Kay Swee Pin v Singapore Island Country Club
[2008] SGHC 143

Case Number : OS 2125/2006, NA 49/2008

Decision Date : 29 August 2008

Tribunal/Court : High Court

Coram : Teo Guan Siew AR

Counsel Name(s) : S H Almenoar (R Ramason & Almenoar) for the plaintiff; Ramesh s/o Selvaraj (Allen & Gledhill) for the defendant

Parties : Kay Swee Pin — Singapore Island Country Club

Damages

29 August 2008 Judgment reserved.

Teo Guan Siew AR:

1 This is an assessment of the amount of damages payable as a result of the invalid suspension of a club membership. It raises important and interesting issues on the law of damages, including whether intangible and non-pecuniary harm such as mental distress, humiliation and the like are recoverable in a contractual setting. It also brings into question the recoverability of exemplary or punitive damages in our private law.

Background

2 The plaintiff, Madam Kay Swee Pin ("Mdm Kay"), was a member of the prominent Singapore Island Country Club ("the SICC"). Her membership was suspended for one year from 2006 to 2007 by the club. She brought an application in the High Court for the club's decision to be set aside, but failed. On appeal, the Court of Appeal reversed the High Court's decision, declaring that the suspension order was invalid and ordering damages to be assessed by the Registrar.

3 The detailed facts of the case are set out in the Court of Appeal's grounds of decision: see *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802. As the events leading up to and following the suspension of Mdm Kay's membership are relevant to the assessment of damages, I shall provide a brief outline of the factual matrix.

4 Mdm Kay became a member of the SICC in 1992. In her application form to be a member, Mdm Kay had stated as her spouse Mr Ng Kong Yeam ("Mr Ng"), with whom she had undergone a Chinese customary marriage in Johor in 1982. As a spousal member, Mr Ng was also entitled to enjoy the facilities of the club. They have a daughter who was able to make use of the club facilities as well as a junior member.

5 In August 2005, Mdm Kay decided to contest the elections for the Lady Captain of a lady golfer's sub-committee. Shortly thereafter, rumours surfaced as to her marital status. The SICC membership office then requested Mdm Kay to produce her marriage certificate. She produced a certificate showing that she had married Mr Ng on 24 August 2005 in Las Vegas. Although Mdm Kay had gone through the customary marriage rites with Mr Ng in Malaysia way back in 1982, they did not have a formal marriage certificate. As such, they decided to register their marriage in Las Vegas in order to furnish the necessary certificate to satisfy the club's membership office. Notably, Mdm Kay

had not been asked to produce a marriage certificate at the point when she first applied to be a club member in 1992.

6 A few days before the election, a member of the club Mr John Lee ("Mr Lee"), the husband of the incumbent Lady Captain of the lady golfer's sub-committee, made a complaint to the General Committee ("the GC") of the SICC. He said that there were concerns among members as to Mdm Kay's marital status which had to be investigated on an urgent basis especially since Mdm Kay was seeking lofty office within the club. Mdm Kay did not know about the complaint until the eve of the election when the general manager of the SICC informed her of it and warned her against running in the election. Mdm Kay nevertheless took part in the election and lost.

7 A series of events then transpired which left Mdm Kay so aggrieved that she decided to come to the courts to seek redress. On the basis that Mr Ng could not have been the husband of Mdm Kay at the time she joined the club in 1992 since their marriage certificate only came into existence in 2005, the GC decided to institute disciplinary proceedings against Mdm Kay. The charge which Mdm Kay had to answer before the SICC's disciplinary committee ("the DC") was that she had acted in a way prejudicial to the interests of the club by falsely declaring Mr Ng as her husband in order for him to make use of the club's facilities. It should be mentioned that even before the DC began its proceedings, the GC did some independent research of its own to discover that Mdm Kay was actually married to one Mr Koh Ho Ping ("Mr Koh") in 1977.

8 In the disciplinary proceedings, Mdm Kay's defence was that even though she had only formally registered her marriage with Mr Ng in 2005, this did not mean that they were not married before then. They were clearly husband and wife for over 20 years and acknowledged by everyone to be so. They had a daughter to the marriage who was already 18 years old. As for her first marriage, Mdm Kay said that it was dissolved more than 20 years ago long before she became a member of the SICC. She could not recall the exact date of the dissolution nor did she have any documents relating to that, because it took place a long time ago and she did not want to remember such an unhappy period in her life. Significantly, Mdm Kay added that if the SICC had insisted on the submission of a marriage certificate at the time she applied to be a member in 1992, she and Mr Ng could easily have complied by registering their marriage at that time.

9 To the DC, the material issue was whether Mdm Kay had been divorced from her first husband at the time when she joined the club. Based on documents from the Supreme Court registry (which interestingly were obtained by the GC), Mdm Kay's divorce petition was filed in 1982, with the *decree nisi* and *decree absolute* granted on 28 November 1983 and 2 March 1984 respectively. This showed that Mdm Kay was already divorced from Mr Koh at the time of joining the SICC. On that basis and also in view of her customary marriage to Mr Ng in Malaysia, the DC recommended that the charge be withdrawn. It must be noted that the DC specifically stated in its findings that it was unable to confirm whether Singapore law recognised the Malaysian customary marriage between Mdm Kay and Mr Ng in 1982 in light of the fact that Mdm Kay's divorce was only completed in 1984.

10 For some reason, Mr Lee came to know about the DC's findings and recommendations even before the GC met to deliberate on the same. He sent an email to the President of the SICC, who then forwarded it to the GC. In the email, Mr Lee essentially set out his own interpretation of the disciplinary matter. He asserted that as Mdm Kay was still lawfully married to Mr Koh when she went through the customary rites with Mr Ng in Johor, it was obvious that not only was the customary marriage of 1982 void but there was also a contravention of the Penal Code. Mr Lee then proceeded to frame the issue before the GC as follows: whether Mdm Kay was a married woman within the meaning of the laws of Singapore and of Malaysia when she applied to join the club and included Mr Ng as a spousal member.

11 In its deliberations, the GC appeared to have assumed that the DC had found Mdm Kay not guilty of the charge because the DC was satisfied that there had been a valid customary marriage between Mdm Kay and Mr Ng. That was incorrect, as the DC had specifically said it was unable to determine the issue of the validity in Singapore of that customary marriage in Johor. As the Court of Appeal noted at [30] of its decision, such an assumption "completely changed the basis of the DC's finding that [Mdm Kay] was not guilty as charged. The DC's finding was not based on the customary marriage being valid, but on its being satisfied on the evidence that the appellant had given a credible explanation as to why she could not have made or intended to make a false declaration as to her marital status to cheat the Club". Proceeding on that erroneous assumption, the GC decided that Mdm Kay could not have validly married Mr Ng in 1982, based on essentially the same reasoning as put forth by Mr Lee, *viz* that the second marriage was invalid since the first was not yet dissolved. Accordingly, the GC remitted the case back to the DC with the direction that the DC makes its recommendations based on the fact that Mr Ng was not a spouse of Mdm Kay at the time of her application, and to take into account any relevant mitigating factors.

12 Eventually, the DC recommended that Mdm Kay compensate the SICC for the green fees which the club could have collected from her for Mr Ng's golf games, totalling $12,500. The GC adopted that recommendation, but in addition decided to suspend Mdm Kay's club membership for one year.

13 When Mdm Kay saw notices of her suspension posted all over the club premises, she wrote to the GC expressing her shock at not being first informed of the suspension before the notices were put up. In the letter, she said that she and her husband had been seriously maligned because they were clearly validly married in Malaysia in 1982. The SICC replied to say that it was not the club's practice to put up suspension notices only after the member in question had been notified. Extremely upset, Mdm Kay wrote a second letter to the GC setting out her arguments as to why there had been a serious miscarriage of justice, notable of which was that she could not have a false declaration when she did not know at the point of making that declaration that it was false, since she believed in good faith that she was validly married to Mr Ng at that time. She pointed out that no one had ever suggested that their marriage was invalid until the impending election for the Lady Captain. Moreover, she asserted that they were financially strong and having paid $190,000 for the membership, would not go to the extent of lying just to save some green fees which they could well afford.

14 Receiving no response from the SICC, Mdm Kay wrote a third letter requesting that the club's annual general meeting ("AGM") pass a resolution to revoke her suspension. When the club rejected that request, Mdm Kay wrote a fourth letter stating that the club's rules allow the AGM to discuss any matter where seven clear days' notice was given. The SICC replied to say that her request was out of order, and since during the period of suspension she was not permitted to enter the club's premises, she would not be allowed to participate in the forthcoming AGM.

15 These events culminated in Mdm Kay's application to the High Court to set aside the SICC's decision to suspend her membership. She sought the following relief:

(a) That the order made by the GC of the SICC to suspend my spouse, my daughter and myself be revoked forthwith;

(b) That the SICC compensates me for the loss of use of club facilities during the period of suspension;

(c) That the SICC refunds the sum I have paid as subscription fees to the club for the period when I was not allowed to make use of club facilities and barred from entering the club's premises;

(d) Costs;

(e) Such further or other reliefs as the Court shall deem fit.

16 The High Court dismissed her application. On appeal, Chan Sek Keong CJ delivering the decision of the Court of Appeal, laid down the rules of natural justice which had to be complied with when a club expels its members. According to the Court of Appeal, there should be a more rigorous application of these natural justice rules in this case because the SICC's own rules confer on the GC very general and extensive disciplinary powers over its members. The Court of Appeal decided that the suspension order should be set aside on broadly three grounds. First, the GC had erred in failing to focus on whether the charge was made out and its decision was irrational and unreasonable. The essence of the charge was that Mdm Kay had made a false declaration, which necessarily meant that it had to be proved that when she filled in the name of Mr Ng as her spouse in the application form, she knew that it was a false statement and that she did it deliberately so that Mr Ng could make use of the club's facilities. That was clearly not shown as the GC addressed their minds instead to the wrong question of whether Mdm Kay had a valid marriage with Mr Ng in 1982. The Court of Appeal's conclusion on this point is succinctly put by Chan CJ at [64] in the following terms:

> [W]e came to the conclusion that the GC erred in law in focusing its discussion … on whether [Mdm Kay's] customary marriage with [Mr Ng] in 1982 was valid or not, and in failing to ask itself whether the Charge was made out. We were also of the view that the GC's finding that [Mdm Kay] was guilty as charged was irrational and unreasonable. Its reasoning was illogical and was based on a failure to address the Charge. The GC inferred [Mdm Kay's] intention from the consequences of her act, *ie*, it inferred that because [Mr Ng] had enjoyed the use of the Club's facilities as a spousal member, [Mdm Kay] must have declared him as her spouse with that intention. This was irrational.

17 Second, there was breach of the rules of natural justice because the GC had failed to give Mdm Kay an opportunity to respond to Mr Lee's interpretation of the DC hearing. In particular, she was not given the chance to respond to the allegation that her customary marriage was void or to explain why it did not matter to the charge against her even if that were indeed the case. The GC had therefore breached its duty to give a fair hearing to Mdm Kay. Third, the charge was inherently defective because the club's rules only applied to members, and at the time Mdm Kay named Mr Ng as her spouse, she was not yet a member of the club. For these reasons, the Court of Appeal allowed the appeal and declared the suspension order invalid. In addition to ordering a refund of all sums paid by Mdm Kay pursuant to the GC's decision, the court also awarded her damages to be assessed by the Registrar.

The assessment proceedings

18 In the proceedings before me, Mdm Kay sought three separate heads of damages against the SICC. These were:

(a) Damages for deprivation of her rights and privileges as a member (including the loss of use of the facilities of the SICC);

(b) Damages for the humiliation, embarrassment, anguish and mental distress caused by the wrongful suspension; and

(c) Aggravated, exemplary and punitive damages.

19 In her affidavit of evidence-in-chief filed for the purpose of the assessment hearing, Mdm Kay said that she and her husband Mr Ng had decided to join the SICC because it was the foremost leading club in Singapore. In addition to enjoying its excellent recreational facilities, membership at the club was also indicative of one's standing in the community and top social circles in Singapore. Being a member at the SICC further provided much business opportunities. Mdm Kay described how she, her husband and her daughter made extensive use of the club's facilities. She in particular was a very active member of the golfing fraternity, playing golf about two to three times a week. She served one year as a committee member and two years as the Vice-Captain of the lady golfer's sub-committee. As a result of the suspension, her family was deprived of all such rights and privileges. For the entire one year period, they were denied access to the club premises and could not go to the club even as guests of members, hence effectively being treated as worse than non-members who could enter the club as guests. Mdm Kay went on to list the types of activities that they could not undertake at the club during the one year, ranging from golfing to swimming at the SICC pools to pilates and dancing classes held at the club. She also could not attend the 43rd AGM which was held during the period of suspension.

20 In addition to the above loss, Mdm Kay deposed as to the other effects of the suspension on her. Mdm Kay and her husband had to decline numerous invitations from business associates and friends to have meals at the SICC because they could not enter the premises, and she said that having to explain why they could not accept the invitations was a constant source of embarrassment. She elaborated on the distress and humiliation she suffered because of the suspension:

> [T]he allegation in the charge against me was that I had lied deliberately or deliberately deceived in order to cheat the Club. I was found guilty of this charge by SICC and suspended for 1 year. I was shocked when I discovered that I had been found guilty of the Charge and suspended for 1 year. *It was and still is a constant source of humiliation, embarrassment and anguish for me. The torment I felt was unbearable. Having to explain constantly to friends, relatives and business associates was painful and difficult, and full of humiliation.*
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> The conduct of SICC after I was found guilty did not help. SICC was arrogant and the attitude of the GC towards me was demoralising. SICC treated me as a pariah as did many so called friends and associates because of the guilty verdict. Many avoided me and [Mr Ng]. [Mr Ng] and I felt humiliated and embarrassed.
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> [emphasis added]

21 According to Mdm Kay, to get away from the stress and strain which they felt, she and Mr Ng decided to join a club outside Singapore. They paid $40,000 for a lifetime membership at a country club in Phuket, Thailand.

22 Mdm Kay further alleged in her affidavit that the SICC's conduct after finding her guilty was also aggravating, especially in that the SICC did not even have the courtesy of informing her of the suspension and instead went around posting news of her suspension on the notice boards all over the club. Mdm Kay said that insofar as the notices of suspension constituted a serious defamation of her, she had instructed her solicitor to commence the necessary legal action for damages for the defamation.

23 During the hearing for the assessment of damages, counsel for the SICC, Mr Ramesh Selvaraj asked Mdm Kay to confirm that she had not prayed specifically for aggravated and punitive damages under her reliefs sought in the originating summons. Mdm Kay said that this would already be covered under prayer (e) which was for any other relief the court deems fit (see [15] above). Mr Selvaraj then

went on to ask a series of questions relating to the membership of Mdm Kay and her husband at the Tanglin Club, another prestigious club in Singapore. In essence, Mr Selvaraj sought to establish that many of the facilities which Mdm Kay and Mr Ng enjoyed at the SICC were also available at the Tanglin Club. The next part of the cross-examination was on the communication of the suspension to Mdm Kay. Mdm Kay's evidence was that while she probably did receive a letter from the SICC notifying her that she had been suspended, she was definitely certain that the letter arrived only when everybody at the club already knew about it because of the notices put up at the club's premises.

24 The other witness who testified was the present Chief Executive Officer of the SICC, Mr Sylvan Braberry. The crux of his testimony was that while it is definitely true that Mdm Kay and her family were deprived of using the club facilities for one year, she had not produced any documentary proof such as receipts for additional expenses that she incurred as a result. He said the SICC would be happy to reimburse her for such expenses if supported by documentary evidence, but the only document that they had was in relation to the $40,000 entrance fee paid by Mdm Kay for the country club in Phuket. Mr Braberry however did not deny that the suspension was a source of humiliation and embarrassment for Mdm Kay, saying that it would likely be so for any member who was subjected to the same plight. Mr S H Almenoar, acting for Mdm Kay, asked Mr Braberry why Mdm Kay's notice of suspension was put up for the entire duration of one year, to which Mr Braberry explained that it was the standard practice of the SICC to leave the notices of suspension on the notice boards for the whole suspension period.

General observations on damages

25 I begin my analysis with some preliminary observations on the rationale and limits of awarding damages. The general principle, as stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39, is that damages refers to "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". In the context of contract, that role of damages would be to place the claimant, so far as money is able to do so, in the same position he would have been in had the contract been duly performed: Parke B. in *Robinson v Harman* (1848) 1 Ex. 850. Therefore, it will be seen that the object of awarding damages is largely compensatory in nature.

26 But there are clear limits to such recompense by monetary means. Many a times, it is in the inherent nature of the damage or loss suffered that it cannot be suitably quantified in money terms. Lord Halsbury L.C. commented in *The Mediana* [1900] AC 113 at 116, in the context of granting damages to compensate for pain and suffering, as follows:

> How is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. But nevertheless the law recognises that as a topic upon which damages may be given.

27 Even where we are speaking of pecuniary losses which are susceptible to arithmetic calculation, such calculation may often not be accurate as there are almost always bound to be evidential difficulties of proof. Yet, there are practical constraints and the law knows generally of no other forms of restoration of the claimant's original position. An assessment of damages payable is therefore not an endeavour at achieving "perfect" justice, but rather to bear in mind that "the rules as to damages can in the nature of things only be approximately just": *Rodocanachi v Milburn* (1886) 18 QBD 67 at 78.

Basis for the award of damages

28 It is important at the outset to clarify and properly understand the basis for the Court of Appeal's award of damages in favour of Mdm Kay, as it would determine the measure of damages that is applicable.

29 As the case appeared at first glance to involve the review by the court of a disciplinary decision, I requested parties to submit on the applicable principles on the recovery of damages in an action for judicial review, and in particular, whether the appropriate measure of damages should be contractual, tortious or some other alternative.

30 Mr Selvaraj helpfully pointed out that this was not a case involving judicial review, there not having been any application taken up pursuant to O 53 of the Rules of Court (Cap 322, R5, 2006 Rev Ed). Instead, the liability of the SICC stemmed from a breach of contract, the contract being embodied in the constitution and rules of the club. Accordingly, as submitted by Mr Selvaraj, the contractual measure of damages should apply. He further said that if indeed this was an action for judicial review, no private remedies, particularly an award of damages, would have been available under Singapore law: *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222; *Chan Hiang Leng, Colin v Minister for Information and the Arts* [1996] 1 SLR 609. Mr Almenoar, on the other hand, contended that it is inappropriate and unnecessary to characterise the measure of damages as contractual or tortious, and seemingly advocated a unique mode of assessing damages for judicial review actions. I note however that the Mr Almenoar did rely primarily on contractual cases in putting forth the case that substantial damages are payable under Mdm Kay's three heads of claim.

31 After consideration, it is clear to me that this case is not about judicial review in the sense of an application under O 53 for the review of a public body's decision and to obtain public law remedies like certiorari and mandamus. It is true that the Court of Appeal had referred at [44] of its decision to the fact that Mdm Kay had applied to the High Court for judicial review of the club's decision. The headnote of the decision also classified the case as one involving judicial review and administrative law. "Judicial review" used in this context does not however denote the exercise of the court's supervisory jurisdiction to review the proceedings and decisions of tribunals or other public bodies of the nature understood in public or administrative law. The SICC is a private country club and evidently not discharging any public functions. Having brought the action in the form of an ordinary originating summons and having prayed for damages, Mdm Kay's claim is clearly in the form of a private law action, which in the circumstances must quite inevitably be characterised as one for breach of contract although this was not expressly stated in the originating summons. Indeed, this was the conception of the Court of Appeal when it noted at [2] that:

> This appeal is concerned with the power of the court to review the exercise of the disciplinary powers by a recreational and social club … *The legal relationship between any club and its members lies in contract, and the rights of members are determined by the terms of the contract, which are found in the constitution or the rules of the club*. The traditional approach of the courts to social clubs is to leave such clubs to manage their own affairs. However, *where a club expels a member, it may only do so in compliance with the rules of natural justice.*
>
> [emphasis added]

32 In the earlier decision of *Haron bin Mundir v Singapore Amateur Athletic Association* [1992] 1 SLR 18 ("*Haron bin Mundir*"), which involved the suspension of membership of an athletic association, the High Court also treated the case as one concerning a breach of contract as encapsulated in the rules of the association:

> The expression 'supervisory jurisdiction' is a term of art. It is the inherent power of the Superior Courts to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions. *The defendants are not a public body. In its true character it is a private organisation very much like a limited company*. As such they do not come under the purview of the supervisory jurisdiction of the Superior Courts.
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> *The true nature of the plaintiff's cause of action is breach of contract…*
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> The device used by the courts to determine cases of expulsion or suspension of members in an unincorporated association is by the application of the doctrine of natural justice. *The rules of natural justice are implied into every contract express or implied which contemplates a hearing affecting the rights and livelihood of persons.*
>
> [emphasis added]

33 Thus, in a similar vein, Mdm Kay's claim properly understood is one in breach of contract, *ie* that the SICC had wrongfully suspended her membership in breach of the terms of contract found in the constitution and rules of the club. There is a "judicial review" of the decision of the GC of the club to the extent of questioning whether it is in line with the rules of natural justice for the purpose of determining if there had been a breach of the contract, such natural justice rules being either expressly or in this case impliedly provided for under the contract in the form of the SICC's constitution. The principles of administrative law that were applied by the Court of Appeal, such as the *audi alteram partem* principle and those relating to the irrationality of the decision-making process, can therefore be seen as being applied by analogy to a private law context for the purpose of deciphering whether there had indeed been a breach of contract. Properly conceived, the claim for damages hence arises from a contractual breach, and it is therefore to the contractual principles of damages that recourse should be had in assessing the quantum of damages that is payable in this case.

Procedural objections by the SICC

34 Before examining whether damages are recoverable under each of Mdm Kay's three heads of claim, it is pertinent to first address certain threshold objections raised by counsel for SICC in connection with the second and third heads of claim: *viz* damages for the humiliation, embarrassment, anguish and mental distress; and aggravated, exemplary and punitive damages. Broadly, Mr Selvaraj made two essentially procedural arguments.

(i) That the Court of Appeal did not make an order in respect of such types of damages

35 Mr Selvaraj's submission was that the Court of Appeal did not make an order in respect of the kind of damages sought under the second and third heads of claim, and the assessing court is not at liberty to vary or modify the judgment. He pointed out that what Mdm Kay had prayed for was the revocation of the suspension order and payment for the loss of use of facilities for one year. That is true, but it must be remembered that Mdm Kay also asked for "such further or other reliefs as the Court shall deem fit" (see [15] above). Even though such a blanket prayer for any other relief which the court thinks should be ordered is frequently included at the end of a series of specific prayers, and may almost seem like a routine standard prayer, that does not mean that it should therefore be devoid of any effect. Due regard and consideration must still be paid to the fact that it was included. In the event, the Court of Appeal made the following orders:

> We therefore allowed the appeal with costs to the appellant and *declared the suspension order*

against the appellant invalid. We also ordered the respondent to refund all sums paid by the appellant pursuant to the GC's decisions, *and awarded the appellant damages to be assessed by the Registrar*.

[emphasis added]

36 Mr Selvaraj contended that the Court of Appeal did not expressly say that damages should be assessed in respect of humiliation and mental distress, or that aggravated and exemplary damages are payable. However, on the other hand, the court likewise did not expressly limit the damages to be assessed to be that of the loss of use of facilities. In my view, and with respect, a reading of the Court of Appeal's decision and the orders made suggests that the damages to be awarded are consequential to the setting aside of the suspension order. In other words, there is force to the submission by Mdm Kay's counsel Mr Almenoar that the order was for damages to be paid for all losses flowing from the wrongful suspension of membership provided that such losses are recoverable as a matter of law, and subject to the usual rules on remoteness, causation and so forth. To the extent that any such damages may not be specifically set out, they would come within the relief that "the Court shall deem fit", corresponding to the Mdm Kay's prayer (e). Mr Selvaraj's construction of the order for damages made is too narrow in the circumstances. Awarding damages under Mdm Kay's second and third heads of claim will not, in my view, be inconsistent or constitute a variation of the Court of Appeal's judgment.

(ii) That Mdm Kay's failure to specifically pray for such damages bars her from claiming such relief

37 The next point raised by Mr Selvaraj was that Mdm Kay had not prayed specifically for her second and third heads of claims in the initial originating summons which she filed to set aside the SICC's suspension order. This, as submitted by Mr Selvaraj, prevents her from making such claims now in the assessment of damages. He relied on the following commentary by Professor Jeffrey Pinsler in *Singapore Court Practice 2006* (Singapore, Malaysia, Hong Kong: LexisNexis, 2006) at para 18/15/3:

> From the procedural perspective the issue arises as to whether 'aggravated damages' must be pleaded. Where aggravated damages are the necessary and immediate consequence of the defendant's wrong they would be encompassed in a claim for general damages, in which case a specific plea would not be necessary …. *If the claim for aggravated damages cannot be regarded as a necessary and immediate consequence of the defendant's wrong, then the facts giving rise to this relief must be pleaded so that the defendant is not unfairly surprised*. Order 18 rule 7 requires, inter alia, all material facts which establish the plaintiff's claim to be pleaded so as to avoid taking the defendant by surprise at the hearing.
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> [emphasis added]

In addition, reference was also made by Mr Selvaraj to established English authorities on the importance of pleadings: *Farrel v Secretary of State* (1980) 1 All ER 166; *Esso Petroleum Co. Ltd v Southport Corporation* (1956) AC 218.

38 There can certainly be no quarrel with the general principles on pleadings, and there is no doubt that pleadings are essential to define the issues and inform all parties of the case they have to meet. But a few initial observations are apposite at this juncture. First, we are dealing with an originating summons in which there are no pleadings. The rules referred to are of course laid down in the context of writ actions. Second, it must be borne in mind that at the time Mdm Kay filed this action, she was not represented by counsel but acting in person. Third, the commentary by Professor Pinsler relied

upon only applies specifically to aggravated damages: there was no mention at all of damages for mental distress and humiliation. There is also the question of whether exemplary or punitive damages should be regarded as distinct from aggravated damages. I shall deal with this issue later, but for present purposes, it would suffice to note that the SICC's position appears to be that there is such a distinction. Hence, for exemplary or punitive damages, Mr Selvaraj instead relied on the English case of *Cassell & Co Ltd v Broome* [1972] 1 All ER 830 for the proposition that such damages must also be specifically pleaded. According to him, this position has since been endorsed by an amendment of the civil procedure rules in England. However, he acknowledged that there has been no such similar amendment to Singapore's rules of court. Mr Selvaraj nevertheless submitted that the underlying rationale of the rule – which is to prevent surprise to the other party –necessitates the same conclusion in Singapore law.

39 The above considerations raise some doubts as to the strict application of the requirement of specific pleadings or prayers to Mdm Kay's second and third heads of claim. Be that as it may, in determining if and how this rule of pleading is applicable to our present case, it is ultimately the substance and rationale of the rule that is more important. As rightly pointed out by Mr Selvaraj, the requirement to specifically plead arises because of the need to prevent the other party from being caught by surprise and prejudiced as a result. That much is clear from the above quote from *Singapore Court Practice 2006* itself. Reference can also be made to O 18 r 8 of the Rules of Court, which states:

> 8.–(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –
>
> (a) …
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise.

40 In general, in considering a claim for damages, whether or not the other party would be so surprised will depend largely on whether the damages sought are in the nature of general or special damages. Special damages differ from general damages in that they do not flow naturally from the breach and will hence require the necessary particulars to be pleaded so that other party will be on notice. This distinction is made clear by Chao Hick Tin J (as he then was) in *The Shravan* [1999] 4 SLR 197 at [77], citing from *Bullen & Leake on Precedents of Pleading* (12th ed):

> General damage is such as the law will presume to be the natural or probable consequence of the defendants' act. It arises by inference of law, and need not, therefore, be proved by evidence and may be averred generally. Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but such as depends in part, at least, on the special circumstances of the particular case. It must therefore be always explicitly claimed on the pleading, as otherwise the defendant would have no notice that such items of damage would be claimed from him at the trial.

41 If special damages are sought without first giving the other party notice of the particular facts which are supposed to give rise to it, then the other party is prejudiced in not being able to prepare to rebut these allegations. The view expressed in *Singapore Court Practice 2006* (see [37] above) is therefore that aggravated damages are generally in the nature of such special damages which must accordingly be specifically pleaded with sufficient notice to the other party, unless they are the necessary and immediate consequence as in defamation cases: see *Lee Kuan Yew v Vinocur* [1995] 3 SLR 477.

42 Dealing first with Mdm Kay's second head of claim, it is an arguable issue whether the alleged mental distress, humiliation, anguish and embarrassment can be said to flow naturally from the wrongful suspension. If it can be so said, then her second head of claim does not even come within the ambit of "special damages" in the above sense and accordingly need not be specifically prayed for. In any event and more importantly, the SICC's argument of surprise must be tested in context. Here we are dealing with allegations of intangible "mental harm" like distress and humiliation, which in their very nature concern the state of mind, experience and emotions of the plaintiff. In this case, the proceedings had been bifurcated. Separate timelines were taken for the assessment of damages and separate affidavits of evidence-in-chief for the assessment were filed. In Mdm Kay's affidavit for the assessment, she elaborated on her feelings of anguish, humiliation and distress (see [20] above). Counsel for the SICC would have had time to digest these allegations and prepare for the cross-examination of Mdm Kay to assess the veracity of her claims. This is not a situation where there are allegations of plentiful new facts and events by the plaintiff, which the defendant, in not having been given notice earlier, is put in a position where he cannot put forward his own version of events and call witnesses to rebut the plaintiff's story. As mentioned, only the state of mind and emotions of Mdm Kay are in issue, and her evidence on this was available prior to and at the assessment hearing to be dissected by the SICC's counsel. As it turned out however, Mr Selvaraj at the hearing did not seriously challenge her allegations of mental distress. In fact, the SICC's own witness Mr Braberry agreed with Mdm Kay's counsel that such feelings of humiliation and anguish can only be expected of someone whose membership had been suspended. In these circumstances, one struggles to see how the SICC can be said to be prejudiced in having to deal with Mdm Kay's claim for damages under the second head.

43 My view is therefore that Mdm Kay's initial failure to specifically pray for damages in respect of her mental distress, humiliation, anguish and embarrassment does not now bar her from seeking such damages at the stage of assessment. This conclusion is buttressed by the approach taken by Chao J in *The Shravan*, where the defect in pleading was clearly regarded by him as not fatal but rather capable of being rectified. There, the challenge brought by the defendant was that an alternative method of calculation of the loss of revenue relied upon by the plaintiff was not pleaded, and that it had to be because the claim was in the nature of one for special damages. Chao JA agreed that it was a claim in special damages, but decided as follows at [78] to [79]:

> On these principles, I think this item of claim is a claim in special damages. It arose because of the particular circumstances of the case, namely, a fluctuating market. It must be pleaded and proved. Of course the position here is that the item on loss of revenue is pleaded, just that this alternative method is not. At the commencement of trial, Hin Leong did, in their opening statement, state that they were seeking the alternative method of claim. Leave was given to Hin Leong to file a supplementary affidavit to substantiate this alternative basis of computation. Leave was also given to the defendants to adduce evidence of market prices of the cargo from any source in the industry. However, at the resumed hearing of the trial, the defendants chose not to adduce any evidence on that.
>
> *There can be no doubt that the defendants had more than ample time to prepare their case on the alternative basis of computing loss of revenue. It was an issue that clearly arose during the trial. If it were necessary that this alternative basis for determining loss should be explicitly pleaded and if the loss had been proven, I would grant the necessary leave to amend.*
>
> [emphasis added]

44 Equally in the present case, the critical issue is not whether Mdm Kay complied strictly with the black letter of the rule on specific pleading (assuming it applies), but instead whether the SICC was in

fact prejudiced and caught by surprise as to the claim for damages for distress and humiliation. For the reasons highlighted above, I am of the view that the SICC could not be said to be so surprised and prejudiced.

45 Moving on to Mdm Kay's third head of claim, it is much more obvious that aggravated damages, as well as exemplary or punitive damages, are in the character of special damages since they do not usually flow automatically from the fact of breach. Other circumstances, particularly those pertaining to the conduct of the defendant in breaching the contract, would of course be relevant. The defendant must be given adequate notice of this in the plaintiff's pleadings or prayers. In the present case however, as is evident from both the Court of Appeal decision and the High Court proceedings, all the circumstances of the suspension, including the entire disciplinary process and how the GC's decision was taken and conveyed to Mdm Kay, were already canvassed in detail for the purpose of liability (*ie* in deciding whether the suspension should be set aside). In other words, the aggravating conduct of the SICC was already addressed at length during the hearings for liability. Crucially, the substratum of facts upon which Mdm Kay's claim for aggravated and exemplary damages now rests is generally the same as that considered by the Court of Appeal. Moreover, this being in the nature of an originating summons, and as is also clear from the record of proceedings, there does not appear to be any dispute of the factual circumstances surrounding the suspension. It follows that the SICC can scarcely maintain the assertion that it is caught unaware by these facts relied upon by Mdm Kay to show the aggravating conduct of the SICC both prior and after the decision to suspend her membership. Mdm Kay's failure to pray specifically for aggravated and exemplary damages in her originating summons therefore should not deny her from making such claims for the purpose of ascertaining the quantum of damages to which she is entitled.

46 Having disposed of the procedural objections raised by the SICC, what follows is to consider whether as a matter of the substantive law on damages, the three heads of claim sought by Mdm Kay are recoverable, and if so what the appropriate quantum should be.

Damages for deprivation of member's rights and privileges (including loss of use of facilities)

47 It was not in dispute that as a result of the one-year suspension, Mdm Kay was deprived of all the rights and privileges as a member and could not make use of the club's facilities from 19 May 2006 to 18 May 2007. In addition to the loss of use of the club's facilities by Mdm Kay and her family, she was also deprived of the right to attend the AGM and to vote at the meeting. As mentioned above, Mdm Kay and her husband joined another country club in Phuket after the suspension of her membership at the SICC. Notably though, she did not claim for the membership fees of that club in Thailand. For the deprivation of her rights and privileges as a member of the SICC for one year, Mdm Kay claimed for $52,500.

48 The SICC's challenge to her claim under this head is a simple one: that she had failed to prove that she had suffered any pecuniary loss and is therefore entitled to only nominal damages. Mr Selvaraj argued that she had produced no evidence whatsoever of any pecuniary loss suffered. As Mr Selvaraj sought to establish during the hearing, first, Mdm Kay and her husband were members of the Tanglin club, and they could simply have made use of the facilities there instead. Second, Mdm Kay had not produced any receipts or other evidential proof showing that they had incurred additional expenses in having to entertain their guests at other venues or having to use facilities elsewhere as a result of the suspension of her membership.

49 It is difficult to see how the SICC is able to justify an argument that no pecuniary loss has been suffered by Mdm Kay in having her membership at the club suspended for one year. She purchased the lifetime membership at a price of $190,000, and it seems obvious that there is a clear pecuniary

component to the membership. As the Court of Appeal commented at [4] of its grounds of decision:

> … membership of the Club was transferable. Membership of SICC is highly sought after for its social cachet as well as for the recreational, social and sports facilities (especially golf facilities) which the Club offers. Membership at SICC is regarded as a symbol of social success by many. For these reasons, membership of SICC comes at a high price. In the present case, [Mdm Kay] paid $190,000 in 1992 to purchase her transferable membership. Hence, a transferable membership *has not only a social value but also an economic value*.
>
> [emphasis added]

50 There can be little doubt that the loss of membership for one year does constitute a pecuniary loss, the membership being clearly one with financial value. The true nub of the difficulty lies in quantification. And it would seem that the real objection by the SICC is that the loss of Mdm Kay had not been precisely quantified accurately in monetary terms. Both Mr Braberry during the hearing and Mr Selvaraj in submissions referred to how Mdm Kay had failed to tender receipts and other documentary evidence showing the substitute expenses that were incurred as a result of the suspension. That misses the point. Mdm Kay is quite plainly not claiming for damages for such expenses incurred. Of course, it appears that expenses caused by a breach of contract are recoverable as a matter of law (see for *e.g.*, *McGregor on Damages* (London: Sweet& Maxwell, 17th ed., 2003) at para 2-030), and if Mdm Kay indeed is claiming for this, then it is true that she will need to adduce the necessary evidence that such expenses were indeed incurred. But the fact is that Mdm Kay is not claiming for such expenses. This is made clear by how she did not seek to claim, for example, for her membership fees at the club in Thailand. The following testimony of Mdm Kay during the assessment hearing indicates that what she is claiming for is the fact that she was deprived of her right of using the SICC's facilities:

> That was my right to go there – that is the issue. I can no longer go to island club. That is my second home there. The fact that I can go somewhere else is besides the point – of course I could have gone to somewhere else.

51 Mr Selvaraj emphasised that damages for breach of contract do not exist at large and are dependent on proved loss. He further relied on *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 for the proposition that the plaintiff bears the burden of proving such loss. This general principle is eminently correct: it is trite law that a person who claims for damages must prove his loss. But this hardly equals to a proposition that the losses in question must be calculated with mathematical precision before damages can be awarded. Mr Selvaraj has not shown me any authority to that effect. He cited the House of Lords decision of *Bonsor v Musicians' Union* [1955] 3 All ER 518, which involved similar facts concerning the wrongful suspension of a member from an association. Yet, I fail to see how that decision assists him as the House of Lords held that the expelled member there was entitled to all remedies available to a breach of contract, including damages. The dicta of Lord Somervell of Harrow did suggest that only special damages can be claimed in such a case, but neither he nor the other Law Lords said that such special damages must be capable of proof to the precise amount. Nor, in fact, was it made amply clear by Lord Somervell what exactly he meant by the term "special damages".

52 To the contrary, there are authorities which say that difficulties of proof do not bar an award of damages. In *Robertson Quay Investments Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623, the Court of Appeal described the process of proving damage in this way (at 639 to 640):

> The law, however, does not demand that the plaintiff prove with complete certainty the exact

amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* continues as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks* [[1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss*. [emphasis added]

…

Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (*ie*, expenses incurred between the time of accrual of the cause of action and the time of trial), or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss such as loss of prospective earnings or loss of profits (see generally *McGregor on Damages* at paras 8-003–8-064). The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

53 Specifically with regard to contractual damages, in *Chitty on Contracts* (London: Sweet & Maxwell, 29th ed, 2004), it is said at para 26-007 that:

> The fact that damages are difficult to assess does not disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence.

54 Therefore, a flexible approach is warranted when it comes to an assessment of damages. The fact that precise quantification is a challenge should not mean that there is to be no recovery. The law does not require absolute certainty in the quantum of loss before an award will be made, but rather the court does its best in the circumstances to give a fair award in the interests of justice. This principle is no different whether we are considering damages in tort or in contract. That an award of damages should lay in the present case seems compelling if one considers a hypothetical case where membership fees are not payable upfront for a life term, but rather payable for each year on the basis of a fixed annual fee. One would then surely be hard-pressed to deny that the member should be entitled to recover for that one year fixed annual fee if he was wrongfully suspended for a year. The mere fact that in Mdm Kay's case the mode of payment of fees was different and took the form of an upfront lump sum payment, which happens to make it more difficult to quantify what is the value of that membership for one year, ought not to preclude her from recovery.

55 As to the appropriate quantum of damages for the deprivation of membership rights for one year, the price tag for a life membership must obviously be taken into account. Mr Braberry said that the SICC life membership presently costs between $200,000 to $250,000, while Mdm Kay's cost her $190,000 in 1992. Mr Braberry also provided evidence of the costs of a term membership for one year, which is $24,000. As a term member, one is equally entitled to all the facilities of the club as a lifetime member. However, there are some crucial differences in that the term member has no right to vote at the AGM, nor is he able to hold office or be co-opted to serve in committees of the club. I agree with Mr Almenoar that such rights are equally valuable and must be considered when making any attempts to derive the amount of damages that should be payable in this case by reference to the price of a term membership.

56 Mr Selvaraj alluded to Mdm Kay's lifetime membership in the Phuket country club, and said that its value of $40,000 should be pro-rated to reflect what its value would be for a year. But in my opinion, the price of membership at the country club in Thailand is less instructive, not least because we are talking about a club in another country. Also, there was not much information at all on the facilities available there and how they compare to those of the SICC.

57 Having regard to how much a lifetime SICC membership costs, and applying a suitable premium to the price of a term membership to reflect the value of rights such as the right to vote, I award $32,000 as damages to Mdm Kay for the deprivation of her membership rights and loss of use of facilities for the one year period of suspension. In reaching this conclusion, I readily concede that a broad-brush approach has been adopted and the process of assessment is far from a scientific inquiry to any degree. Nevertheless, the assessing court must do its best within the practical limits to make a fair award and achieve as just a result as the law is capable of producing.

Damages for mental distress, humiliation, embarrassment and anguish

58 It does not appear to be seriously disputed that Mdm Kay had indeed suffered much distress and undergone a difficult period as a result of the wrongful suspension of her membership. She described in her affidavit how she suffered constant humiliation and embarrassment, especially in having to explain to friends and relatives about why she was suspended, and how there had as a result been much anguish and mental distress for her. As already stated, counsel for the SICC during cross-examination did not challenge these allegations to any extent, and the SICC's Mr Braberry seemed to accept that she had indeed experienced such emotional and mental suffering. The SICC's objections laid more in the procedural objections (which has already been dealt with above) and the argument that damages for such kinds of losses and damage are not recoverable in contract as a matter of law.

59 Before examining in detail the law on whether such losses are recoverable in respect of a contractual breach, it is convenient to first quickly dispose of a line of argument by Mr Selvaraj apparently premised on the availability of relief for Mdm Kay in a claim for defamation. During the assessment hearing, Mdm Kay was questioned as to whether she had instructed her counsel to commence an action in defamation against the club, and whether she had the intention to proceed with such a claim. Her answer was that she had indeed consulted her lawyers on this, and was keeping her options open. Mr Selvaraj then argued in submissions that the damages sought under this head are properly within the province of a defamation claim instead and should be pursued separately.

60 However the simple answer to Mr Selvaraj's objection is that there is a distinction between the damages sought for reputational losses on the one hand, and damages for mental distress, humiliation and so forth on the other. These constitute separate categories of losses: the recovery of one should not deprive the pursuit of the other. To be sure, the following exchange between Mr Selvaraj and

Mdm Kay during the assessment hearing must be referred to:

> DC: Page 2 of D1 [a letter which Mr Almenoar's firm had sent on behalf of Mdm Kay to the SICC alleging defamation] – last paragraph – demanding for an appropriate sum in damages to compensate for the serious injury to reputation character and credit as well as the associated distress and embarrassment *etc* – confirm that for this Assessment of Damages you are also claiming for reputational loss etc?
>
> Kay: Yes.

61 One must however read the above bearing in mind that Mdm Kay is a lay person who is unlikely to fully appreciate that the law recognises different categories of losses which in turn are recoverable pursuant to different types of causes of action. Even accepting that there is some overlap between the losses claimed in this action and that in a possible defamation suit, this fact alone ought not to preclude recovery by Mdm Kay here. This is best put across by Andrew Phang Boon Leong JA writing extra-judicially in 2003, where in the context of considering the argument that recovery ought to be denied if damages sought for mental distress were in reality damages for defamation, he stated as follows [see Andrew Phang, "The Crumbling Edifice? The Award of Contractual damages for Mental Distress" [2003] JBL 341 at 342-343]:

> However, we are now clearly no longer fettered by technicalities centring around, for instance, the concept of the forms of action and, indeed, one might add that the disregarding of legalistic constraints in the facilitation of just results is nowhere better illustrated in relatively recent times than in the House's own decision in *Henderson v Merret Syndicates Ltd* to the effect that in the context of concurrent actions in contract and tort, the claimant had a free choice as to which action to mount. Indeed, it makes no real sense that the claimant might or might not be awarded damages for mental distress, depending on whether it framed its action in contract or in tort.
>
> …
>
> *Indeed, there is no reason why one avenue of legal redress must necessarily be precluded simply because another exists. Justice demands that there be no double-recovery but beyond this, there is no compelling reason for maintaining artificial barriers.*
>
> [emphasis added]

62 Furthermore, as pointed out by Mr Almenoar, any claim for defamation is at best speculative at the moment. For these reasons, Mr Selvaraj's argument based on the availability of an alternative avenue of redress in defamation does not hold water.

The general prohibition and its exceptions

63 It is not inconceivable that a breach of contract can potentially cause the innocent party to experience feelings of distress, anguish, humiliation and embarrassment. Such intangible emotional harm or undesirable sensory experiences, the subject matter of Mdm Kay's second head of claim, would be referred to hereinafter collectively as "mental distress". The general position as a matter of English law is that damages for such mental distress are not recoverable where the action is one for a breach of contract. The leading authority cited for this proposition is frequently the House of Lords decision of *Addis v Gramophone Co* [1909] AC 488 ("*Addis*") (see *Chitty on Contracts* at para 26-074; *McGregor on Damages* at para 3-019). In that case, it was held that damages could not be awarded to an employee for his hurt feelings in having been wrongfully dismissed, even if the dismissal had

been carried out in a harsh and humiliating way. The decision in *Addis* has been accepted in Singapore: see *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560 ("*Teo Siew Har*"); *Haron bin Mundir; Arul Chandran v Gartshore* [2000] 2 SLR 446 ("*Arul Chandran*").

64 A close reading of the *Addis* decision reveals however that its specific ground for refusing recovery is not that there should be no *compensation* for such mental distress, but rather that damages should not be awarded as *punishment* for causing such distress through the contractual breach. In other words, punitive or exemplary damages should not be awarded for causing mental distress. Such was the interpretation of the decision by our Court of Appeal in *Teo Siew Har*. Chao Hick Tin JA, delivering the judgment of the court, said at [55]:

> We will begin by first looking at the House of Lords' decision in *Addis v Gramophone Co Ltd* [1909] AC 488, which has been taken to stand for the proposition that damages will not generally be awarded for non-pecuniary loss, in particular mental distress. In that case, the plaintiff was successful in bringing a wrongful dismissal claim against the defendant. *The Law Lords emphasised that damages for breach of contract were in the nature of compensation, not punishment*. This did not include damages for his injured feelings even if he had been dismissed in a harsh and humiliating manner.
>
> [emphasis added]

65 The precise ruling in *Addis* is therefore more pertinent to the third head of Mdm Kay's claim, which will be dealt with later. The question for now remains whether damages can nevertheless be ordered in respect of mental distress as a matter of compensation. The English Court of Appeal in *Watts v Morrow* [1991] 1 WLR 1421 would suggest that the answer to this question is also in the negative. Bingham LJ stated as follows (at 1445):

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

66 Framed as such a general principle, it seems clear that the prohibition in the law extends to all attempts at recovering damages for mental distress in a contractual claim, whether such damages are regarded as compensatory or punitive in character. Our High Court in the cases of *Haron bin Mundir* and *Arun Chandran* has endorsed Bingham LJ's general statement of principle. This general prohibition is grounded in legal policy: mental distress constitutes a category of loss which is not recoverable in contractual actions as a matter of law because of certain policy considerations. GP Selvam J in *Arul Chandran* referred (at [17]) to the following passage from an American book (Howard O Hunter, *Modern Law of Contracts*, (1999 Rev Ed)) which highlights four possible policy considerations against recovery of damages for mental distress:

> Recovery for mental distress, disappointment, and anguish is inappropriate in contract actions for four reasons: (1) it is not directly related to the economic effect of the breach; (2) it is open to speculation; (3) it may be the subject of frivolous claims; and (4) it is not reasonably within the contemplation of the breaching party.

The policy against recovery is particularly strong in commercial cases. In *Johnson v Gore Wood & Co* [2001] 2 WLR 72, Lord Cooke commented that "[c]ontract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude".

67 However, in England, there developed exceptions to this general rule prohibiting recovery, the most well-known of which is that embodied in the so-called "holiday" cases. In *Jarvis v Swan Tours* [1973] QB 233, the defendant travel agent had promised the claimant a very attractive holiday package with excellent facilities. The trip turned out to be a huge disappointment hardly matching the standard advertised. The English Court of Appeal awarded damages as compensation for the disappointment, distress and frustration experienced by the claimant. Lord Denning said that in a proper case damages for mental distress can be recovered in contract, such as where it is a contract for a holiday or any other contract to provide entertainment and enjoyment. Even though such damage is difficult to assess in terms of money, it is no different from the assessment which the court has to make in personal injury cases for loss of amenities. The case was subsequently followed and applied to similar facts in other cases involving spoiled holidays: *Jackson v Horizon Holidays* [1975] 1 WLR 1468; *Jackson v Chrysler Acceptances* [1978] RTR 474.

68 This exception is not limited to only contracts for holidays. In the relatively recent House of Lords decision of *Farley v Skinner* [2001] 3 WLR 899, the defendant employed by the claimant to survey a house was specifically asked about whether the property was affected by aircraft noise. The defendant surveyor negligently failed to investigate and discover that the property was indeed so affected. But the problem for the claimant was that the purchase price he paid was found to match the market value of the house even taking into account the aircraft noise interference, such that he could not have suffered any pecuniary loss. The House of Lords nevertheless held that an award of damages was justified in respect of his disappointment at the loss of a pleasurable amenity and his distress in having to cope with the excessive aircraft noise. Their Lordships took the view that the peace of mind and quiet which the claimant wanted to enjoy at the premises was a major or important part of the contract.

69 Thus, recovery for mental distress is possible where the object of the contract was to provide pleasure and enjoyment but the exact opposite result occasioned instead because of a breach of the contract. Bingham LJ in *Watts v Morrow* described the exception (at 1445) as such:

> But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.

70 For convenience, such contracts falling within this exceptional category shall hereinafter be referred to as contracts that have as their object the provision of "mental benefits". *Farley v Skinner* establishes that it is sufficient that the provision of the "mental benefits" is a major or important object of the contract: it need not be the sole or entire purpose of the contract. And since this is the important decision by the House of Lords which recognises the existence of this exception and clarifies its scope (in particular confirming that its reach is not limited to only the "holiday" cases), this exceptional category where mental distress sounds in damages will be labelled below as the "*Farley v Skinner* exception".

The parties' arguments

71 Both parties appear to be in broad agreement with the law as stated, and their differences lay in how the present case fits into the above scheme of things. In seeking damages for mental distress, Mr Almenoar relied principally on the Malaysian decision of *Florence Bailes v Dr Ng Jit Leong* [1985] 1 MLJ 374 ("*Florence Bailes*"), which concerned facts very similar to that in the present case. The plaintiff in *Florence Bailes* was found to have been wrongfully suspended from a club in Penang by the club's committee in breach of the rules of natural justice. The court awarded her damages in the

sum of RM10,000 for the embarrassment, distress and humiliation which she suffered as a consequence of the wrongful suspension. In addition, Mr Almenoar also referred to the English decisions of *Watts v Morrow*, *Jarvis v Swan Tours* and *Farley v Skinner* and said that these were relevant and instinctive in considering the damages to be awarded. Presumably, Mr Almenoar's contention was that Mdm Kay's claim for damages for mental distress falls within the exceptional category of contracts as recognised in these cases.

72 Mr Selvaraj on the other hand submitted that *Florence Bailes* is a case which should be confined to its own special facts, and that in any event it may not even be a good precedent in Singapore because of our local decisions in *Arul Chandran* and *Teo Siew Har*. He essentially emphasised how the general rule against recovery for mental distress had been endorsed by our courts, and that it should be applied in the present case to deny recovery by the plaintiff. The cases of *Jarvis v Swan Tours* and *Farley v Skinner* were sought to be distinguished.

Whether the Farley v Skinner exception applies in the present case

73 As mentioned above, it is definitely true that our local courts have adopted the same general rule that precludes recovery of damages for mental distress in a breach of contract case. However, it is also equally clear that there is recognition of the *Farley v Skinner* exception where the contract is one for the provision of "mental benefits". Specifically, both Selvam JC in *Haron bin Mundir* and the Court of Appeal in *Teo Siew Har* made reference to the "holiday" cases as examples of this exception to the general rule, although the exception was found to be inapplicable on the facts of the individual cases. And contrary to Mr Selvaraj's submissions, the Malaysian case of *Florence Bailes* is not inconsistent with our local courts' approach and is reconciliable as a case which falls within the scope of the *Farley v Skinner* exception. GP Selvam JC in *Haron bin Mundir*, after alluding to the cases of *Jarvis v Swans Tour* and *Jackson v Horizon Holidays Ltd*, said of the *Florence Bailes* case (at [43]):

> In view of the foregoing, the Penang Club case must be regarded as a case no more than a decision on the facts of the case. *It may be rationalised on the basis that the club was to provide mental and emotional comfort to the plaintiff*. It cannot, however, be regarded as a case establishing any general principle or as a new exception to the general rule outlined above.
>
> [emphasis added]

The case of *Haron bin Mundir* itself was clearly distinguishable on the facts from *Florence Bailes*, since the former involved the suspension of a member of an athletics association, where the relationship between the association and its members cannot be said to be one which has as its object the provision of "mental benefits". The exception was therefore not triggered and the general rule prevailed.

74 The pertinent question that arises is whether the present case falls within the *Farley v Skinner* exception. There seems little doubt that the SICC club membership contract does come under the class of contracts which provides for "mental benefits". Indeed, Mr Selvaraj did not appear to contend that the membership contract is not one to provide pleasure and enjoyment. However, he maintained that the cases like *Jarvis v Swans Tours* and *Farley v Skinner* can be distinguished such that damages for mental distress is not recoverable by Mdm Kay. It was argued that while one of the objects of the contract between the SICC and Mdm Kay is for the latter's enjoyment of the club's facilities, any loss of such enjoyment (if proved) would already be considered under her first head of claim. Mr Selvaraj also contended that the Mdm Kay's mental distress was not with respect to the enjoyment of the club's facilities itself, but rather arose because of the club's actual act of wrongful suspension and in particular the placing of suspension notices for the duration of her suspension.

75 These arguments by Mr Selvaraj are persuasive at first glance, but ultimately are, with respect, misconceived. For a start, it is not immediately obvious whether there can indeed be a meaningful distinction drawn between mental distress caused by being deprived of the enjoyment of the club's facilities on the one hand, and mental distress caused by the actual act of suspension on the other. Suspension of membership necessarily entails and is the reason why one is deprived of the use and enjoyment of the club's facilities. Potentially, although not argued expressly, Mr Selvaraj could be distinguishing between the effect of the suspension of membership and the manner in which that suspension was carried out. Presumably, the argument could be that mental distress suffered as a result of the effect of the contractual breach (*ie* the feelings of distress in being denied the use and enjoyment of the club facilities) is recoverable under the *Farley v Skinner* exception, but mental distress caused by the manner of breach (*ie* the way the suspension was carried out) is not. That analysis unfortunately cannot withstand scrutiny because it is clear that the exception applies in both of those situations. The general principle stated by Bingham LJ in *Watts v Morrow* is that damages will be awarded for mental distress "if the fruit of the contract is not provided *or if the contrary result is procured instead* [emphasis added]". Hence, the SICC membership contract being one for the provision of "mental benefits", and mental distress having resulted instead, damages are recoverable whether or not the distress can be attributed to the loss of use of facilities or the way in which the suspension was carried into effect.

76 Mr Selvaraj's other submission, that any such damages of the nature recognised under the exception would already be subsumed under Mdm Kay's first head of claim for loss of enjoyment of the club's facilities, also misses the point. It fails to recognise the different nature of the first and second heads of claim. Under the first, Mdm Kay is claiming for damages to reflect the loss she sustained as a result of having been deprived of the access and use of the club. She is seeking compensation for not having been able to *physically* step into the premises and make use of the facilities, as was her right as a member. There is further a financial value attached to this, as recognised by the Court of Appeal which opined that the membership has both social and economic value. At the same time, there are also the more *intangible* benefits of the club membership in terms of the pleasure, relaxation and comfort that can be derived. Undoubtedly, Mdm Kay was equally denied of such "mental benefits" as well during the period of suspension. Over and above that, she was subjected to quite the opposite feelings of mental distress. And it is for that damage which Mdm Kay seeks compensation under the second head of claim. The two heads of claim are therefore separate and distinct and should not be conflated in determining what should be the appropriate compensation. They compensate her for different aspects of her loss.

77 The above analysis becomes clearer when the facts in other cases are considered. In *Jarvis v Swans Tours*, it must be borne in mind that the claimant did get to travel to and stay at the ski resort in Switzerland as promised by the travel agents. Accordingly, there could have been no issue of compensating him for any loss in terms of not having been able to go for the holiday trip. However, the English Court of Appeal awarded him substantial damages because the quality of that holiday fell far below the standards promised. It is noteworthy that the House of Lords awarded him damages of £125 when the contract price of the holiday was only £63.45. Obviously then, their Lordships were dealing with something over and above just the ticket price of the trip. As Lord Denning's grounds of decision makes clear, damages were awarded for the enjoyment and entertainment promised but not delivered and the consequent mental distress that resulted. Similarly in *Farley v Skinner*, although it was found that there was no pecuniary loss because the aircraft noise did not reduce the market value of the house, the House of Lords nevertheless recognised that the claimant there should be compensated for the mental distress he suffered in having to live with the additional noise level, again an intangible and non-pecuniary aspect of his loss.

78 Accordingly, in my view, compensation for the deprivation of the rights and privileges as a

member (including the loss of use of facilities) does not preclude recovery for damages for mental distress arising from the wrongful suspension. Like *Florence Baile*s, this claim for damages to compensate for mental distress comes within the *Farley v Skinner* exception and recovery should be allowed. I would add that this result is justified not only as matter of case authority, but also as a matter of policy and principle.

79 Returning to the policy objections against recovery of contractual damages for mental distress referred to by the court in *Arul Chandran* (see [66] above), the first is that such losses are not directly related to the economic effect of the breach. This contention assumes that we are dealing with commercial contracts where only economic interests are at stake. As explained above, the club membership in our case is not such a contract, but rather has as one of its important object the provision of "mental benefits". Where the opposite result of mental distress is procured instead, it is eminently reasonable as a matter of principle that compensation should follow. The second policy concern that such claims are open to speculation is not invalid but should probably not be given undue weight. It has already been pointed out that difficulties of assessment have never proved an insurmountable obstacle in the law on damages. The attainment of justice as best as the law can should be the overriding consideration. If it were otherwise and awards for intangible losses be disallowed because of the impossibility of precise calculation, damages for pain and suffering and the like in tortious cases would not have been possible. Third, it is said that extending the reach of damages to cover mental distress may open the floodgates to frivolous claims. Yet the exception is limited and narrow, and there is little risk of indeterminate liability. Recovery in the present case is only permissible because the SICC membership constitutes a contract which has as its central focus the provision of pleasure, enjoyment and other "mental benefits". The majority of contracts entered into do not fall within such an exceptional category.

80 Thus far, the issue has been posed as one of policy: *viz* whether there are certain types of losses which are regarded as not recoverable as a matter of the law of contract because of various underlying policy considerations. But it would be seen that one of those considerations, the fourth point in the passage referred to in the *Arul Chandran* decision, relates to whether the loss was in fact within the reasonable contemplation of parties. One should immediately recall that this factor is what is also typically examined at the stage of ascertaining whether the damage sustained is too remote. Indeed, while the traditional analysis in this area of the law is to identify categories of losses which are recoverable and those that are not as a matter of policy, there is an increasing trend both in case law as well as academic literature to approach the issue instead from the perspective of remoteness of damage.

Alternative analysis based on remoteness of damage

81 The blanket rule prohibiting recovery of damages for mental distress in contractual actions (subject to some narrowly defined exceptions) is not without controversy. Specifically with regard to employment contracts, there are indications in English cases that the general rule in *Addis* may not be totally secure. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, Lord Cooke commented that he would "take leave to doubt the permanence of *Addis* in English law", after noting that damages were awarded for mental distress for breaches of employment contracts in Canada and in New Zealand. Lord Hoffmann in *Johnson v Unisys Ltd* [2003] 1 AC 518, after similarly referring to Canadian developments in this area, said that to follow the Canadian approach would involving overcoming the obstacle of *Addis*, a task that he was prepared to perform if called upon to do so.

82 It would appear that one of the main problems with the current state of the law is that it fails to adequately address the fact that some contracts do not have a purely commercial dimension but may involve other interests as well. This makes a *blanket* general prohibition against any relief for

mental distress caused by contractual breaches difficult to justify. As observed in *McGregor on Damages* at para 3-020:

> The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If, however, the contract is not primarily a commercial one, in the sense that it affects not the claimant's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation.

83 Indeed, a forceful argument can be made that the proper approach should not be for the law to identify certain types of losses as being absolutely non-recoverable in contract, but rather for the law to focus the inquiry on whether such losses in terms of mental distress or other types of intangible harm are too remote to warrant recovery. This is because there can be a myriad of different types of contract. While the majority of them can be expected to have commercial considerations at their hearts, some of them do not only entail business interests but also other non-pecuniary aspects as well. It is however difficult to try and carve out carefully defined exceptions to cater for each and every of these different types of contract. There could be much uncertainty and problems of characterisation. As the law stands, it is not always an easy task to draw a clear distinction between contracts that are purely commercial in nature with a view to profit, and those that seek to provide enjoyment, pleasure and other "mental benefits" (which would trigger the *Farley v Skinner* exception). These difficulties with the current approach of having a general prohibitory rule with ad hoc exceptions have been considered in detail by Andrew Phang Boon Leong JA in his 2003 article referred to above (see above at [61]). Phang JA argued persuasively in favour of an alternative approach which reverses the general rule: all losses arising from a breach of contract, including mental distress, are recoverable but subject to the usual rule of remoteness. In commercial cases, there can be a rebuttable presumption that damages for mental distress will be too remote. Phang JA explained the reasons for such an approach (at 372-373):

> [T]he English courts themselves have conceded that where the "core" of the contract concerned involved the provision of comfort, pleasure, peace of mind or freedom from distress, damages should be awarded. In such situations, it is (as we have seen) undoubtedly the case that the award of damages for mental distress is eminently appropriate. However, why should the line be drawn at this juncture only when it is entirely possible to conceive of other situations where a breach of contract has in fact occasioned mental distress? *It is one thing to argue that such mental distress is too remote a consequence of the breach but quite another thing altogether to dismiss the possibility of the award of damages (and the opportunity of doing justice) out of hand. Whilst it is true that damages for mental distress would (as we have already seen) probably be too remote in a purely commercial context, this does not logically entail a blanket prohibition against the award of such damages without more.*
>
> [emphasis added]

84 There are indications in recent English decisions of a similar approach. In *Johnson v Unisys Ltd,* Lord Millett suggested (at [70]) that the rationale behind non-recovery for mental distress in contract cases has to do with the fact that parties would not have had such consequence within their reasonable contemplation:

> [T]he general rule would seem to be a sound one, at least in relation to ordinary commercial contracts entered into by both parties with a view of profit. In such cases non-pecuniary loss such as mental suffering consequent on breach is not within the contemplation of the parties and

> is accordingly too remote. The ordinary feelings of anxiety, frustration, and disappointment caused by any breach of contract are also excluded, but seemingly for the opposite reason: they are so commonly a consequence of a breach of contract that the parties must be regarded not only as having foreseen it but as having agreed to take the risk of its occurrence … Contracts which are not purely commercial but which have as their object the provision of enjoyment, comfort, peace of mind or other non-pecuniary personal or family benefits (as in *Jarvis v Swans Tours Ltd* [1973] QB 233 and similar cases) are usually treated as exceptions to the general rule, though in truth they would seem to fall outside its rationale. Such injury is not only within the contemplation of the parties but is the direct result of the breach itself and not the manner of breach. Indeed the avoidance of just such non-pecuniary injury can be said to be a principal object of the contract.

And in *Farley v Skinner*, Lord Scott also addressed the issue of contractual damages for mental distress from the perspective of the remoteness principles in *Hadley v Baxendale* (1854) 9 Exch 341.

85 While this approach based on remoteness principles is conceptually attractive and appears to enjoy some support in English case law, it must be pointed out that both parties in the present case did not submit on it. I therefore go no further in the discussion of this approach, save to mention the following observation. A membership contract with a country club is quite evidently not a purely commercial contract, because it has as its principal object the enjoyment and pleasure to be derived by the member from the use of the club's recreational facilities. Bearing this in mind, if a member were to be deprived of all these facilities (for which she has paid a hefty sum) because of a wrongful suspension of her membership for no good reason, a strong argument can certainly be made that the anguish and distress on her part would be within the contemplation of the club.

86 Therefore, although my decision that Mdm Kay is entitled to damages for mental distress is on the basis of existing law and particularly that the *Farley v Skinner* exception applies, I would add that the alternative analysis based on the principles of remoteness of damage would suggest a similar conclusion.

The appropriate quantum

87 It is apposite at this juncture to briefly revisit the facts to appreciate the kind of mental distress which Mdm Kay had gone through. The charge levied against her was a serious one which implied that there was dishonesty. She had given her explanations to which the DC largely accepted and thus found her not guilty. However, it turned out that the GC misinterpreted the findings of the DC, and focussed intently on the wrong question of whether Mdm Kay's customary marriage to Mr Ng in 1992 was a valid one in law. All along Mdm Kay had a perfectly credible and satisfactory response but yet she was not given an opportunity to speak. She also had no chance to rebut the allegations of the complainant Mr Lee. After the suspension took effect, Mdm Kay wrote no less than four letters setting out vehemently her objections and again reiterating her clearly plausible account for what had happened. The contents of these letters show a person truly aggrieved at the miscarriage of justice and protesting her innocence. It must have been particularly distressful how her repeated attempts at putting forth the perfectly sensible and cogent explanations appeared to have fallen on deaf ears, the GC apparently choosing not to listen. To compound matters, the notices of suspension were left on the notice boards around the premises of both locations of the SICC for the entire one-year period of suspension, as is the standard practice of the club. The suspension notice stated that Mdm Kay had "acted in a manner prejudicial to the interests of the Club and its members in that she had falsely declared Mr Ng Kong Yeam as her spouse to make use of Club Facilities since September 1992". The message put across to the other members of the club was that Mdm Kay had lied and cheated the club simply to save some green fees for her husband. This must have surely caused a significant

degree of humiliation and embarrassment to Mdm Kay.

88 In approaching the issue of quantum, the earlier observations on how an assessment of damages is never a precise science must again be borne in mind. Seeking to quantify compensation for something as intangible as undesirable sensory experiences and emotional harm is bound to invite allegations of arbitrariness and subjectivity. Yet, the impossibility of a precise calibration of the monetary compensation to fit exactly the degree of harm or damage ought not to preclude recovery. Once the law has taken the view that damages in mental distress should in principle be recoverable in such a case, the court must do its utmost in the circumstances to give such damages an appropriate quantum. As Sir David Cairns in *G W Atkins Ltd v Scott* (1991) 7 Const LJ 215 noted (at 221), "[t]here are many circumstances where a judge has nothing but his common sense to guide him in fixing the quantum of damages, for instance, for pain and suffering, for loss of pleasurable amenities or for inconvenience of one kind or another". One learned commentator (see Michael G. Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 Can. Bar Rev. 323 at 368) has observed to similar effect:

> [I]t is hard to make scientific the process of awarding damages for intangible losses in contract cases. The most one can hope for is internal consistency in awards and in the values espoused by our legal system.

89 One of the main problems in the present case is that both parties did not really address to any significant extent the question of what the appropriate quantum of damages should be. The SICC's position all along was that damages should not be payable for mental distress whatsoever as a matter of law, and hence Mr Selvaraj made no submissions as to quantum at all. Mdm Kay's counsel Mr Almenoar put forth two figures – $125,000 (which he said is too much) and $80,000 (which he said is too little) – and then simply asserted that a figure in between of $102,000 is the amount that should be awarded. No specific reasons however were given as to how these figures were derived at.

90 Admittedly, there is difficulty because of the seeming dearth of case law on what is appropriate compensation for mental distress, especially in the specific context of a wrongful suspension of membership. The "holiday cases" like *Jarvis v Swan Tours* are of limited precedential value when it comes to the issue of quantification, as they deal with very different subject matter. Some guidance as to the appropriate quantum can however be gleaned from the Malaysian case of *Florence Bailes*. There, the court awarded RM10,000 as damages for the mental distress caused by the wrongful suspension of membership. Mr Almenoar argued that in considering this case, a few factors need to be taken into account. First, he alluded to the fact that in *Florence Baile*s, the claimant did not have to pay any entrance fees to be a member of the club and instead only had to pay a monthly fee. In contrast, Mdm Kay had to fork out $190,000 for her membership. Second, the suspension in *Florence Bailes* concerned only the claimant herself, while in our present case not only Mdm Kay, but her husband and daughter as well, were affected. Third, whereas the claimant in *Florence Bailes* was a housewife, Mdm Kay is actively involved in running one of the largest travel agency in Singapore. Mr Almenoar also pointed out that the period of suspension there was only 3 months as opposed to 12 months in Mdm Kay's case, and that the case took place 24 years ago and inflation over this period of time should be taken into account. In my opinion, the much shorter period of suspension in *Florence Bailes* and the fact that the case took place many years ago are clearly pertinent considerations which suggest that the amount to be awarded in the present case should be considerably higher.

91 Having said that, it must be acknowledged that in the English cases which discussed the quantum of damages for mental distress, the tone is one of judicial conservatism. In *Watts v Morrow*, Bingham LJ took the view that awards for mental distress should be modest and restrained. The Law Lords in the subsequent decision of *Farley v Skinner* agreed, with Lord Steyn commenting that "[i]t is

important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation". Although their Lordships in *Farley v Skinner* observed that the judge's award of £10,000 for the claimant's distress in having to cope with the excessive aircraft noise was on the top end of what would be appropriate, they were not prepared to interfere with the award made.

92 Having in mind the above considerations, my opinion is that the $102,000 sought by Mdm Kay for mental distress is excessive. Based on the rather limited material and arguments on the quantum of damages before me, the sum of $40,000 in my view would be sufficient to compensate Mdm Kay for the mental distress that she sustained as a result of the wrongful suspension.

Aggravated, exemplary and punitive damages

93 In considering Mdm Kay's third head of claim, it is first essential to clarify an issue on terminology. Exemplary damages, or punitive damages as they are more frequently called in the American context, refers generally to damages that are awarded against the defendant as punishment, in cases where his conduct in breaching the contract is particularly flagrant, reprehensible and egregious. The English Law Commission regarded the aim of exemplary damages as two-fold: to punish the defendant and to deter both the defendant and others from conduct that is malicious or socially harmful (see its *Report on Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997)). Such goals of punishment and deterrence can be contrasted with the compensatory role of damages alluded to above. The term "aggravated damages" however is less clear. It could be used in the context where the aggravating circumstances of the breach led to additional losses for the plaintiff, such as injury to his feelings and dignity. Here, "aggravated damages' will connote the additional compensation that is given to the plaintiff in such instances and would be no different from the damages for mental distress under Mdm Kay's second head of claim. On the other hand, the aggravating factors could also mean that the conduct of the defendant is so bad and uncalled for that he should be penalised by paying damages. Aggravated damages on this latter conception would then be simply referring to the same thing as exemplary and punitive damages. This uncertainty with the term "aggravated damages" was noted by the English Law Commission in its report:

> The nature and purpose of aggravated damages has been the subject of much confusion. Existing uneasily on the border between exemplary and compensatory damages, they have variously been interpreted as being exemplary or compensatory, or as being a hybrid of the two. The confusion arises because an aggravated damages award will only be made in a case where the defendant has engaged in exceptional conduct. The quantum – and the effect – of an aggravated award may be similar to that which an exemplary award would have had in the same case.

94 Since Mr Almenoar grouped Mdm Kay's claim for aggravated damages together with the claim for exemplary and punitive damages, and damages for mental distress were already sought under the second head of claim, it would seem that the reliance is on aggravated damages as punishment, as opposed to in its compensatory sense. In any case, to the extent that Mdm Kay is seeking to recover monetary *compensation* for additional losses or harm suffered as a result of the aggravating conduct of the SICC in the way it suspended her membership, that would already be covered as part of the damages awarded under her second head of claim.

95 Mr Almenoar described how the Court of Appeal had found serious breaches of natural justice by the SICC, such as prejudgment, irrationality in decision-making and the framing of an illegal charge. In light of the findings of the Court of Appeal, it is hard to deny, and indeed does not appear to be disputed, that the club had certainly acted in a less than acceptable or reasonable way in this entire

episode. But the real and threshold question is not whether its conduct is indeed reprehensible and deserving of punishment, but rather, even assuming its conduct was in fact so, whether the SICC should therefore be made to pay damages *to the plaintiff Mdm Kay* in this action as a form of penalty for the misconduct. Mr Almenoar asserts that the answer is yes, but without citing any case law or authority to back up his stand. Unfortunately, the weight of authority is against him.

96 As mentioned in my initial observations, the general role of awarding damages is perceived as compensatory in nature. Exemplary or punitive damages are more the exception than the norm, at any rate as a matter of English law. In the House of Lords decision of *Rookes v Barnard* [1964] AC 1129, Lord Devlin clarified this area of the law and severely curtailed the scope of exemplary damages, regarding it as an anomaly in the law of damages which has a solely compensatory purpose. In reconciling earlier English decisions where such awards for exemplary damages were made, Lord Devlin suggested that these could be explained as in reality cases of aggravated damage (in the compensatory sense), opining that "it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed" in such cases. A blanket ban on exemplary damages was therefore imposed, subject to only three limited exceptions: (i) where there had been oppressive, arbitrary and unconstitutional conduct by government servants; (ii) where the defendant's conduct had been calculated by him to make a profit for himself which exceeds any compensation payable to the claimant; and (iii) where exemplary damages were expressly authorised by statute.

97 This general prohibition against exemplary damages was subsequently re-affirmed by *Cassell & Co Ltd v Broome*, a leading House of Lords decision which has been judicially adopted in Singapore in several cases. In particular, in the context of defamation cases, Lai Kew Chai J in *Lee Kuan Yew v Jeyaretnam JB* [1990] SLR 688 endorsed this general rule that damages may only be compensatory, with the only exception being where the defendant, either with knowledge of the tort or recklessly, decides to publish because he may gain more than he would lose in material terms.

98 In the realm of contract, as highlighted above, the House of Lords decision of *Addis* is the leading case on this point, (although it has been frequently cited for the proposition that damages for mental distress are not recoverable). Lord Atkinson compared the contractual position with the tortious one, and was of the view that while exemplary damages are recoverable for the latter, it could not be for the former. (It must be remembered that the case was decided before *Rookes v Barnard* at a time when it was still thought that exemplary damages could generally be obtained in a tortious action). Lord Atkinson stated as follows (at 496):

> In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v Thorpe*. One of the consequences is, I think, this: he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.
>
> …
>
> In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present ….

Addis has of course been cited and followed in many local cases, including *Teo Siew Har* wherein Chao JA accepted the principle in *Addis* that contractual damages are in the nature of compensation

and not punishment.

99 Quite apart from authority, recognising exemplary or punitive damages in private law can obscure the traditional divide between the civil and the criminal spheres in the law: the former concerns itself with compensation and regulating the relationship between private individuals, while the latter focuses on punishment and deterrence in the public context. This line will be blurred if we introduce punitive elements into private law through the award of exemplary damages. As noted in *McGregor on Damages* (at 11-001):

> Whether a modern legal system should recognise exemplary damages at all has been much debated, but it is thought that, all in all, the case for dispensing with them is made out. The central argument against them is that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law.

100 But one may argue against an *a priori* assumption that the civil and criminal distinction is necessarily one of consequence, particularly since it seems that the boundaries are becoming blurred. The English Law Commission in its Report (see [93] above), in supporting the award of exemplary damages, suggested it may not be possible to maintain a bright divide between civil and criminal law: just as the criminal justice system can be seen as increasingly incorporating compensatory elements, it can be said that punitive elements should not be excluded entirely from civil law remedies. Yet, there is a clear difference in terms of the standard of proof. A legitimate concern is whether the imposition of punitive measures on defendants in civil matters is harsh and unfair to them without the same procedural safeguards afforded by the criminal law. Another concern is the potential windfall to claimants. It is difficult to justify why the monies exacted from the defendant as a punishment for his behaviour should go to the claimant rather than to the State.

101 Such policy considerations militate against the recognition of exemplary and punitive damages in private law and specifically in the law of contract. That said, it must be acknowledged that this is a developing area of law and such a cursory discussion hardly does any justice to this important issue. There are signs of liberalisation in other common law jurisdictions, principally in Canada. Andrew Phang Boon Leong JC (as he then was) in *CHS CPO Gmbh* (*in bankruptcy*) *v Vikas Goel* [2005] 3 SLR 202 commented thus (at [65] to [66]):

> The rather limited circumstances under which exemplary damages will be granted under English (and, presumably, Singapore) law appears to be in a state of transition, even flux (compare, for example, the House of Lords decisions of *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co Ltd v Broome* [1972] AC 1027 on the one hand with both the House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 and the New Zealand Privy Council decision of *A v Bottrill* [2003] 1 AC 449 on the other; further reference may be made to the English Law Commission's *Report on Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997)).
>
> There is the yet further issue as to whether or not exemplary damages could be awarded for cynical breaches of contract (see generally, for example, the Canadian Supreme Court decision of *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257). All these issues raise important questions of great import but fall outside the purview of the present decision.

102 However, the burden is on the plaintiff to show that such exemplary and punitive damages are recoverable as a matter of law and on the facts in this case. As seen, the present weight of authority is against the recognition of such damages, and no argument in principle or policy had been put forth to show why the position should be otherwise. In the result, Mdm Kay cannot succeed in her third

head of claim.

Conclusion

103 For the above reasons, I assess the amount of damages payable under Mdm Kay's first head of claim (for the deprivation of membership rights and privileges) as $32,000, and under the second head of claim (for mental distress) as $40,000. I disallow the third head of claim for aggravated, exemplary and punitive damages. The total quantum of damages awarded is therefore $72,000.