Raffles Town Club Pte Ltd v Tan Chin Seng and Others
[2005] SGCA 40

Case Number : CA 23/2005, 28/2005

Decision Date : 23 August 2005

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : K Shanmugam SC, Stanley Lai and Ler Min Hui Candace (Allen and Gledhill) for the appellant in CA 23/2005 and the respondents in CA 28/2005; Molly Lim SC, Roland Tong, Wang Shao-Ing and Ambrose Chia (Wong Tan and Molly Lim LLC) for the respondents in CA 23/2005 and the appellants in CA 28/2005

Parties : Raffles Town Club Pte Ltd — Tan Chin Seng; Lee Ah Sim Alan; Wong Leong Thong Peter; Kong Cheong Hin Steven; Chia Ee Lin Evelyn; Liu Hui Nan; Lim Choo; Ng Cheng Hwa; Meta Mui Khim Irene; Yong Kah Teck

Damages – Assessment – Whether club members entitled to claim for diminution in value of club membership due to club owner's breach of contract in failing to provide premier club – Whether sufficient evidence before court to prove applicable measure of damages – Whether lack of definite figures as to value of premier club and value of non-premier club as at date of breach barring claim for diminution in value

23 August 2005 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 Before us are two cross-appeals lodged by both the plaintiffs and the defendant against the assessment of damages made by the High Court (reported at [2005] 2 SLR 302) pursuant to an earlier decision of this court ("the first appeal") where we held that the defendant was liable to the plaintiffs for damages for breach of contract.

2 The ten plaintiffs sued on their own behalf as well as on behalf of another 4,885 persons named in a schedule to the Amended Statement of Claim pursuant to O 15 r 12(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). All the 4,895 plaintiffs are founder members of the Raffles Town Club ("RTC" or "the Club" as may be appropriate), a proprietary club owned by the defendant.

3 The full facts of the case giving rise to the action were set out in our judgment in the first appeal reported at [2003] 3 SLR 307. We held that in the light of the representations made in the promotional material which the defendant despatched to the plaintiffs, it was an implied term of the contract that the defendant would deliver to the plaintiffs a premier club and it had failed to do so. Instead, the defendant admitted a large number of people, totalling some 19,000, as members. At all material times, the plaintiffs were ignorant of the total number of persons who had become members of RTC.

4 However, in March 2000 when the Club opened its premises to members, there was a tremendous squeeze on its facilities. Even then, the plaintiffs did not know what was the exact cause. When queried, the chief operating officer of the defendant said that there were about 7,000 members. It was only in March 2001, in an unrelated action between the promoters of the Club, that it was divulged that the Club had a total of close to 19,000 members, making it the largest social or

recreational club in Singapore by a wide margin. Besides, this number of 19,000 excluded family members. Accordingly, in terms of membership size, RTC has no peer.

5 In the first appeal we recognised that assessment of damages in the present case "could pose some difficulties, though not insurmountable". We also noted that the depreciation in the price of membership due to the general weakened market condition for club memberships should be distinguished from that due to the breach.

6 Before the assessment judge, the position ultimately adopted by the plaintiffs was that they claimed for losses on the following two distinct bases:

(a) Diminution in value of the RTC membership due to the breach;

(b) Damages for loss of amenities, accessibility and enjoyment due to the large number of members.

7 In relation to the question of diminution in value, the plaintiffs assessed that to be in the sum of about $15,925, after disregarding the depreciation due to the general weakened market condition. For this purpose, the plaintiffs submitted that the proper date on which the diminution should be computed should be March 2001, as that was the date on which the plaintiffs, and in turn the public, came to know that the Club had such a large number of members. That should be taken to be the date of the breach; any other date would not be appropriate. We agree.

8 At the assessment, the defendant argued that under the first head of claim, the plaintiffs were not entitled to any substantial damages but only nominal damages. As for the second head, the defendant submitted that damages should only be assessed in the light of individual circumstances; damages should not and could not be awarded on the basis of a single uniform sum for all the plaintiffs as the condition of each individual member would be different. For example, how often each plaintiff would use the facilities of the Club would obviously not be the same. Based on subsequent usage figures, particularly the recent ones, the defendant contended that the facilities of the Club were, in fact, under-utilised and thus there could not have been any loss of enjoyment by the plaintiffs.

9 The judge refused the claim based on the first head on the ground that the plaintiffs had not satisfactorily proved the alleged diminution. However, she awarded each plaintiff damages of $1,000 for loss of amenities, accessibility and enjoyment of a premier club. She granted the plaintiffs the full costs of the assessment.

10 Both the plaintiffs and the defendant were dissatisfied with different aspects of the decision. The defendant filed its notice of appeal first, Civil Appeal No 23 of 2005 ("CA 23/2005"), challenging that part of the judgment granting to each plaintiff a sum of $1,000 for loss of amenities, *etc* as well as giving to the plaintiffs the full costs of the assessment. It contended that the award of $1,000 to each plaintiff was wrong in principle, and even if it were not wrong, the quantum given was excessive. The plaintiffs filed an appeal, Civil Appeal No 28 of 2005 ("CA 28/2005"), against that part of the judgment which refused to grant them damages based on the first head of claim.

Diminution in value

11 Although the defendant filed its notice of appeal before the plaintiffs, we think it is more logical to deal first with the question of the diminution in value of the RTC membership.

12 The gist of the plaintiffs' claim is that as the defendant has failed to deliver a premier club to the plaintiffs, the plaintiffs should be entitled to be compensated in respect of the difference in value between a premier club and a non-premier club. The approach advanced by the plaintiffs was first to determine the market value of the RTC membership as at March 2001. Here, the plaintiffs relied upon the evidence of a club broker of 14 years' standing, Ms Phua Geng Hoon ("Ms Phua"), whom they called as their witness. She gave evidence as to the market prices of 18 club memberships from 1996 to 2004, including that of RTC. According to the data, as of March 2001, the market price of an RTC membership was $10,800.

13 Next, the plaintiffs relied on their expert witness, an economics analyst and a professor in both the Schools of Computing and Business at the National University of Singapore, Dr Ivan Png Paak-Liang ("Dr Png"). Based on the sales data provided by Ms Phua, Dr Png made a study of eight comparable social clubs, namely, the American Club, the British Club, Europa Country Club, Fairway Club, Hollandse Club, Singapore Polo Club, Singapore Recreational Club and Superbowl Golf and Country Club ("Superbowl"). Dr Png found that the average decline in the price of the eight clubs over the period March 2000 to March 2001 was about 16.5% whilst RTC's decline was about 66.3%. However, we ought to explain that in making that calculation, Dr Png took $32,000 as the price of RTC as at March 2000 because there was a transaction at that price at the time. Accordingly, he said that the RTC membership value suffered a larger decline than was generally the case and the excess decline of 49.8% must be due to the breach; a club with so many members, no matter how attractive its physical facilities, would have its value undermined as a result. In dollar terms, this 49.8% decline would work out to be a sum of about $15,925 (approximately 49.8% of $32,000), a loss which could not be attributable to the general weakened market.

14 The plaintiffs also called a club expert, Mr Robert Sexton, who, having compared the fall in price of the RTC membership with the position prevailing in international clubs outside Singapore, came to the conclusion that the RTC membership price suffered the dramatic decline because of the perception that it was not a club of excellence or premier standing. We would like to state here that we do not think this part of Mr Sexton's evidence is really helpful to determine the values of clubs in Singapore. A question as to the price or value of membership of a club must depend on local conditions. You may have two clubs of equal excellence (even here there may be controversy as to what "excellence" means or entails) in two different countries, but it does not follow that their price movements must necessarily be in tandem. It is difficult enough to evaluate the worth of memberships of two clubs of similar standing in the same country, as so many factors would come into play. One would only compound the difficulties if one has to take into account the different economic conditions of two countries. The fact that a club of international standing in one country depreciated over a specified period by a low percentage has no relevance as far as a similar club in another country is concerned. No helpful conclusion can be drawn from their different rates of decline as to value.

15 The defendant called two expert witnesses, both basically accountants but specialising in corporate financing and restructuring and business valuation. They testified that based on their studies, the RTC membership did not suffer any diminution in value on account of the breach. The first expert was Mr Nicky Tan ("Mr Tan"). He used Pinetree Country Club ("Pinetree") and Fort Canning Country Club ("FCC") as index clubs and said that the RTC membership price fell less than those two clubs over the same period of March 2000 to March 2001. In his view, the price movements of the memberships of these two clubs offered the best comparables. The second expert was Mr Ong Yew Huat ("Mr Ong"), who used the Pinetree, FCC and another club, the Singapore Recreation Club ("SRC"), as comparables and he came to very much the same conclusion as Mr Tan.

The law

16 The principle governing damages for breach of contract is that they are to compensate the claimant for the loss or damage suffered by him on account of the breach. One of the earliest cases which enunciated this rule is *Robinson v Harman* (1848) 1 Exch 850; 154 ER 363 where Parke B said at 855:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

17 In cases such as this, involving a breach relating to intangible benefits, it is understandably difficult to determine the precise damages suffered by the promisee. In *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422, which involved the delivery of defective goods, Devlin J (as he then was) postulated that the court must do it even though clear proof was not possible and he said (at 438):

> If the actual damaged goods are sold with all faults, good evidence can be obtained of the difference in value, but such a sale is not always possible, and a claim for substantial damages cannot be limited to goods which have been sold. Moreover, damage may arise from two sources. Suppose that goods are delivered which are inherently defective in breach of the contract of sale and that they are further damaged by negligent handling in breach of the contract of carriage, and that in their damaged condition they fetch 70 per cent. of their sound value. Is the plaintiff to recover nominal damages only because he cannot prove against either defendant what part of the depreciation in value was due to his acts? It is one thing to say, as I have said, that this is the sort of situation which parties in contemplating the measure of damage would be glad to avoid, and it is another thing to say that it is one which must necessarily result in an injured plaintiff obtaining no satisfaction. I think that in such a situation the court is bound to do the best that it can. It is no more difficult to estimate a plaintiff's loss in such circumstances than it is to estimate the loss of earning power caused by physical disablement. The third parties submit that the latter case is entirely different. I do not think the fundamental principle on which damages are awarded for breach of warranty of quality, namely, that it "is the estimated loss" directly and naturally resulting in the ordinary course of events "from the breach of warranty", is any different in principle. *It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can*. [emphasis added]

18 Devlin J then quoted the following passage of Vaughan Williams LJ in *Chaplin v Hicks* [1911] 2 KB 786 at 792, which in our view is highly instructive:

> In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognised. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.

1 9 *Chaplin v Hicks* was a case where the defendant, in breach of contract, prevented the plaintiff, who belonged to a limited class of competitors, from winning a prize. Fletcher Moulton LJ said (at 795):

> But it is said that the damages cannot be arrived at because it is impossible to estimate the

quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.

Large membership benefits the plaintiffs

20 Before us, the defendant also made a strong submission which it made below, namely, that unless something like 19,000 persons were admitted into membership, the Club would not have been able to survive and if the Club could not continue, the plaintiffs would have lost everything. With 19,000 members, the Club could at least carry on and provide the facilities for the plaintiffs to enjoy. Thus, the plaintiffs suffered no loss and no damages should be awarded. Implicit in this argument is the suggestion that the plaintiffs should in fact appreciate that the defendant accepted so many members, as without a large member base, the Club would probably have ceased to exist.

21 With respect, and like the judge below, we find this argument strange and, indeed, astonishing. That would be turning logic on its head. It was an implied term of the contract that the defendant would give to each of the plaintiffs a premier club. That was our determination in the first appeal. The defendant must fulfil that promise. What the defendant now seems to be saying is that if there were only a membership of 5,000 to 7,000, RTC would not be able to make ends meet and would have to close down. Thus, the present situation benefits the plaintiffs, who lost nothing from the breach as the Club is here and is still a viable concern. In our opinion, this argument completely ignores the defendant's contractual obligation of providing a premier club to the plaintiffs at $28,000 and to maintain it as such. What would be the cost of establishing and maintaining a premier club was a matter exclusively within the knowledge or control of the defendant. If the defendant had made a wrong bargain or calculation, it had only itself to blame. It should not be permitted to shift its responsibilities. It is pertinent to note that in its bi-monthly newsletter of March 1997, the defendant was aware that there was an optimal membership level that RTC had to observe to avoid overcrowding. It is important not to confuse the plaintiffs' entitlement to damages and the defendant's ability to pay the same. They are distinct matters. The fact that the defendant could well go under if the plaintiffs should execute their judgment is immaterial in law. Whether the plaintiffs would think that such an outcome would be in their interest is also a separate matter.

Have the plaintiffs adduced evidence to show the diminution?

22 In her judgment, the assessment judge agreed with the submission of counsel for the plaintiffs that the applicable measure of damages was the difference in value between a premier club and a non-premier club as at the date of breach (*ie*, March 2001). However, she held that the plaintiffs had failed to prove this difference. She said at [25] to [27]:

> [I]n the context of the present case, as Ms Lim [counsel for the plaintiffs] has argued that RTC with 19,000 members is worse than ordinary clubs, the plaintiffs have to, *inter alia*, identify those clubs they have in mind (and this was not done) as representing RTC's actual position because of the breach and to lead evidence on value. There is no material before the court from which an inference can be drawn as to the difference between the value of what was contracted for at a special price of $28,000 and which genre of clubs (and their value) that RTC with 19,000 members is said to have become on account of the defendant's breach. To this extent, the evidence is incomplete.
>
> [W]ithout evidence of a differential in value, the court cannot assess in monetary terms (a) the position the plaintiffs would have been in if the breach of contract had not occurred and (b) their

actual position as a result of the breach of contract, so that the difference is made up by an award of damages. The situation here is dissimilar to instances where precise or credible evidence is not available and the court must do the best it can with the evidence available.

I must stress that in no way does this judgment seek to impose any rigid "formula" or "method" to determine a just compensation. The simple fact of the matter is that I am not convinced that the plaintiffs' loss measured by the diminution in value of their club membership as presented is right on the facts of the present case. Such a measure is not, in my judgment, a proper assessment of what has been lost, and it should not be so used.

23 The point made by the defendant, which was accepted by the judge, was that if, as the plaintiffs contended, RTC should have taken in only 5,000 to 7,000 members to remain a premier club, their experts ought to have worked out the value of such a limited membership club and the value of an RTC membership with 19,000 members.

24 We have earlier referred to the evidence of Ms Phua. Based on her records, she gave evidence on the transactions relating to 18 social clubs memberships in Singapore, including RTC. As mentioned before, she set out, in a table, the price movements of the sales of memberships of those clubs over the period from 1996 to 2004. She also set out, in a schedule, the transfer fees charged by each of those clubs, the membership size of each club, the nature of the club and the number of years remaining of the lease of the land on which the club was situated.

25 Specifically, in relation to RTC, she said that in March 2000, at the time the Club first opened, there was a transaction for an RTC membership at $32,000. In May 2000, it dropped to $28,000. By June 2000 the drop was even more severe, down to $16,000. Thereafter, the decline in price was more gradual, falling to $13,000 in December 2000 and $10,800 in March 2001 which was about the time the size of the Club's membership was disclosed to the public in the unrelated action among its promoters. Still later, in October 2003, its membership price went down to $7,300. It was increased to $7,400 in 2004, which increase, in Ms Phua's opinion, was due to the goods and service tax being raised from 4% to 5%.

26 Ms Phua also told the court that the number of persons who wished to get rid of their RTC memberships greatly overwhelmed the trickling number of people who wished to acquire that membership.

27 At this point, we will return to the evidence of Dr Png. As mentioned before, relying on the data provided by Ms Phua, he advanced a proposition based on an eight-club index. He explained that, unlike Mr Tan and Mr Ong, he excluded FCC from the eight-club index because it was severely affected by the financial difficulties of its proprietor, which was on the verge of going under. Next, Dr Png adopted $32,000 as the market value of RTC as at March 2000, the date on which RTC officially opened. That was also the date on which the Club's members could resell their memberships if they had wanted to because the sale moratorium imposed by the defendant had expired. On the date of the breach, March 2001, an RTC membership was transacted at $10,800, a drop of $21,200 (from $32,000), or a 66.3% decline, approximately 49.8% more decline than the average decline of the eight-club index.

28 The judge explained the unsatisfactory aspect of the study as follows (at [45]):

As it happened, the deterioration of the general market conditions straddled the period from December 1996 to March 2000. By using the March 2000 base period, the effects of the deterioration of the general market conditions in the earlier years on those clubs comprised in the

index were not reflected whereas in the case of RTC, the moratorium caused a delayed effect on the fall of RTC prices due to the deteriorated general market condition in previous years. In the result, after the moratorium when transfers were eventually allowed for RTC memberships, the fall in price subsequently was significantly greater than those of the index. The situation lends itself to a distorted picture and any conclusions as to the effects of general market conditions on RTC relative to the index clubs need to be viewed with caution in the light of this anomaly.

29 We understand why Dr Png adopted $32,000 as the market value of the RTC membership as at March 2000. After all, there was a transaction at that price at the time. *Prima facie*, it would not be wrong to use that as an indication of market value. However, while there was no evidence to indicate that that transaction was not genuine, in view of the very sharp decline in the price of the RTC membership in the next few months, we have some hesitation in holding that all that depreciation was due to the breach and not to a delayed response to the decline in the general market. There was, after all, a moratorium on sale between December 1996 and March 2000. The sale at $32,000 in March 2000 could well be an aberration. Thus, we agree with the judge's view that adopting $32,000 as the market value as at March 2000 could create a distortion.

30 Ideally, if it is possible to have direct evidence of what a run-of-the-mill social club was worth as at March 2001 and what a premier social club would then be worth, that would probably be the best estimate of the loss suffered by each of the plaintiffs. From the data provided by Ms Phua covering the 18 clubs, their transaction prices in March 2001 ranged from $1,200 for Superbowl to $43,000 for the American Club. Clearly, there are many factors which affect the price of membership of a club *eg*, the location of the club, whether it is a members' club or proprietary club, the administration and other charges which the club imposes to effect a transfer, its total memberships, the monthly subscription which a member has to bear, and the number of remaining years of the lease of the land on which the club stood. Taking Superbowl as an illustration, its transaction price has been at $1,200 from January 2001 to the present. Two factors should be noted. First the club imposed a transfer fee of $1,050. Second, the lease of the land on which the club stands has only five years left. Thus, when a member disposes of his membership in Superbowl, he will only get a net sum of $150.

31 On the other hand, Pinetree, on which the experts of the defendant as well as Mr Sexton for the plaintiffs placed importance, was transacted at $33,000 in December 1996 and $18,200 in March 2001, a decline of about 44.8%. It is true that Dr Png did not venture to give figures as to what a premier social club and a run-of-the-mill club would be worth as at March 2001. We seriously doubt that he, or for that matter anyone else, could ever give a definite figure. There are plainly too many factors which could affect the value of a club. Whatever figure any expert gives would naturally have to rely upon the actual sale transactions relating to other similar social clubs here. All the experts were in agreement that Pinetree was an appropriate comparable. Mr Sexton also thought that the American Club is also a premier club although it is a members' club. The difficulty here (of advancing a definite figure) is even greater than if the court were to be asked to determine how much a luxury car would cost or be worth. The first issue to be decided is what makes of cars fall within the category of "luxury cars". The second issue is whether you are referring to a brand new car or a used car, and if the latter, the age of the car. An expert would probably not be able to give a single price unless those two points are clarified. In the case of a club, or a premier club, the imponderables are even greater.

32 The indisputable fact is that each of the plaintiffs paid $28,000 for a premier club as at December 1996. It is true that the defendant in its promotional materials had claimed that its membership was worth $40,000. We think one ought to differentiate between fact and sales pitch or puff. Thus, it is probably correct to say that $28,000 represented the likely market value of the RTC

membership as at end 1996. At the date of the breach, March 2001, the RTC membership was transacted at $10,800. So between December 1996 and March 2001, the depreciation amounted to $17,200. Next, one must determine how much of that decline was due to the general weakened market condition or demand for club memberships over the same period. Once that is established, it would be fair to assume that the difference represented the decline due to the breach.

33 As mentioned before, the experts called by the defendant, Mr Tan and Mr Ong, had also given evidence on this. Mr Tan opined that the RTC membership price fell less than Pinetree and FCC over the same period. Mr Ong's computation was that during the period of March 2000 to October 2001 the decline of the RTC membership price was 33% whereas it was 50% for FCC, and 24% each for Pinetree and SRC, giving a similar average decline. It seems to us that the problem with Mr Tan's and Mr Ong's conclusions is that they both used FCC as an index club. For the reasons which we have alluded to earlier, to use FCC as an index club would be wrong. FCC was then in crisis and its members faced a real prospect of losing everything. Thus, to use the FCC as an index club (out of two or three) to determine the normal rate of decline of a social club would clearly cause a distortion. Moreover, the study done by Mr Ong has one other difficulty. It relates to his selection of October 2001 as the cut-off date. He attempted to explain the choice of this date on the ground that October 2001 was one month before the present action was instituted by the plaintiffs and that that date would more accurately reflect the market price of the RTC membership before the bad publicity brought about by the present action could have had any impact on the price. But this explanation, in our view, is hardly convincing. October 2001 is of no relevance whatsoever. The choice of October 2001 seems like an *ex post facto* rationalisation of a pre-determined result.

34 We recognise that, *prima facie*, it is attractive to determine the loss due to the breach by merely looking at the position at Pinetree. The two experts of the defendant regarded Pinetree as an appropriate comparable. Dr Png did not use Pinetree in his eight-club index not because Pinetree was not a premier club but because at the time the proprietor of Pinetree was also facing some financial problems. The plaintiffs' other expert, Mr Sexton considered Pinetree a premier club. In December 1996, Pinetree was traded at $33,000. In March 2001 it was at $18,200, a decline of approximately 44.8%. For the corresponding period and on the basis earlier described (see [32]), the decline for the RTC membership price was about 61.4%. Thus one could reasonably attribute the excess decline of 16.6% to the breach. While admittedly such an approach could be criticised as being too narrow and not representative of the general decline due to the general state of the market condition, there are indeed considerable similarities between RTC and Pinetree. They are both proprietory clubs and are located in the same vicinity. They have broadly the same facilities and their target members were professionals and those from the business community. The only significant difference between the two is that, at the relevant time, Pinetree had only a membership of 4,800, whereas RTC had 19,000.

35 An even more direct way to determine the diminution in value of RTC due to the breach would be to compare the sale prices of the memberships of RTC and Pinetree as at March 2001. The parties were in agreement that Pinetree was a premier club of comparable standing to what RTC would have been if it had not accepted so many members. RTC was transacted at $10,800 and Pinetree at $18,200. These data were all brought into evidence by Ms Phua. The difference is $7,400. This could be another method of determining the diminution in value of the RTC membership due to the breach. Thus we could not quite agree with the judge when she said at [25]:

> There is no material before the court from which an inference can be drawn as to the difference between the value of what was contracted for at a special price of $28,000 and which genre of clubs (and their value) that RTC with 19,000 members is said to have become on account of the defendant's breach. To this extent, the evidence is incomplete.

36 The eight-club index adopted by Dr Png has the advantage of being more representative and thus it seems to us that the calculations obtained therefrom are more likely to be accurate. But, as we have indicated before, it would probably not be right to take the $32,000 transaction effected in March 2000 to be the starting point to make the comparison. The starting point ought to be December 1996, and it would be reasonable to assume that at that point what each of the plaintiffs paid for his or her RTC membership represented the fair value for that membership. Taking $28,000 at December 1996 and $10,800 at March 2001, the date of the breach, the decline in price is $17,200; in percentage terms this would be about 61.4%. On the eight-club index worked out by Dr Png, the average decline over the corresponding period was approximately 50%. Thus, for RTC there was an enhanced decline of 11.4% which one could reasonably assume to be attributable to the breach, namely, that there were just too many members in RTC. This would work out to be the sum of $3,192. We should add that this is one alternative method which the plaintiffs have submitted in their Case before us. We think this is as fair and rational a method to work out the probable loss due to the defendant's breach as any. In a clearly inexact issue such as this, there is simply no one indisputable formula to work out the loss. There are flaws in every method which could be used for this purpose. Common sense tells us that a club with 5,000 to 7,000 members would be more valuable or sought after than the same club with some 19,000 members. The court has to work out the plaintiffs' loss as best as it can based on the data placed before it. If there had been no moratorium on the sale of RTC memberships during the period between December 1996 and March 2001, it would probably have been easier to determine the loss due to the breach.

37 The judge seemed to think that the way the plaintiffs formulated their claim, on the basis of depreciation in the value of the membership, was as though the defendant had given a warranty to each of the plaintiffs that the value of his or her membership would not decline. She also thought that what the plaintiffs were seeking was a refund under the guise of damages. However, she accepted that diminution in value was an appropriate method of assessing compensation on the facts of this case.

38 As we see it, we do not think the claim of the plaintiffs under the first head is based on any warranty given by the defendant against a decline in value of its membership. Of course, there was never any warranty of any kind. The plaintiffs were only trying to determine the loss due to the breach. They bought the membership at $28,000 in December 1996, and at March 2001, the membership was transacted at $10,800. While it is true that the contract price of $28,000 need not necessarily represent the true value of the membership, it is nevertheless the best evidence of its value. It is true that at the time when the plaintiffs were invited to subscribe for membership, they were told by the defendant that the membership was, in fact, worth $40,000. If one were to take $40,000 as the base figure, then the decline in the value of the RTC membership would be even sharper. The plaintiffs were not taking that line; neither are we.

39 If contract or transacted prices cannot be taken on the face of it to represent the fair value of memberships of clubs, we wonder what other bases there can be. Common sense tells us that value must obviously, among other things, depend on demand. There is no immutable value as to any thing, whether tangible or intangible. That is so even for precious things like gold or diamond. The same must be said for club memberships. An expert must give his opinion based, as far as possible, on objective facts or indicators. We would have thought that actual transactions are probably the best such indicators.

40 We note that the judge was concerned about the reliability of the sales statistics. She remarked at [44]:

> Dr Png agreed that unlike the stock market where shares are transacted actively on a daily basis,

memberships in the club market are bought and sold infrequently. Another feature of the club market is that there is less transparency in the timing and disclosure of the transacted prices unlike in the stock market where transacted prices are recorded immediately for all to see. Dr Png has admitted in his supplementary affidavit that he has had to accommodate for the delay in disclosure of transacted club prices by considering changes in prices for one, two, three and four months after the relevant dates.

41 While we agree with her comments, the fact is that the sales data are nevertheless the best thing we have got, in the absence of a more transparent market, like the Singapore Exchange for stocks and shares, which would record instantaneously all transactions in club memberships. The volume in club transactions is low. There could also be mistakes in reporting or recording, but we are unable to see any reason why anyone would deliberately want to falsify a transaction, either as to price or date. After all, the transfer fee levied by a club is fixed and not based upon a percentage of the transacted price. If the court were to take the view that all the sales data on the 18 clubs were suspect, the court must still do its best to assess the loss, an exercise no more difficult, and perhaps easier, than that in *Chaplin v Hicks* which related to the plaintiff's chance of being picked as a prize winner in a beauty contest. Even the judge acknowledged that the present case is not one where nominal damages would suffice.

42 What we are trying to determine is the value of an RTC membership as at March 2001 if the Club had a membership of between 5,000 and 7,000. We know that an RTC membership with 19,000 members was traded at $10,800. There is no one correct way to work that out. The method of using Pinetree and doing a direct calculation referred to in [35] above is one method. Another method is to use the rate of decline in Pinetree to ascertain the loss (see [34] above). The third method would be the use of the decline in price of RTC from December 1996 to March 2001 and applying the eight-club index (see [36] above). The latter does provide a practical and fairer mechanism to determine the diminution in value due to the breach.

43 The judge said at [26] that the situation here "is dissimilar to instances where precise or credible evidence is not available". She further commented at [28] that the plaintiffs' experts "have not in the assessment calculated the value of RTC membership based on 5,000 members and how much the RTC membership would have been worth if the Club had 14,000 more members".

44 But should the fact that Dr Png did not offer a figure as to the value of an RTC membership (with only 5,000 members) as at March 2001 prove fatal to the plaintiffs' claim under the first head? The data on the transactions relating to the 18 clubs were before the court. We do not think it is that essential that Dr Png should say more. In any event, in our judgment, the third method contended by the plaintiffs, referred to in [42] above and elaborated on at [36] above, does provide a reasonable and fair way to determine the loss due to the breach and we think it should therefore be adopted.

Judgment

45 On the basis of the above, each plaintiff should be entitled to $3,192 in damages under the first head. However, this being only an estimate, we would round it down to $3,000 for each plaintiff. In the light of this holding, there will be no further order for damages under the second head, as there is much overlap in the two heads of claim. Otherwise there will be double compensation.

46 In the premises, we would allow the appeal of the plaintiffs in CA 28/2005 and award each of the plaintiffs damages in the sum of $3,000, being the diminution in value of their membership in RTC. Following from that, we would also allow the appeal of RTC in CA 23/2005 to the extent that there will

be no compensation under the second head of claim. The appeal by RTC in CA 23/2005 against the costs order is dismissed.

47 Overall, the plaintiffs have succeeded and they shall have the costs in CA 28/2005 and half the costs in CA 23/2005. The security deposit in CA 28/2005, together with any accrued interest, shall be returned to the plaintiffs. The security deposit in CA 23/2005 shall be released to the plaintiffs to account of their costs.

48 We understand that the defendant has paid two sums, namely, $4,895,000 and $880,000, into court pursuant to its applications for a stay of execution of the damages awarded by the assessment judge and costs of the assessment. In the light of our decision herein, we order that the two sums, together with any accrued interest, be paid out to the plaintiffs' solicitors to account of the damages due under this judgment and the costs payable by the defendant to the plaintiffs.

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