Devagi d/o Narayanan (alias Devaki Nair) and another
v
Wong Poh Choy Tommy (alias Wong Pau Chou) and others

[2017] SGHC 147

High Court — Originating Summons 913 of 2016
George Wei J
1, 22 March 2017

Unincorporated associations and trade unions — Constitution

Unincorporated associations and trade Unions — Meetings

29 June 2017

George Wei J:

Introduction

1 The defendants were members of the Management Committee ("MC") of the Neptune Court Owners' association ("NCOA"). The present dispute arose in connection with the defendants' usage of the funds of the NCOA to finance certain defamation proceedings brought by them against several members of the NCOA, including the plaintiffs herein. By Originating Summons 913 of 2016, the plaintiffs sought the following reliefs:

(a) An injunction to restrain the defendants from using the funds of the NCOA for the purposes of paying the legal fees of the defamation proceedings;

(b) A declaration that the defendants' use of the funds of the NCOA to pay for the legal fees incurred in the defamation proceedings, as well as the legal fees incurred in the present proceedings, is wrongful and in breach of the constitution of the NCOA.

(c) That an account be taken of all the funds of the NCOA that have been used to pay for the legal fees of the defamation proceedings and the legal fees of these proceedings.

(d) An order that the defendants shall jointly and or severally refund to the NCOA the full amount of monies accounted for under (c) above.

2 On 22 March 2017, I granted the plaintiffs' application and delivered brief oral grounds. The Defendants being dissatisfied subsequently appealed my decision. Accordingly, I now set out the full grounds for my decision.

Facts

The parties

3 The plaintiffs are Devagi d/o Narayanan @ Devaki Nair and Shaikh Anwar Ishak ("the Plaintiffs"). They each own a unit in the 99-year leasehold development known as "Neptune Court", situated at Marine Vista in Singapore. All unit owners within Neptune Court, including the plaintiffs, are required to be members of the NCOA. The NCOA is a registered society under the Societies Act (Cap 311, 2014 Rev Ed) ("the Societies Act"). It is governed by rules set out in a document entitled "Constitution of the Neptune Court Owners' Association" ("the NCOA Constitution").

4 Pursuant to Rule 7 of the NCOA Constitution, each member of the NCOA pays a monthly subscription fee. Specifically, Rule 7 states that "Every

member shall pay subscription from time to time as hereinafter provided *for the maintenance* of Neptune Court" [emphasis added].[1]

5 At the time I delivered my decision, the four defendants ("the Defendants") were members of the NCOA MC.[2]

(a) The 1st defendant, Tommy Wong Poh Choy @ Wong Pau Chou, was President of the MC. He had held this position since 2008.

(b) The 2nd defendant, Mr Lim Muan, was a Committee Member of the MC between March 2015 and March 2017. He was also previously the Honorary Treasurer from March 2009 to March 2010, and from March 2011 to March 2013.

(c) The 3rd defendant, Ms Alvina Khoo Lea Ing, was the Honorary Treasurer between March 2015 and March 2017. She was previously the Honorary Assistant Treasurer from March 2009 to March 2010 from March 2011 to March 2013. She was also a Committee Member from March 2008–March 2009 and March 2013 to March 2015.

(d) The 4th defendant, Mr Lim Kim Woon Michael, was the Honorary Assistant Treasurer between March 2015 and March 2017. He was also previously the Honorary Treasurer from March 2013 to March 2015, and a Committee Member from March 2010 to March 2013.

Background to the dispute

6 These proceedings were brought amidst deep-seated acrimony between

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1 1st plaintiff's Affidavit dated 8 September 2016, Exhibit DN-1, at page 25.

2 1st defendant's Affidavit dated 5 October 2016, at paras 4–7.

various groups of Neptune Court residents, who have sharply diverged on matters relating to the proposed privatisation of the estate. By way of background, Neptune Court was built by the Singapore government in 1975 as a housing benefit for civil servants. While the 752 units within Neptune Court are held by individual owners ("unit owners"), the land and common areas of the estate ("the Land and Common Areas") are owned by the Ministry of Finance ("MOF").

7 Sometime in or around 2010, the MC raised the idea of privatising Neptune Court. Privatisation would involve Neptune Court unit owners collectively purchasing the Land and Common Areas from the MOF. It was ultimately hoped that there might be an *en bloc* sale of Neptune Court. Pursuant to the proposed privatisation, a privatisation committee was established ("the Privatisation Committee"), and the MC engaged Messrs Tan & Au LLP ("T&A") as solicitors to assist in the privatisation process.[3]

8 Rule 2 of the NCOA Constitution, which sets out the objects of the NCOA, was also amended to include a new provision, Rule 2(b):[4]

> OBJECT OF THE ASSOCIATION
>
> 2(a). The object of the Association is to provide for the maintenance, security, upkeep, repair and improvement to the blocks of flats known as "Neptune Court", Marine Vista, Singapore XXXXX and all matters connected therewith.
>
> *(b). To provide the means for lessees of Neptune Court to express their collective opinion and determination on matters affecting the interest of Neptune Court and the residents including enhancement and status of the estate and use of rights and privileges accorded by the Land Titles (Strata) Act.*

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3 1st defendant's Affidavit dated 25 January 2017 at para 7.

4 1st defendant's Affidavit dated 25 January 2017 at para 7(3).

[emphasis added]

9 As of October 2011, the MOF was agreeable to the proposed privatisation, and was prepared to sell its interest in the Land and Common Areas to the unit owners for the price of $64.5 million subject to several conditions, including a requirement that at least 75% of unit owners consented to the privatisation. However, after a consent gathering exercise was conducted, only about 52% of unit owners gave consent for the proposed privatisation.[5]

10 It was around this time that certain Neptune Court residents began to express unhappiness about the manner in which the privatisation exercise was being conducted. Various residents raised their concerns in the following correspondence:

(a) Two letters to the MC dated 20 January 2012 and 2 February 2012 ("the 2012 Letters") from Messrs B T Tan & Co ("BTT"), acting on behalf of nine unit owners, including the two Plaintiffs herein ("the Nine Unit Owners");[6]

(b) A letter dated 23 February 2012 to the Honorary Secretary of the MC from a unit owner, Mr Seah Kim Bee, containing three resolutions proposed to be voted on at the 37th Annual General Meeting ("AGM") of the NCOA ("the Proposed 37th AGM Resolutions"), which was scheduled for 25 March 2012;[7] and

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5 1st defendant's Affidavit dated 25 January 2017 at para 7.

6 1st defendant's Affidavit dated 25 January 2017 at para 7(a).

7 1st defendant's Affidavit dated 25 January 2017 at para 8(a).

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(c) An email dated 14 March 2012 ("the March 2012 Email") from a unit owner, Mr Terh Chiew Kim ("Mr Terh"), to the MC and various other addressees, including the Member of Parliament for Joo Chiat, the MOF, the Registry of Societies and the Ministry of Law.[8]

11 For present purposes, I will not discuss the details of what was said in these letters, emails and proposed AGM resolutions. To summarise very briefly, these communications alleged and/or raised concerns that, *inter alia*,

(a) the MC was not authorised under the NCOA Constitution to conduct matters related to the privatisation or intended *en bloc* sale of Neptune Court;[9]

(b) the MC did not have the authority or mandate from the general body of the NCOA to negotiate and agree to purchase the Land and Common Areas of Neptune Court from the MOF at the purchase price of $64.5 million;[10]

(c) the MC and/or the Privatisation Committee had failed to provide information and updates to the general body of the NCOA in relation to whether or not the privatisation exercise had lapsed;[11] and

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8 1st defendant's Affidavit dated 25 January 2017 at para 7(a).

9 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, pp 15–16.

10 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, p 8.

11 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, p 14.

(*cont'd on next page*)

(d) the expenses incurred for the privatisation exercise should not be paid out of the existing NCOA funds because these were not estate maintenance expenses.[12]

12 I also pause to note that the second of the 2012 Letters (*ie*, the letter dated 2 February 2012) from BTT called upon the MC to, *inter alia*, produce proof of their mandate to negotiate on behalf of the Owners of Neptune Court and to disclose all correspondence between the MC, the Privatisation Committee and the MOF "from the commencement of the negotiations on the purchase of the land and common areas to date".[13] The letter concluded with the following statement:[14]

> **TAKE NOTICE** that unless the aforesaid information and correspondences are given by your clients by 4.00pm 6.2.2012 our clients shall take such legal action as they may be advised to protect their interest.

13 It appears that subsequently, the MC received a letter from BTT which stated that "since the offer from the Ministry of Finance to purchase the common property and carry out the privatisation of Neptune Court estate [had] lapsed", the nine Unit Owners would not be taking any action, but they reserved their right to take legal proceedings against the MC or Privatisation Committee when it would be necessary to do so.[15]

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12 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, p 16 and p 44.

13 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, p 11.

14 Exhibit DN1 of the 1st plaintiff's Affidavit dated 21 December 2016, p 12.

15 1st defendant's Affidavit dated 28 February 2017, p 9.

The Defamation Proceedings

14 On 31 May 2012, the members of the MC, including the Defendants herein, commenced District Court Suit 1545/2012/E ("DC 1545") against eight individuals, including the Plaintiffs herein. By DC 1545, the MC claimed that the defendants in that case had defamed them in the 2012 Letters and the March 2012 Email. It is noted that the decision to commence DC 1545 was made under legal advice from T&A. The dispute was eventually mediated and settled between the parties, after which DC 1545 was discontinued by the MC.[16]

15 On 23 October 2012, the members of the MC commenced District Court Suit 3091/2012 ("DC 3091") against a total of 26 defendants. The decision to commence this claim was also taken under legal advice from T&A. Like DC 1545, DC 3091 was also a claim in defamation. This time brought on the basis that the Proposed 37th AGM Resolutions were defamatory. The 26 defendants were Neptune Court residents who had added their signatures in support of the Proposed 37th AGM Resolutions. DC 3091 was heard by the learned District Judge Loo Ngan Chor, who, on 22 January 2016, dismissed the claim. His grounds of decision are reported in *Tommy Wong Poh Choy & ors v Seah Kim Bee & ors* [2016] SGDC 85 ("*Wong v Seah*"). District Judge Loo found that the Proposed 37th AGM Resolutions were not defamatory (*Wong v Seah* at [23]–[34]) and, in any event, the defences of qualified privilege and fair comment were applicable to the claim (at [35]–[38]).

16 Dissatisfied with that outcome, the plaintiffs in DC 3091 appealed the decision by way of District Court Appeal 4 of 2016 ("DCA 4"). DCA 4 was

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[16] 1st defendant's Affidavit dated 25 January 2017 at paras 7(a)–(e).

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dismissed on 15 September 2016 by See Kee Oon JC (as he then was). The MC then applied to the High Court for leave to appeal to the Court of Appeal. That application, too, was dismissed by See JC on 12 January 2017.[17] Finally, the MC applied to the Court of Appeal for leave to appeal, which application was also dismissed on 17 March 2017. DC 1545, DC 3091 and the appeals arising from that action will collectively be referred to in this judgment as "the Defamation Proceedings".

17 It was not disputed that the MC had used the general funds of the NCOA to pay the legal fees and costs incurred in connection with the Defamation Proceedings. As a matter of fact, on 28 February 2017, the 1st defendant filed an affidavit stating that, at a meeting dated 19 March 2012, the MC had "agreed to use the NCOA funds to pay for the legal fees incurred for any legal proceedings in the above connection" (referring to the commencement of DC 1545). The affidavit exhibited the minutes of this meeting, which make reference to the 2012 Letters, the March 2012 Email and the Proposed 37th AGM Resolutions.[18] With reference to the 2012 Letters, the minutes state:

> 3.3 MC/NCPC had instructed Tan & Au LLP to accept service of process.
>
> 3.4 BT Tan replied that since "the offer from the Ministry of Finance to purchase the common property and carry out the privatisation of Neptune Court estate has lapsed," the Nine dissenters will not be taking any legal action for the present, but reserve their right to take legal proceedings on MC/NCPC "when it is necessary to do so".
>
> 3.5 We cannot allow these dissenters to have the perpetual opportune (*sic*) to pounce at the MC/NCPC at their whims. We have therefore directed Tan & Au LLP to take legal action accordingly.

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17 1st defendant's Affidavit dated 25 January 2017, para 8.

18 1st defendant's Affidavit dated 28 February 2017, pp 7–11.

> 3.6 The MC agreed that as the Nine dissenters would be taking legal proceedings against MC/NCPC we need to defend ourselves and protect our integrity as responsible NC office bearers carrying out our mandated tasks given by NCOA. *MC also agreed that the costs would be paid from NCOA funds*.
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> [emphasis added]

The present dispute and the parties' arguments

18 The question before me was whether the MC was duly authorised to use the funds of the NCOA to pay for the Defamation Proceedings as well as the present proceedings. A preliminary issue that arose was whether the Plaintiffs had *locus standi* to bring this action against the Defendants in their personal capacities.

The Plaintiffs' case

19 The Plaintiffs' position was relatively straightforward. They submitted that the use of the NCOA funds to finance the Defamation Proceedings was illegal, *ultra vires* and in breach of the NCOA Constitution.

20 First, the Plaintiffs relied on the objects of the NCOA as set out in Rule 2 of the NCOA Constitution, which I reproduce here for convenience:

> OBJECT OF THE ASSOCIATION
>
> 2(a). The object of the Association is to provide for the maintenance, security, upkeep, repair and improvement to the blocks of flats known as "Neptune Court", Marine Vista, Singapore XXXXX and all matters connected therewith.
>
> 2(b). To provide the means for lessees of Neptune Court to express their collective opinion and determination on matters affecting the interest of Neptune Court and the residents including enhancement and status of the estate and use of rights and privileges accorded by the Land Titles (Strata) Act.

Based on these provisions, the Plaintiffs argued that the Defendants' use of NCOA funds to fund personal defamation suits fell outside of the scope of the NCOA's objects.[19]

21 More specifically, the Plaintiffs relied on Rule 18(a) of the NCOA Constitution ("Rule 18(a)"), which I set out in full below:

> 18(a). Unless otherwise provided in this Constitution, the Committee is empowered to negotiate with institutions or individuals or to employ persons *for the maintenance of Neptune Court and to pay for all expenditure for such maintenance.* The Committee is empowered to approve expenditure other than those of recurrent nature not exceeding $30,000 per project. The number of such projects shall be limited to three per financial year provided that such projects are of urgent nature. *For any other type of expenditure requiring only the Association Fund and not provided for above, approval must be obtained from the Annual General Meeting or Special General Meeting or by consent of a simple majority by way of a ballot to be held on a day designated as the balloting day which shall be decided by the Committee and in which not less than one-half of the NCOA members shall participate, failing which the results of the ballot shall not be taken into account.* Fourteen days before such a balloting day, a notice of such a ballot shall be sent to every member of the NCOA stating the purpose(s) of the ballot. Sealed ballot box(es) shall be opened and votes counted in the presence of not less than six independent members. The results shall be made known to the general body of NCOA members within one week.
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> [emphasis added]

22 The Plaintiffs argued that the above provision could be split into two portions. The first portion, comprising the first three sentences of Rule 18(a), provided that the MC was empowered to approve maintenance expenditures other than those of recurrent nature not exceeding $30,000 per project, subject to the condition that the MC could only approve three such projects per financial

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[19] Plaintiffs' Skeletal Submissions, paras 22–24.

year, and that such projects had to be urgent. The second portion of Rule 18(a) provided that "For any other type of expenditure requiring only the Association Fund and not provided for above, approval must be obtained" either through an AGM, Special General Meeting ("SGM") or consent of a simple majority gathered by means of a ballot.[20]

23 The Plaintiff contended that the expenditure of NCOA funds on the legal fees of the Defamation Proceedings came within the second portion of Rule 18(a). This set out a clear procedure for how non-maintenance related expenditures were to be approved – either through an AGM, SGM, or through a ballot – and the MC had not followed this procedure and never obtained the general body's approval to use the NCOA funds to finance the Defamation Proceedings. Accordingly, this expenditure was in breach of the NCOA Constitution.[21]

The Defendants' case

24 Unsurprisingly, the Defendants argued that they, and the MC generally, had obtained the necessary approval to use the NCOA funds to finance the Defamation Proceedings.

Locus standi

25 There were several planks to the Defendants' case, one of which was that the Plaintiffs did not have *locus standi* to bring this action on behalf of the NCOA. In this regard, the Defendants cited the well-known rule in *Foss v*

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[20] Plaintiffs' Skeletal Submissions, paras 25–27.

[21] Plaintiffs' Skeletal Submissions, para 31.

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Harbottle (1843) 2 Hare 461 ("*Foss v Harbottle*"), arguing that the proper plaintiff to seek a refund of the NCOA funds applied towards the legal fees of the Defamation Proceedings would be the NCOA itself.[22] In support of this proposition, learned counsel for the Defendants, Mr Christopher Daniel ("Mr Daniel"), cited the following extract from Jean Warburton, *Unincorporated Associations: Law and Practice* (Sweet & Maxwell, 2nd Ed, 1992) ("*Warburton*") at p 78:

> It has been argued, by analogy with company law, that an individual member cannot bring an action in connection with a wrongful act by an officer of the association which could be ratified by a majority of the members at a general meeting. Whilst it is now clear that the rule in *Foss v Harbottle* applies to trade unions in respect of *intra vires* matters, it probably still does not apply to unincorporated associations in general because they cannot sue in their own names.

26 Based on this passage, Mr Daniel argued that, conversely, the rule in *Foss v Harbottle* did apply to the NCOA because it was a registered society and was able to sue and be sued in its own name. The Defendants also cited the case of *Taylor v National Union of Mineworkers* [1985] IRLR 99 ("*Taylor*"), which was described in their written submissions as being a case in which Vinelott J had dismissed an application for restoration of misspent union funds "on, among other bases, that the plaintiffs had no standing to commence the action on behalf of the trade union".[23]

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22 Defendants' Skeletal Submissions, para 58.

23 Defendants' Skeletal Submissions, para 60.

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Use of funds within the objects of the NCOA

27 Another plank to the Defendants' case was the argument that the use of the NCOA funds to pay the legal fees of the Defamation Proceedings was within the objects of the NCOA.[24] The Defendants pointed to the fact that, as stated in Rule 2(b) of the NCOA Constitution, one of the objects of the NCOA was to "provide the means for lessees of Neptune Court to express their collective opinion on determination of the matters affecting the interest of Neptune Court (…) including enhancement and status of the estate and use of rights and privileges accorded by the Land Titles (Strata) Act." The Defendants submitted that this clause meant that all matters arising out of or in connection with the proposed privatisation were within the objects of the Constitution. The Defamation Proceedings, having arisen out of the proposed privatisation exercise, fell within the objects of the Constitution.

Compliance with the procedures set out in the Constitution

28 The Defendants also contended that the MC had duly obtained approval and authorisation to expend the funds of the NCOA on the legal fees of the Defamation Proceedings. With regard to Rule 18(a), the Defendants did not dispute that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings had to be approved either at an AGM, SGM or by consent of a simple majority obtained through a ballot.[25] The Defendants submitted that since the NCOA Constitution was silent as to the proportion of votes required to pass a resolution, a simple majority would be sufficient.[26]

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24 Defendants' Skeletal Submissions, paras 10–19.

25 Defendants' Skeletal Submissions, para 26(a).

26 Defendants' Skeletal Submissions, para 41.

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However, the Defendants disagreed with the Plaintiffs that the procedure had not been complied with. Their position appeared to be as follows:[27]

(a) Rule 18(a) required the use of the NCOA funds to be approved at any AGM.

(b) Under Rule 23(a) of the NCOA Constitution, one of the purposes of the AGM was to "receive from the Committee a report, balance sheet and statement of accounts for the preceding financial year, and an estimate of the receipts and expenditure for the coming financial year".

(c) Under Rule 24(b) of the NCOA Constitution, the text of a proposed resolution was to be signed by at least three members (one proposer and two seconders). Under Rule 24(c), the proposed resolution was to be accompanied by a brief explanatory note giving the reasons for the proposed resolution; and under Rule 24(d), the Honorary Secretary was to circulate to the members copies of the proposed resolutions received by him.

(d) Each year, the sum from the NCOA funds used to pay for the legal fees of the Defamation Proceedings in the preceding year, as well as the sum from the NCOA funds budgeted to pay for the legal fees of the Defamation Proceedings the following year, were set out in a statement called the "Estimated Income and Proposed Expenditure Budget" ("the Income and Budget Statements").

(e) This process satisfied Rule 23(a) which did not even require any "approval". In fact, Rule 23(a) only stipulated that the general body was

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[27] Defendants' Skeletal Submissions, paras 25–40.

> to "receive" the "report, balance sheet and statement of accounts for the preceding financial year, and an estimate of the receipts and expenditure for the coming financial year", and this was duly complied with.[28]
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> (f) Further, these Income and Budget Statements were circulated before each AGM, and accompanied by a brief explanatory note. These statements were presented to the members attending the AGM, all in accordance with Rule 24 of the Constitution (see [(c)] above). These Income and Budget Statements were then approved by having one person propose the approval and two seconders support the approval of the statements.[29]

29 Thus, by following the procedures in Rules 23 and 24 of the NCOA Constitution, the MC had obtained "approval at an AGM" in accordance with Rule 18(a) of the NCOA Constitution.

30 In response to the Plaintiffs' argument that expenditures of the NCOA funds could not simply be approved through a "proposer-and-two-seconders" mechanism, the Defendants' position is perhaps best captured by what Mr Daniel stated in oral submissions:[30]

> The understanding of "approved", even if it was there, cannot be divorced from how the parties understood the issue, and that's how they've been dealing with it year after year after year. That's how they've dealt with it.

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28 Certified Transcript of OS 913/2016 and SUM 1242/2017, hearing on 22 March 2017, p 10 line 4.

29 Defendants' Skeletal submissions at para 30(3), referring to 1st defendant's Affidavit dated 25 January 2017, para 21.

30 Certified Transcript of OS 913/2016 and SUM 1242/2017, hearing on 22 March 2017, p 10 lines 7–10.

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31 In this regard, the Defendants cited certain extracts from *Warburton* at pp 13–14, in which the learned author noted that the courts "have recognised the informal nature of many unincorporated associations" and have eschewed taking "too rigid an approach", preferring instead to allow general concepts of unreasonableness, fairness and common sense to be given greater weight.[31]

32 The Defendants also argued that if any member of the NCOA had been dissatisfied with the Income and Budget Statements and wished to voice objections to any proposed expenditure, he or she was free to propose a resolution to that effect.[32]

33 The last submission was closely related to another plank of the Defendants' argument, which was that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings had effectively been approved by virtue of the defeat of "Resolution 7" at the 40th AGM of the NCOA ("the 40th AGM").

34 Resolution 7 was tabled for a vote by one Mr Soon Kim Hock ("Mr Soon") at the 40th AGM which convened on 29 March 2015. It was worded as follows:[33]

> That Neptune Court Owners' Association's moneys, collected monthly/yearly for the general maintenance and improvement works in the Estate must not be used by any individual or group, officially elected or otherwise, for litigations of one sort or another, barring on financial or other matters affecting the smooth running and maintenance works of the Association.

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31 Defendants' Skeletal Submissions, para 32.

32 Certified Transcript of OS 913/2016 and SUM 1242/2017, hearing on 22 March 2017, p 10 lines 5–6.

33 Defendants' Skeletal Submissions, para 42.

35 It should be noted that when Resolution 7 came up for discussion, the 1st plaintiff queried Mr Soon on whether Resolution 7 should be backdated so that the rule would apply to whatever money had already been used by the MC for the purpose of funding litigations. Mr Soon responded that this was not his intention.[34] When the matter was put to a vote, there were 37 votes in favour of Resolution 7 and 42 votes against it.[35] The 1st plaintiff and one other voter abstained.[36]

36 The Defendants made two points in relation to Resolution 7. First, they argued that the fact that Mr Soon expressly clarified that Resolution 7 was only intended to apply to the *future* use of the NCOA funds to pay legal fees "shows unmistakably that the use of the NCOA funds to pay for the legal fees incurred for the Legal Proceedings up to the date of Resolution 7 had already been approved by the members of Neptune Court".[37] Secondly, the Defendants stated that the defeat of Resolution 7 "substantially complied" with the requirement in Rule 18(a) that the use of the NCOA funds had to be approved by a simple majority.[38]

Arguments based on the MC's discretion and Estoppel

37 Leaving aside submissions that approval had been obtained in a proper and binding manner, the Defendants raised an alternative argument that even if the use of the NCOA funds had not been approved at an AGM, under Rules 14,

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34 1st plaintiff's Affidavit dated 8 September 2016, p 429.

35 1st plaintiff's Affidavit dated 8 September 2016, p 432.

36 Defendants' Skeletal Submissions, para 36.

37 Defendants' Skeletal Submissions, para 45.

38 Defendants' Skeletal Submissions, para 47.

(*cont'd on next page*)

32 and 35 of the NCOA Constitution, the MC was entitled to use their discretion to approve such use.[39]

38 Beyond this, the Defendants also argued that the Plaintiffs had in any case "acquiesced" to the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings and were now estopped from obtaining the relief they sought. In this regard, the Defendants cited the case of *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 2 SLR(R) 817 ("*Nasaka Industries*") and noted that the elements of estoppel by acquiescence were as follows:

(a) B must be mistaken as to his own legal rights;

(b) B must expend money or do some act on the faith of his mistaken belief;

(c) A must know of his own rights;

(d) A must know of B's mistaken belief; and

(e) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal rights.

39 The Defendants argued that they had been legally advised that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings was allowed under the Constitution and had acted and expended the NCOA's funds on the faith of that belief.[40] The Plaintiffs knew that this was in breach of the

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[39] Defendants' Skeletal Submissions, paras 55–57.

[40] Defendants' Skeletal Submissions, para 71.

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Constitution, and that they were entitled to prohibit such use of the NCOA funds, and had stated as much in a letter dated 27 September 2013.[41] However, they had abstained from pursuing the issue to allow DC 3091 to reach its conclusion.[42] The Defendants appeared to have been suggesting that the Plaintiffs had thereby "acquiesced" to any misuse of the NCOA's funds and had only commenced the present proceedings in 2016, three years after making their complaint via letter in September 2013. Thus, "the irresistible conclusion (…) is that the Plaintiffs had maliciously intended the Defendants to persist in their mistaken belief and suffer the consequences".[43]

Issues to be determined

40 The main issues to be determined were:

(a) Whether the Plaintiffs had *locus standi* to bring this action; and in particular whether they had standing to seek a refund of any misapplied funds.

(b) Whether the use of the NCOA funds to pay for the legal fees incurred in the Defamation Proceedings and the present proceedings had been duly approved in accordance with the Constitution.

(c) Whether the Plaintiffs were estopped from bringing this action.

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41 Defendants' Skeletal Submissions, para 73.

42 Defendants' Skeletal Submissions, paras 74–75.

43 Defendants' Skeletal Submissions, para 80.

Decision and analysis

Whether the Plaintiffs had locus standi *to bring this action*

41 The Plaintiffs clearly had the requisite standing to bring this action to seek both injunctive and declaratory relief. The law governing an unincorporated association such as the NCOA is premised on a contractual bargain encapsulated by the constitution of the association (see *Chee Hock Keng v Chu Sheng Temple* [2016] SGCA 34 at [29] and *Tan Boon Hai v Tan Kia Kok and another* [2017] 3 SLR 234 ("*Tan Boon Hai*") at [65] and [66]).

42 Members of such an association enjoy contractual rights to have the rules of the association observed and abided by, and are entitled to assert those rights in court. That much was clear from an extract cited by the Defendants themselves from *Warburton* at p 78:[44]

> From time to time, a member will become dissatisfied about the way in which the association are being run or the direction they are taking. If the rules of the association and the general law are being followed, the member's only remedies are to raise questions and put motions at the annual general meeting, to try to get sufficient members together to call a special general meeting and to endeavor to get himself elected to the committee.
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> *If there has been a breach of the rules or the general law relating to the conduct of meetings, the member can look to the court for assistance.* The usual remedy is a declaration although the court may also grant an injunction to prevent further breaches. Theoretically, the court may award the member damage for breach of contract but this is highly unlikely because of the difficulties of proving loss by the individual member.
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> [emphasis added]

43 I would add that this was obviously *not* a situation where the member's complaint was merely that he or she was "dissatisfied about the way in which

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[44] Defendants' Skeletal Submissions, para 62.

the association [was] being run" even though the rules of the association were being followed. The Plaintiffs' complaint was undoubtedly that the rules of the association were *not* being followed. The Plaintiffs were, therefore, entitled to look to the Court for assistance.

44 The *Warburton* extract cited in [42] above suggests that the usual remedy is declaratory and/or injunctive relief, and that damages are a "highly unlikely" remedy. I emphasise, however, that the Plaintiffs were *not* seeking damages for themselves. The relief prayed for was an order that the Defendants return or refund *to the NCOA* the misspent monies. I thus considered whether the Plaintiffs were entitled to seek a refund of the misapplied monies. I concluded that they were.

Whether the Plaintiffs had locus standi *to seek a refund of the misused funds*

45 As mentioned above, the Defendants cited *Taylor* as a case in which Vinelott J dismissed an application for restoration of misspent union funds on the basis "that the plaintiffs had no standing to commence the action on behalf of the trade union".[45] This was not an accurate description of that decision. The plaintiffs in *Taylor* were members of the National Union of Mineworkers (Derbyshire Area) ("the Derbyshire Union"). They obtained a declaration that a strike called by the Derbyshire Union was called in breach of the rules of the union. Subsequently, upon inspecting the Derbyshire Union's books of account, the plaintiffs discovered that the union had spent over £1.7 million in support of the strike. They then applied for summary judgment on their claim that the payments were unlawful and a misapplication of the union's funds, and sought

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[45] Defendants' Skeletal Submissions, para 60.

"damages" from the union's secretary and treasurer for breach of contract and/or breach of trust.

46 Contrary to what the Defendants have argued, Vinelott J did *not* find that the plaintiffs lacked *locus standi*. In fact, Vinelott J held the very opposite (*Taylor* at 102):

> The first question is whether the plaintiffs are in a position to maintain an action against the individual defendants in effect on behalf of the Derbyshire Union whose members have not been consulted on the question whether proceedings should be brought against the individual defendants.
>
> …
>
> In *Edwards v Halliwell*, the plaintiff, a member of the same union, claimed that a resolution increasing the contributions of employed members was invalid. Under the rules such a resolution required a two-third majority obtained at a ballot vote. The purported resolution was passed without a ballot. The Court of Appeal held that the rule in *Foss v Harbottle* did not apply to bar the plaintiff's right to sue. (…) Any member was entitled to refuse to pay an increased subscription unless made payable by a valid resolution. In a classic exposition of the rule in *Foss v Harbottle*, (…) Jenkins LJ said:
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> > "The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or an association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or the association is in favour of what has been done, then *cadit questio*. (…) If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. (…)
> >
> > The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in those cases where the act

> complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority.
>
> …
>
> I have read that passage in full, because Jenkins LJ *makes it clear that the protection afforded by the rule in* Foss v Harbottle *to a company and a trade union does not extend to cases where the plaintiff seeks to prevent or remedy an application of the funds of the body which is outside the powers conferred by its constitution.* The reason is that such an application cannot be ratified by a mere majority of the members or indeed by any majority, however large. Any member is entitled to insist that the funds of the body be used exclusively in furtherance of its objects, those objects to be inferred from its constitution.
>
> [emphasis added]

47 On the facts of the case, Vinelott J held that the expenditure of the Derbyshire Union's funds in support of the strike was indeed *ultra vires*. The Defendants are correct in pointing out, however, that Vinelott J dismissed the plaintiff's application for summary judgment. He reasoned that although the misapplication of union funds could not be ratified by any majority of the members, the members could nevertheless resolve not to take any action to remedy the wrong done to the union, and that such a resolution, if made in good faith and for the benefit of the union, would bind the minority. Since Vinelott J had before him an "impressive body of evidence" suggesting that the "overwhelming majority" of the members approved of the expenditure in question, he felt he could not rule out the possibility that a majority of members might be able to properly and lawfully take the view that it would not be in the interests of the union that the individual defendants should be made personally liable (*Taylor* at 107). This is a point I will return to later.

48 For present purposes, what is significant is that *Taylor* stands as authority for the proposition that the rule in *Foss v Harbottle* does not bar the

right of an individual member to maintain an action against the officers of an unincorporated association claiming that a particular application of funds by the officers was *ultra vires*, and requiring the officers to make good the loss to the unincorporated association. This is consistent with the following remarks from *Warburton* at pp 78–79:

> If a member considers that the committee or the treasurer are *using funds for purposes other than those of the association,* he can apply to court for a declaration that payments made were unauthorised. (…) The court may also grant an injunction restraining any further misapplication of the association's funds *and order the relevant officers to repay the funds misspent.*
>
> [emphasis added]

49 The question that followed was whether the use of the funds of the NCOA to pay for the costs of the Defamation Proceedings and the present proceedings was *ultra vires* the objects of the NCOA Constitution.

Whether the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings was beyond the objects of the NCOA

50 The Defendants argued that the use of the NCOA funds to pay for the costs of the Defamation Proceedings was within its objects for the following reasons:

> (a) The very object of adding Rule 2(b) to the NCOA Constitution (see [7] above) was "to empower the NCOA MC and the members of Neptune Court to take such steps arising out of or in connection to the proposed privatisation of Neptune Court".[46] Thus all matters arising out

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[46] Defendants' Skeletal Submissions, para 12.

of or in connection with the proposed privatisation of Neptune Court were within the objects of the NCOA.

(b) The defamatory statements which were the subject of the Defamation Proceedings were concerned with the proposed privatisation exercise.[47]

(c) The Defendants commenced the Legal Proceedings for the benefit, and on behalf of the members of Neptune Court because they wished to protect the process of privatisation from "degenerating into a mudslinging contest between the pro-privatisation and anti-privatisation factions in Neptune Court", "to encourage a transparent and open discourse on the issues affecting the interest of the members of Neptune Court", and "to send a signal to the members of Neptune Court that slanderous, untrue and baseless allegations (…) could not be tolerated".

51 Having considered these arguments, I was unable to see how the Defamation Proceedings were within the objects of the NCOA. Under Rule 2(b), one object of the NCOA is to allow Neptune Court unit owners "to express their collective opinion and determination on *matters affecting the interests of Neptune Court and the residents including enhancement and status of the estate and use of rights and privileges accorded by the Land Titles (Strata) Act*" (emphasis added). Yet even accepting that the italicised portion of this phrase could well encompass the proposed privatisation of Neptune Court, I did not agree that simply *any* matter arising in connection with the proposed privatisation came within the objects of the NCOA. The fact remained that the object stated in Rule 2(b) was to allow the unit owners "to express their

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[47] Defendants' Skeletal Submissions, para 15.

collective opinion and determination". Thus, the question was whether the Defamation Proceedings bore any reasonable connection with allowing the unit owners to express their collective opinion and determination on privatisation. In my view, they did not.

52 Defamation is concerned with reputation: not honour as such. The Defamation Proceedings in question were brought in the name of the Defendants and not in the name of the NCOA. The Defamation Proceedings were concerned with the *personal* reputations of the Defendants and the other plaintiffs therein. Doubtless, the Defendants were office bearers within the NCOA MC, but that does not alter the point that the reputations at issue in these suits were the personal reputations of the defendants. I failed to see how proceedings to vindicate these personal reputations were necessary or even helpful for allowing the unit owners to express their will in relation to privatisation.

53 The Defendants claim that they were trying to "protect the process of privatization" from turning into a "mudslinging contest". To begin with, however noble this purported goal of eliminating hostilities between the "pro-privatisation and anti-privatisation factions in Neptune Court" may have been, it seemed to me that the acrimony of court proceedings would hinder, rather than further that goal. More fundamentally, I did not feel that this goal came within the object of allowing the members of Neptune Court to voice their collective opinion on matters relating to privatisation at all.

54 The Defendants also appeared to suggest that they needed to commence the Defamation Proceedings because any comments which impugned their handling of the privatisation exercise would affect their ability to successfully

accomplish the privatisation of Neptune Court. As stated by the 1st defendant in his affidavit dated 5 October 2016:

> The defamation proceedings against the Defendants in DC 1545/2012/E, DC 3091/2012/X and HC/DCA 4/2016 were instituted to protect office-bearers of the [MC] and [the Privatisation Committee] from further continued harassment and unjustified attacks on their integrity and reputation, which has a direct correlation with their ability *to carry out privatisation* and affects public confidence in their execution of their duties to the Association.

55 The 1st defendant also deposed on affidavit that "privatisation is the *raison d'etre* for the NCOA and will remain so unless and until this object clause is removed from the Constitution".[48] That is a view that appears to be shared by T&A, who in a letter responding to inquiries by the Commercial Affairs Department concerning the alleged misuse of the NCOA's funds to pay for the legal fees of DC 3091 stated:[49]

> *One of the objects of the association was to privatise Neptune Court*. When the Management Committee members carry out their duties to *fulfil the objects of privatisation of the estate*, they were subject to defamatory statements which put the privatisation in jeopardy.
>
> [emphasis added]

56 Regrettably, the understanding that the object of the NCOA *is privatisation* is, to my mind, a serious distortion of Rule 2(b) of the NCOA Constitution, which is phrased in neutral terms which do not suggest that the NCOA's purpose is to work either *for* or *against* privatisation. That distorted understanding, whether honestly held or not, appears to have been relied upon to further and justify a distinctly pro-privatisation agenda, and the

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48 1st defendant's Affidavit dated 5 October 2016, para 30.

49 1st defendant's Affidavit dated 5 October 2016, Exhibit TW-8, p 259.

commencement of the Defamation Proceedings was but an example of this. Indeed the Defendants say that they commenced the Defamation Proceedings to "protect the process of privatisation". Yet the goal of privatisation is *not* as such within the objects of the NCOA Constitution. What *is* within the objects of the NCOA Constitution is allowing the members of the NCOA to express their collective will on matters including privatisation.

57 For the payment of the legal fees incurred in connection with the Defamation Proceedings to be *intra vires*, the Defamation Proceedings would need to bear a reasonable relationship to that object. This relationship was not established. The alleged connection between the defamation claims brought by the Defendants (and others) and "allowing the members to express their collective opinion" on the issue of privatisation was far too tenuous. I therefore found that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings was *ultra vires* the objects of the NCOA and, as such, *Foss v Harbottle* did not apply to the Plaintiffs. They thus had *locus standi* to seek a refund of the misused funds on behalf of the NCOA.

58 I now turn to consider whether or not the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings had been duly approved in accordance with the terms of the NCOA Constitution. I note, however, that it was not strictly necessary for me to determine this issue. Given my finding that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings was *ultra vires* the objects of the NCOA, the effect of this was that such an expenditure "[could not] be ratified by a mere majority of the members or indeed by any majority, however large" (see *Taylor* at 102, cited at [46] above).

Whether the impugned use of the NCOA funds was duly approved in accordance with the NCOA Constitution

Whether the MC had discretion to approve the impugned use of the NCOA funds without complying with Rule 18(a)

59 As noted above, the Defendants sought to argue that even if the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings had not been approved in accordance with Rule 18(a), Rules 14, 32 and 35 of the NCOA Constitution conferred the MC with wide powers to approve such use.

60 For convenience, I set out Rules 14, 32 and 35 of the NCOA Constitution in full:[50]

> 14. Unless otherwise provided in this Constitution, the decision of the Committee shall be binding on all members of the Association, until and unless overruled by Resolutions by the Annual or Special General Meeting.
>
> 32. All resolutions of the committee shall be binding on the Association and the members thereof unless revoked by subsequent resolution of the Association in General meeting or unless inconsistent with a prior resolution of the Association in General meeting.
>
> 35. In the event of any question or matter arising out of any point which is not expressly provided for in the Rules, the Committee shall have power to use their own discretion.

61 I found no merit in the Defendants' attempt to rely on these provisions. Rules 14 and 35 may both be dealt with quickly because they are expressly stated to be subject to the *other provisions* of the NCOA Constitution. Rule 14 states that the decision of the Committee shall be binding on all members "*unless otherwise provided in this Constitution*" (emphasis added). Rule 35 stated that the Committee had power to use their own discretion only in the

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[50] 1st plaintiff's Affidavit dated 8 September 2016, pp 28–30.

event of any question or point "*which is not expressly provided for in the Rules*" (emphasis added). Thus, both these rules are obviously subject to the express provisions of the NCOA Constitution *including* Rule 18(a), which stipulates how non-maintenance expenditures are to be approved.

62 I accept that Rule 32, unlike Rules 14 and 35, does not contain any such clause which explicitly subordinates the Committee's power to bind the NCOA to the other Rules within the NCOA Constitution. However, I think Rule 32 must be seen in the context of the entire NCOA Constitution, which, like every other contract, should be construed as a whole, with no words being ignored, omitted or glossed over (*Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR(R) 1 at [72]). Rule 32 comes amidst numerous detailed provisions which expressly delimit the MC's powers, one of which is Rule 18(a) which addresses the MC's powers to with respect to expending the funds of the NCOA. On the Defendants' argument, Rules 14, 32 and 35 taken together would confer the MC with such wide discretion that rules such as Rule 18(a) would effectively be rendered otiose. In my view, that is an untenable interpretation of the NCOA Constitution. A far more reasonable interpretation of Rule 32 read together with the other provisions of the NCOA Constitution is that while all resolutions of the committee are binding on the Association (unless subsequently revoked), those resolutions must be made in accordance with, and within the confines of the rest of the Rules.

63 Accordingly, I found that Rules 14, 32 and 35 did not have the effect of giving the MC broad discretion to approve any use of the NCOA's funds without having to comply with the other Rules of the NCOA Constitution, including Rule 18(a). Therefore, whether or not the use of the NCOA's funds was duly authorised was a matter to be determined by reference to that Rule.

Whether the approval of the Income and Budget Statements complied with Rule 18(a)

64 As noted above, the Defendants did not dispute that the use of the NCOA funds to pay for an expenditure such as the Defamation Proceedings needed to be approved at an AGM, SGM or by consent of a simple majority obtained through a balloting exercise, pursuant to Rule 18(a).

65 However, the Defendants appeared to suggest that the means of obtaining approval at an AGM under Rule 18(a) had to be read together with Rules 23 and 24 (see [28] above). The Defendants' overall position, as I understood it, was that the MC was entitled to gain approval for non-maintenance expenditures by simply including such expenditures within the Income and Budget Statements and laying them before the AGM. Indeed it should be noted that the Defendants' primary position was that *no approval was needed at all* (see [28(e)] above) and the AGM was simply to "receive" such Income and Budget Statements. Its secondary position was that approval was *in fact* obtained through a one-proposer-two-seconder mechanism (see [28(f)] above).

66 I dismissed this argument for two reasons. First, as a matter of construction, I did not agree that the stipulation in Rule 18(a) that "approval must be obtained from the AGM" should be interpreted by reference to Rules 23 and 24. With regard to Rule 23, it was simply untenable that the meaning of "obtaining approval" in Rule 18(a) was for the MC to lay its Income and Budget Statement before the AGM and have the AGM "receive" the said report. The words of a contract cannot be given a meaning which they cannot reasonably bear (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [31]). Yet to interpret Rule 18(a) in the manner that the Defendants contend for would be to do exactly that – to give the words "*obtaining approval*" a meaning which

they could not reasonably bear. The entire exercise would not, in any sense, be an obtaining of any approval at all.

67 With regard to Rule 24, this was simply a provision which stipulated how resolutions proposed to be voted on at an AGM should be brought to the Honorary Secretary's attention, tabled, accompanied by an explanatory note and circulated to the members. The fact that the Defendants had complied with these provisions with regard to their Income and Budget Statements did *not* mean that they had thereby obtained approval for the expenditure reflected within those statements under Rule 18(a). I note, however, that the Defendants go further – they say they have complied with Rule 18(a) not only by complying with Rule 24, but also by "approving" the Income and Budget Statements through a one-proposer-two-seconder mechanism. This, argues the Defendants, was a proper way of obtaining approval because this was how things had been "dealt with…year after year after year" (see [30] above).

68 I was unable to agree. To begin with, I did not think it was a reasonable interpretation of Rule 18(a) that approval could be obtained for an expenditure by mentioning the said expenditure in an Income and Budget Statement, and then having one proposer and two seconders approve that Statement. I failed to see how the Defendants could, on one hand, accept that a simple majority was necessary to pass a resolution,[51] but on the other hand argue that all expenditures listed within an Income and Budget Statement could be approved by a grand total of three persons (one proposer and two seconders) *despite* an express provision in Rule 18(a) that a separate process of approval is needed for certain

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[51] Defendants' Skeletal Submissions, para 41.

expenditures. The effect of that would be nothing short of absurd and would turn the "approval" process into an exercise in rubber stamping.

69 Mr Daniel was at pains to emphasise that this was in fact how the Income and Budget Statements had been approved "year after year". In this regard, Mr Daniel submitted that the rules of an association should be read as "living things that are meant to regulate neighbours".[52] As I understand it, his point was that there was scope for reading the NCOA Constitution *in light of* the custom and practice of the NCOA. However, as noted by Vinelott J in *Taylor* at 105,

> Custom and practice at a particular moment must be borne in mind in construing the rules and seeing what is to be implied in them. *But if the rules are clear, custom and practice cannot be given effect if they conflict with the rules.*
>
> [emphasis added]

70 If indeed it were true that the NCOA and MC had fallen into a pattern in which the MC was no longer required to obtain approval for non-maintenance expenditures, and was allowed instead to simply make passing notes of these expenditures in the "Income and Budget Statements" each financial year, I would describe that as a case where custom and practice conflict with the clear terms of Rule 18(a). Thus, I would not give such "custom and practice" effect.

71 In any event, the Plaintiffs adduced evidence which suggests that it is *not* true that the NCOA and the MC had fallen into any such pattern. It seems that in 2009, at the 34th AGM of the NCOA, a resolution was specifically tabled to approve the expenditure of $70,000 from the NCOA's sinking fund on

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[52] Certified Transcript of OS 913/2016 and SUM 1242/2017, hearing on 22 March 2017, p 9 lines 20–21.

(*cont'd on next page*)

privatisation expenses.[53] Further, as recently as 2015, at the 40th AGM of the NCOA, the 1st defendant himself had tabled a resolution for $1.2 million from the sinking fund to be used for the purposes of repainting and repair works.[54] I note that the "repainting and repair works" come within maintenance expenditures, but $1.2 million far exceeds the $30,000 limit stipulated in Rule 18(a). I agreed with the Plaintiffs that these resolutions showed that, contrary to what the Defendants had suggested, there was no custom or practice of simply including in the Income and Budget Statements expenses that would require specific approval under Rule 18(a).

72 I was therefore unable to agree with the Defendants that the approval of the Income and Budget Statement was "equivalent to an approval of the use of the NCOA funds to pay the legal fees incurred in the [Defamation] Proceedings".[55]

73 Quite part from the reasons I have already mentioned, one of the major difficulties standing in the way of the Defendants' position was that the Income and Budget Statements did not even state explicitly that the funds of the NCOA had been used to pay for the legal fees of the Defamation Proceedings. The Defendants do not dispute that the amounts spent on these legal fees were inconspicuously parked under "Privatisation Expenses" for the Income and Budget Statements for the years ending 31 December 2013, and "Privatisation/Legal Expenses" for the years ending 31 December 2014,

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53 Plaintiffs' Skeletal Submissions, para 32(b); 1st plaintiff's Affidavit dated 9 February 2017, p 151.

54 Plaintiffs' Skeletal Submissions, para 32(c); 1st plaintiff's Affidavit dated 9 February 2017, para 32(b).

55 Defendants' Skeletal Submissions, para 34.

(*cont'd on next page*)

31 December 2015 and 31 December 2016.[56] As for the year ending 31 December 2013, "Privatisation Expenses" was a complete mislabelling which hid, rather than revealed, the fact that funds of the NCOA were spent to finance the Defamation Proceedings. Even when this label was changed in subsequent years, there was a failure to explain or to specify what was meant by "Legal Expenses". Given the history that the MC had in the past engaged lawyers to advise them on matters directly relating to the proposed privatisation of the estate (see [7] above), such a label was liable to mislead.

74 The Defendants have emphasised that the explanatory notes to the Income and Budget Statements which were circulated before each of the AGMs included comments which showed that the NCOA funds were being used to pay for the legal fees incurred in connection with the Defamation Proceedings. These comments were as follows:[57]

(a) In the explanatory notes to the Income and Budget Statement circulated before the 39th AGM (in March 2014), it was stated that "the Court Case is still on-going. It is not appropriate for the Committee to estimate as there may be potential recovery of up to 70%". This same comment was repeated in the explanatory notes to the Income and Budget Statement circulated before the 40th AGM (in March 2015).

(b) In the explanatory notes to the Income and Budget Statement circulated before the 41st AGM (in March 2016), it was stated that "an appeal to the Supreme Court of Singapore has been lodged. The

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56 1st plaintiff's Affidavit dated 8 September 2016 pp 233, 270, and 326

57 Defendants' Skeletal Submissions, para 40

committee is only able to estimate after the full grounds of decision is out."

75 In my view, these cryptic and brief one or two-line comments were grossly insufficient to allow the members of the NCOA to make any kind of informed judgment on what exactly these "privatisation/legal expenses" were. I also note that the *earliest* of these explanatory notes came about in 2014, which was some time after the MC had *already* begun using the NCOA funds to pay for the legal costs of the Defamation Proceedings. It must follow that circulating these comments along with the Income and Budget Statements was no substitute at all for following the procedure clearly set out in Rule 18(a) of the NCOA Constitution.

Whether the Defendants could rely on the fact that some members were aware of the impugned use of the NCOA funds

76 Finally, the Defendants urged me to consider the circulation of the Income and Budget Statements in the light of what was actually raised and discussed at the AGMs. As I understand it, the point was that since some members did raise queries on the expenses, the members of the NCOA must have been aware that the funds of the NCOA were being used to pay for the legal fees incurred in connection with the Defamation Proceedings, and yet had not voiced any objections.[58] I was unpersuaded by this argument for two reasons.

77 First, even if it is true that some members of the NCOA were *aware* of the impugned use of the funds of the NCOA, the fact was that the general body

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[58] Defendants' Skeletal Submissions, para 64.

of the NCOA was never given the chance to *vote* on whether its funds should be used to pay for the legal expenses for the Defamation Proceedings. That was the procedure clearly set out in Rule 18(a). It was not followed.

78 Secondly, while it may be true that the court does not take "too rigid an approach" in considering the rules of an association (see [31] above), I was not prepared to infer that the Defendants had effectively obtained approval or ratification for the impugned use of the NCOA funds simply because the general body had failed to pass a resolution objecting to such expenditure. In the first place, I was not convinced that the members of the NCOA had an informed and clear picture of how and/or to what extent the funds of the NCOA were being used in connection with the Defamation Proceedings. Having examined the minutes of the AGMs, I found that the discussions relating to the issue were at times mingled with other topics relating to the contentious issue of privatisation, and often clouded by acrimony.

79 Furthermore, it seemed that when questions were raised by members about the expenditures in question, the responses from the 1st defendant were often somewhat evasive and, with respect, rather self-serving. The minutes are fairly lengthy and I would not go into the full details of what was said, but to use an example which the Defendants themselves rely on,[59] the 1st defendant made the following remarks from the 38th AGM in 2013:[60]

> 5.8 Following on from Mr Andrew Lee's comment on legal expenses, Chairman informed members that he would then explain to them whether the Committee had the right to spend the money. He had not brought the matter up because he

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59 1st defendant's Affidavit dated 25 January 2017, para 30.

60 1st plaintiff's Affidavit dated 8 September 2016, p 292.

> thought that all members would have understood this from the Minutes.
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> 5.9 First and foremost, Chairman asserted that silence about the allegations would have been construed as an implicit admission that the allegations were true and his Committee had an indefensible position against members' allegations, whereas in his opinion, the Committee had acted in a disciplined, dignified manner and to achieve a deterrent so as to allow future volunteers to serve without fear of legal action by fellow members.
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> 5.10 Secondly, *after having sought legal advice, the Committee* ***was allowed*** *by NCOA's Constitution to spend close to $70,000 in 2012 to protect the dignity and honour of the office of 18 people and to counter the person who originally took the Committee to task because the Officer-Bearers had to defend themselves*. Chairman reiterated that defending the Committee was a deterrent, so that future volunteers would not have to serve in fear.
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> [emphasis added in italics and bold italics]

80 I note that such remarks gave the incorrect impression that the *NCOA Constitution already inherently allowed* the MC's expenditure of NCOA funds in connection with the Defamation Proceedings, and suggested implicitly that there was no need for the MC to obtain approval. That incorrect assertion might have been made with genuine reliance in the legal advice which the MC had sought, but that was beside the point. A discussion in which the MC declares to the general body that, according to its legal advice, it already has an inherent right to expend NCOA funds in a certain manner is simply no substitute for a process of *obtaining approval*, which by its very nature must be a process that begins with the premise that *unless and until* the general body *gives* its approval, the proposed expenditure is *not* authorised.

81 In a similar vein, I recognise that there was considerable discussion between one "Mr Saw" and the 1st defendant concerning the use of the NCOA funds in connection with the Defamation Proceedings at the 39th AGM in

2014.[61] In this discussion, the 1st defendant acknowledged that legal fees were costly, but suggested that Mr Saw should "refer to the past Minutes of meetings" to clarify any doubts because otherwise it would appear suspicious to him that the Committee had "spent money without *informing* members" (emphasis added).[62] Again, such remarks incorrectly implied that the MC had already done the necessary to obtain authorisation for the impugned use of the NCOA funds. I also note that the 1st defendant commented that he "would not know" what would happen with regard to the legal costs of the Defamation Proceedings if the MC were to lose the case.

82 In considering such discussions, I was ultimately concerned with whether the members of the MC had a reasonably clear and informed appreciation of both the facts and details of how the NCOA funds had been and would be used in connection with the Defamation Proceedings, as well as their *right to be consulted and to give or to withhold* approval for such use. Only then could the lack of a resolution opposing such expenditure be taken as implicit approval or ratification which substantially complied with the requirement in Rule 18(a). On the whole, given the acrimony of the discussions, the manner in which they were conducted and the incomplete and sometimes misleading information that was communicated in the course of those discussions, I did not feel that any implicit approval had been obtained.

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61 1st plaintiff's Affidavit dated 8 September 2013, pp 351–357.

62 1st plaintiff's Affidavit dated 8 September 2013, pp 351–357.

(*cont'd on next page*)

Whether the use of the NCOA funds to pay for the legal fees incurred for the Defamation proceedings had been approved by the defeat of Resolution 7

83 The Defendants argued that the use of the NCOA funds to pay for the legal fees of the Defamation Proceedings had effectively been approved by virtue of the defeat of "Resolution 7" at the 40th AGM. For convenience, I reproduce the text of Resolution 7:[63]

> That Neptune Court Owners' Association's moneys, collected monthly/yearly for the general maintenance and improvement works in the Estate must not be used by any individual or group, officially elected or otherwise, for litigations of one sort or another, barring on financial or other matters affecting the smooth running and maintenance works of the Association.

84 The Defendants first argued that the fact that Resolution 7 was expressly clarified to apply to the *future* showed that the use of the NCOA funds to pay for the legal fees *in the past* had been duly approved. I rejected this argument without hesitation. The clarification that Resolution 7 was to apply to the future was purely a position taken on Mr Soon's own part. I failed to see how Mr Soon's own intention and clarification that he only intended for the resolution to refer to the future could indicate that the use of the NCOA funds up to that point having been duly approved.

85 The Defendants' next argument was that the defeat of Resolution 7 "substantially complied" with the requirement in Rule 18(a) that the use of the NCOA funds had to be approved by a simple majority.[64] In this regard, the Defendant cited the case of *Tan Boon Hai*, where Kannan Ramesh JC (as he then was) applied the contractual doctrine of substantial performance to the

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63 Defendants' Skeletal Submissions, para 42.

64 Defendants' Skeletal Submissions at para 47.

question of whether an election process within an unincorporated association should be set aside because the elections committee ("EC") was improperly constituted. Ramesh JC held that any breaches of the Constitution of the HTCA had not been breaches of rules which were equivalent in status to "conditions" within a contract, and had only had "trifling" consequences. He therefore refused to declare the elections null and void.

86 I pause to note that Ramesh JC was clearly concerned with "the implications of constitutional breaches which are, in substance, procedural irregularities" (see *Tan Boon Hai* at [62]). There is of course the question whether the approach taken was applicable to the present facts where the breach of the NCOA Constitution complained of was no mere "procedural irregularity" but a total failure to seek approval for a specific use of the association's funds. Even assuming that *Tan Boon Hai* was applicable, and putting aside the issue of whether Rule 18(a) is equivalent in status to a "condition" within the *Tan Boon Hai* analysis (see *Tan Boon Hai* at [69]), what is clear is that in applying the doctrine of substantial performance, Ramesh JC was taking an approach focused on the *effects* of the breach. It was only where the breach had occasioned no prejudice and only had trifling consequences that the duties enshrined in the constitution could be said to have been "substantially performed" (see *Tan Boon Hai* at [69] and [72]).

87 The question, therefore, was whether it could be said that the MC's failure to seek approval to use the NCOA funds to pay the legal fees incurred in the Defamation Proceedings had occasioned no prejudice and/or only had trifling consequences. That seemed to me to be a completely untenable position to take. The effect of such failure was that some $427,700 in funds contributed by the members of the NCOA had been spent in the course of legal proceedings

without the general body having been given an opportunity to vote on such expenditure beforehand.[65]

88 The Defendants appear to suggest that no prejudice had been occasioned because, through the defeat of Resolution 7, the impugned use of the NCOA funds had nevertheless been ratified. In my view, however, the defeat of Resolution 7 was not to be equated with an implied retrospective approval of the MC's previous use of the NCOA funds to pay for the legal expenses incurred in the Defamation Proceedings. There may have been any number of reasons why certain members had not voted in favour of Resolution 7 as it was tabled and worded. Indeed the 1st plaintiff herself abstained from voting after her suggestion that Resolution 7 should have retrospective effect was met with Mr Soon's clarification that he intended for Resolution 7 only to have prospective effect (see [35] above).[66] She may well have been of the view that, in only applying to the *future*, the Resolution did not go far enough.

89 There were yet other members who appeared uncomfortable that the wording of Resolution 7 would go *too far*, and proposed amendments that would make the terms of the Resolution less absolute.[67] The 1st defendant himself opposed the resolution on the basis that it could have the drastic effect of preventing the NCOA from responding to various types of legal claims, thereby exposing the NCOA to "the risk of becoming insolvent or bankrupt".[68] The point I make is that there was evident controversy over the scope and implications of Resolution 7, and the fact that a majority of the members attending the 40th

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65 1st plaintiff's Affidavit dated 17 March 2017, p 63.

66 1st plaintiff's Affidavit dated 8 September 2016, at p 429.

67 1st plaintiff's Affidavit dated 8 September 2016, at pp 428–429 at 6.7.5 and 6.7.9.

68 1st plaintiff's Affidavit dated 8 September 2016, at pp 430–431.

AGM did not vote in favour of Resolution 7 cannot be taken to mean that they approved of the specific use of the NCOA funds impugned in these present proceedings – *ie*, to pay the legal fees incurred in connection with the Defamation Proceedings.

90 I therefore found that there was no merit to the Defendants' argument that the use of the NCOA funds to pay for the legal fees incurred for the Defamation proceedings had been approved by the defeat of Resolution 7 by a majority.

Whether the Plaintiffs were estopped from bringing this action

91 I was of the view that the Defendants' argument on estoppel by acquiescence was a non-starter. Under the test laid out in *Nasaka Industries* (see [38] above), the elements of estoppel by acquiescence are:

(a) B must be mistaken as to his own legal rights;

(b) B must expend money or do some act on the faith of his mistaken belief;

(c) A must know of his own rights;

(d) A must know of B's mistaken belief; and

(e) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal rights.

92 One crucial element of this test was obviously not satisfied in the present case – that is, it could not be said on *any* view that the Plaintiffs had *encouraged* the Defendants in their expenditure of the NCOA funds by abstaining from asserting their legal rights. Far from it, the 1st plaintiff had raised her concerns

and expressed her dissatisfaction not only through a letter in September 2013 (see [38] above), but also in successive AGMs, year after year. In particular, the 1st plaintiff had raised questions about, *inter alia*, (i) who was financing the costs of the Defamation Proceedings at the 38th AGM in 2013;[69] (ii) how much of the funds spent on "privatization/legal" expenses had been used in connection with a "court case" at the 39th AGM in 2014;[70] and (iii) why so much money was being spent on legal fees at the 40th AGM in 2015.[71] The Defendants, having disregarded these protests, cannot now claim that they have been prejudiced by virtue of the Plaintiffs' "encouragement" of their wrongful expenditure, or that it would be unconscionable to allow the Plaintiffs to obtain the reliefs they sought in OS 913.

93 I note that the Defendants' argument on estoppel by acquiescence was premised on the fact that the Plaintiffs had commenced legal proceedings only in September 2016, and not any earlier.[72] Although the test in *Nasaka Industries* contemplated that encouragement could take the form of one party "abstaining from asserting his legal rights", I did not agree that the Plaintiffs had "abstained from asserting their legal rights" merely because they had initially chosen to raise their objections through letters and making comments at AGMs rather than bringing an action in court. In any event, a failure to assert one's rights by commencing legal proceedings does not necessarily amount to "encouragement". The element of "encouragement" in *Nasaka Industries* may perhaps be understood with reference to other authorities on estoppel by

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69 1st plaintiff's Affidavit dated 8 September 2016, p 282.

70 1st plaintiff's Affidavit dated 8 September 2016, p 344.

71 1st plaintiff's Affidavit dated 8 September 2016, p 419.

72 Defendants' Skeletal Submissions, paras 79–80.

acquiescence which have stated that "it has to be shown that the party estopped *simply stood by* knowing full well that an innocent part was labouring under a mistake as to his rights" (*Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd and others* [2000] 1 SLR(R) 355 at [27]; see also *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35 at [48]). Quite clearly this was not a situation where the Plaintiffs had "simply stood by" in relation to the wrongful use of the NCOA funds. I therefore found that the Plaintiffs were not estopped from bringing this action.

The 42nd AGM

94 This concludes the main part of my decision. For completeness, I note that at the first day of the hearing on 1 March 2017, the case was adjourned during the course of arguments. This was to enable counsel to take instructions on certain matters in connection with a possible method for amicable resolution. This was unsuccessful. The Defendants proceeded to table a fresh resolution for the 42nd AGM of the NCOA scheduled for 26 March 2017 ("the Fresh Resolution"). In brief, the Fresh Resolution sought approval of the members for payment of the legal expenses incurred by the Defendants in their unsuccessful Defamation Proceedings out of the funds of the NCOA. The Plaintiffs objected to the proposed resolution and filed a summons for an injunction that was placed before me when the hearing resumed on 22 March 2017.

95 At the resumed hearing on 22 March 2017, I declined to grant the injunction. In reaching that decision, I noted that the substantive issue before me in OS 913 of 2016 concerns the use of NCOA funds to pay the legal costs of the defamation suits brought by the defendants.

96 The Defendants like any member of the NCOA enjoyed the right to

table resolutions for discussion and approval at an AGM. That said, leaving aside the issue as to whether the AGM has the power to ratify an *ultra vires* decision, I noted that Vinelott J in *Taylor* held that Members of the Union could resolve that no action should be brought to recover an *ultra vires* payments (see [47] above). The decision, however, had to be made in good faith and for the benefit of the society/union (*Taylor* at 107).

97 Whether any resolution (even if passed) would be effective depends on the facts and circumstances and whether the "defect" can be cured or effectively defended against as a matter of law by the AGM passing the fresh resolution in question. It bears repeating that I decided that the payments made for the legal expenses of the Defendants were *ultra vires*. I noted that even if the expenditure was *intra vires* it was clear that the NCOA MC had failed to obtain proper approval for the items in accordance with the established procedures. The question as to whether the proposed Fresh Resolution, or any resolution to the effect that the members would not require the MC to repay the misspent monies, would meet the *Taylor* standards (*ie* that such resolutions had to be made in good faith and for the benefit of the NCOA) was not a matter that could be decided in the current proceedings. The legal effect of any such resolution and the applicability of the *Taylor* holding would have to be addressed (if necessary) at the appropriate time in subsequent proceedings. That said, I note again Vinelott J's comments, that his decision was based on what he regarded as "wholly exceptional circumstances" (*Taylor* at 107) which circumstances included the point that there was evidence before him that the members *would* likely resolve not to take any action to rectify the *ultra vires* payments.

Conclusion

98 For the aforementioned reasons, I allowed the Plaintiffs' claim in OS

913/2016.

99 For completeness, I add that prior to the hearing of OS 913/2016, the Defendants by Summons 399/2017 applied for leave to cross-examine the Plaintiffs. This application was refused with costs reserved to the hearing of OS 913/2016.

100 Costs were also awarded to the Plaintiff for OS 913/2016 and Summons 399/2017 fixed at $13,000 plus disbursements. This award included the costs of Summons 1242/2017 (the injunction application).

George Wei
Judge

Tan Bar Tien and Sylvia Tan (B T Tan & Company) for the plaintiffs;
Christopher Anand Daniel and Elizabeth Chua (Advocatus Law LLP) (instructed) / Au Thye Chuen and Carolyn Tan Beng Hui (Tan & Au LLP) for the defendants.