exemplary save that, because of some prior involvement or connection with the matter, the fair minded observer would apprehend bias. The decision is once more unlawful but for a completely different reason. Only in rare cases will the distinction between these two concepts be significant.

52 In our view, the present case was a rare case where the distinction between apparent bias and prejudgment was significant, and indeed, crucial.

Here, the members of MC2 had decided the complaint against Sim, albeit on an informal basis before they were empanelled by MC 2013/2014 to decide the same complaint against Sim on a formal basis.

Prejudgment and predisposition

53 Prejudgment is different from predisposition. In *National Assembly for Wales v Condron and another* [2006] EWCA Civ 1573, Richards LJ observed (at [43]):

> 43 We were referred to various cases in which the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors. The cases include *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 320-321, [1997] 1 PLR 8, [1996] NLJR 478; *Bovis Homes Ltd v New Forest Plc* [2002] EWHC 483 (Admin) at paras 111-113, and *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) at paras 25-32. I do not propose to quote from them, since I regard the general nature of the distinction as being clear enough.

In the present case, the Judge found that the the 25/7/2013 Letters showed the predisposition of the writers rather than their prejudgment in relation to the fresh complaint against Sim (see [55] below). We were unable to agree with this finding (see [61] below)

Prejudgment and provisional judgment

54 Further, prejudgment, which takes the form of a premature conclusive determination, is also different from a provisional decision. By definition, one is not final and subject to change, while the other is final. Thus, in *Porter v*

Magill, the House of Lords held an auditor's decision to be valid despite his issuance of a press statement announcing his provisional findings during the course of his investigations. In *Lanes*, the English Court of Appeal held that an adjudicator's provisional decision, disclosed for the assistance of the parties, did not constitute prejudgment. In *Project v Hutt* (6 April 2006) (unreported) (at [22]) (and endorsed in *Amjad and others v Steadman-Byrne* [2007] 1 WLR 2484 at [13]–[14]), the Appeal Tribunal said:

> 22 There are, of course, occasions when a judge or tribunal can quite properly explore difficulties that have become apparent from the evidence in a case, prior to the point at which all evidence has been led and submissions made, whether with a view to encouraging parties to consider settlement or narrowing the issues between them, or otherwise. There must, though, be few occasions when that can properly be done at a point prior to the leading of any evidence in the case since, at that stage, there is, by definition, no evidence before the court or tribunal on which it can comment. Moreover, if minded to make such a comment, it is plain that the risk of giving an impression of prejudgment will arise if it is not made clear to the parties that any views expressed are but provisional, that the tribunal's mind is not yet made up and that it remains open to persuasion.

Whether the 25/7/2013 Letters were provisional judgments

55 The Judge found as a fact that the opinion of the six MC2 members set out in the 25/7/2013 Letters did not constitute prejudgment on their part, and were no more than provisional views which might have led them to have a predisposition towards suspending the Appellants' membership under rule 15(d)(i) of the Club Rules. In the Judge's view, the 25/7/2013 Letters were not, in themselves, sufficient evidence that the six MC2 members had closed their minds to matter, as demonstrated by their various actions in giving Sim a full hearing and accommodating him on all his procedural needs and requests at the hearing.

56 On the basis that the members of MC2 were not disqualified from hearing the complaint against Sim on the application of the principle of necessity, the Judge held (Judgment at [64]–[65]):

> 64 The time for determining whether there has been a breach of natural justice should be the conclusion of the entire hearing at the 8 October Meeting since all the factual circumstances leading up to the [8/10/2013] Decision and the decision-making process can then be examined. On the present facts, there is insufficient evidence to conclude that [MC2] or any members of the MC had *in fact* "closed their mind" during the hearing which continued to the time the [8/10/2013] Decision was made or that they were in fact separately biased towards the plaintiffs in some way.
>
> 65 In fact, much of the evidence placed before me appears to indicate the contrary (see [59] above). However, this does not rule out the possibility that the [25/7/2013 Letters] (the sole fact relied on by the plaintiffs to allege a breach of natural justice by [MC2]) may in fact show that the [8/10/2013 Decision] was tainted with apparent bias or predetermination or both. It must be noted that I had accepted the possibility of apparent bias being made out on the basis that the only fact before me was the [25/7/2013 Letters] (see above at [56]). **On that assumption, I found that necessity applied such that the MC members did not have to disqualify themselves**. I will now proceed to determine if apparent bias is indeed made out having regard to all the circumstances of the case. …
>
> [emphasis in italics in original; emphasis added in bold]

The Judge's approach in deciding the contested issues of prejudgment, apparent bias and the principle of necessity

57 It can be readily seen from these passages that the Judge adopted the following decision-making process in dealing with the issues of prejudgment, apparent bias and necessity:

> (a) First, he held that the 25/7/2013 Letters did not amount to prejudgment of the complaint against Sim amounting to either actual bias or apparent bias, but merely constituted provisional views of the writers which led them to predisposition towards suspending Sim and

his wife as members of the Club. Hence, the members of MC2 who wrote the letters had not closed their minds to the issue and prejudged it.

(b) Secondly, he was prepared to accept that the 25/7/2013 Letters could evidence "some form of bias" and that the said letters might *in fact* show that the 8/10/2013 Decision "was tainted with apparent bias or predetermination or both" (Judgment at [56], [65] and [72]);

(c) Thirdly, *on that assumption* (Judgment at [65]), MC2 was not disqualified from hearing the complaint against Sim, as otherwise there would have been no other body qualified to hear the complaint, and that such a result would be detrimental to the interest of the Club in maintaining its reputation (Judgment at [56]).

(d) Fourthly, therefore, there was no alternative but to qualify MC2 to hear the complaint against Sim.

(e) Fifthly, the actual hearing showed that MC2 gave Sim a full hearing which was conducted fairly and impartially.

58 The Judge adopted a "cover all bases" approach to deal with the issues raised in the case. In our view, while this approach might not necessarily be unfair to the appellants, it had the advantage of enabling the Judge's findings at each stage of the process to reinforce the other, thus validating the process. For example, the finding that MC2 made the 8/10/2013 Decision with an open mind served to validate the initial finding that the 25/7/2013 Letters merely expressed the provisional views of its members. However, if the said letters amounted to apparent bias or prejudgment, which the Judge was only prepared to assume, but not find as a fact, the issues of whether the members of MC2 were

disqualified from hearing the complaint and the applicability of the principle of necessity would become crucial. If the members of MC2 were disqualified for bias, and the principle of necessity was not applicable to private associations, or in the circumstances of the case, the final and fifth stage of the process would, and could, not have taken place. There would be no finding of fact at the final stage to reinforce the finding of fact at the first stage.

Were the views expressed in the 25 July 2013 Letters provisional?

59 The Judge held that the six members of MC2 had not closed their minds as the 25/7/2013 Letters by themselves were insufficient evidence of the closing of their minds. He referred (Judgment at [75]) to the fact that, at the hearing itself, the "chairman Michael Ho specifically informed the first plaintiff that they had come to the hearing with an open mind and were giving him an opportunity to state his case…[and] that the [MC2] members had read all the documentation pertaining to the case." He also referred to the fact that one member had disagreed with the majority's decision. That, in sum, was the Judge's reasoning for holding that MC2 heard the complaint against Sim with an open mind. The mutually reinforcing chain of reasoning is apparent from these findings.

60 We disagreed with the Judge's approach and also his reasoning. Granted that the dissenting member's vote might be interpreted as evidence of an open mind, it did not follow that the other five members had not closed their minds. Arguably, this argument cut both ways. It could be argued, for instance, and logically, that for *that reason* the other five members had closed their minds! It could be said that this was the exception that proved the rule. If the members of MC2 had been disqualified from hearing the complaint in the first place, there would be no factual finding that could provide an *ex post facto* justification for

the initial finding that the conclusion expressed collectively in the 15/7/2013 Letters were provisional, subject to their giving a final conclusion.

61 We could not agree with the Judge that the 25/7/2013 Letters were intended to express provisional views. Firstly, the writers were not asked to give their provisional views but their considered views on whether they agreed with the decision of MC1. Secondly, there was no occasion for them to give their concluded or final views on the matter. In our view, 25/7/2013 Letters were intended to inform the Judge that they, as incoming members of MC 2103/2014 shared the views of MC1 that Sim was not fit to remain a member of the Club. What the said letters meant to convey to the Judge was that *if they had been members of MC1, they would have made the same decision made by MC1 in order to protect the reputation of the Club*. We had no doubt that by the said letters, the members of MC2 had prejudged the complaint against Sim. The Judge accepted as a positive factor in favour of MC2 that its chairman had informed Sim that they had come to the hearing with an open mind and were giving him an opportunity to state his case. In our view, the Judge should have been more sceptical of assurances or declarations of this nature. In *Locabail*, the English Court of Appeal said at pp 477–478:

> … Nor will the reviewing court pay any attention to any statement by the judge concerning the impact on his mind or his decision: the insidious nature of bias makes such a statement of little value …

See also *Porter v Magill*, where Lord Hope said at [104] that a court should place no weight on statements by decision-makers that they are not biased.

62 The members of MC2 were not selected because the chairman of MC 2013/2014 believed that they had emptied or intended to empty their minds of the views expressed in the 25/7/2013 Letters. They were selected because the

other members were all disqualified from hearing the complaint, and the chairman thought that they were not so disqualified. In any case, whatever the state of their minds was, the 25/7/2013 Letters most certainly raised in the mind of a fair and well informed observer a reasonable suspicion or apprehension of bias.

63 In this connection, it is necessary to note that all the MC1 members who were involved in the 3/4/2012 Decision had disqualified themselves from rehearing the complaint against Sim as members of MC2 on the ground that they had already decided the complaint against Sim. But so did the six members of MC2. They were in exactly in the same position. In truth, it was arguable that their position was even worse. While those MC1 members had heard Sim in person before finding against him, MC2 had condemned Sim without hearing him. A considered decision is still a decision, even if expressed in a private or informal setting. Bias or prejudice expressed or shown in private is just as unacceptable as when shown in public. The character does not change. When the six MC2 members were selected to rehear the complaint against Sim, they should have asked themselves whether their own positions were any different from those of the members of MC1. If they had, as fair minded persons, they would have concluded that their positions were the same, or even worse.

64 Accordingly, we were of the view that the 25/7/2013 Letters were sufficient to constitute prejudgment of the complaint against Sim, and that any reasonable, fair minded and fully informed observer looking at the circumstances of the case on 12 September 2013 would have formed the view that there was prejudgment by the members of MC2 amounting to apparent bias.

The principle of necessity

The principle of necessity in administrative law

65 The principle of necessity applies to enable a decision-maker, whether an individual or a tribunal, who is subject to disqualification on account of bias, to decide a complaint or dispute where: (a) no other person or tribunal competent to decide the matter is available; or (b) a quorum cannot be formed without his participation: see Harry K Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) ("*De Smith's*") at para 10-065. The principle was applied by the courts to statutory tribunals to ensure that they were not disabled from performing their statutory functions. The rule is an implicit expression of the principle that the rules of natural justice may be excluded explicitly by statute.

66 In Singapore, the High Court has applied the necessity principle outside this domain in several cases to enable disciplinary or management committees of social clubs and other private associations to impose sanctions on their members for breach of the rules of the clubs or associations. In the present case, the Judge also applied the principle on an assumptive basis to enable it to consider the merits of the substantive hearing of the complaint before MC2. The question thus arose as to whether the necessity principle should be extended to apply to private associations to enable them to exercise their functions.

The principle of necessity in Australia, Canada and England

67 In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 ("*Laws*"), Mason CJ and Brennan J, in a joint judgment, said (at [39]):

> 39 … even if … there be a case for holding that a reasonable apprehension of bias attaches to all the members of the Tribunal, the operation of the rule of necessity would ensure

> that the Tribunal is not disabled from performing its statutory functions. The rule of necessity permits a member of a court who has some interest in the subject-matter of the litigation to sit in a case when no judge without such an interest is available to sit: *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 HLC 759, at pp 787–788 (10 ER 301, at p 313). … The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. Those rules may be excluded by statute …

68 In a separate judgment, Deane J said (at [12]–[13]):

> 12 I agree with Mason C.J. and Brennan J. that the rule of necessity is, in an appropriate case, applicable to a statutory administrative tribunal, as it is to a court, to prevent a failure of justice or a frustration of statutory provisions. That rule operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment. There are, however, two *prima facie* qualifications of the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Second, when the rule does apply, it applies only to the extent that necessity justifies.
>
> 13 The question whether the application of the rule of necessity would involve positive and substantial injustice must be answered by reference to the circumstances of the particular case. In a case where the appearance or actuality of disqualifying bias is the result of conflict of interest or extrinsic knowledge, the relevant circumstances will include the manner in which the conflict of interest arose or the extrinsic knowledge was obtained (see, generally, Tracey, "Disqualified Adjudicators: The Doctrine of Necessity in Public Law", Public Law, (1982), 628, at pp 634ff.). In particular, the circumstance that, in such a case, the conflict of interest or extrinsic knowledge arose from or was caused by the deliberate act of the party who would otherwise be entitled to complain of bias may dictate a negative answer to the question whether the application of the rule would involve positive and substantial injustice to that party.

> Conversely, the fact that such a conflict of interest or extrinsic knowledge arose from or was caused by some voluntary collateral act of the adjudicator may constitute a powerful consideration favouring an affirmative answer to that question.
> …

69 Similarly, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1998] 1 SCR 3 ("*Remuneration of Judges of PEI*") (at [6]), the Supreme Court of Canada explained that the principle of necessity "finds its source in the rule of law" and serves to prevent a "failure of justice". The court said (at [7]) that the principle "should be applied rarely, and with great circumspection" as it causes injustice. That case involved institutional bias, *as distinct from personal bias*, as the judges of various provincial courts had to decide on matters concerning the manner by and the extent to which provincial governments and legislatures could reduce the salaries of provincial court judges. Thus, no matter who the judges were, they would be in a position of conflict, as they would have had to decide an issue in which they had a pecuniary interest. This case can be compared with *Dimes v The Proprietors of the Grand Junction Canal and others* (1852) 3 HLC 758 ("*Dimes*") where the Lord Chancellor had a conflict of interest as a result of personal circumstances, although in that case, the Lord Chancellor was only required to do a formal act, rather than to render a substantive decision.

70 In England (see *De Smith's* at para 10-067), the position is that the doctrine has been sparingly employed, and if possible the decision-making body should remove that part of it which is infected. In Deane J's words, "[i]t applies only to the extent necessity justifies" (*Laws* at [12]). The principle of necessity in effect requires one to choose, as between two evils, the lesser evil. Rather than suffer no justice being done at all by denying both parties from being heard, it permits a limited risk of injustice to one. Consequently, there must be, and there are, limitations to the applicability of the principle of necessity.

The principle of necessity in Singapore

71 The High Court has held that the principle of necessity is applicable in the following cases: *Anwar Siraj*, *Chiam See Tong*, *Lawrence Khong*, and now, in the instant case. These decisions are discussed below.

(1) *Anwar Siraj*

72 In *Anwar Siraj*, the plaintiff was required to show cause as to why an action should not be taken against him for breaching his "Terms and Conditions of Service" ("the Regulations") with Jurong Town Corporation ("JTC"). The defendant, who was the chairman of JTC, was the adjudicator as provided by reg 119(4) of the Regulations. He was also the accuser in three out of the five charges against the plaintiff. The plaintiff objected to the defendant adjudicating the matter as the defendant would be a judge in his own cause.

73 JTC relied on the principle of necessity, and referred to Geoffrey A Flick, *Natural Justice: Principles and Applications* (Butterworths, 1979) ("*Flick on Natural Justice*") at pp 138–139, where the author stated that the rule :

> … is perhaps the greatest single common law exception to the general rule that an adjudicator who appears to be biased or prejudiced must disqualify himself from participating in a proceeding. The rule is firmly established in both English and Commonwealth jurisdictions … and in American jurisdictions. … and is to the effect that disqualification of an adjudicator will not be permitted to destroy the only tribunal with power to act. The rule applies regardless of whether the disqualification arguably arises from the combination of prosecutorial and judicial functions, pecuniary interest, personal hostility or bias …

74 The plaintiff responded that that the principle of necessity had limitations, and relied on *Flick on Natural Justice at* pp 140–141:

> One suggested limitation is that the rule is inapplicable if the disqualification of a member will still leave a quorum of an administrative agency capable of acting. Clearly the rule is inapplicable where the statute provides an alternative forum to the biased tribunal or where the statute contemplates that a majority of the agency can reach a decision.
>
> …
>
> Perhaps a final limitation is that even the rule of necessity will not justify an adjudicator sitting where actual bias can be shown. The law as to bias rests upon the existence of a real likelihood of bias and the consequence that a hearing may be unfair …

75 A P Rajah J held that as s 5(5) of the then Jurong Town Corporation Act (Cap 209, 1970 Rev Ed) provided that the deputy chairman or one of the members thereof could act in matters concerning JTC whenever the chairman was either absent or unable to do so (and in that case the chairman, the defendant, was "unable to do so" by reason of bias), the principle of necessity was not applicable as the deputy chairman could have been appointed to hear the charges against the plaintiff.

(2) *Chiam See Tong*

76 In *Chiam See Tong*, the plaintiff ("Chiam") sued the defendant political party, SDP, which he was secretary-general of before he resigned, for wrongful expulsion and for consequential reliefs. Chiam was expelled for breach of party discipline for breaking his oath not to "do or say anything which may be detrimental to the SDP or undermine the standing of the leadership of the party within or without the party." Chiam had criticised the conduct of certain leaders of the SDP at a talk given to the Singapore Press Club following his resignation. The CEC of the SDP decided to charge him for breaking his oath.

77 He appeared before the CEC to answer the charges against him. He objected to five of the CEC members hearing the complaints against him on the

ground of bias as they were the very persons he had criticised in public. He also objected to another four members who were employees of town councils whose chairmen were two of the CEC members he had criticised, and therefore would not be able to vote freely or independently. The chairman overruled his objections without giving any reasons. The CEC proceeded with the hearing, and, after hearing Chiam's explanations, decided to expel Chiam from the SDP.

78 Chiam contended in court that the disciplinary proceedings against him were conducted in breach of the rules of natural justice for the reason he had given to the CEC. He also alleged that the CEC failed to act in good faith in the best interest of the party and that the CEC's actions were actuated by indirect and improper motives unconnected with his conduct, or that the CEC had acted maliciously in order to injure him. He also admitted that he would not have objected to the remaining four members of the CEC hearing the charges against him. Khoo J dealt with the issue of bias and necessity at [57]–[61] of his judgment as follows:

> 57 It seems to me that [Chiam] has formidable difficulties on this issue of bias. Defence counsel, in an able and well-researched submission, rightly reminds me that the relationship between [Chiam] and [SDP] was based on contract. [Chiam] was bound by the constitution. The constitution clearly designates the CEC as the body responsible for disciplining members of the party. There is no alternative tribunal. [Chiam], by being a member of the party, had agreed that the members of the CEC should act in an adjudicative capacity under cl IV(d) of the constitution.
>
> 58 Theoretically, of course, it would have been possible for the nine members to whose participation [Chiam] objected to withdraw, leaving four members to adjudicate. It seems to me, however, that the constitution does not contemplate that disciplinary proceedings against a member should be conducted by such an emaciated body. The CEC would not have the character of a CEC if a substantial majority of its members were left out of it. I venture to suggest that the reason for having in the constitution the CEC as the disciplinary tribunal is to have a body whose members could bring their individual views and judgment to bear on a disciplinary matter. A hearing by the

> remnants of the CEC cannot possibly equate in quality a hearing by the whole CEC. This does not mean that individual members cannot be disqualified. However, where it is alleged, as in this case, that the overwhelming majority, including all the office bearers, should disqualify themselves, a serious question arises whether what is left is the kind of body which the constitution contemplates should be the body to take charge of such matters.
>
> 59 [Chiam] at the Press Club interview had indeed criticised the whole of the leadership. By his own logic, the whole CEC should not have sat. Indeed, this was the stand he took when making his preliminary objections at the commencement of the hearing, although on a slightly different ground.
>
> 60 It seems to me that such a position was, and is, not a viable one in the context of this case. [Chiam's] counsel and [Chiam] himself had difficulty suggesting what alternative tribunal would be available if the whole CEC were disqualified from sitting.
>
> 61 In the absence of an alternative tribunal, it seems to me that out of necessity the CEC had to sit in judgment of [Chiam], as otherwise [SDP] would be powerless to act against the alleged infractions of discipline. I am much encouraged in taking this view by the following statement (citing authorities) in *De Smith's Judicial Review of Administrative Action* (4th Ed, 1980) p 276:
>
> > An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice. So, if proceedings were brought against all the superior judges, they would have to sit as judges in their own cause. Similarly, a judge may be obliged to hear a case in which he has a pecuniary interest. The judges of Saskatchewan were held to be required ex necessitate to pass upon the constitutionality of legislation rendering them liable to pay income tax on their salaries.

79 It seems clear to us, reading this judgment today, that since the five CEC members comprising the leadership of SDP (the other four impugned members were not leaders) were judges in their own cause, their participation in the proceedings against Chiam was in breach of a fundamental principle of the rules of natural justice. Applying the principle of necessity to enable them to

participate in the matter would not have changed the inevitable outcome. It would result in a failure of justice that the principle is designed to prevent. Justice could not be done, and was not seen to be done. Hence, the principle of necessity could be a source of injustice in such situations. Applying it created a conundrum. How can the principle of necessity prevent a failure of justice without creating it in the very process of applying it to the case? Khoo J provided the solution by giving judgment to Chiam, on the factual finding that justice had not been done to Chiam as he had not been given a fair hearing. This outcome may be contrasted with the outcome in the present case, thus demonstrating the potential inconsistency and unsatisfactory consequence of applying the necessity principle to clubs and private associations.

80 In *Chiam See Tong*, there were two other possible solutions to the problem. Another judge hearing the case might have avoided the problem by interpreting the disciplinary rules as allowing only unbiased CEC members to hear the charges against Chiam (see *Laws* at [91] below). There was nothing in the constitution of the SDC that provided expressly that a disciplinary charge against a member must be heard by all the members of the CEC. A second solution, which would have been neater, would be for Khoo J to hold that, as a matter of law, the principle of necessity should be restricted only to bodies exercising statutory functions (which was the origin of the principle) and was not applicable to non-statutory, private committees. If there was no quorum because biased members of the CEC could not sit, it would be too bad for the SDP. The court should have allowed fairness to Chiam to prevail over the need for certain members of the CEC to be judges in their own cause. If the court had held that Chiam could not be charged and heard before a biased CEC, it would surely have prompted the SDP to constitute an impartial panel of the CEC to hear the complaints against Chiam without breaching the rules of natural justice, if the stakes were high enough for the good of the SDP as a political party. This

could have been done, for example, by amending the constitution of the SDP to enable disciplinary issues to be resolved without breaching the rules of natural justice. As a matter of fact, when Chiam was crossed examined in court, he conceded that he would have been prepared to appear before the four CEC members against whom he had made no allegations of bias. The court discounted this on the ground that before the hearing before the CEC, Chiam had applied for the whole of the CEC to be disqualified. This showed that if the CEC had taken the trouble to question Chiam on this, a qualified CEC could have been constituted to hear the complaints against him.

(3) *Lawrence Khong*

81 In *Lawrence Khong*, the plaintiff ("Khong") was a member of the defendant social club ("the SPC") whose membership had been suspended for two months by a disciplinary tribunal comprising five committee members. The disciplinary tribunal found that Khong had acted in a manner prejudicial to the interests of the SPC by disseminating a statement that questioned the propriety of the committee members' decision to amend the results of a motion of no confidence against them. The disseminated statement had in effect criticised the conduct of all of the members of the disciplinary tribunal.

82 The SPC invoked the principle of necessity, and referred to two Malaysian decisions, *viz*, *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 and *Datuk T P Murugasu v Wong Hung Nung* [1988] 1 MLJ 291 for the proposition that disciplinary powers were vested solely in the disciplinary committees and that the principle of necessity applied to allow such individuals to still adjudicate over disciplinary matters despite a finding of apparent bias if nobody else could make up the disciplinary committee under the constitution. In this connection, the SPC argued that

rule 23(a) of its Rules stipulated that any disciplinary hearing should be conducted by way of a committee meeting, and that rule 34(b) provided that "[f]ive Committee Members, three of whom shall be Charter Polo Playing Members, shall form a quorum". It was the SPC's case that only two 2013 Committee members who were not from the 2012 Committee could have participated in the disciplinary proceedings. Given its inability to form a quorum, it would then be impossible to hold a disciplinary committee meeting pursuant to rule 23(a). For this reason, it was argued that the rule against apparent bias should not operate to disqualify the 2013 Committee members who were needed to form a quorum. Otherwise, Khong could not be subject to disciplinary proceedings and this would be unjust to the SPC.

83 Tan Siong Thye JC (as he then was) accepted the SPC's argument that the principle of necessity applied to the SPC, but rejected the argument that it was applicable in the circumstances of the case. He gave the following reasons:

> (a) First, the two "untainted" members were unaccountably absent from the committee meeting. The 2013 Committee could have rescheduled the disciplinary meeting to a date when the two "untainted" members could constitute part of the minimum quorum of five members to hear the complaint against Khong. Having a quorum of five members, with two of them "untainted" was better than having a quorum of five "tainted members" as justice must, as far as possible, be seen to be done—"so long as their presence would have enhanced the perception of justice being done, their presence was required" (*Lawrence Khong* at [47]).
>
> (b) Secondly, under rule 31(1)(h), the 2013 Committee had the power to co-opt a maximum of two committee members to make up the

quorum with the other two "untainted" members. This was not done or considered. This was an even better alternative as a majority of the five-member quorum would then have been neutral.

(c) Thirdly, rule 33 allowed the 2013 Committee to delegate its disciplinary powers to sub-committees in the Minute of Appointment or in the Byelaws.

Does the principle of necessity apply to non-statutory bodies?

84 In the three decisions discussed above, and also in the instant case, the courts were not asked and did not consider whether, as a matter of law, the principle of necessity was applicable to the private entities, as contrasted to public statutory bodies. In the instant case, the Judge was aware of this distinction between bodies exercising statutory and non-statutory functions. However, he held that there was no reason why the principle should be confined only to bodies exercising statutory functions (Judgment at [52]). He gave no reason for this finding, other than that the courts in *Anwar Siraj* and *Chiam See Tong*, and also the two Malaysian cases had held that the principle of necessity was applicable to non-statutory bodies.

85 Save in India where the Supreme Court in *Amar Nath Chowdhury v Braithwaite and Company Ltd and others*, AIR 2002 SC 678 applied the principle to a private company in disciplinary proceedings against a shareholder (although the principle was found not applicable on the facts), we are not aware of any other commonwealth jurisdiction that has applied the principle of necessity to bodies exercising of non-statutory functions. In our view, this is so for good reasons. The purpose of the principle is to enable statutory tribunals and judicial bodies to hear matters in which they may have a personal or institutional interest, as not do so would frustrate the operation of the statutory

provision with consequent public or private detriment and undermine public confidence in the administration of justice (see *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [65], *per* Gleeson CJ and McHugh, Gummow and Hayne JJ). As for administrative bodies, the principle of necessity preserves the public confidence in the performance of statutory functions. In this regard, Mason CJ and Brennan J made the following observation in their joint speech in *Laws* (at [39]):

> 39 … The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. …

86 In *Clenae Pty Ltd and others v Australia & New Zealand Banking Group Ltd* [1999] VSCA 35, a case which concerned the necessity of having a judge hear a particular matter, Callaway JA stated (at [92]) that when one considers the principle of necessity, "[i]t invites the question 'Necessary for what purpose?'". In the case of statutory bodies, it would be to discharge functions vested in it by written law. In the case of private entities, the situation is entirely different. If the purpose is for, as is the case of private entities, the advancement or the protection of their private interests, then in a conflict between such interest and the interest of justice, the latter should prevail over the former. The principles of natural justice should not be subordinated to interests involving the private gain or loss in terms of reputation or social values of non-statutory, private bodies. There is no failure of justice to cure or any implication on the rule of law (which constitutes the source of the principle (see [69] above)), and consequently no reason to subject the defendant to prejudice, actual or potential.

87 The logic of not applying the principle of necessity to non-statutory bodies is sound. To apply it in such circumstances would be to prefer an intolerable risk of failure of justice. Far from avoiding a failure of justice, there will be a complete failure of justice; and the *raison d'être* for the application of the principle will then be lost. In short, the rules of natural justice must prevail over contractual rights when exercised unjustly or seen to be exercised unjustly.

88 In *Laws*, Gaudron and McHugh JJ held (at [9]):

> 9 … Whatever the precise scope of the doctrine of necessity in the natural justice context, it seems contrary to all principles of fairness that, on the ground of necessity, a person should have to submit to a decision made by a person who has already prejudged the issue. Likewise, there seems much to be said for the view that, in the absence of a contrary statutory intention, the ground of necessity should not require a person to submit to a decision made or to be made by a person who is reasonably believed to have prejudged the issue.

The above observations were made in a minority opinion in a case of apparent involving the performance of a statutory function. We would go further to say that in a case where prejudgment amounts to actual bias, *ie*, where the mind is closed at the hearing, the principle of necessity should not be applicable, since to apply it in such circumstances would merely give lip service to the principle as it would result in the decision-maker making a manifestly unjust decision. Such a hearing would be an empty procedural formality.

89 In any case, as we can see from the local cases that private associations may always change their rules if necessary without having to breach the rules of natural justice in any disciplinary proceedings against any of their members. In contrast, statutory rules, if applicable, are intended to be applied even in situations where apparent bias may be present. The principle of necessity is born out of the necessity to give effect to the statutory scheme, and not to frustrate it.

90 Statutory tribunals, and even the judiciary as an institution, can suffer from institutional bias (see *The Judges v Attorney-General for Saskatchewan* (1937) 53 TLR 464*; Beauregard v Canada* [1986] 2 SCR; and *Remuneration of Judges of PEI*), or the personal bias of the statutorily appointed adjudicator, but private associations do not suffer the same constraints. They can amend their constitutions or rules and can also use alternative means, such as to appoint other members, to remove the appearance of bias. As stated in *De Smith's* (at para 10-067) in relation to statutory tribunals:

> The doctrine of necessity has been sparingly employed, and if possible the decision-making body should remove that part of it which is infected with bias (for example, by the recusal of those members of a disciplinary committee who had been a part of a previous sub-committee which decided to institute proceedings against the claimant). Alternatively, where possible the body should be reconstituted (e.g. by constituting a separate panel). However, as we have seen, this is not always possible.

In contrast, reconstituting the panel in a private body is always feasible by changing the applicable rules.

91 In administrative cases, *Laws* involved a case where the conduct of members of a statutory tribunal was alleged to have given rise to a reasonable suspicion of prejudgment. The Australian High Court found that out of the ten tribunal members, only three were inflicted with bias. Consequently, it was held that only the other seven members were permitted to hear the matter, and that the other three members could not. In the Privy Council decision of *Jeff and others v New Zealand Dairy Production and Marketing Board and others* [1967] 1 AC 551 ("*Jeff*"), it was held that a marketing board was required to make a zoning order allotting milk produced by a district to a dairy company by way of necessity despite the fact that the board had given that very same dairy company a significant loan (and thereby having a pecuniary interest in its

business). This was because the power to make zoning orders and the power to make loans were both statutory powers conferred upon the board by statute and in this regard, the Board observed (at 566):

> When there is a conflict between the farmers and the factories, the board may find itself placed in an unenviable position, having, as the board accepts, the duty to act judicially and yet having a financial interest in maintaining and advancing the viability of the company to which it has advanced money. Yet in their Lordships' view the conclusion is inescapable that Parliament intended in this instance to make an exception to the general rule.

92 The decisions in *Remuneration of Judges of PEI* and *Jeff* make it clear the principle of necessity is only applicable to cases where it is legally impossible to have anyone other than the appointed authority as the adjudicator, and thus necessity applies. In any other case, that authority must do everything in its capacity to remove the bias (*Laws*).

93 In our view, the strongest justification for holding that the principle of necessity is not applicable to private entities is that it is contrary to the rule of law if the principle would enable them to adopt disciplinary and other control rules that exempt them from having to observe the rules of natural justice. The principle of necessity would then become a source of injustice, rather than a bulwark against injustice. The law should not allow contractual rights to prevail over the principles of natural justice by resorting to the principle of necessity.

MC 2013/2014 failed to remove bias

94 In the present case, the Judge held (Judgment at [54]–[55]):

> 54 … [MC 2013/2014] had done everything in its power to reduce, as much as was practically possible, any bias including any suspicion or apprehension of bias when it decided on the [MC2] members to make up [MC2] to hear and decide the matter. …

> 55 … For the purpose of constituting [MC2] to enable it to deal with such an important matter concerning the reputation of the Club, the doctrine of necessity must prevail over and displace the rules of natural justice to the extent necessary for this purpose to be achieved (see *Laws* v *Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 96)

95 We could not agree with this finding. In our view, MC 2013/2014 failed to do everything that was practically possible to remove the bias associated with the 25/7/2013 Letters or to the extent necessary for this purpose to be achieved. There was one easy and simple thing that MC 2013/2014 could have done to achieve this purpose. If the members of MC 2013/2014 were so troubled by Sim's continued membership of the Club tarnishing the reputation of the Club, all or a sufficient number of them could have sacrificed their management positions by resigning under rule 21(d)(ix)(2) of the Club Rules so that new untainted members could be co-opted or elected to fill the vacancies under rule 21(a)(iv). Such a gesture would have resulted in some delay in restarting the hearing of the complaint against Sim, but again, if the reputation of the Club was at stake, the delay would have been justifiable. As it is, the failure of MC 2013/2014 to do everything possible to remove "the infected part" had already resulted in several years of delay.

96 In our view, the Judge should have declined to invoke the principle of necessity in the circumstances of this case. He should have disqualified all the six members of MC2 on the ground of prejudgment amounting to actual bias or apparent bias. The decision-making process adopted by the Club was not, in our view, desirable and should have been avoided. The reason why courts disqualify a decision-maker from deciding a matter by reason of apparent bias is that notwithstanding his assurances that he has an open mind, no one can read his mind, and that bias is very often unconscious.

97 Given our findings at [95], we do not propose to examine all the reasons given by the Judge in upholding the 8/10/2013 Decision of MC2 (by a majority of 5 to 1) on the ground that much of the evidence placed before him showed the decision was not reached in breach of natural justice. However, it is desirable that we give our views on two matters on which we hold a different view:

(a) The first is the Judge's finding that the rules of natural justice should not be applied with the same rigour as applied by this court in *Kay Swee Pin* because Sim had a grace period of six months to sell his "family membership" and that therefore it would not result in a severe reduction in the economic value of the membership (as a result of Sim being hamstrung to sell). With respect, we were unable to see the economic logic of this conclusion. There was no evidence to show what the market price of the Club's membership was at the material time. Further, it seemed to us that Sim's "family membership" was being put under a forced sale by the 8/10/2013 Decision. It is common knowledge that a forced sale of property reduces its value. Here, it was even worse than a forced sale. Under r 15(d) of the Club Rules, if Sim failed to transfer his family membership within six months, their membership rights would have been extinguished under the Club Rules.

(b) The second is the exculpatory explanation that when the MC2 members wrote the 25/7/2013 Letters, they did not anticipate or expect that they would have had to decide the same issue. In our view, this explanation was not defensible. They must have been aware of the objective of the letters. Sim had argued that the 3/4/2013 Decision was made without a quorum, and the Judge had reserved judgment. A decision against the Club for lack of a quorum would have raised the prospect of their having to rehear the complaint against Sim. Indeed, we

found it surprising that the said members agreed (or were advised) to write the letters when the issue of whether there was a quorum was *sub judice*, and that they ran the risk of committing contempt of court for attempting to influence his deliberations or interfere with the judicial process.

98 In summary, our decision was as follows:

(a) The 25/7/2013 Letters were evidence of actual prejudgment and the members of MC2 were disqualified from hearing the complaint against Sim.

(b) The principle of necessity is not applicable to social clubs and other private associations, like the Club.

(c) Even on the assumption that the principle of necessity was applicable to the Club, MC 2013/2014 had failed to do everything possible to make it possible for an impartial management committee of the Club to hear the complaint against Sim.

(d) The constitutions or rules of private association, being contractual arrangements, may always be changed by the general body of members. Further alternate panels of adjudicators may be formed to ensure that biased members do not hear matters affecting the rights of a member. This is so that justice must not only be done, but be seen to be done.

Decision on the appeal

99 For the reasons given, we allowed the appeal and declared the 8 October Decision null and void. We also awarded costs to the appellants fixed at $30,000 plus disbursements to be agreed.

Damages

100 After the conclusion of the appeal, the Parties filed written submissions on the appellant's claim for damages. The appellants submit that, in addition to general damages, they are entitled to aggravated damages as this is a developing area of the law. They also submit that, in any event they are claim damages for mental distress suffered by them as a result of the wrongful suspension of their membership.

101 The Club submitted the appellants were not entitled to aggravated damages, but damages for mental distress could be awarded for breach of contract, but that the appellants have failed to adduce any evidence of mental distress to justify an award of damages for this head of claim.

102 In our view, the appellants are not entitled to claim aggravated damages for breach of contract. Contractual damages are compensatory in nature. In *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 ("*Kay Swee Pin (AD)*"), which also involved the wrongful suspension of club membership, the Assistant Registrar provided an admirable analysis of the applicable principles of law in holding that Madam Kay was entitled to (a) damages for deprivation of her rights, and privileges as a member (including the loss of use of the facilities of the SICC); (b) damages for the humiliation, embarrassment, anguish and mental distress caused by the wrongful suspension; but not to (c)

aggravated, exemplary and punitive damages. We endorse his analysis of the law.

103 We accordingly hold that the appellants are entitled only to general damages, if any, relating the temporary loss of membership rights and privileges and mental distress, and direct that such damages be assessed by the Registrar or any Assistant Registrar.

Sundaresh Menon	Andrew Phang Boon Leong	Chan Sek Keong
Chief Justice	Judge of Appeal	Senior Judge

Ragbir Singh s/o Ram Singh Bajwa (Bajwa & Co) for the appellants;
Chang Man Phing, Ng Shu Ping and Lim Wan Yu Cheronne
(WongPartnership LLP) for the respondent.