Pilkadaris Terry and others *v* Asian Tour (Tournament Players Division) Pte Ltd and another and another suit
[2012] SGHC 236

Case Number : Suit No 624 of 2010 and Suit 551 of 2010

Decision Date : 27 November 2012

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Christopher Anand Daniel, Ganga Avadiar and Harjean Kaur (Advocatus Law LLP) for the plaintiffs; Simon Yuen (Legal Clinic LLC) for the defendants.

Parties : Pilkadaris Terry and others — Asian Tour (Tournament Players Division) Pte Ltd and another

Contract – Restraint of Trade

27 November 2012 Judgment reserved.

Judith Prakash J:

Introduction

1 This case involves the interesting question of whether and how the doctrine of restraint of trade applies to a sporting association and its members. The association in question is called The Asian Tour and it is made up of professional golfers from all over the world, albeit mainly Asian, who wish to practise their trade in Asia.

Background

The parties

2 There are two consolidated actions before me. In the first, Suit 551 of 2010 ("Suit 551"), the plaintiffs are Terry Pilkadaris ("Mr Pilkadaris"), Matthew James Griffin ("Mr Griffin") and Guido Van Der Valk ("Mr Van Der Valk"). A fourth plaintiff is named on the writ of summons but at an early stage he decided that he did not wish to proceed with the claim and took no further part in the proceedings. In the second action, Suit 624 of 2010 ("Suit 624"), the first three plaintiffs are the same persons as in Suit 551 and in this action they have been joined by a fourth plaintiff, Anis Helmi Hassan ("Mr Anis"). All the plaintiffs are professional golfers. Mr Pilkadaris and Mr Griffin are Australians, Mr Van Der Valk is Dutch and Mr Anis is Malaysian.

3 The defendants in both suits are Asian Tour (Tournament Players Division) Pte Ltd ("ATTP"), a private limited company incorporated in Singapore in February 2004, and Asian Tour Ltd ("ATL"), a company limited by guarantee incorporated in Singapore in June 2004. Two of the persons who were instrumental in setting up the defendants gave evidence in this case. The first is Kyi Hla Han ("Mr Han"), a former professional golfer who is now the executive chairman of ATL and a director of ATTP. The second is Unho Park ("Mr Park") a professional golfer who plays tournament golf for a living and is a member of The Asian Tour.

4 The plaintiffs have all at one time or another been members of The Asian Tour. The plaintiffs

started proceedings against ATTP initially on the basis that that was the organisation that owned The Asian Tour and that they were members of. Subsequently, ATTP and ATL alleged that it was ATL which owned the Asian Tour and that the plaintiffs' membership had been with ATL. As a consequence, the plaintiffs added ATL as second defendant to the suits. The background of the Asian Tour is therefore relevant.

Formation of the Asian Tour

5 Prior to 2004, Mr Han and Mr Park were members of the Asian PGA Tour ("APGAT"). Like other professional golfers on this Tour, they earned their living from participating in golf tournaments organised by APGAT. APGAT was a corporation in the business of organising golf tournaments in all of Asia apart from Japan and deriving revenue therefrom particularly from the sale of television rights. It decided on the number of tournaments that would be held each year, where they would be held and the prize money and size of the tournaments. The professional golfers had no say in any of these decisions and were only required to turn up and play. They were not owners of APGAT and had no stake of any sort in the company.

6 A group of professional golfers including Mr Han was dissatisfied with the situation. They considered that APGAT was driven primarily for commercial purposes that did not take into account the players' desire to see the Tour grow and be taken care of so as to provide them with a career path. This group was attracted by the model presented by the United States PGA ("US PGA") Tour, the European Tour and other recognised golf Tours where the professional golfer was a stakeholder in the Tour who could be the master of his own destiny by organising tournaments, getting sponsors for prize money and obtaining commercial and media income for the benefit of himself and his fellow Tour members.

7 In 2003, Mr Han, Mr Park and other golfers decided to set up a new golf Tour in which:

(a) Touring professionals could and would become stakeholders (hereinafter called "members") and take charge of their own destiny by owning the business.

(b) The members would elect a Tournament Player's Committee ("TPC") to take charge of golfing matters.

(c) The members would elect a board of directors to manage the business of a golf Tour and the majority of the directors would be members themselves.

(d) The Tour would become a member of the International Federation of PGA Tours ("IFPGA") (of which the US PGA Tour and European Tour are dominant members) and thereby allow members of the Tour to qualify to play in the lucrative world tournaments held under the auspices of the IFPGA.

(e) World ranking points would be given to winners of tournaments organised by the Tour and such points could make them eligible to play in the four major golf championships in the world.

(f) There would be the opportunity for members to participate in events that were co-sanctioned by other Tours.

(g) There would be a properly structured system for young professionals to learn, compete and rise in ranking within the Tour.

(h) The Tour would be a self-regulating body for its members.

The features mentioned above are all features of the major golf Tours which make up the IFPGA.

8 In early 2004, all the professional golfers in the APGAT, including Mr Pilkadaris, left that organisation to start the Asian Tour. Mr Han explained that the Asian Tour was established in order to help the members own their own destiny. The intention was that the Asian Tour would create more playing opportunities for its members. APL was structured as a public corporation limited by guarantee just like the European Tour in order to allow for a large membership. The members of the Asian Tour would vote for those members they desired to fill the TPC (of whom two would sit on the board of directors), two more to be member directors on the board and several non-member directors. The Asian Tour would be a complete player-led organisation. Subsidiary companies would be formed to be the business units of the Asian Tour.

9 On 18 August 2004, a players' meeting was held in Tianjin China. The players were told about the Asian Tour, its structure, and the rights and responsibilities of members. The inaugural AGM of ATL was held in November 2004 and both a TPC and a board of directors were elected. Mr Han was elected as chairman of the board, a position which he held right up to the date of the hearing. In 2004, a document entitled "2004 Asian Tour Members Handbook & General Regulations" ("2004 Regulations") was published. A new edition of the handbook and regulations was brought out every year thereafter.

10 In 2004, its inaugural season, the Asia Tour staged a total of 22 tournaments offering prize money of US$12.3m. In 2005, the Asian Tour staged 27 tournaments with US$20m in total prize money. The Tour also had new events in Qatar, Brunei, Indonesia and Thailand. In 2006, the prize money increased to US$24m and new tournaments were held in Pakistan, India and Malaysia. The Asia Tour continued to grow and in 2008, there were 30 events and prize money of US$39m. At the time of the hearing, the Asian Tour had over 200 members.

The plaintiffs join the Asian Tour

11 Mr Pilkadaris became a professional golfer in Australia in October 1998 and a member of the APGAT in 2002. He joined the Asian Tour when it was set up having attended the August 2004 players' meeting. At that time, the Asian Tour was the only body in South East Asia that provided golf tournaments catering to professionals in the region. Due to its tie up with the IFPGA, the Asian Tour was able to provide a Tour of quality tournaments. Mr Pilkadaris stated that when he signed up as a member of the Asian Tour, it was his understanding that ATTP owned and was managing and administering the Tour. On signing up, he was given a copy of the 2004 Regulations. Subsequently, Mr Pilkadaris renewed his membership of the Asian Tour annually by paying the membership fees for each subsequent year up to and including 2010.

12 In 2010, Mr Pilkadaris was a member of and held playing status on the European Challenge Tour, the Australasian Tour and the Asia Tour. He had been a member of all three Tours for four years.

13 Mr Griffin became a professional golfer in Australia in October 2008. He is a member of the PGA Tour of Australasia and the Asian Tour. He qualified to join the Asian Tour as a member in 2009. When he signed up for the Asian Tour, he was given a copy of the 2009 Regulations. He renewed his membership in 2010. Mr Griffin's understanding was that the Asian Tour was owned and run by ATTP.

14 Mr Van Der Valk became a professional golfer in the Netherlands in 2002. He is a member of the Dutch PGA National Tour and the Asian Tour. He joined the Asian Tour in or about January 2005 and

was given a copy of the 2005 Regulations. At that time his understanding was that ATTP was managing and administering the Asian Tour. Mr Van Der Valk subsequently renewed his membership annually including in 2010.

15 Mr Anis is a member of the Malaysian Professional Golf Tour, the ASEAN Tour, and the Asian Tour. He became a member of the Asian Tour in 2007. On joining, Mr Anis was given a receipt for the payment of his membership fees but no other document. Subsequently, he renewed his membership with the Asian Tour annually including in 2010.

Events leading to these actions

Entry of OneAsia

16 In 2008, an organisation known as OneAsia Limited ("OneAsia") announced that it wanted to hold between four and six golf tournaments in Asia in 2009 with attractive prizes. These tournaments were not expected to take place on the same dates as the Asian Tour tournaments and Asian Tour members were eligible to participate by invitation. OneAsia was a series of golf tournaments organised for commercial benefit. Professional golfers were not eligible to become members of OneAsia. A professional golfer could only play in a OneAsia tournament if invited by OneAsia to participate in that event.

17 The TPC discussed OneAsia's proposed tournaments in 2008. It sought the views of members of the Asian Tour. The decision was that since the OneAsia tournaments appeared to complement the Asian Tour schedule, subject to there being no clash of dates, the TPC did not object to Asian Tour members participating in OneAsia's tournaments in 2009.

18 This attitude changed subsequently. In March 2009, OneAsia published its tournament schedule for 2009. This schedule showed, according to Mr Park, that OneAsia had "poached" the Volvo China Open, the Kolon Hana Bank Korean Open and the Midea China Classic which were previously tournaments on the Asian Tour schedule. The TPC considered that this was a wholly different matter from OneAsia offering new tournaments. Instead it was taking away tournaments from the Asian Tour. The TPC therefore reviewed the situation and decided to impose certain stipulations regarding the participation of its members in tournaments organised by OneAsia.

19 These stipulations were as follows:

(a) All Asian Tour members wishing to compete in OneAsia events had to apply for release under Regulation 1.10 of the 2009 Regulations.

(b) Each release would be dealt with on a case-by-case basis and would be at the discretion of the TPC and the executive management.

(c) Players who gained entry through the European Tour categories would be granted a release.

(d) Players who gained entry through their home tour (*ie* Chinese players in China for the Volvo China Open 2009) would be granted a release.

(e) Players who gained entry through OneAsia categories would not be released.

(f) Players who were not granted a release and continued to participate in OneAsia events

would be fined US$5,000 and banned from Asian Tour tournaments for the remainder of the season.

20 By late 2009, Mr Park said, the situation turned ugly. The Asian Tour found that five of its tournaments had been poached by OneAsia as part of the OneAsia Schedule of Tournaments for 2010. OneAsia was attacking the Asian Tour by taking away the latter's tournaments. It became a predator and was seriously damaging Asian Tour's ability to provide a meaningful career for its members.

21 The TPC decided that the "conflicting event" clause (Regulation 1.10 of the 2009 Regulations) was not sufficient to defend Asian Tour against the war waged by OneAsia. Some of the OneAsia events could be scheduled on dates which did not conflict with Asia Tour events. As OneAsia had publicly stated on its website that it was challenging the established Asian Tour for supremacy in Asia, the TPC decided to add another category of tournament which would require a release before an Asian Tour member could play in a OneAsia event. This category was the "competing event" category which was incorporated into the 2010 Regulations.

Asian Tour's "Release Policy"

22 The evidence as given on behalf of the defendants by their Director - Finance, Mr John Chung Chun Yee ("Mr Chung"), is that many well-known golfing Tours have what is commonly referred to as a "Release Policy". This is a policy or rule that provides that, in certain circumstances, a member of that Tour needs to obtain a "Release" from his Tour in order to participate in an event which has not been organised or sanctioned by his Tour.

23 In the case of the Asian Tour, the release policy is contained in Regulation 1.10. Regulation 1.10 first appeared in the 2004 Regulations. It was amended in the 2010 Regulations to include the need for a release to enable a member to participate in a "competing event" in addition to the original requirement for release to play in a "conflicting event".

24 It is the plaintiffs' position that Regulation 1.10 of the 2009 Regulations and the same Regulation (as amended) in the 2010 Regulations are an unreasonable restraint of trade. The defendants' position is that these regulations are part of a set of regulations that sets out the unique features of a Golf Tour and the relationship between such a Tour and its members and also between its members. The Regulations show that some degree of individual rights is exchanged for the collective benefits to be obtained from membership of the Golf Tour and the doctrine of restraint of trade does not apply.

The plaintiffs come into conflict with the Release Policy

25 The commencement of these actions was precipitated by events relating to the following golf tournaments that the plaintiffs participated in, that were organised by OneAsia:

(a) The Luxehills Chengdu Open, held in Chengdu, China, from 1 to 5 April 2010 ("Chengdu Open");

(b) The 29 GS Maekyung Open Golf Championship, held in Seoul, South Korea, from 6 to 9 May 2010 ("Maekyung Open");

(c) The SK Telecom Open, held in South Korea, from 20 to 23 May 2010 ("SK Telecom Open"); and

(d) The Indonesian Open presented by Enjoy Jakarta, held in Jakarta, Indonesia, from 1 to 4 July 2010 ("Indonesian Open").

26 The Chengdu Open, Maekyung Open and SK Telecom Open are the subject matter of Suit 551, and the Indonesian Open is the subject matter of Suit 624.

27 On 4 March 2010, a circular entitled "Release Policy for Upcoming OneAsia Events" was circulated to members of the Asian Tour. It stated that with regard to these OneAsia events, "*[A]ll members must request for* [*sic*] *releases in writing*" and "*[A]ny member who elects to play in any respective event without being granted a release will be subject to a fine of USD5000.*" Regarding the Chengdu Open, in particular, the circular stated that since the event was a "conflicting event" being played during the same week as the SAIL Open, except for Chinese nationals, players would *not* be released to play in this event.

28 In February/March 2010, three of the plaintiffs *viz* Mr Pilkadaris, Mr Griffin, and Mr Van Der Valk, made requests to the TPC or officers of the Asian Tour to be released in order to participate in the Chengdu Open. All these requests were denied. On 5 April 2010, the three members were issued with letters on the letterhead of ATTP stating that they had breached Regulation 1.10 of the 2010 Regulations by participating in the Chengdu Open and that they had each been imposed with a penalty of US$5,000. They were also informed that they could appeal against the decision by writing to the Asian Tour board of directors within 14 days. Each of the plaintiffs duly lodged an appeal in April 2010.

29 The circular released in March 2010 also covered the Maekyung Open. It stated that this event was a competing event and only Korean nationals would be released to participate in the event. On 16 February 2010, Mr Pilkadaris sought a release to participate in the event. Not having received a reply, he sent a further request on 14 April 2010. This request was not replied to either. On 30 April 2010, Mr Griffin enquired whether written permission was necessary to participate in the Maekyung Open as it was not a competing event. This enquiry was addressed to Ms Kala Ramanathan, the Senior Manager - Membership Services of ATTP. Ms Ramanathan replied the same day stating that permission was required.

30 On 13 May 2010, Mr Pilkadaris and Mr Griffin were issued letters on the letterhead of ATTP which stated, *inter alia*, that they had breached Regulation 1.10 of the 2010 Regulations and had each been fined US$5,000 for competing in the Maekyung Open. They appealed.

31 Sometime in March or April 2010, a circular entitled "*Release Policy for SK Telecom Open 2010*" was circulated to members of the Asian Tour. It informed them that the SK Telecom Open had been deemed to be a competing event and players would *not* be released to participate in the event unless they were Korean nationals. It also warned members that players who participated in the event without being granted a release would be subject to a fine of US$5,000. Mr Pilkadaris and Mr Griffin duly made requests for the necessary releases. Both requests were denied. On 24 May 2010, they were informed they had breached Regulation 1.10 of the 2010 Regulations and had been fined US$5,000 each for competing in the SK Telecom Open. Both plaintiffs lodged appeals.

32 According to the defendants, the appeals were heard on 22 July 2010 by Mr Ho Lon Gee (a director of ATTP), Mr Park and Mr Lam Chih Bing ("Mr Lam"), another professional golfer, who was a director of ATL and chairman of the TPC. The results of the appeals were as follows:

(a) With regard to Mr Pilkadaris:

(i) Chengdu Open: Penalty of US$5,000 to stand

(ii) Maekyung Open: Penalty of US$5,000 "waived"

(iii) SK Telecom Open: Penalty of US$5,000 reduced to US$4,000.

(b) With regard to Mr Griffin, all the fines were to stand as imposed.

(c) With regard to Mr Van Der Valk, the fine of US$5,000 imposed for the Chengdu Open was to stand.

33 The plaintiffs were informed of the outcome of their appeals by letters dated 22 July 2010. These letters also stated that unless the fines were paid by Wednesday, 28 July 2010, 5pm (Singapore time), they would be suspended from playing in any of the tournaments within the Asian Tour. Mr Pilkadaris and Mr Van Der Valk had signed up to play in the Brunei Open and their participation in this tournament was jeopardised by reason of the threatened suspensions.

Start of proceedings and injunction applications

34 On 28 July 2010, Suit 551 was commenced. On the same day, the plaintiffs applied for injunctions (via summons 3510 of 2010 ("SUM 3510")) to restrain ATTP, pending the trial of the action, from taking any steps to prevent the plaintiffs in Suit 551 from playing in any golf tournament (whether within the Asian Tour or outside of it), including by imposing any penalties or sanctions against them for playing in any golf tournament which was not within the Asian Tour.

35 The injunction application was fixed for hearing on 3 August 2010. The plaintiffs' solicitors informed Mr Han of the commencement of the suit and of the filing of the injunction application and asked him to confirm that pending this hearing, Mr Pilkadaris and Mr Van Der Valk would be allowed to play in the Brunei Open notwithstanding that they had not paid the fines that had been imposed on them. ATTP did not agree to this request and on 28 July 2010, the two men paid their fines under protest.

36 SUM 3510 was heard before Choo Han Teck J on 3 August 2010. As Mr Pilkadaris and Mr Van Der Valk had paid their fines, the judge ordered a holding injunction in favour of Mr Griffin only.

The Indonesian Open and Suit 624

37 On 7 June 2010, a circular entitled "Release Policy for Indonesian Open 2010" was issued. The circular stated that Indonesian Open had been deemed a competing event and only Indonesian nationals would be released to play in this event. Members who played in the event without being granted a release would be subject to a fine of US$5,000.

38 Mr Pilkadaris, Mr Griffin and Mr Anis sought releases from the TPC. These requests were refused. On 5 July 2010, these three plaintiffs were informed that they had breached Regulation 1.10 of the 2010 Regulations and that they had been imposed with a fine of US$5,000 for competing in the Indonesian Open. They appealed and on 12 August 2010, they were informed that their appeals had been heard by the board of directors of ATL on 10 August 2010 and that it had been decided that all of their respective fines were to stand. They were further informed that unless they paid those fines by 5pm on Thursday, 19 August 2010, they would be suspended from playing in any of the tournaments within the Asian Tour.

39 Suit 624 was commenced on 18 August 2010. The plaintiffs applied under Summons 3887 of 2010 ("SUM 3887") for similar orders as had been applied for under SUM 3510. Subsequently, both summonses were fixed to be heard together. On 24 August 2010, both summonses were dismissed and costs were ordered to be in the cause. Subsequently, in October 2011, Suit 624 was consolidated with Suit 551 and the two actions were ordered to be tried together.

The claim and the defence

40 By these actions, the plaintiffs seek the following main reliefs:

(a) A declaration that Regulation 1.10 of the 2009 and 2010 Regulations is unenforceable and null and void for being in unreasonable restraint of trade;

(b) A declaration that the first and/or second defendant's invocation of Regulation 1.10 of the 2010 Regulations against the plaintiffs is, in any event, capricious, arbitrary and made in bad faith;

(c) A declaration that further, and in any event, the penalties imposed against the plaintiffs by the first and second defendants are unenforceable in law because they operate *in terrorem* and, *inter alia*, are not at all a genuine pre-estimate of any damage that the Asian Tour and the first and second defendants could even remotely suffer by reason of the plaintiffs taking part in the tournaments outlined above;

(d) A permanent injunction restraining the first and second defendants, whether by themselves, or through their associates, employees, agents or howsoever, from taking any steps in order to prevent, and/or the effect of which would be to prevent, the plaintiffs from participating in any golf tournament or championship within the Asian Tour on the basis of the charges made by the Asian Tour and the first and second defendants against the plaintiffs;

(e) A permanent injunction restraining the first and second defendants, whether by themselves, or through their associates, employees, agents or howsoever, from taking any steps in order to prevent, and/or the effect of which would be to prevent, the plaintiffs from participating in any golf tournament or championship outside of the Asian Tour, including (but not limited to) imposing any punishment on the plaintiffs for so participating in such golf tournaments or championships; and

(f) Damages.

41 The defendants filed separate defences in each action but the position taken by them is the same. The salient points are as follows:

(a) The plaintiffs are members of the Asian Tour and the Asian Tour is owned and controlled by ATL.

(b) ATTP is a wholly owned subsidiary of ATL.

(c) ATL organises golf tournaments either under its own name or co-sanctioned with other Golf Tours which are members of IFPGAT.

(d) The essence of a professional Golf Tour like ATL is that its members (professional golfers) are stakeholders. They own the Tour. They elect their tournament players committee and their

board of directors. Prospective members were informed of the structure of the Asian Tour at a players' meeting in August 2004.

(e) On 3 November 2004, ATL held its inaugural AGM. At that meeting, the chief executive reported on the corporate structure, the interim TPC, and the board to the members.

(f) In 2009, OneAsia organised professional golf tournaments and poached tournaments that had hitherto been on the ATL's tournament schedule. It took away five tournaments in 2010. Each tournament taken away had prize money of US$1m or more. If left unchecked, the predatory action of OneAsia could seriously affect the livelihood of the members of the Asian Tour.

(g) The TPC and the board of directors of ATL had the duty and responsibility to protect the Asian Tour and the livelihood of its membership. They did this by invoking the "conflicting event" regulation and in 2010, issuing a "competing event" regulation.

(h) Conflicting event regulations are also found in the regulations of other Tours.

(i) The competing event regulation was introduced to address situations which the conflicting event regulation did not address. It allowed the TPC and the board to assess which tournaments were to be designated as "conflicting or competing" so that Asian Tour members would require permission from the executive chairman before there could be a release to play in such tournaments. This was not a blanket policy nor was it targeted exclusively at OneAsia's tournaments. Rule 1.10 provided for wide exceptions to the rule.

(j) All the plaintiffs are members of ATL and none of them had any contractual relationship with ATTP. The Regulations were issued by ATL and under the Articles of Association of ATL, the board was entitled to issue, amend and revoke regulations from time to time and such regulations would be binding on members of the Asian Tour.

(k) The 2010 Regulations were published and circulated to all members of the Asian Tour on or about 4 March 2010. Under the Articles of Association of ATL, the Regulations became operative on the date that they were published to the members.

(l) There was a printing error in both the 2009 and 2010 Members' Handbooks under "Definitions" in which the Asian Tour was defined to mean ATTP when it should have read ATL. In all other respects, the Handbooks pointed to ATL as being the owner of the Asian Tour.

(m) The defendants admitted that ATL had imposed all the penalties complained of by the plaintiffs and to dealing with the appeals in the manner stated by the plaintiffs.

(n) The defendants, however, refuted the plaintiffs' assertions that the fines were penalties and dealt with the circumstances relating to each situation in which a plaintiff applied for a release and was denied one. There is no need for me to set out these assertions in detail.

42 The issues that may need to be determined are:

(a) Who is the owner of the Asian Tour and in that respect, which entity are the plaintiffs members of?

(b) Does the doctrine of restraint of trade apply to the Asian Tour?

(c) If the doctrine applies, are Regulation 1.10 of the 2009 Regulations and Regulation 1.10 of the 2010 Regulations, or either of them, an unreasonable restraint of trade?

(d) Was the invocation of Regulation 1.10 of the 2010 Regulations against the plaintiffs capricious, arbitrary and made in bad faith?

(e) Are the fines imposed on the plaintiffs penalties and thereby unenforceable?

The issues

Membership and ownership of the Asian Tour

43 The plaintiffs' position is that the documentary evidence substantiates their assertion that they are members of the Asian Tour and that ATTP is the entity that owns and runs the Asian Tour. They rely on the following:

(a) The Memorandum and Articles of Association of ATTP.

(b) The dates of incorporation of each of ATTP and ATL.

(c) The fact that in all the Regulations from 2004 right up to 2010, the Asian Tour is defined to mean ATTP.

(d) The fact that all correspondence sent to the plaintiffs on the issue of their alleged breaches of the Regulations were written on ATTP's letterhead.

(e) ATL's status as a company limited by guarantee.

44 This issue would never have arisen had the defendants been careful with their documentation and had delineated the responsibilities of ATL and ATTP properly. Whether deliberately or by reason of some woolly thinking, both defendants have for years given everyone the impression that ATTP is the owner of the Asian Tour. It is also worth noting that none of the plaintiffs was ever given a certificate of membership which indicated clearly the identity of the organisation that he had joined. Instead, each time a plaintiff paid his membership fees, he was issued with a receipt which did not indicate the name of the entity issuing it nor contain any pertinent particulars of that entity. For example, on 16 January 2010, Mr Van Der Valk paid a sum of US$500 and was issued receipt no. 016280 dated that date. The receipt bears the words "Official Receipt" at the top and bears the following wording:

Received from ..... Guido Van Der Valk .....

The sum of ..... US$500/- .....

Being payment of ..... 2010: Membership Fee .....

The words between the ellipses are handwritten whereas the other wording is printed. Apart from this, the receipt bears a signature above the printed wording "Issued by". There is no description of the person who is the issuer or of the person who is signing on behalf of the issuer. The receipt therefore tells one nothing at all about the organisation which is being joined.

45 I deal first with the issue of membership. This has to be resolved by a consideration of the legal

nature of each of the companies concerned and not simply by looking at what they said and what they did.

46 ATTP is a private limited company and therefore by law is limited to a maximum of 50 members or shareholders. It has an authorised capital of $100,000 divided into 100,000 shares of $1 each. When it was incorporated on 2 February 2004, ATTP had three subscribers, all professional golfers, each taking up one share. Subsequently, however, all three issued shares were transferred to ATL and ATTP thereby became a wholly owned subsidiary of ATL. The main objects of ATTP are to administer, manage and promote the affairs, business and interests of professional golfers and to organise, administer and conduct golf tournaments. The Memorandum also states that it is to act as "a governing body for professional Golfers in membership and where appropriate to coordinate its own activities with other golf bodies in Asia and elsewhere".

47 Turning to the Articles of Association (the "Articles"), these are in a fairly standard form. The term "Member" is defined as "member of the company". The term "Asian Tour" means such golf tournament as is sanctioned by ATTP and "Asian Tour Members" means the members who subscribe to ATTP to be "members of such tours and tournament sanctioned by [ATTP]". Going by these definitions, only ATL would qualify as an Asian Tour Member since it is the only entity which is a shareholder of ATTP and thus a member of that company. Under the rubric "Share Capital and variation of rights", the Articles set out how shares are to be issued and transferred. There is nothing in these provisions to distinguish them from the articles of any private limited company engaged in commerce. It should be noted that Art 8 provides that every person whose name is entered in the register of members is entitled to receive a share certificate from the company. The Articles go on to provide for calls on shares to be made and to deal with the transfer and transmission of shares. Article 20 is a pre-emption provision providing that no member can transfer his shares without first offering it to existing shareholders. Under Art 24, when a member dies or becomes bankrupt, his shares revert to the company or are transferred to the existing shareholders at par value. Under Art 25, a member's shares may be forfeited if he fails to pay a call or an instalment of a call. Shareholding of ATTP does not last just one year or require renewal by payment of an annual subscription fee.

48 ATL is a public company limited by guarantee. This means that the number of its members is not limited. There are no shares in the company. Instead, every member undertakes to contribute to the assets of the company, in the event of its being wound up, in an amount not exceeding $1. ATL was incorporated in June 2004. Its main object according to its Memorandum is to carry on all or any of the businesses involved in the organisation, establishment, development, designation and/or commercialisation of golf events, tournaments and competitions within the region. Other main objects are to encourage the development of skills of golfers, to be a governing body for professional golfers and to look after the welfare of its members.

49 In the Articles of ATL, the term "Member/s" is defined as "A Member/Members of the Company admitted pursuant to Article 5". Article 4 permits only a natural person to be entitled to be admitted as a member. Under Art 5, the directors are empowered to make Byelaws setting out the criteria against which applications to membership shall be judged. It is significant that Art 5 also provides that until such Byelaws are made, the directors have the discretion to admit as a member a person who is a sufficiently competent golfer to warrant his participation in the Tour or, as an honorary member, a person who has made an enduring and significant contribution to the game of golf. It is clear, therefore, that from the outset the members of ATL had to be human beings who were golfers or who had contributed to golf. In contrast, the definition of "Member" in the Articles of ATTP does not limit membership to natural persons who are golfers.

50 On the issue of membership, Art 2 expressly provides that the number of members of ATL is

unlimited. Article 3 provides for various classes of members *viz* Regular Members, Affiliated Members, Associated Members, Temporary Members and Honorary Members. The definition of Regular Members bears citing. It is:

> Regular Members (otherwise known as full members) shall comprise full country members (members of a recognised national tour of a country in Asia which fulfils the criteria set out in relevant Byelaws and until such Byelaws are made as the Board shall in their discretion determine) and full playing members (any player eligible to compete in the Company's Tournaments based on criteria set out in the relevant Byelaws and until such Byelaws are made as the Board shall in their discretion determine).

51 Article 4 entitled "Application to Membership" states that any natural person shall on application be entitled to be admitted as a Regular, an Affiliated, an Associated or Temporary Member as may be determined by the directors. Under Art 7, members are required to pay an annual subscription fee in a sum determined by the Board from time to time.

52 Under the heading "Rights and Obligations of Membership", Art 9 provides that members shall only be entitled to participate in Tournaments endorsed by ATL and other golf tournaments that the Board has given specific approval to participate in. Article 10 empowers the Board to draw up Byelaws that set out the criteria for directors to determine whether a particular member shall be disqualified from participating in any particular tournament or tour. It is also worth mentioning that under the heading "Termination of Membership", Art 12 permits a member to resign his membership by giving the company written notice while Art 13 empowers the Board to draw up Byelaws setting out the criteria for terminating the membership of a member.

53 Adduced in evidence were the 2004 Regulations. This was the first members' handbook issued in respect of the Asian Tour and the evidence was that this document was in fact the Byelaws promulgated pursuant to Arts 111 and 112 of the Articles of ATL which empowered the Board to make one or more Byelaws and specifically provided that it should draw up Byelaws which:

> (a) Set out the criteria against which applications for the granting of playing privileges in Tournaments shall be judged and relating to the rights and obligations arising from the granting of any playing privileges;
>
> (b) Set out the criteria against which the golf playing ability of any particular Member will be judged with a view to terminating his membership;
>
> (c) Governed the conduct of Members while participating in any tournament endorsed by ATL and the conduct of Members generally; and
>
> (d) Setting out the administration and conduct of tournaments.

It should be noted that the Preamble to the 2004 Regulations specifically stated "These Regulations are made pursuant to the Asian Tour Articles of Association ...".

54 I am satisfied that the 2004 Regulations were indeed the Byelaws contemplated by the Articles of ATL and were made by the directors of ATL pursuant to those Articles. There is nothing in the Articles of ATTP which permits the drawing up of such Byelaws. It is also clear from the structure of both companies that although ATTP may have been incorporated first, it was ATL that was intended to be the organisation in which individual golfers could hold membership and thereby qualify to play in golf tournaments organised by ATL or its subsidiaries. There was no way that ATTP could accept

members who had the rights and obligations set out in the Byelaws. That company can only have members who were shareholders and it is limited to a maximum of 50 shareholders at any time. The members governed by the Byelaws could not be called shareholders, that term being wholly inappropriate to indicate their rights and liabilities. The Articles of ATL which I have set out above clearly delineate the rights and liabilities of members and these rights and liabilities are further elaborated in the Regulations in place from time to time. From a scrutiny and comparison of the memorandum and articles of both companies, it is clear to me that at all times it was ATL that was, and was intended to be the main organisation for professional golfers and that ATTP was intended to be and became a subsidiary handling the day-to-day operations of the Asian Tour.

55 There was sloppy administration on the part of those running the two companies as shown by the fact that it was only in July 2009 that the number of members of ATL as shown in returns filed with the Accounting and Corporate Regulatory Authority was updated from three to 210. It was also sloppy to issue receipts for membership fees which did not clearly indicate the company the applicant was becoming a member of. However, such sloppiness could not change the fact that golfers could qualify to become members of ATL by, *inter alia*, applying for membership and paying an annual membership fee, whereas in order to become members of ATTP, they would have to subscribe for shares and once they became shareholders, they would remain shareholders until they disposed of their shares. They could not be shareholders of ATTP on an annual basis.

56 Persons who became members of the Asian Tour in 2004 like Mr Pilkadaris, Mr Lam, Mr Park and Mr Han, were given the 2004 Regulations and accepted that these set out the bye-laws governing them and their membership of the Asian Tour. Unfortunately, neither the 2004 Regulations nor succeeding editions up to the 2010 Regulations specifically mentioned ATL. It was only in the 2011 Regulations that the Preamble was amended to read "These Regulations are made pursuant to the Asian Tour *Limited's* Articles of Association ..." (emphasis added). Whilst it may not have been clear to members like Mr Pilkadaris (who had not been intimately involved in the setting up of the Asian Tour) that they were members of ATL rather than of ATTP, and the situation was obscured by later editions of the Regulations like the 2009 Regulations which defined "Asian Tour" as ATTP and "Asian Tour Tournaments" as all those tournaments run under the auspices of the Asian Tour, they were in law and in fact members of ATL.

57 It was the evidence of Mr Han and Mr Park that ATL was modelled on the example set by the European Tour. That was why it was structured as a public corporation limited by guarantee which would allow for a large membership which a private limited corporation would not. Mr Park specifically stated that each golf touring professional who joined ATL would become a Member of ATL under its Memorandum and Articles and would have all the rights of Members accorded to them by those documents, some of which have been described in [50] to [52] above. The business units of the Asian Tour would be in the form of subsidiary companies like ATTP. It was the evidence of Mr Lam that in August 2004 at the briefing meeting held in Tianjin China, he and about 200 professional golfers were briefed about the Asian Tour and were told that it would be ATL which was a corporation limited by guarantee and that this corporate structure allowed a professional golfer to apply to become a member of ATL. I accept this evidence which is corroborated by the legal structures of the two companies as described above.

58 The next issue is whether the Asian Tour is owned by ATTP or ATL. As a preliminary point, I note that neither party addressed me on the issue of whether the Asian Tour, a series of golf tournaments, is a thing which can be owned. They both seemed to assume that it is capable of ownership. Perhaps they are viewing the Asian Tour from the perspective of copyright and would argue some type of copyright ownership vests in ATL or ATTP so that no other entity would have the right to organise one or more golf tournaments and call it the Asian Tour.

59 Assuming without deciding that the Asian Tour is something that can be owned, I do not think that much rides on how this issue is determined. ATTP is a wholly owned subsidiary of ATL. If it owns the Asian Tour, then in effect ATL is the ultimate owner of the Asian Tour. In his foreword to the 2004 Regulations, Mr Han said that the face of golf in Asia underwent a fundamental change in January 2004 when the members took action to form a tour that was member owned and controlled. Throughout the 2004 Regulations, there were references to "Members of the Asian Tour" either in full or simply as "Members". On this basis, since the Members were members of ATL, the Asian Tour must be owned by ATL.

60 Further, in the 2005 Regulations, the following statement from the Board of Directors of the Asian Tour was printed:

> *The Asian Tour is a not for profit company limited by shares held in trust for its Members*. The Articles of Association of the Asian Tour vest authority in the Board to conduct the day to day business of the Association in the best interest of its Members. The Association is established for the benefit of Asian Tour professional golfers.
>
> [emphasis added]

If the sentence in italics set out in the statement was meant to refer to ATL, it was incorrect legally since ATL is not a company limited by shares. But, in any case, if it was meant to refer to ATL, that meant that the Directors considered ATL as the owner of the Asian Tour. On the other hand, if the sentence was meant to refer to ATTP, then what it meant was that the shares of ATTP were held in trust for members of the Asian Tour.

61 In my judgment, it is ATL which is the owner of the Asian Tour because this was the intention of all parties from the very beginning – to establish a golf tour in Asia that was owned by professional golfers. ATL is the organisation which has as its members the professional golfers who are qualified to play in events organised by the Asian Tour. ATTP is a private limited company and a subsidiary of ATL and the professional golfers are not its direct shareholders. Whatever ATTP does in relation to organising and administering the Asian Tour, it does as a subsidiary of ATL. All the evidence points to ATL as the owner of the Asian Tour though, as I have stated above, even if it is ATTP that is the owner of the Asian Tour, there is no appreciable difference to the position of the plaintiffs since ATL owns ATTP. The only question that arises from my finding that ATL owns the Asian Tour is whether the plaintiffs should be penalised in costs for suing ATTP initially and trying to obtain an injunction against it. This is an issue that I will deal with below.

Does the doctrine of restraint of trade apply to the Asian Tour?

62 The plaintiffs accept that the relationship between them and ATL/the Asian Tour is contractual and that when they became members of the Asian Tour, they did so on the terms of the Regulations in force from time to time. It is the law that the memorandum and association of a company constitute a contract between the company and its members. In the case of ATL, Art 111 which empowers the Board to make Byelaws specifically provides that all such Byelaws for the time being in force shall be binding on all members and that in the event of conflict between the Byelaws and the Articles, the Byelaws will prevail. It is clear therefore that the Regulations form part of the contract between the plaintiffs and ATL.

63 The defendants described the Asian Tour as an association of golfers and stated that like all associations of individuals, rules of conduct are necessary to cement the relationship and set out rational conduct approved by the collective body and assert that this was why the Regulations (*ie*,

the Byelaws) were promulgated. Whilst not specifically denying that the relationship is essentially contractual, the defendants preferred to speak in terms of common objectives and duties. Their position, therefore, is somewhat vague.

64 The defendants averred that members of an association that is formed to pursue a common objective to enhance the professional careers of such members owe to each other and to the association a duty of fidelity. This duty takes the form that members will not do anything that would damage or injure or in any way compromise or prejudice the common objective/purpose. It is a duty which is partly expressed and partly implied. The express provisions are found in the Articles and the Regulations and the implied duty is a matter for construction by the court. When the defendants talk in terms of express and implied duties, it appears to me that essentially they are recognising the contractual nature of the relationship.

65 The nature of the relationship between the Asian Tour and its members is important because it has an impact on whether the doctrine of restraint of trade applies to the Asian Tour. The law is that covenants in a contract that run afoul of that doctrine will be rendered unenforceable as the Court of Appeal recognised in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [45]. The court explained that the doctrine seeks to vindicate the legal right to freedom of trade while balancing, at the same time, the doctrine of freedom of contract and it therefore endorses the public policy which negates unreasonable attempts to proscribe freedom of trade. The court was careful to qualify its pronouncements by saying "we would *not* go so far as to state that the doctrine of restraint of trade *always* applies in *every* contractual context" (emphasis original). The court went on to endorse Lord Atkinson's pronouncement in *Leather Cloth Company v Lorsont* (1869) LR 9 Eq 345 that every person should be at liberty to work for himself or herself and ought not (in principle) deprive either himself or herself or the state of his or her labour, skill and talents.

66 The defendants attempted to distinguish the various cases which the plaintiffs cited in relation to restraint of trade by arguing that the unique features of the Asian Tour and its relationships with its members set it apart factually from any of the case authorities cited by the plaintiffs and indeed from any case authorities that the defendants had been able to find. The plaintiffs' authorities, the defendants argued, dealt with employer-employee relationship and the situation where the impugned regulation was imposed by a purported governing or regulatory authority. The employer-employee cases were not relevant since the members of the Asian Tour were independent contractors and not employees of the Asian Tour. The other authorities were distinguishable because the Asian Tour, the defendants said, was neither a governing nor a regulatory body. It was an association of professional golfers, all of whom were equal and had come together as the Asian Tour to generate career benefits for themselves to an organisation that leveraged on their collective strength.

67 In the view of the defendants, the closest analogous situation was that of a partnership because of the following features:

(a) Partners join to form an association/partnership;

(b) The association/partnership is for the common purpose of generating a profit; and

(c) A partner can leave the partnership while the remaining partners continue the common purpose of the partnership business.

In a partnership, the partners have a fundamental duty of good faith to each other and thus a fiduciary relationship. This means that they have a duty not to place themselves in a position in which

their interest would or may conflict with duties owed to their partners and they also have a duty not to make a profit for themselves from their positions. From the defendants' point of view, Regulation 1.10 of the 2010 Regulations was an express provision providing that the plaintiffs owed the Asian Tour a duty of fidelity not to play in conflicting golf tournaments without the written consent of the executive chairman of the Asian Tour.

68 I do not think that the analogy drawn by the defendants between the Asian Tour and a partnership serves them well. Partnerships are basically contractual relationships formed for the purpose of carrying on business or trade either by doing business or by pursuing a profession to earn a livelihood. They are also relationships to which the doctrine of restraint of trade has been applied in many cases due to the increasing tendency of partners to include in their partnership articles provisions which restrict the manner in which persons who leave the partnership can thereafter practise their trade or profession. If the Asian Tour is akin to a partnership, then I can see no reason of policy or principle not to apply the doctrine of restraint to it.

69 Looking at the situation from the policy perspective, I must bear in mind that from as long ago as 1894 in the seminal decision of *Thorsten Nordenfelt (pauper) v The Maxim Nordernfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*") it has been recognised to be against public policy to allow interference with individual liberty in trading and carrying on a business or an occupation. Whilst the cases that have come to court are generally concerned with employment situations or sale of business situations, the doctrine is not limited to the same and has been engaged in other circumstances. In *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, it was applied to a society of milk-producers which changed its rules to prevent any member from selling milk to anyone except the society. I can see nothing in principle that would make it objectionable to apply the doctrine to an association constituted by a company limited by guarantee and governed by Regulations which has as its purpose organising golf tournaments for its members who are professional golfers so as to provide them with opportunities to earn their living from participation in such tournaments. The defendants themselves proclaimed that the purpose of the Asian Tour is to safeguard the careers of the region's professional players and to allow golfers to determine their own destinies and future. As stated in the 2005 Regulations, its mission is to expand tournament golf so as to substantially enhance the careers of its members. The Asian Tour is as much a trade association as the milk producers society in the case referred to above was and, in as much as it seeks to govern the actions of its members in their professional lives and in relation as to how they earn a living, it is operating in an area in which the doctrine of restraint of trade applies.

70 I am not, in fact, blazing any trails in coming to this decision. In Australia, as stated by Toohey J in the Federal Court of Australia case of *Hughes v Western Australia Cricket Association (Inc) & Ors* [1986] FCA 357 at [163], it is well established that the doctrine of restraint of trade may operate in the case of sportspersons who derive income from the sport they played. A whole series of Australian authorities is cited in support of that proposition. It is also relevant that that case itself involved a cricketer and various cricket associations and it was held that a certain rule which prevented the cricketer from playing in a cricket match without obtaining consent from certain parties was void as being a restraint of trade.

Is Regulation 1.10 in breach of the doctrine of restraint of trade?

71 Before analysing the Regulations, I should say something about how the Asian Tour is operated. In order to be a member of the Asian Tour, a professional golfer must qualify for membership by participating in the Asian Tour's qualifying (or Q) school and competing with other aspirants. Those who play well enough qualify to take up membership of the Asian Tour. Once they join the Asian Tour, professional golfers are ranked by it in an order of merit and this ranking determines which, if any, of

the tournaments organised by the Asian Tour such members would be able to play in. The rankings are changed annually in accordance with how well the respective members have done in the preceding golfing season. The members are regarded as independent contractors; they receive no salary or allowances from the Asian Tour. Instead, to join, they have to pay an annual membership fee. All expenses incurred by a player when playing in a tournament organised by the Asian Tour are borne by the player himself. The player's only earnings come from his winnings, if any, in a particular tournament.

72 In 2010, the Asian Tour was scheduled to arrange about 35 golf tournaments, either by itself or jointly with other golf organisations. I shall use Mr Pilkadaris' evidence to illustrate what that meant for members of the Asian Tour. Mr Pilkadaris said that for him to be eligible to play in the Asian Tour tournaments in the 2010 season, he had to finish within the top 65 in the 2009 order of merit and that meant he had to play in at least nine tournaments in 2009. It was up to Mr Pilkadaris to choose which tournaments he would participate in to meet that requirement.

73 Mr Pilkadaris was eligible to play in between 17 and 22 Asian Tour events during the 2007 to 2010 seasons but he only chose to play in about ten to 15 events due to his playing commitments on other Tours. His ranking at the end of the 2010 season would allow him access to the different stages of Q schools for different Tours including the US PGA Tour and the Japan Tour.

74 Mr Anis was the most junior player among the plaintiffs. His evidence was that the manner in which he qualified for Asian Tour tournaments was slightly different from Mr Pilkadaris' route due to his ranking. For the 2009 season, he was ranked 162nd in the Asian Tour's final order of merit. As such he qualified for only a limited number of tournaments in 2010 and that too was dependent on vacancies arising due to the withdrawal of other players in any particular tournament. Mr Anis said that even though he is a Malaysian national, he does not qualify automatically for Malaysian tournaments. It is essential for him to sign up for as many tournaments as possible as there is no guarantee that he would be able to play in even one Asian Tour tournament in any year.

75 The material portions of Regulation 1.10 as it appears in the 2009 and the 2010 Regulations read as follows:

> **2009 Regulations**
>
> **1.10 Conflicting Events**
>
> The Asian Tour recognises the individual rights of all Members of the Asian Tour operating as independent contractors. The Asian Tour, therefore, recognises and warrants to all Members that at no time does it hold out to tournament Sponsors and/or Promoters the guaranteed appearance or entry of any individual Members. (I shall refer to this as "The independent contractor provision")
>
> Notwithstanding the above statement of the fact, the Asian Tour requires all Members to submit themselves to the following *Conflicting Events Regulations* to ensure that the Asian Tour may remain in a position to fulfil, at all times, its collective obligations in respect of representative fields.
>
> (a) Members of the Asian Tour shall not compete in any tournament or exhibition match, whether private or public, scheduled on the same dates as, or in the seven days immediately before or after an Asian Tour Order of Merit Tournament without the written permission of the Executive Chairman.

(b) The Member must send a written request for release to the Executive Chairman at least 14 days before the close of the entries of the particular Asian Tour Tournament if he wishes to participate in a conflicting event. Members will remain entered in the Asian Tour Tournament until they officially withdraw from the tournament.

(c) A release will normally be granted in the following instances:

(i) Local National PGS Championships and local National Opens.

(ii) Members wishing to take part in an event on their own home Tour.

(iii) ...

(iv) ...

(d) Should a member request a release and be denied and then play in a conflicting tournament, the member shall be liable to immediate suspension and/or a fine of up to US$5,000.

[emphasis added]

2010 Regulations

1.10 Competing and Conflicting Events

... [The independent contractor provision is set out here] ...

Notwithstanding the above statement, the Asian Tour requires all Members to submit themselves to the following *Competing and Conflicting Events Policy* to ensure that the Asian Tour may remain in a position to fulfil, at all times, its collective obligations in [*sic*] to all its members.

(a) The Board of Directors may designate any golf tournament not organised by the Asian Tour as a "competing event".

(b) Where such has been done the said event shall be deemed to be a "competing event".

(c) A conflicting event shall include any tournament or exhibition match whether private or public, scheduled on the same dates as, or in the seven days immediately before or after an Asian Tour Order of Merit Tournament.

(d) No member of the Asian Tour shall compete in any Conflicting Event (which shall include a Competing Event) without the written permission of the Executive Chairman.

(e) Should a Member request a release and be denied and then play in a conflicting tournament, the member shall be liable to:

(i) A fine of up to US$5,000 and/or

(ii) A suspension of membership or

(iii) A suspension from participation in one or more Asian Tour Order of Merit Tournament or

(iv) A suspension for a given period

as the Executive Chairman may think appropriate.

...

(i) A release will normally be granted in the following instances:

(i) Members wishing to take part in an event in their country of nationality.

(ii) Asian Tour Members, competing in the US Masters, US Open, US PGA and Open Championship and all World Golf Championship tournaments.

(iii) Asian Tour Members competing in tournaments in any of: ...

[emphasis added]

76 It should be noted also that under paragraph 3 of the Preamble of both the 2009 and the 2010 Regulations, the Board delegated its power to the Executive Chairman and the TPC to administer the Regulations. Significant amendment or repeal of Policy was stated to be at the discretion of the Board of Directors.

77 It can immediately be appreciated from a comparison of the 2009 Regulation 1.10 with the 2010 Regulation 1.10 that the ability of the Asian Tour to prevent members from playing in golf tournaments organised by others ("third party tournaments") was much enhanced in 2010. In 2009, members were free to play in third party tournaments as long as these took place on dates when no Asian Tour tournament was being held and which fell outside the period of seven days before or after an Asian Tour tournament ("Conflicting Event prohibition"). This Conflicting Event prohibition continued in 2010, but in addition, members were prevented from playing in any tournament which the executive chairman and the TPC declared to be a "Competing Event" ("Competing Event prohibition"). This was a much wider prohibition. The flouting of such prohibitions would result first in a fine and secondly, if that fine was not paid, in a suspension which would prevent the suspended member from playing in tournaments of the Asian Tour until the suspension was lifted. The suspension would only be lifted on payment of the fine.

78 The plaintiffs say that the prohibitions imposed by the Regulations are more egregious than other restrictive provisions which have been found to be in restraint of trade. In particular they rely on *Buckley v Tutty* [1971] HCA 71 ("*Tutty*"), a decision of the High Court of Australia. In that case, the respondent, Mr Tutty, was a professional footballer and he had obtained certain orders against the appellants restraining them from acting upon or in any way enforcing against him certain rules relating to the registration, retention and transfer of players. The appellants appealed against these orders.

79 In assessing whether the rules were in restraint of trade, the court stated at [13]:

> The rules however prevent professional players from making the most of the fact that there are clubs prepared to bid for their services. If valid, the rules prevent a professional player who is a member of one club, even if he is not contractually bound to play for it, from becoming employed as a professional footballer by another club, except with the concurrence of the former club or the Qualification and Permit Committee. This is plainly a fetter on the right of a player to seek

and engage in employment. It is not to the point that the player may resign from the League. If he does resign he may perhaps obtain employment as a labourer or as a cricketer but he will not be able to obtain employment as a professional Rugby League footballer, either in New South Wales or in a number of other places. The rules in our opinion operate as a restraint of trade.

80 In coming to that decision, the court agreed with the English decision of *Eastham v Newcastle United Football Club* [1963] 1 Ch 413 ("*Eastham*"). The court in *Eastham* had to determine whether retain and transfer provisions that applied to Mr Eastham as a professional football player operated in restraint of trade. On the last day of the football season, each professional club sent to the football league its retain and transfer list. If retained, the player remained a registered player of the retaining club and was debarred from playing for any other club, but he was not re-employed with the club and, until he re-signed with the club, no contract existed. There was no maximum period of retention. If a player was on the transfer list, he could not seek re-employment except with a club willing to pay the fee. A player who was dissatisfied with the terms offered for retention or with the transfer fee or was unable to arrange his transfer might appeal to the league's management committee, when he might get a free transfer, or, subject to compliance with certain transfer rules, transfer to a club outside the football league. The retain and transfer systems operated either separately or together and the retention provisions were used to reinforce a club's desire to secure a transfer fee for a player it did not wish to retain. If the retention and transfer provisions operated together, and a player was placed on both lists, all he could do was to apply to have the transfer fee reduced, but he could not go outside the league.

81 Wilberforce J found, *inter alia*, that the retention provisions operated in restraint of trade on the basis that when the retention notice was given by the club to the player, the player was not, by the effect of it, re-employed by the club. Further action on his part was still needed before he again became employed by the club, in that he had to re-sign. The player got no wages until he re-signed nor did the period before he re-signed count for benefit.

82 The plaintiffs submitted that, if in *Tutty* and *Eastham* where (1) the professionals involved were employed by the respective organisations against which they were seeking relief, (2) they were paid wages by these organisations, (3) money was most likely spent training them, and (4) these professionals played representing those organisations, the courts have been willing to find that the rules of the organisations preventing them from finding alternative employment are in restraint of trade, then in this case, since (1) the plaintiffs were independent contractors, (2) they did not play for the Asian Tour, but played for themselves, (3) the Asian Tour did not pay them, (4) the Asian Tour did not train them, (5) it was the plaintiffs who paid the Asian Tour, and (6) the Asian Tour had no obligation to offer them any tournaments to play in for them to become better golfers, rules preventing them from playing in any tournaments organised by other operators must operate in restraint of trade.

83 The defendants did not answer this argument directly. It was their submission that Regulation 1.10 was an express provision that the plaintiffs owed a duty of fidelity to the Asian Tour and to its members not to play in conflicting golf tournaments without the consent of the executive chairman of the Asian Tour. The defendants argued that by taking the position that Regulation 1.10 was a restraint of trade the plaintiffs were saying that they had the right to take the benefits derived by them by reason of their membership of the Asian Tour but were under no duty to be loyal to the Asian Tour which had benefitted their careers greatly. In my view, this argument misses the point. It does not deal with the doctrine of restraint of trade or recognise the public policy considerations behind the doctrine. The defendants made the further point that the court should interpret Regulation 1.10 as a provision that is made by a collective body to protect its profession and livelihood. That point goes to the second part of the argument which is whether the restraint of trade imposed is

reasonable; it does not deal with the first part of the submission which is to consider whether or not Regulation 1.10 is *prima facie* in restraint of trade.

84 Having considered the authorities and the arguments, I agree with the plaintiffs that Regulation 1.10 as it appears in both the 2009 and 2010 Regulations is a restraint of trade. It prevents the plaintiffs who are members of the Asian Tour from playing in any golf tournament which they are otherwise eligible to play in if such tournament falls within the ambit of the Regulation. The plaintiffs are professional golfers who need to be able to take part in as many tournaments as they can in order to improve their chances of making a living by earning prize money and by qualifying for bigger and better tournaments. The defendants' argument of the plaintiffs owing loyalty to the Asian Tour does not meet the point. The Asian Tour equally has a duty not to impose unreasonable restrictions on its members or seek to substantially restrict the area in which they may earn their living. The Asian Tour does not promise its members the opportunity to participate in any let alone all of its tournaments; they have to qualify and only those members who are highest in ranking have the chance of playing in a reasonable number of tournaments. Low ranking members like Mr Anis may end up not playing any Asian Tour tournament in any particular year. Since the Asian Tour cannot guarantee its members a living, it must be reasonable when restricting them from seeking opportunities to earn that living outside the Tour.

Is the restraint unreasonable?

85 Determining that Regulation 1.10 is in restraint of trade is not the end of the matter. *Nordenfelt* also established that restraints of trade may be justified by the special circumstances of a particular case. At p 565 of the judgment, Lord Macnaghten observed:

> All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade ... may be justified by the special circumstances of a particular case. *It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public*, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time ... [being] in no way injurious to the public.
>
> [emphasis added]

86 As indicated by *Nordenfelt* and succeeding cases, to be justifiable a covenant that is in restraint of trade must be reasonable between the parties concerned and reasonable in the interests of the public. If it is crafted to protect a legitimate proprietary interest, and does not go beyond what is required to protect that interest, the covenant may be upheld. It should be noted that, as stated in *National Aerated Water Co Pte Ltd v Monarch Co, Inc* [2000] 1 SLR(R) 74 at [31], reasonableness is not judged by whether the parties have freely entered into the restraint because the rule against unreasonable restraint is based on public policy and may not be excluded by mutual consent.

87 It was the defendants' position that Regulation 1.10 was made to protect professional golfers and their livelihood and to achieve this aim by protecting the Asian Tour itself. The plaintiffs were members of the Asian Tour who were driven by their personal greed to play in a competitor's tournament. They knew full well that the competitor, OneAsia, had poached some six tournaments from the Asian Tour schedule and this had seriously affected the collective interest of the members of the Asian Tour. Yet, for their own self interest they had pursued this course of action.

88 The defendants also argued that the scope of the alleged restraint was restricted. The Asian Tour had applied Regulation 1.10 only to tournaments organised by OneAsia in Australia, Korea, China, Thailand and Indonesia. The first and second plaintiffs were permitted to play in the Australian tournaments as they were Australian nationals. For the Korean, Chinese, Thai and Indonesian tournaments, the nationals of those countries were permitted by Regulation 1.10 to play in tournaments in their own countries. The vast majority of Asian Tour members who are not permitted to play under Regulation 1.10 took this restriction as their sacrifice for the common good of the Asian Tour. It was an investment they made to ensure the healthy growth of the Tour, to be able to reap the future benefits of such growth.

89 Further, the restriction was not an absolute prohibition. It consisted of a financial disincentive. An Asian Tour member could play in the prohibited tournaments without a release and pay the penalty of US$5,000 for each such tournament. They pointed out that Mr Pilkadaris did not consider the financial disincentive prohibitive. He had said in an interview that he had set aside US$40,000 to pay the penalties of playing in eight tournaments organised by OneAsia. Also, a member by resigning or allowing his membership to lapse would bring himself outside the application of Regulation 1.10 and this course was indeed followed by Mr Van Der Valk to circumvent the Regulation.

90 The plaintiffs responded that, in their pleadings, the defendants did not identify any legitimate proprietary interest to be protected. Nor, said the plaintiffs, could they justify the existence of such an interest. The Regulations indicated that the mission of the Asian Tour was to develop golf across the region and enhance the careers of its members. Its principal objectives were to increase the number of tournaments and prize money for members; develop and promote golf throughout Asia; and establish mutually beneficial working relationships with other golf tours. The plaintiffs said that these objectives could not justify the restrictions placed on them by Regulation 1.10 when at the same time the Asian Tour recognised the individual rights of all members operating as independent contractors. The Asian Tour therefore did not have any proprietary interest in their respective careers. The Asian Tour did not guarantee the plaintiffs any number of tournaments in which they could participate and by the same token, the plaintiffs were not obliged to participate in any minimum number of tournaments within the Asian Tour. The plaintiffs, if eligible, could choose to play in a certain number of tournaments in a year for their winnings to count towards their order of merit ranking for that year but the defendants could not mandate which tournaments the plaintiffs should play in to satisfy this requirement.

91 The defendants, the plaintiffs submitted, did not assert a proprietary interest in the careers of Asian Tour members. What they alleged to justify the "Conflicting Event" and "Competing Event" prohibitions was that the TPC and the Board of the Asian Tour had "a duty and responsibility to protect the Asian Tour and the livelihood of its general membership". The plaintiffs' response was that this was not the interest that the Asian Tour had wanted to protect in the first place and even if it was accepted by the court as a legitimate proprietary interest, Regulation 1.10 in both the 2009 and 2010 Regulations was wider than necessary to protect this interest.

92 The defendants' witnesses defended the reasonableness of the Conflicting Event prohibition by stating that similar provisions found in the US PGA Tour, European Tour, Sunshine Tour and Australasian Tour were very wide and in some cases much more restrictive than the Asian Tour's release policy.

93 An examination of these various provisions does not, however, support the defendants' stand. The US PGA Tour provision prohibits a US PGA member from participating in any other golf tournament or event *on a date* when a US PGA Tour co-sponsored tournament or event for which such member is exempt is scheduled. Players are entitled to apply for a release and the provisions set out various

guidelines on release policy, but it should be noted that no conflicting event releases will be approved for tournaments held in North America. Even then, however, the US PGA Tour provision is narrower than the Conflicting Event prohibition because it only applies to dates on which both a US PGA tournament and a conflicting tournament are scheduled. The Conflicting Event prohibition applies to the period starting seven days before the Asian Tour tournament in question and ending seven days after it.

94 Turning to the European Tour, the material provision prevents members of the European Tour listed in certain categories from competing in any tournament or exhibition match whether private or public, scheduled against a Race to Dubai tournament or held within one week prior to and within 50 miles of a European Tour approved tournament without the written permission of the chief executive. This again is less restrictive than the Conflicting Event prohibition in that it only applies to tournaments which have coincidence of dates with the Race to Dubai tournament or are held within a limited period of one week before the European Tour approved tournament and within 50 miles of the same. The prohibition period is longer for the Asian Tour and there is no geographical limit although a release may be granted in certain situations.

95 In Australia too, the prohibitions are narrower in that there must be a coincidence of dates between the approved tour and the conflicting tour, the conflicting tour must be held in Australia or New Zealand and the member must be eligible to play in the approved tour. In the case of the Asian Tour, even members who are not eligible to play in the approved tour are prohibited from participating in conflicting tournaments. The Sunshine Tour which is a South African Tour also limits the prohibition against participating in a non-tour tournament to one that is scheduled against a Sunshine Tour sanctioned tournament.

96 The plaintiffs submitted that it is one thing to expect that in a case where a member enters and is eligible for a particular Asian Tour tournament, yet subsequently wishes to withdraw from that tournament to participate in a non-Asian Tour tournament which falls on the same date, a regulation is in place to limit the member's ability to do so, since this could jeopardise the representative field of the Asian Tour tournament. But once the coincidence of dates is removed, the rationale for any further restraint on the members becomes unreasonable. The provisions of the other Tours that the defendants relied on supported the plaintiffs' position rather than that of the defendants' since the common thread running through all those regulations was that there had to be a coincidence of dates (apart from the European Tour position). Even in that case, however, there was less of a restriction because of the geographical limitation. Further, in the US PGA Tour and the Australasia Tour regulations, the restriction only applied if the member seeking to participate in the conflicting tournament was eligible to participate in the sanctioned tournaments. In the case of the Asian Tour, members are restricted whether or not they qualify to play in sanctioned tournaments. Mr Van Der Valk pointed out what he considered the unfairness of this regulation in his testimony when he said that in the Singapore Open, there are only 75 players from the Asian Tour who will be able to play in that event. The others will not be able to participate. He was unable to understand how it would be in the best interest of the Asian Tour to stop those others from playing in another event in the same week if they could get into one.

97 Moving on to the Competing Event prohibition, Mr Chung and Mr Lam agreed in court that there are no provisions in the US PGA Tour, European Tour, Australasian Tour and Sunshine Tour that allow such Tours to declare any tournament as competing, and acquire a release for participation in such a tournament. The plaintiffs submitted that on the face of the regulation, it was already clear that this was an unreasonable restraint on the plaintiffs. The plaintiffs were penalised for participating in the Maekyung Open, the SK Telecom Open and the Indonesian Open notwithstanding that these were not conflicting events in the terms of the Conflicting Event prohibition. The plaintiffs submitted that it was

absolutely unreasonable for members of the Asian Tour to be restrained by the Competing Event prohibition should they wish to participate in tournaments for which there was no overlapping Asian Tour tournament.

98 There is also the issue of whether the Competing Event prohibition actually worked to "protect the Asian Tour and the livelihood of its general membership" which was the rationale for the adoption of that provision. In their defence, the defendants had said that the Competing Event prohibition was not a blanket policy or one targeted exclusively at OneAsia's tournaments. This was supported in the affidavits of their witnesses but at trial, a slightly different story was told.

99 Mr Park said in his affidavit that if OneAsia could poach more of the Asian Tour tournaments, then the business of the Asian Tour would no longer be sustainable and would collapse. Members of the Asian Tour would then have to grovel in order to be invited to participate in OneAsia's tournaments. If OneAsia could be "stopped or seen off", the members of the Asian Tour would benefit. It was, he said, wholly in the interests of the general membership that members of the Asian Tour did not support OneAsia, or at least not without penalty. In court, Mr Park further agreed that the "Conflicting Event" and "Competing Event" prohibitions were directed at OneAsia.

100 Mr Chung agreed that the effect of his affidavit was that the addition of the Competing Event prohibition was to address the OneAsia threat. In his view, by taking away tournaments from the Asian Tour, OneAsia had openly declared war on the Asian Tour and the TPC had to take action to defend the interests of its general membership.

101 This evidence supports the supposition that the defendants' motivation in adopting the Competing Event prohibition was largely to deal with a perceived threat from OneAsia by denying them the participation of Asian Tour members. The defendants had agreed in court that the more golf tournament organisers and the more golf associations there are, the better the situation would be for their members. Further, they had to admit that the presence of OneAsia organising tournaments would further the game of golf in Asia and increase the prize money on offer for golfers in Asia. The defendants also recognised that professional golfers were focussed in playing in as many tournaments as possible regardless of who organised them. In this context, it is hard to see how the interests of the members of the Asian Tour would be protected by banning them wholesale from participating in other tournaments even when these did not conflict with a scheduled Asian Tour tournament. The plaintiffs themselves naturally believe that giving members of the Asian Tour the right to play in OneAsia events would further the interests of the members. However, it should also be noted that in court Mr Chung agreed that generally any policy that allows members of the Asian Tour to play in more tournaments would be in their best interests.

102 The other question that arises is whether the Competing Event prohibition is effective in preventing Asian Tour members from competing in OneAsia tournaments. The evidence appears to indicate that the higher ranked members of the Asian Tour are able to play in such tournaments with impunity and continue to do so because they can afford to pay the fines imposed on them by the Asian Tour. These are the very members whom the Asian Tour accuses OneAsia of cherry-picking. At the same time, lower ranking members of the Asian Tour like Mr Anis are caught by the Competing Event prohibition because if they breach it, they cannot afford to pay the fines and they will then be suspended from the Asian Tour. As a result, the number of tournaments open to them will shrink. Thus, the Competing Event prohibition adversely affects the interests of those members who most need to participate in golf tournaments while not deterring the best players from breaching it.

103 It is also relevant in this consideration that in court, witnesses for the defendants admitted that OneAsia no longer poses a threat to the Asian Tour. Mr Park testified that he did not believe that

OneAsia would be able to sustain itself for very long. He also admitted that whilst it was a possibility that OneAsia could take more tournaments away from the Asian Tour, he actually did not think that OneAsia could in fact do so any more. He conceded that although OneAsia was trying to grow, it was not really a threat to the Asian Tour. Mr Lam in his evidence admitted that it would be possible for the Asian Tour to still grow to have new tournaments, to keep its old tournaments and increase the prize money despite its members being able to play freely in tournaments organised by third parties.

104 The defendants argued that Regulation 1.10 did not operate so as to restrain the plaintiffs from playing sufficient golf games in order to promote their careers. They pointed out that Mr Pilkadaris had claimed in court that he carried cards for three golf Tours and only wanted to play about 25 to 30 tournaments per year although he had the option of playing nearly every week of the year. Mr Griffin held two Tour cards and he said that he wanted to play about 30 to 35 tournaments per year. The defendants said that with two Tour cards he could easily achieve that aim. As for Mr Van Der Valk, he too held two Tour cards and he only wanted to play about 30 tournaments a year. The net effect was that these three plaintiffs by virtue of their membership of the Asian Tour and certain other Tours had sufficient tournaments to meet their stated career needs so they were not impeded by Regulation 1.10. What they wanted was to play in more lucrative tournaments organised by OneAsia to satisfy their own personal greed even though they were aware that the predatory action of OneAsia was detrimental to the common good of members of the Asian Tour.

105 The defendants did not deal with the situation of Mr Anis and other members of the Asian Tour like him who were only members of the Asian Tour and were not highly ranked enough yet to qualify for other Tours. These members would be impeded by Regulation 1.10 from playing in any OneAsia event. I cannot assess the reasonableness of Regulation 1.10 only in relation to some members of the Asian Tour. I have to consider it in relation to the position of all members of the Asian Tour. It should be noted that Mr Griffin, while confirming that he was free to play in two tournaments organised by OneAsia in Australia because of his nationality, agreed that members of the Asian Tour who were from Singapore, Malaysia, India and the Philippines were disadvantaged because they would be unable to play in these events due to the Competing Event prohibition.

106 The defendants also did not address the concession of their witnesses that OneAsia was not a threat. This concession answered the defendants' submission that they had acted to protect the Asian Tour from further damage being inflicted by OneAsia.

107 The defendants went on to argue that Regulation 1.10 was reasonable in the interests of the public. They said it is clearly in the interests of the Singapore public to have top quality golf tournaments in Singapore with top international golfers competing as this would attract tourists and put Singapore on the world map. Since the formation of the Asian Tour it had brought in and sanctioned big tournaments including the Barclays Singapore Open which is touted as the biggest and most prestigious national golf tournament in the whole of Asia. This tournament attracts many players ranked in the top 50 in the world. A healthy, strong and viable Asian Tour is thus serving the interests of the Singapore public and if it is damaged or weakened by OneAsia and is unable to continue the Singapore tournaments, the country will be the poorer for this.

108 Whilst it is good for Singapore to have a strong, healthy and viable Asian Tour, it must also be good for Singapore to have other world ranking golfing tournaments played here. From Singapore's point of view, the more top ranking golf games there are here, the better. The allegation that OneAsia is predatory has not been proved. OneAsia may have been able to sanction some tournaments that had previously been sanctioned by the Asian Tour but there was no allegation much less evidence that OneAsia had interfered with any contractual relationships undertaken by the Asian Tour or induced anyone to breach their contract with the Asian Tour.

109 In the result, I am satisfied that the defendants have not been able to show that either the Conflicting Event prohibition or the Competing Event prohibition is reasonable either between the parties or with respect to the public interest. The Competing Event prohibition is far too wide and arbitrary whilst the time period covered by the Conflicting Event prohibition is much wider than that imposed by other Tours and the defendants have not been able to establish why the Asian Tour needs such a lengthy period to protect itself.

110 In my judgment, Regulation 1.10 as it appears in both the 2009 and 2010 Regulations was in restraint of trade and was therefore void. In view of this conclusion, I need not go on to consider the issues relating to whether the invocation of that Regulation against the plaintiffs was capricious, arbitrary and made in bad faith and to whether the fines imposed are, legally, penalties.

Conclusion

111 There will be judgment for the plaintiffs in both actions. I make the following orders:

(a) There shall be a declaration that the Regulation 1.10 as it appears in the 2009 and 2010 Regulations is unenforceable and null and void for being in unreasonable restraint of trade.

(b) The second defendant shall repay to the plaintiffs all fines imposed on and paid by them in respect of the penalties levied on them for breach of Regulation 1.10.

(c) The defendants, whether by themselves or through their associates, employees, agents or otherwise howsoever are restrained from taking any steps in order to prevent, or the effect of which would be to prevent, the plaintiffs or any of them from participating in any golf tournament or championship within the Asian Tour on the basis of breach of Regulation 1.10 in the 2009 Regulations or in the 2010 Regulations.

(d) The defendants, whether themselves or through their associates, employees, agents or otherwise howsoever are restrained from taking any steps in order to prevent, or the effect of which would be to prevent, the plaintiffs or any of them from participating in any golf tournament or championship outside of the Asian Tour, including (but not limited to) imposing any punishment on the plaintiffs for so participating in such golf tournaments or championships.

(e) The plaintiffs' costs of these actions shall be taxed and paid by the second defendant.

112 I have made an order for the second defendant to pay the plaintiffs' costs because I have found that it is the second defendant which the plaintiffs are members of and which owns the Asian Tour. I am not making any order for the plaintiffs to pay the first defendant's costs, although the first defendant should not have been sued. This is because it was not the plaintiffs' fault that they thought that they were members of the first defendant rather than the second. Their confusion over the organisation to which they belonged was, as I have stated above, caused by the incorrect terminology employed by the defendants giving rise to the wrong impression and the inadequate manner in which the membership records of ATL were kept and administered.