IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 11

Civil Appeal No 74 of 2021

Between

(1) Phua Seng Hua
(2) Meow Moy Lan
(3) Lim Seng Hoo

… *Appellants*

And

(1) Peter Kwee Seng Chio
(2) Exklusiv Resorts Pte Ltd

… *Respondents*

In the matter of Suit No 756 of 2019

Between

(1) Meow Moy Lan
(2) Phua Seng Hua
(3) Lim Seng Hoo

… *Plaintiffs*

And

(1) Exklusiv Resorts Pte Ltd
(2) Peter Kwee Seng Chio

… *Defendants*

GROUNDS OF DECISION

[Tort — Misrepresentation — Fraud and deceit]
[Tort — Negligence]
[Contract — Remedies — Damages — *Wrotham Park* damages]
[Damages — Compensation and damages — Tort]

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Phua Seng Hua and others
v
Kwee Seng Chio Peter and another

[2022] SGHC(A) 11

Appellate Division of the High Court — Civil Appeal No 74 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Quentin Loh JAD
11 February 2022

14 March 2022

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 The appellants ("Appellants") initially represented 170 members of a club known as The Pines ("the Club") in bringing an action against the ~~r~~espondents ("Respondents"). The clubhouse was initially located at 30 Stevens Road ("30SR") owned by the 2nd Respondent Exklusiv Resorts Pte Ltd ("Exklusiv"). The 1st Respondent Peter Kwee Seng Chio ("PK") is a director and indirect shareholder of Exklusiv.

2 Exklusiv is wholly owned by Laguna Golf Resort Holding Pte Ltd ("LGRH") which is in turn wholly owned by Group Exklusiv Pte Ltd ("Group Exklusiv"). The latter is owned at all material times by PK, his wife, his son and his daughter. In effect, PK controls Exklusiv. LGRH manages the Laguna National Golf & Country Club ("Laguna Club") in Singapore.

3 The Appellants claimed against the Respondents for the tort of deceit, negligence and breach of its contract with each of the Club's members. The claim related to decisions by Exklusiv to redevelop 30SR, demolish the clubhouse at 30SR, sell 30SR to Oxley Gem Pte Ltd ("Oxley Gem"), amend the Club's rules to allow the relocation of the clubhouse and relocate the clubhouse to the premises of the Laguna Club.

4 On 30 June 2021, the trial judge ("the Judge") issued his judgment ("Judgment"). He dismissed the claims under the tort of deceit and negligence. He allowed the claim for breach of implied terms of contract. He awarded damages of $1,500 to each plaintiff as nominal damages. The Appellants then appealed against the dismissal of their claims in tort and the damages awarded. There was no cross-appeal by the Respondents against the finding of breach of contract or the damages awarded. On 14 December 2021, the Appellants informed the Registrar that 31 of the 170 members have withdrawn from the appeal.

5 We heard the appeal on 11 February 2022 and dismissed it with costs. We set out the grounds of our decision below.

Deceit

6 The crux of the claim on deceit focussed on Exklusiv's letter dated 14 March 2013 to members which allegedly made various representations set out in the Appellants' Skeletal Arguments at para 8:

> (a) "[A] decision has therefore been made [by Exklusiv] to comprehensively redevelop the premises in order to provide members with a brand-new, up-to-date clubhouse and facilities and at the same time to optimize the use of the land currently occupied by the Club" (*ie*,

the "Confirmed Redevelopment" and "Confirmed Redevelopment Representation");

(b) the Club will remain at 30SR (*ie*, the "Location Representation");

(c) the members will get a new dedicated clubhouse at 30SR which will be half its existing size (*ie*, the "Size Representation"). At the Club's dialogue session with its members on 21 August 2012 (the "Dialogue Session"), the Respondents informed the members that the new clubhouse after redevelopment would be half its existing size (the Club's existing clubhouse and amenities occupied the whole of 30SR, *ie*, 18,477.2m^2 [approx. 198,889 sq ft]). However, on 27 February 2013, the Urban Redevelopment Authority ("URA") issued a "Provisional Grant" in respect of the re-development plans which allocated only 882.2m^2 out of 29,556.5m^2 for the new clubhouse. The Respondents did not correct their earlier representation in Exklusiv's 14 March 2013 letter and thus the Size Representation was repeated; and

(d) the members will enjoy access to and use of the facilities and amenities of a hotel that will be built on 30SR in addition to the facilities at the Club's own dedicated clubhouse (*ie*, the "Facilities Representation").

(collectively, the "Representations")

7 The crux of the deceit claim was that at the time of the 14 March 2013 letter, the Respondents knew that the Representations were false and/or they knew they had no proper basis to make the Representations.

8 This claim was based on the fact that on the next day, *ie*, 15 March 2013, Exklusiv had granted an Option to Purchase ("OTP") to Oxley Gem to buy 30SR. Under the OTP, Oxley Gem had granted to Exklusiv the first right of refusal to lease from Oxley Gem part of the intended development at 30SR which would include a clubhouse and club facilities. However, the right of refusal did not oblige Oxley Gem to have a clubhouse in the intended development. Hence, the Appellants argued that the Respondents knew that the Representations were false or had no proper basis to make the Representations because Exklusiv would no longer be able to ensure that the Representations were fulfilled.

9 According to the Judge, the Appellants had submitted that the Size Representation was made at the Dialogue Session (and not in the letter dated 14 March 2013). He rejected the submission as it was not pleaded.

10 The other representations centred on the question of whether the Respondents had intended to provide a new clubhouse for members at 30SR. Based on the evidence before and after 15 March 2013, the Judge found that they had so intended and the Appellants had failed to prove otherwise.

11 We noted that para 31 of the Statement of Claim (Amendment No 4) ("SOC") sets out the representations in the 14 March 2013 letter. The Size Representation was not pleaded. There was some mention at para 27 of the SOC of a representation of size at the Dialogue Session but that is not mentioned as one of the Representations arising from the 14 March 2013 letter. In any event, we did not agree that the Size Representation was made at the Dialogue Session. Furthermore, the Appellants' focus in arguments below was not so much the size of the clubhouse but rather the absence of a clubhouse at 30SR.

12 We were also of the view that the Appellants failed to prove that the Respondents had not intended to provide a new clubhouse at 30SR. The Appellants had pitched their case too high in relying on deceit. They had conflated the matter of absence of control over the redevelopment of 30SR with evidence of intention not to provide a new clubhouse.

13 While it was true that from 15 March 2013, when the OTP was granted to Oxley Gem, Exklusiv was no longer able to ensure that a new clubhouse would be redeveloped at 30SR, this did not necessarily mean that Exklusiv did not intend to procure such a clubhouse at 30SR for the members. While the Appellants had suggested that the first right of refusal in the OTP was "a red herring" and referred to "carefully choreographed moves" to amend plans for a clubhouse, the Judge was of the view that it was highly unlikely that the Respondents would have gone to the extent of obtaining the first right of refusal or continued to include a clubhouse in the plans submitted to the relevant authority, if there was no intention to include a clubhouse in the redevelopment of 30SR. Furthermore, the Appellants did not plead any conspiracy between the Respondents and Oxley Gem. Nor was such a conspiracy alleged in evidence. We agree with these views.

14 On the particular facts of the case, the evidence before 15 March 2013 showed that Exklusiv had intended to redevelop 30SR with a new clubhouse. Even from 15 March 2013, Exklusiv had entered into an agreement with Oxley Gem with a view to providing a new clubhouse. The correspondence and oral evidence showed that this was pursued for some time until about the end of 2015 when the clubhouse at 30SR was no longer viable. This was not a case where the Respondents had merely provided lip service to give the impression that they were genuine about the intent to provide a new clubhouse at 30SR. They

were genuine about it and pursued it but failed. That cannot constitute deceit in the circumstances.

15 In the course of oral arguments before us, the Appellants mentioned that there was a provision in the OTP under which Exklusiv undertook to notify members of the Club of the sale to Oxley Gem. This was not done. The suggestion was that this was part of the deceitful conduct of the Respondents. However, this was not pleaded. Furthermore, this was not a point raised in the appeal before us until the hearing on 11 February 2022.

Negligence

16 The Judge said that the Appellants had alleged that the Respondents owed a duty of care to provide timely, true and accurate information as regards the redevelopment of the clubhouse at 30SR and that the Respondents had breached this duty.

17 However, the Judge was of the view that the SOC "ought to state the facts upon which the supposed duty is founded" and it failed to do so. Also, the SOC should allege the precise breach of duty. Instead, the Appellants pleaded the following:

(a) not calling for "general meetings of the Club members, in a timely fashion, to accurately and truthfully inform them of milestones in the completion of the Confirmed Redevelopment, or of any purported obstacles or difficulties";

(b) hiding the "truth of what was in fact happening or had already happened" from the Club's members; and/or

(c) making the misrepresentations as to the Proposed Redevelopment and the Confirmed Redevelopment.

"Proposed Redevelopment" refers to the proposed redevelopment of the Club's clubhouse at 30SR presented at the Dialogue Session, and dealt with in a list of questions and answers circulated to members who attended the Dialogue Session. "Confirmed Redevelopment" refers to the Club's confirmation that it had reached a decision to "comprehensively redevelop the premises in order to provide members with a brand-new, up-to-date clubhouse and facilities and at the same time to optimize the use of the land currently occupied by the Club".

18 The Judge was of the view that the Appellants failed to plead particulars as to: (a) the milestones or obstacles mentioned; and (b) what was the truth that the Respondents had allegedly hid from the Appellants. As for the misrepresentations, he had found that there was no misrepresentation as to the Respondents' intention to provide a new clubhouse at 30SR. Hence, the Judge concluded that the negligence claim failed.

19 We agreed with the Judge that the SOC was vague. However, it was arguable whether this was fatal or was more of a case in which particulars ought to have been provided but the Respondents did not seek the same.

20 For the appeal, the Appellants argued that the basis of the duty of care was that Exklusiv was the proprietor and manager of the Club. PK was a director of Exklusiv and controlling shareholder of Exklusiv's ultimate parent, *ie*, Group Exklusiv. As proprietor of the Club, Exklusiv was obliged under Rule 4 (of the Club's rules) to provide members with a clubhouse at 30SR. Rule 4 states:

> **4. PROPRIETOR TO PROVIDE CLUB HOUSE AND PAY ALL EXPENSES**
>
> The Proprietor will provide the Club with a club house at No. 30, Stevens Road, Singapore 257840 and everything reasonably necessary for carrying on the Club in accordance with its objects including tennis courts, squash courts, restaurants, conference room, card rooms, billiard rooms, racquetball court, gymnasium, health centre, library bar and swimming pool and will be solely responsible for all expenses connected therewith and for the engagement and payment of servants and all other matters involving expenditure of money. PROVIDED ALWAYS that the Proprietor reserves the rights to vary at its sole discretion the facilities from time to time.

21 Accordingly, or so the Appellants argued, the Respondents were obliged to provide timely, true and accurate information about the status of the clubhouse at 30SR in any redevelopment of 30SR. By reason of the proprietor-member relationship and Rule 4, the Appellants were entitled to rely on the Respondents for timely, true and accurate information relating to the redevelopment of 30SR.

22 Further, the Appellants submitted that the Respondents had voluntarily assumed the responsibility to provide timely, true and accurate information on the redevelopment of 30SR.

23 The Appellants also alleged that the Respondents failed to inform the members about the following milestones of the redevelopment:

(a) The Respondents hid a condition (the "Condition") from the members. Had the members been aware of the Condition, they would have required Exklusiv to reach a satisfactory resolution with them of all issues impinging on their membership arising from any redevelopment of 30SR.

(b) The Respondents did not correct the Size Representation to the Appellants despite knowing that the URA Provisional Grant only allocated "882.5m^2" which was less than one-twentieth of the size of the existing clubhouse.

(c) The Respondents did not inform members about the sale of 30SR when the OTP was executed on 15 March 2013, or at any time thereafter until October 2017.

(d) The Respondents' alleged decision to relocate the Club in late 2015 was never communicated to the members until October 2017. This is despite PK's testimony that the relocation of the Club was a significant matter and that members should have been informed.

24 The Condition which the Appellants referred to was a term stated in a letter dated 23 September 2011 from the URA to Exklusiv's architects in response to Exklusiv's then proposal for written permission for a redevelopment. The terms required Exklusiv to "demonstrate that all members have been informed of the club's redevelopment plans and that a satisfactory resolution has been reached for all affected members."

25 Exklusiv was also required to provide a letter to the URA to state that the Condition had been addressed before it re-submitted its proposal for written permission.

26 It was true that Exklusiv did from time to time provide information to the members about the redevelopment. PK also appeared to accept in oral evidence that Exklusiv should do so. However, as the Respondents argued, this did not necessarily mean that in law the Respondents were obliged to provide

timely, true and accurate information about the milestones of the redevelopment.

27 In any event, we did not agree that the Respondents were obliged to disclose the Condition from the URA. We agreed with the Respondents that that was a matter between the URA and Exklusiv. Indeed, the commercial reality was that if Exklusiv had disclosed the Condition to the members, it would have opened itself to pressure tactics of the members who might have thought that they could have held Exklusiv to ransom if Exklusiv wanted to proceed with any plan for redevelopment.

28 As for the correction of the Size Representation, we have said that the Size Representation was not made.

29 We then came to the omission to inform members about the sale of 30SR when the OTP was granted on 15 March 2013 or at any time thereafter until October 2017. It was true that up till and including the time when the 14 March 2013 letter was issued, Exklusiv did not inform the members of the intended sale of 30SR to Oxley Gem. Indeed, it might even be said that the information provided up till then gave the contrary impression, *ie*, that the redevelopment would be undertaken by Exklusiv itself. However, it was inaccurate for the Appellants to say that Exklusiv informed them of the sale only in October 2017. By a letter dated 14 January 2014, Exklusiv informed members that it had completed the handover of 30SR to Oxley Gem. As for the period between 15 March 2013 and September 2017, it was undisputed that Exklusiv itself did not communicate information about the sale to members. However, it was more likely than not that the members were aware of the sale because of the following developments before 14 January 2014:

(a) when the OTP was granted on 15 March 2013, Oxley Gem made a public announcement of the grant on the same day;

(b) on 22 March 2013, there was a report in Today about Oxley Gem building a hotel on Pines land. Today is a daily English language newspaper circulating in Singapore.

(c) on 24 March 2013, there was a report in the Straits Times about the sale. The Straits Times is a daily English language newspaper circulating in Singapore; and

(d) on 29 May 2013, Oxley Gem exercised the OTP and a public announcement of that fact was made on the same day.

30 In the circumstances, any attempt to suggest that the Appellants only knew about the sale in October 2017 was misguided. We were of the view that it was likely that the members knew about the sale on or about 22 or 24 March 2013. This was important because it related to the question of causation of damage and the assessment of damages which we will come to later.

31 As for the allegation that the communication to relocate the Club in late 2015 (to an address other than 30SR) was not communicated until October 2017, this was immaterial simply because the Appellants were no longer basing their claim for damages on a breach during the month of October 2017 for the appeal.

Breach of contract

32 As mentioned, the Judge found that Exklusiv had breached certain implied terms of contract. The implied terms he found included:

(a) that the nature and object of the Club is that of a city club located in a location in a central area of Singapore; and

(b) a rule which permitted amendments to the Club's rules (*ie*, Rule 66) did not permit amendments which would allow the Club to be situated outside the central area.

33 In making amendments to Rules 3 and 4 which were to allow the Club to be situated at any location as the proprietor thought fit at its sole discretion and in declaring in a letter dated 27 October 2017 to members that the clubhouse would no longer be situated at 30SR, Exklusiv had breached such implied terms.

34 However, the Judge considered the assessment of damages from the date of breach being 27 October 2017. He also considered any diminution in value of the Appellants' membership, bearing in mind that they were granted access to: (a) the non-golfing facilities at the Laguna Club; (b) facilities at a five-star hotel within the grounds of the Laguna Club known as the Dusit Thani Laguna Singapore Resort and (c) the facilities of a satellite clubhouse at 30SR (when available) for at least three years. He found that the Appellants had failed to prove any loss and awarded $1,500 to each as nominal damages.

The claim for damages

35 The appeal alleged that the Judge had erred when he used 27 October 2017 as the date of the breach of contract. The correct date for the breach should be 15 March 2013, *ie*, the date of the grant of the OTP to Oxley Gem.

36 Secondly, the Judge should have awarded damages based on the decision in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others* [1974] 1 WLR 798 ("*Wrotham Park* damages"). In particular, the Appellants

relied on Rule 4 which provides that the clubhouse would be situated at 30SR. They argued that by granting the OTP to Oxley Gem, Exklusiv had put it out of their power to perform this obligation. Had the Respondents not concealed the OTP and the consequent sale from the Appellants, the Appellants would have applied for an injunction to stay the sale to protect their rights under Rule 4. Hence, the Appellants postulated a hypothetical situation where Exklusiv would have negotiated with the Appellants to be released from Rule 4. The Appellants would have referred to the sale price of $318m under the OTP and Exklusiv's profit of $217m. As the total amount received from all members for acquiring their memberships was about $10m, this was 10% of the $101m paid by Exklusiv in 2002 to purchase 30SR. A practical and fair bargain that Exklusiv and the Appellants would have reached would be 10% of the $217m profit. The $21.7m figure would then be divided among 1,490 members resulting in a figure of $14,563.75 *per* member which was rounded down to $14,500 *per* member. This was the sum which the Judge should have awarded.

37 Coming back to the Appellants' claim in tort, they argued for compensatory damages for the same sum of $14,500 *per* member. However, they argued that this is not a claim for *Wrotham Park* damages in the sense that they were not basing the tort damages on the basis of a hypothetical bargain between the Respondents and the Appellants. They argued that it was a claim for the value of their right to obtain an injunction to stop the sale to protect their contractual right. In addition, they also sought punitive damages of another $14,500 making a total of $29,000 for each of them.

The court's decision on damages

38 There were many obstacles in the way of the claim for *Wrotham Park* damages, compensatory damages and punitive damages.

39 First, the Appellants failed to specifically plead their case for *Wrotham Park* damages for breach of contract. The SOC did not even mention the allegations they rely on in their appeal for such damages, including: (a) their belated allegation that they would have applied for an injunction to stop the sale of 30SR or its redevelopment; (b) the hypothetical situation of Exklusiv striking a bargain if they had sought such an injunction; and (c) that it is likely that they would have obtained such an injunction or had a right to claim such an injunction.

40 It is also significant that the Appellants did in fact proceed to adduce evidence in relation to the quantification of damages at the trial below. This is another reason why *Wrotham Park* damages ought to have been specifically pleaded.

41 *Wrotham Park* damages are "special damages" which are not presumed and are exceptional. In contrast, general damages need not be specifically pleaded – a simple "the plaintiff claims damages" will suffice: *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd* [2021] SGCA 111 ("*Noor Azlin (Damages)*") at [253] and [254]. The reason for this distinction was explained in *Noor Azlin (Damages)* at [258]:

> First, facts warranting the grant of special damages are ***not those that the law will presume*** to be the natural, direct or probable consequences of the action complained of. They do not follow from the action complained of in the ordinary course. Second, and as a corollary to the first reason, they are ***exceptional*** in character.
>
> [emphasis added]

42 In our view, *Wrotham Park* damages bear both of the distinguishing characteristics of special damages. For context, the legal requirements that must be satisfied to obtain *Wrotham Park* damages are set out in *Turf Club Auto*

Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal [2018] 2 SLR 655 ("*Turf Club*") at [217]:

> (a) First, as a threshold requirement, the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff's expectation or reliance loss) and specific relief are unavailable.
>
> (b) Second, it must, as a general rule, be established that there has been (in substance, and not merely in form) a breach of a negative covenant.
>
> (c) Third, and finally, the case must not be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis. In other words, it must be possible for the court to construct a hypothetical bargain between the parties in a rational and sensible manner

43 It is immediately apparent that entitlement to *Wrotham Park* damages is not presumed by the law. For instance, the third requirement may fail as "***it may be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant***, ***even on a hypothetical basis***. ***Or such a bargain may have been legally impermissible***." [emphasis in original in bold italics and underline] (*Turf Club* at [176]). Indeed, the third requirement was not satisfied in *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193. The defendant had breached a covenant not to transfer certain shares away. Kannan Ramesh JC (as he then was) declined to award *Wrotham Park* damages as he concluded that the plaintiff would not have released the defendant from his covenant. The plaintiff needed to return these shares to a third party, JESOIL, eventually (at [25]). To release the defendant from his covenant was

commercially unrealistic as it would have, among other things, exposed the plaintiff to "serious risk". The covenant was in place to ensure that the defendant would be in a position to return the shares if the transaction was unwound (at [214]). Thus, specific facts establishing that a hypothetical bargain is "rational and sensible" must be pleaded. A defendant should not be left to guess at what the plaintiff's case on this requirement is.

44 Further, the Court of Appeal in *Turf Club* made abundantly clear that *Wrotham Park* damages plays a "*limited role*" and is a "*limited doctrine* which applies in a *specific context*" [emphasis in original in italics and italics with underline] (at [177] and [240] respectively). The "specific context" referred to is when all three requirements enumerated at [42] are fulfilled, including that *orthodox* compensatory damages are unavailable (at [177]). Accordingly, *Wrotham Park* damages are exceptional in nature.

45 While the Appellants submitted in the course of oral arguments that *Wrotham Park* damages are a general head of damages by reference to [93] of *Turf Club*, we were not persuaded. That paragraph is merely a summary of the amicus curiae's submissions and there is no indication that it reflects the Court of Appeal's view. In addition, that the Court of Appeal in *Turf Club* regarded *Wrotham Park* damages as compensatory in nature did not advance the Appellants' case. Such damages may still be special damages. In *Noor Azlin (Damages)*, the Court of Appeal noted that aggravated damages – awarded only when the plaintiff is able to show that there is "contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress, as the case may be" – although compensatory in nature, are special damages (at [261]).

46 We refer to the view expressed in *LighthouseCarrwood Ltd v Luckett* [2007] EWHC 2866 (QB) at [57] and [58]:

> **[57]** What of the *Wrotham Park* point? Upon this, I received long and detailed submissions. I am asked to rule that *Wrotham Park* damages are not available to the Claimant in this case, and I do so rule. …
>
> **[58]** I do not propose to deal with this at any length, satisfied as I am that the application for *Wrotham Park* damages has little merit. It has ***not been pleaded***. It sprang out of nowhere on Monday morning. It did not give the Defendant any opportunity to deal with it. He would have had to be allowed to have the opportunity to bring evidence of the ***factors which would have been used in the hypothetical negotiation***. …
>
> [emphasis in original in bold; emphasis added in bold italics]

In that case, the whole of the plaintiff's claim was struck out as it was "not able to prove any case on damages" (at [77] and [84]).

47 Similarly, the Appellants in the present case were not entitled to claim *Wrotham Park* damages due to want of pleading. If it were otherwise, the Respondents would have been irremediably prejudiced as they were deprived of the opportunity to lead evidence on matters including the methodology the parties would have used to arrive at a quantum of compensation and the relevant factors the parties would have taken into account (*eg*, Exklusiv's financial position at the material time). However, in any event, there were other factors militating against a claim for *Wrotham Park* damages for breach of contract which we shall discuss subsequently.

48 Secondly, for the tort of deceit and negligence, the SOC did not assert that the date of breach or the date of loss was 15 March 2013 which they were trying to allude to in the appeal, even though many allegations and dates were tossed about in the SOC.

49 Indeed, for breach of contract, the SOC specifically asserted that the date of breach was 27 October 2017 as that was the date of the letter from Exklusiv informing members that the clubhouse would no longer be at 30SR. No other date was alleged then.

50 In the Appellants' opening statement for the trial, they again referred to the date of breach of contract as "27 October 2017 or earlier based on the events that preceded the 27 October 2017 letter". However, no other specific date for breach of contract was mentioned.

51 In the circumstances, it did not lie in the mouth of the Appellants to argue on appeal that the Judge had erred in using 27 October 2017 as the date for breach of contract when they themselves had advocated that date.

52 The truth was that the Appellants had not intended to use 15 March 2013 as the relevant date initially. They were changing their position which they were not entitled to. They had not intended to use 15 March 2013 because they had not initially intended to argue that they would have applied for an injunction on or soon after 15 March 2013 to stop the sale of 30SR, whether in the context of their claim for breach of contract or in tort.

53 Thirdly, for tort, their then counsel had conceded in the course of oral closing submissions at trial that it would require some gymnastics to try to bring a claim for *Wrotham Park* damages for tort. Hence, on appeal they argued that the claim in tort was not for such damages because they were not relying on a hypothetical bargain. However, if they were not relying on such a bargain, there was no basis to claim $14,500 *per* member. They had derived that sum from a hypothetical bargain which they had advanced for breach of contract. In our view, there was no basis for claiming $14,500 *per* member, if the argument on

the hypothetical bargain was not pursued. The Appellants were in fact still relying on it for the tort claims but said they were not because they were trying to persuade the court that they were not seeking *Wrotham Park* damages for the tort claims. They did not show what the value of the alleged right to seek an injunction was in the absence of a hypothetical bargain.

54 Fourthly, in so far as the Appellants alleged that they would have sought an injunction, this was putting their case too high whether for breach of contract or tort. As mentioned, there was no mention of seeking an injunction to stop the sale of 30SR in the SOC. Even in the affidavits of evidence-in-chief, there was only a reference to being denied the opportunity to raise timely objection to the sale and a statement that the Respondents would then be obligated to resolve the matter before the completion date of the sale, and more probably than not, the original clubhouse at 30SR would still be standing. Even then, the SOC was not amended to state 15 March 2013 as the applicable date for the claim in contract or tort.

55 Furthermore, the Appellants had not shown, on the evidence, that they were thinking of any court action, let alone the seeking of an injunction at the material time, *ie*, from 15 March 2013. As mentioned, there were newspaper reports on 22 and 24 March 2013 about the sale. By a letter dated 14 January 2014 Exklusiv informed members that it had completed the handover of 30SR to Oxley Gem. No one from the Appellants placed any objection with the Respondents soon thereafter in March 2013 or in or after January 2014. Any suggestion belatedly made in oral evidence (see, for example, Mr Lim Seng Hoo's assertion in re-examination) that the Appellants would have taken legal action in March 2013 came too late. We therefore rejected the argument that they would have sought such an injunction.

56 The Appellants argued that the OTP had a provision which referred to the possibility of an injunction by a Club member against any construction on the property. In our view, this did not assist the Appellants. It was a provision between Exklusiv and Oxley Gem. While these parties contemplated the risk of such an injunction, it did not mean that the Appellants would have sought an injunction to stop the sale (or any construction).

57 We also noted that the Appellants had put their case on the footing that they would have sought such an injunction and not that they had lost the chance to consider seeking such an injunction. The loss of a chance was mentioned in their opening statement for the trial but not before us. Indeed, they did not even attempt to persuade us what the loss of a chance would have amounted to.

58 Fifthly, we agreed with the Respondents that the Appellants' proposed quantification of *Wrotham Park* damages blurred the distinction between personal contract rights and proprietary rights. By seeking to elevate their claim to a portion of the profits which Exklusiv was supposed to have made from the sale of 30SR, they were seeking to gain a share of an interest which rightly belonged to Exklusiv and not to them. They were not entitled to do so and there was no other formulation of their claim for *Wrotham Park* damages.

59 In the circumstances, we need not address the Respondents' argument that the Appellants' claim was not even for a breach of a negative covenant, as required for *Wrotham Park* damages, but a breach of a positive one. Nor do we need to address the Respondents' arguments that ordinary damages were available.

60 Therefore, the Appellants failed in their claim for damages of $14,500 for each of them, whether couched as *Wrotham Park* damages or as orthodox

compensatory damages. We also did not agree that the Appellants were entitled to punitive damages for tort. Such damages must be specifically pleaded and there was no good reason to depart from this general rule. In addition, the tort of deceit was not made out and even if, for the sake of argument, there was some negligence as alleged, it did not come close to constituting such reprehensible conduct as would warrant the imposition of punitive damages.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Chelva Retnam Rajah SC, Shobna Chandran, Muhammad Taufiq bin Suraidi and Thaddaeus Aaron Tan Yong Zhong (instructed) (Tan Rajah & Cheah), Lau Kah Hee (BC Lim & Lau LLC) for the appellants;
Vikram Nair, Foo Xian Fong and Tan Mazie (Rajah & Tann Singapore LLP) for the first and second respondents.