

CLUB MEMBERS PERMITTED TO BRING REPRESENTATIVE ACTION AGAINST CLUB OWNER

Koh Chong Chiah & Ors v Treasure Resort Pte Ltd [2013] SGCA 52 concerned an appeal by the members of Sijori Resort Club (“**Club**”) against the High Court’s decision disallowing them to continue with their representative action against the owner of the Club, Treasure Resort Pte Ltd (“**Treasure**”) and Treasure’s sister company, Colony Members Service Club Pte Ltd (“**Colony**”). The claim was a representative one as the seven members bringing the claim would be acting as representatives in the proceedings of the other 202 Club members.

The Court of Appeal held that the representative rule in Singapore should be applied in a broad and flexible manner, and that the rule was to be treated as a flexible tool of convenience in the administration of justice. Adopting this approach, the Court of Appeal found that there was sufficient commonality of interest and grievance amongst the Club members’ claims against Treasure for repudiation of membership agreements and misrepresentation, and that the Club members would benefit from the relief sought in the action. The Court of Appeal thus permitted the representative action to proceed.

Joy Tan and Koh Swee Yen acted for the successful appellants. This Update takes a look at the Court of Appeal’s decision and considers its implications.

Facts

The Club had originally been owned and operated by Sijori Resort (Sentosa) Pte Ltd. In January 2006, it was sold to Treasure. The Club members in this suit had joined the Club prior to the sale, and their membership agreements with the original Club owner were novated to Treasure as part of the sale.

Treasure takes over the Club

In December 2006, Treasure wrote to the Club members to inform them that it had taken over the Club. In the letter (“**December 2006 Letter**”), it also stated, among other things, that:

- Club members would be able to continue enjoying the membership privileges accorded to them under their existing membership with the Club so long as they continued to pay their monthly subscription fees to Treasure; and
- The membership privileges which Club members would continue to enjoy included all existing benefits extended to them when the Club was owned by Sijori Resort (Sentosa) Pte Ltd.

In another letter, Treasure also requested the members to start paying their membership fees to it as from January 2007 onwards. The Club members duly did so.

Treasure offers a new membership with Colony

In February 2008, Treasure wrote again to the Club members to offer them a new membership to continue using the Club and which would be in lieu of their existing Club membership. The new agreement would be with Colony. The monthly subscription fees were, however, more than five times more than their current Club membership fees. Club members were also informed that if they rejected the offer, they would not be entitled to any rights and privileges as a member of the Club.

Appellants bring representative action

The appellants, acting on behalf of themselves and another 202 Club members, commenced a suit against Treasure for breach of contract, repudiation of contract, and misrepresentation. The suit also included a claim against Treasure and Colony for conspiracy. Treasure applied for the proceedings to be discontinued as a representative action. The application was unsuccessful before the Assistant Registrar, but was successful before the High Court. The appellants appealed to the Court of Appeal.

The issue before the Court of Appeal was whether the applicants should be allowed to bring a representative claim pursuant to Order 15 Rule 12(1) of the Rules of Court.

Legal Background: Representative Actions

What a representative action is

Essentially, what is sought in a representative action is a final determination of the rights of all the claimants vis-à-vis the defendant and *vice versa* based solely on the claims brought by the representative plaintiff and the defence raised by the defendant. Therefore, all the claimants in a representative action will succeed or fail based on the strength of the case mounted by the representative plaintiff and the defence pleaded by the defendant.

Representative actions governed by Order 15 Rule 12

Representative actions are akin to, but not the same as, the statutory class action suit. The class action regime as a procedural tool includes various protections and benefits which are not present in representative actions. In Singapore, the representative action is the only general process which enables a large number of persons to be directly involved in the litigation. The procedure is governed by Order 15 Rule 12 of the Rules of Court. Order 15 Rule 12(1) states:

“Where numerous persons have the *same interest* in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.” [emphasis added]

The “same interest” test

Accordingly, the test for whether a representative action may be brought is whether the persons seeking to be represented in the action have the “same interest” in the proceedings. How the court determines whether persons have the “same interest” in the proceedings was the key issue that had to be decided by the Court of Appeal in this case.

Court of Appeal Holds that the Test for Representative Actions Should be Applied Flexibly

The two stages of Order 15 Rule 12

The Court of Appeal first noted that Order 15 Rule 12(1) operates in two stages:

- The first stage was jurisdictional: the claimants had to satisfy the threshold requirement that they have the same interest in the proceedings.
- The second stage was discretionary: even if the first stage is satisfied, the court may still exercise its discretion to discontinue the proceedings in question as a representative action where the overall circumstances of the case so justify.

The Court stated that, in determining whether the “same interest” requirement is satisfied, the key question is the degree of commonality required. A strict test would confine the representative action to a narrow band of cases. This was, in the view of the Court, incongruous, given the importance of representative litigation in the modern age as a means for the courts to effectively dispense justice.

Focus should be on commonality of issues

After reviewing cases from England, Canada, and Australia, the Court held that the proper approach to deciding whether an action had been properly commenced as a representative action would be to focus on the commonality of issues. In its view, to demand that all the claimants in a representative action should have identical interests would render Order 15 Rule 12 otiose.

The Court then laid out the legal principles that should be applied to determining whether the “same interest” requirement had been satisfied:

Class clearly defined

- The class of represented persons must be capable of clear definition. This is critical because it identifies the individuals who are entitled to relief and who will be bound by the judgement—members of the class of represented persons must be identified by an objective criterion which bears a rational relationship to the common issues being asserted.

Adequately represent interests

- The proposed representative plaintiffs must adequately represent the interests of the class of represented persons, and must vigorously and capably prosecute the interests of the entire class.

Significant common issues of fact/law

- There must be significant issues of fact or law common to all the claimants in a representative action. To this end, the courts must carry out a comparison of the significance of the common issues between the claimants with the significance of the issues which differ between them.

Same interest in relief granted

- All the claimants in a representative action must benefit from the relief granted by the court, i.e., they must have the same interest in the relief granted by the court.

Exercise of discretion

Having determined that the “same interest” requirement has been satisfied, the court should then consider whether it should nevertheless exercise its discretion to discontinue the representative action. In this, it will consider whether there are other reasons not to allow the action to proceed as a representative action. To do this, it will consider all the circumstances of the case. Factors that would be considered include the real possibility that the defendant could raise separate defences against different claimants, as well as cost considerations.

The Court emphasised that, ultimately, it should be borne in mind that Order 15 Rule 12(1) is a facilitative provision for the efficient and speedy administration of justice, i.e., “a rule of convenience”, and that the court should still discontinue an action as a representative action where the procedure will not provide an efficient or effective means of dealing with the claims in question, or where it is otherwise inappropriate in the circumstances.

Applying the Test to the Facts of the Case

The Court decided that the “same interest” requirement had been satisfied with respect to the claims for repudiation of contract and misrepresentation but not for the claim for breach of contract. As the Court discussed each element of each claim in turn, we will in this update, only summarise its main conclusions, noting the main reasons as to why the Court determined that there was (or was not) sufficient commonality of issues.

Issue of novation relied on letter and payments

A preliminary issue for the claims in contract was whether the membership agreements had been properly novated to Treasure and what their terms were. For the issue of novation, the question of fact to be answered for finding that there had been a successful novation turned on the same factual matrix. All the claimants were relying on the December 2006 Letter by Treasure and their subsequent continued payment of Club membership fees to establish this.

Issue of terms determined on limited set of documents

For ascertaining the terms of the agreements, the claimants shared sufficient commonality of interest in their means of proving the terms. This was because what had to be determined was largely based on an objective evaluation of a limited set of documentary evidence: the various initial agreements on Club membership and the agreements between Treasure and the original owner of the Club, Sijori Resort (Sentosa) Pte Ltd. With regards to the terms, it is noteworthy that the Court of Appeal decided that the claim could continue as a representative action even if subsequent developments gave rise to some differences:

- While there were eight different versions of the Club membership application form that had been signed over the years, the Court opined that if need be, the trial judge could sub-class the claimants according to the version of the agreement they had signed and allow smaller representative actions to proceed in relation to the eight different versions.
- For any claimants alleging implied terms, if the judge found the alleged terms could not be implied in fact, he could discontinue the suit as a representative action with respect to the particular claimant relying on that term.

Claim of repudiation turned on intent expressed in letter

For the claim of repudiation, the Court noted that the crux of the claimants' case rested on the February 2008 letter by Treasure setting out its intention to renounce all of its obligations under the existing membership agreements. The key question was therefore what the manifested intentions of Treasure were in sending that letter, and the inquiry was an objective one of construing the letter based on what a reasonable man in the position of a Club member would have inferred from the words in that letter.

Claim of breach based on varied circumstances

The Court then considered the claim of breach of contract for breaches in 2007. It noted that each alleged breach was not the same vis-à-vis each of the claimants. Each breach would have to be examined in the light of the circumstances prevailing then to see if there had in fact been any actual breach in relation to the particular claimant concerned. Sub-classing was also not a feasible solution here as the pleaded circumstances surrounding

each claim of breach were too varied for sub-classing to be effective. Accordingly, the breach of contract claim was not a common issue between all the claimants.

*Claim of
misrepresentation
turned on letter
and payments*

As for the claim in misrepresentation, the Court noted that the alleged misrepresentation was contained in the December 2006 Letter that had been sent to all the claimants. Whether it amounted to a misrepresentation would depend on how the words of the December 2006 Letter would be understood assessed objectively in the context of the factual matrix. As for whether there had been reliance, each of the claimants was proceeding on the same basis: that the act of paying their monthly subscriptions to Treasure amounted to reliance. Accordingly, there was a commonality of issues on this claim.

*Representative
action would
save time
and costs*

Turning to the question of whether it should exercise its discretion to nevertheless discontinue the representative action, the Court noted that there would be a considerable time and cost savings for the parties if the suit were to be reinstated as a representative action since the factual inquiry and legal analysis for the determination of the common issues in the claim would not need to be repeated for each of the individual claimants.

*Treasure
would not
suffer prejudice*

It also found that there would not be any real prejudice suffered by Treasure from allowing the representative action to proceed. While Treasure brought up a long litany of points in this regard, each was determined to be not prejudicial by the Court. This Update will look at only a couple of the points raised:

- With respect to differences in damages, the Court noted that these differences were such that they could be dealt with by sub-classing the claims.
- With respect to any prejudice that might be suffered in cross-examination, it considered that there would be none as the claimants had confirmed that they would also be able to put forward a representative claimant for each of the eight versions of the membership application form used at the material time.

The Court therefore held that it would reinstate the suit as a representative action with respect to the claims of repudiation of contract and misrepresentation.

Our Analysis / Comments

This decision has wider implications, as it has endorsed the proposition that the representative rule should be applied in a

broad and flexible manner, thereby paving the way to greater access to justice. The Court held that the “same interest” requirement in the representative rule is met where there are significant issues of fact or law common to all claimants in a representative action, and where all claimants must benefit from the relief granted by the court, that is where there is “commonality of interest, grievance and relief”. This broad approach provides a means for individuals to pursue deserving actions which might be otherwise stifled by cost-related barriers.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or contact any of the following partners:

**Joy Tan**

Deputy Head – Commercial &
Corporate Disputes Practice
DID: +65 6416 8138
Email: joy.tan
@wongpartnership.com
Click [here](#) to see Joy's CV.

**Koh Swee Yen**

Partner – Commercial &
Corporate Disputes Practice
DID: +65 6416 6876
Email: sweeyen.koh
@wongpartnership.com
Click [here](#) to see Swee Yen's CV.

CONTACT DETAILS**Singapore**

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
Tel: +65 6416 8000
Fax: +65 6532 5711/5722

China

WongPartnership LLP
Beijing Representative Office
Unit 3111 China World Office 2
1 Jianguomenwai Avenue, Chaoyang District
Beijing 100004, PRC
Tel: +86 10 6505 6900
Fax: +86 10 6505 2562

WongPartnership LLP
Shanghai Representative Office
Unit 5006 Raffles City Office Tower
268 Xizang Road Central
Shanghai 200001, PRC
Tel: +86 21 6340 3131
Fax: +86 21 6340 3315

Middle East

WongPartnership LLP
Abu Dhabi Branch
Al Bateen Towers
Building C3 Office 11-01 (P1)
P.O. Box No. 37883
Abu Dhabi, UAE
Tel: +971 2 651 0800
Fax: +971 2 635 9706

WongPartnership LLP
Licensed by the QFCA
Office 12-20
Amwal Tower, West Bay
P.O. Box No. 15397
Doha, Qatar
Tel: +974 4491 2332
Fax: +974 4491 2339

contactus@wongpartnership.com

wongpartnership.com