IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 28

Civil Appeal No 9 of 2015

Between

SINGAPORE SWIMMING CLUB

… *Appellant*

And

KOH SIN CHONG FREDDIE

… *Respondent*

JUDGMENT

[Restitution] — [Unjust enrichment] — [Mistake]

[Equity] — [Fiduciary relationships] — [Duties]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Singapore Swimming Club
v
Koh Sin Chong Freddie

[2016] SGCA 28

Court of Appeal — Civil Appeal No 9 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Steven Chong J

21 August 2015

26 April 2016 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This appeal centres on issues relating to the validity and scope of a resolution that was passed by the management committee of the appellant, Singapore Swimming Club ("the Club"), on 14 January 2009,[1] and the payments that were made by the Club pursuant to this resolution. The resolution, which the parties refer to as "the Indemnity Resolution", states that members of the Club would assume liability arising from any legal action brought against members of the management committee as a result of their discharge of duties and responsibilities to the Club.

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[1] Appellant's Core Bundle ("CB") Vol II (Part A) at p 140.

2 The Indemnity Resolution was passed shortly after the respondent, Mr Freddie Koh Sin Chong ("the Respondent"), who was the former president of the Club, was sued by four members of the immediately preceding management committee ("the Four Members") for making two defamatory statements against them. Pursuant to the resolution, the Club bore the legal costs of defending the defamation claim (*ie*, Suit No 33 of 2009 ("Suit 33")) brought by the Four Members against the Respondent. The Club continued paying the legal costs incurred in relation to Suit 33 until a few months after this court found on appeal in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("the CA Defamation Judgment") in November 2011 that the Respondent had made the two defamatory statements with malice.

3 The Respondent thereafter brought a claim against the Club for the legal costs that he had paid personally after the Club refused to indemnify him in accordance with the Indemnity Resolution. The Club, in response, brought a counterclaim against him seeking the refund of the monies that it had paid as legal costs for Suit 33. The Club argued that the Indemnity Resolution was invalid, or in the alternative that even if it was valid, the monies had been paid under the Club's mistaken belief that the Respondent had acted in the discharge of his duties and responsibilities to the Club when he made the two defamatory statements. Both the claim and counterclaim were dismissed by the trial judge ("the Judge"). The Club appealed the Judge's decision to dismiss its counterclaim.

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The facts

The defamatory statements

4 The two defamatory statements were made by the Respondent at the Club's management committee meetings on 29 October and 26 November 2008, and were recorded in the minutes of the meetings which were published on the Club's notice board.

5 The two defamatory statements pertained to the decision of the 2007/2008 management committee ("the 2007 MC") to purchase a new water system for the Club's facilities, including its swimming pools and Jacuzzis. As the expenditure for the purchase of this system was an unbudgeted item, the 2007 MC had to either call for an extraordinary general meeting ("EGM") to request a supplementary budget or approve the expenditure on the basis of it being an "emergency" and subsequently seek ratification of the expenditure at the next annual general meeting ("AGM"). The 2007 MC decided to adopt the latter course and sought to obtain ratification of the expenditure at the Club's next AGM on 25 May 2008 ("the 2008 AGM"). At the 2008 AGM, the matter turned out to be highly contentious. Instead of ratifying the expenditure, the members of the Club adopted a motion, which was supported by 210 members, for the establishment of a Special Ad Hoc Audit Committee ("the Audit Committee") consisting of four of the Club's members to review the expenditure.

6 On 8 August 2008, the Audit Committee returned with a report that concluded that there was no breach of the Club's procedures as the expenditure was of an emergency nature. Shortly after, however, the treasurer of the Club, Mr Tan Wee Tin ("WT Tan"), discovered several documents that

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had not been disclosed to the Audit Committee, which contained information that was inconsistent with the representations made by the 2007 MC at the 2008 AGM. The 2008/2009 management committee ("2008 MC") asked the Audit Committee to consider these new documents, and tasked WT Tan to investigate further.

7 The first defamatory statement was made by the Respondent at a management committee meeting on 29 October 2008. After WT Tan had reported his findings to the committee, the Respondent, who had earlier been elected as president of the Club at the 2008 AGM, remarked that the 2008 MC should correct a "misrepresentation of the facts made by the [2007 MC] to influence the ratification of the expenditure at [the 2008 AGM]".

8 At the second management committee meeting held on 26 November 2008, the Respondent made the second defamatory statement consisting of several allegations against the 2007 MC, *eg*, "[i]t could be a case of misrepresentation of facts to [the 2008 AGM] to get ratification for a capital expenditure of a water system that could not be justified under the urgent [or] emergency reason". As stated at [4] above, the minutes of both meetings were posted on the Club's notice board in accordance with its practice.

9 On 22 December 2008, the Four Members, through their solicitors, issued a letter of demand to the Respondent alleging that the Respondent had falsely and maliciously defamed them.[2] The Four Members demanded that the Respondent apologise to them, undertake not to repeat the two defamatory statements, and compensate them for the damage to their reputation.

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[2] CB Vol II (Part B) at pp 7–9.

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The passing of the Indemnity Resolution

10 After receiving the letter of demand, the then General Manager of the Club, Khoo Boo Beng ("BB Khoo"), emailed the Club's insurance brokers, Acclaim Insurance Brokers Pte Ltd ("Acclaim"), to enquire whether the impending defamation action would be covered by the Club's existing insurance policy.[3]

11 On 29 December 2008, Acclaim responded that the insurer was still in the process of reviewing the Club's policy coverage, but expressed the tentative view that the policy might not apply. It wrote:[4]

> … we would highlight that there is an 'Insured vs Insured Exclusion' under the renewed Policy, and the definition of 'Insured' extends to include all past, present and future committee members of the Club. As this incident involves the past committee members taking an action against the present committee members, there is a likelihood that the claim may fall under this 'Insured vs Insured Exclusion'.

12 BB Khoo forwarded this email to four persons, including the Respondent and another member of the 2008 MC, Mr Eric Ng ("Eric Ng"). Eric Ng replied on 30 December 2008:[5]

> We would let the members know that in this instance the Club would not be covered by its insurance policy because this is an action taken against the present [management committee] by the previous one. It is fully understandable that the policy would exclude such actions. Regardless of the insurance cover the Club would still have to defend its [management committee].

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[3] Record of Appeal ("ROA") Vol V (Part A) at p 222.

[4] CB Vol II (Part B) at p 10.

[5] ROA Vol V (Part A) at p 253.

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> It is good to let the members know who is wasting their money.

13 On 12 January 2009, Suit 33 was commenced by the Four Members against the Respondent. A day later, the insurer wrote to Acclaim confirming that "the Insured v Insured Exclusion would apply in this matter",[6] and thus Suit 33 would not be covered under the Club's insurance policy. The letter from the insurer was forwarded to the Respondent, BB Khoo and others.

14 In the meantime, the Respondent, Eric Ng and another member of the 2008 MC met with Mr Hri Kumar Nair SC ("Mr Nair") of Drew & Napier LLP ("D&N") to discuss the impending defamation action, *ie*, Suit 33. They decided to engage Mr Nair, but D&N required that the Club provide confirmation that it would indemnify the Respondent for his legal costs in Suit 33 before it would agree to act for the latter.

15 On 14 January 2009, between 1.30pm and 2pm, BB Khoo received a letter signed by ten of the Club's members ("the Members' Letter").[7] In the said letter, the ten members of the Club expressed their disapproval of the use of the Club's funds to finance the defence of Suit 33, and stated that "[t]he use of Club's funds for such a purpose would be improper" because the "Club could not be liable for the tortious acts either of its officials or committee members". They requested that: (a) the Club's funds not be used for the purposes of defending the Respondent's alleged tortious acts; or (b) if the Club's funds had been used, steps be taken to recover the monies; and (c) a copy of the letter be circulated to all management committee members.[8]

[6] ROA Vol V(Part A) at p 270.

[7] ROA Vol V (Part K) at p 98, para 5; CB Vol II (Part A) at p 66, para 3.

[8] CB Vol II (Part B) at p 26.

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16 The 2008 MC held a meeting in the evening of the same day ("the 14 January MC Meeting").[9] The issue of Suit 33 was raised towards the end of the meeting after several other agenda items had been discussed. According to the minutes of the meeting, the vice-president of the Club chaired this part of the meeting instead of the Respondent, as the Respondent was personally involved in the issue. It was recorded in the minutes that the following took place:[10]

> …
>
> (c) Rules Chairman explained that according to the lawyers, the defamation suit must be proffered against an individual (in this case [the Respondent] and not a position (in this case President of the Club) even though the wording of the defamation suit made it very clear that [the Respondent] was being sued for what he did and said as President of the Club and Chairman of the [management committee] meeting. As such the Club is duty bound to defend its elected officers who are being sued for discharging their duties as elected officers without which no member would serve in the [management committee] or any of its Sub Committees.
>
> (d) Rules Chairman also explained that the Club bought the D & O Insurance to cover its Management Committee, executive staff and sub committee members to mitigate its losses in the event of such liabilities occurring. However if for any reason such liability insurance cover is not available, the Club would still have to defend its officers.
>
> (e) Responding to a question from [management committee] member Theresa Kay, Social Chairman said that she need not worry about the Insurance cover because the Club would cover her when the Insurance liability limit is reached.
>
> …

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[9] CB Vol II (Part A) at p 130.

[10] CB Vol II (Part A) at pp 139–140, para 5(c); see also ROA Vol V (Part R) at pp 48–53.

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17 After some discussion, a vote was taken to decide whether the Club would grant its management committee members an indemnity against liability incurred in any legal action brought against them in the discharge of their duties. No one objected, and by the Club's practice, this meant that the Indemnity Resolution was unanimously passed. The Indemnity Resolution, which has not been revoked, is worded as follows:[11]

> … the Club will assume all and any liability in the defen[c]e of and awards against any member of the Management Committee ("MC") including but not limited to defen[c]e costs, legal costs and expenses including incidentals in respect of any legal action, demand or claim brought against the Management Committee (whether in part or whole) as a result of the MC or individual MC member discharging its, his or her duties and responsibilities for and on behalf of the Club as office bearers including any claims for any errors and omissions resulting from the discharge of its, his or her said duties and responsibilities. …

18 The minutes of this meeting were put up on the Club's notice board in accordance with usual practice. Commencing 7 February 2009, the Club started making payments in respect of legal fees incurred by the Respondent for Suit 33.

Challenge against the Indemnity Resolution in OS 469

19 The Indemnity Resolution has been the subject of discussions at Club meetings and has even given rise to several disputes in court between members. The first of such court proceedings was Originating Summons No 469 of 2009 ("OS 469"), which was filed by a member of the Club, Mr Poh Pai Chin ("PC Poh"), who was one of the ten signatories of the Members' Letter. In OS 469, PC Poh sought, *inter alia*, a declaration that the Indemnity

[11] CB Vol II (Part A) at p 140, para 5(f).

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Resolution was void and *ultra vires* the rules of the Club ("the Club's Rules"), and a declaration that the authorisation by members of the 2008 MC of the use of the Club's funds to pay for the Respondent's legal costs, expenses and damages in respect of Suit 33 was improper and *ultra vires* the Club's Rules.[12]

20 The Club took the stance that the Indemnity Resolution was valid. Members of the 2008 MC filed affidavits in support of the Club's position. One such affidavit was Mr Ashok Sharma's, in which he deposed that the 2008 MC had acted in accordance with their powers under rr 21(a), 21(g) and 21(j) of the Club's Rules and had followed a longstanding policy of the Club that was reflected in the Club's Financial Operating Manual ("FOM"), namely, that the Club would "indemnify any committee member who [is] sued in respect of acts done or statements made in discharging his duties as such committee member".[13] Under the Club's Rules, r 21(a)(i) vests the management of the Club in the management committee, r 21(g) provides that the management committee shall have control of the revenue and ordinary expenditure of the Club, and r 21(j) provides that the management committee shall have the power to set and decide all policies and matters relating to the Club.

21 OS 469 was dismissed by the High Court on 18 August 2009 without issuing any written grounds.[14]

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[12] CB Vol II (Part B) at p 122.

[13] CB Vol II (Part A) at pp 62–63, para 21.

[14] CB Vol II (Part B) at p 126.

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Purported reaffirmation of the Indemnity Resolution at the 2009 AGM

22 OS 469 was raised at the Club's AGM held on 24 May 2009 ("the 2009 AGM") as part of a motion to refer two members of the 2008 MC, Mr Gary Oon ("Gary Oon") and Ms Theresa Kay ("Theresa Kay"), to the disciplinary committee for having written to PC Poh's solicitors, in their capacity as members of the management committee, without consulting the 2008 MC.[15]

23 In the course of discussing this motion, the Respondent explained to the members present that it had always been the Club's practice and policy that the Club's funds would be used to defend its management committee members if they were sued in the course of discharging their duties and responsibilities.[16] The members were also informed that the 2008 MC had unanimously approved the Indemnity Resolution at the 14 January 2009 MC Meeting.[17]

24 Gary Oon objected and argued that he had not voted in favour of the resolution, and that the vice-president who had chaired the discussion on that issue had not called for a vote. He asserted that defamation, being a voluntary act, could not be construed to have been done in the discharge of duty and thus any costs payable as a result of a defamation suit should not be borne by the Club.[18] He told the members that it would not be in the Club's interest to use the Club's funds to pay the legal costs for Suit 33.[19] The Respondent refuted

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[15] ROA Vol V (Part E) at p 88.

[16] ROA Vol V (Part E) at p 89 at para 16.7.

[17] ROA Vol V (Part E) at p 89 at para 16.7.

[18] ROA Vol V (Part E) at p 91 at para 16.10.

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Gary Oon's account of events and told the members that Gary Oon was seeking to recant his position despite having voted in favour of the resolution at the meeting. A resolution to censure Gary Oon and Theresa Kay was eventually passed by the members.[20]

25 At the end of the 2009 AGM, a member of the Club proposed a motion to affirm the Indemnity Resolution.[21] The Respondent, as Chairman of the AGM, called for a vote on the motion, which read:

> That the House affirms the Management Committee's resolution that the Club indemnifies all Management Committee members, Sub Committee members, Disciplinary Panel/Committee members, and Ad Hoc Committee members who, in the discharge of their duties and responsibilities for and on behalf of the club are sued, the Club funds will be used to defend them, an indemnity which has been the practice of the Club.

There were no objections by the members of the Club, and the Indemnity Resolution was thus declared to have been unanimously reaffirmed.

26 This re-affirmation was, however, challenged by six members of the Club (comprising the Four Members, Gary Oon and one Gope Ramchand)[22] in Originating Summons No 826 of 2009. The reaffirmation was held by the High Court to be null and void, as it was not a matter specified on the agenda for the 2009 AGM and was passed in breach of the Club's Rules.[23]

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[19] ROA Vol V (Part E) at p 91 at para 16.10.

[20] ROA Vol V (Part E) at p 91 at para 16.28.

[21] ROA Vol V (Part E) at p 102 at para 17.24.

[22] ROA Vol V (Part N) at p 55, para 1.

[23] ROA Vol V (Part N) at pp 49–51; *Freddie Koh Sin Chong v Singapore Swimming Club* [2015] 1 SLR 1240 at [37].

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Approval of the payments at the 2010 AGM

27 The payments made pursuant to the Indemnity Resolution came up for approval at the next AGM held on 23 May 2010 ("the 2010 AGM").

28 The payments that had been made in relation to Suit 33 were listed under the category of "ROC/ROM search fees, legal and professional fees" in the 2009/2010 annual report,[24] which was to be received and approved at the 2010 AGM.[25] In total, $508,000 had been spent on this item in the financial year ending 31 January 2010. At the 2010 AGM, two members of the Club requested a breakdown of the expenditure for this item. It was explained that of this amount, $403,000 was spent on defending the defamation action against the Respondent in Suit 33,[26] and $27,000 on defending PC Poh's challenge of the validity of the Indemnity Resolution in OS 469.[27]

29 When asked whether the Club would incur further legal costs, the treasurer, WT Tan, replied that a further $350,000 had been set aside in the Club's budget for use in Suit 33 for the next financial year.[28] He also confirmed that the Club would have to bear the total costs and damages should the Club (by which he presumably meant the Respondent) be unsuccessful in defending Suit 33 because the suit was not covered by insurance.[29]

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[24] CB Vol II (Part B) at p 99.

[25] ROA Vol V (Part I) at p 94.

[26] ROA Vol V (Part E) at pp 173–174, para 6.1.4.

[27] ROA Vol V (Part E) at p 174, para 6.1.6.

[28] ROA Vol V (Part E) at p 174, para 6.1.10.

[29] ROA Vol V (Part E) at p 175, para 6.1.15.

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30 This led to a number of pointed remarks and questions from members of the Club, which included the following:

(a) enquiries by several members including Mr Manohar Sabnani[30], Mr Aziz Tayabali,[31] Mr Mohan Das Naidu[32] and Mr Mano Subnani[33] on whether the Club had considered using mediation as a means to resolve Suit 33;

(b) a proposal by Mr Choo Kok Lin that the management committee members should not get coverage from the Club and should bear the legal costs on their own, which was ruled to be out of order as it was not an item on the agenda for the 2010 AGM;[34]

(c) a debate between Mr Robin Tan and the Respondent as to whether the Club had made an offer to settle,[35] which ended with the Respondent stating that there was an offer to settle and that proof thereof would be produced in due course;[36]

(d) a pointed comment by Mr Mohan Das Naidu that perhaps the parties involved did not feel the pinch because the money was coming from the Club's coffers;[37] and

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[30] ROA Vol V (Part E) at p 176.

[31] ROA Vol V (Part E) at p 179, para 6.6.

[32] ROA Vol V (Part E) at p 180, para 6.7.2.

[33] ROA Vol V (Part E) at p 181, para 6.9.

[34] ROA Vol V (Part E) at p 177, para 6.3.

[35] ROA Vol V (Part E) at pp 177–179, paras 6.5.2–6.5.15.

[36] ROA Vol V (Part E) at pp 177–179, para 6.5.15.

[37] ROA Vol V (Part E) at p 180, para 6.7.5.

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(e) a query by Mr Mohd Amin on whether the 2008 MC "felt hurt" that the Club spent over half a million dollars on legal costs, to which the 2008 MC responded that they did. After hearing this, Mr Amin expressed that he was glad to hear that because he did not want others to think that the management committee was using the Club's money carelessly as it was not their personal funds.[38]

31 Despite the heated discussion, the annual report, audited accounts and operating budget for the next financial year were confirmed and adopted by the members of the Club without objections.[39]

High Court's judgment on Suit 33

32 On 29 October 2010, the High Court delivered its judgment on Suit 33. The High Court found that the two statements made by the Respondent were defamatory of the plaintiffs in Suit 33, *ie*, the Four Members, but the gist of the defamatory sting had been justified. The Respondent was therefore found not liable. The parties in Suit 33 appealed the respective parts of the decision that was adverse to them in Civil Appeal No 210 of 2010 and Civil Appeal No 213 of 2010 (together, "the Suit 33 Appeals").

Approval of the audited accounts at the 2011 AGM

33 At the next AGM held on 22 May 2011 ("the 2011 AGM"), the audited accounts for the financial year ending 31 January 2011 and the operating budget of the next financial year were again confirmed and adopted by the members of the Club without objection.[40]

[38] ROA Vol V (Part E) at p 183, para 6.11.

[39] ROA Vol V (Part E) at pp 192, 197, paras 6.17, 7.4.

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34 It appears from the minutes of the meeting that there had not been any discussions relating to Suit 33 at the 2011 AGM. Information on the suit and the legal costs incurred was, however, available in the documents that had been approved. It was also recorded in the annual report that $549,000 had been spent on legal proceedings (which included other cases) for that financial year, and that as of 31 January 2011, Suit 33 had cost the Club a total of $920,370.[41] A summary of the events that led to Suit 33 and related proceedings was also provided. It was indicated in the financial statements that $103,000 had been budgeted for legal fees for the next financial year.[42]

The CA Defamation Judgment

35 On 21 November 2011, the CA Defamation Judgment was delivered. The Court of Appeal allowed the appeal of the Four Members and dismissed the Respondent's cross-appeal. The Court of Appeal found the Respondent liable for defamation, as the statements were defamatory and had not been justified. The Court of Appeal further held that the Respondent could not rely on the defence of qualified privilege because the defence was defeated by malice.

36 The Court of Appeal observed that it was doubtful whether the Respondent had a genuine or honest belief in the truth of the defamatory statements, given that the defamatory statements were made before he had formed an opinion on whether the Four Members had made the misrepresentations at the 2008 AGM deliberately,[43] but nevertheless found

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[40] ROA Vol V (Part E) at pp 268, 278, paras 4.102, 5.47.

[41] ROA Vol V (Part I) at p 222.

[42] CB Vol II (Part B) at p 103.

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that, at the minimum, a reckless disregard for the truth could be implied from his conduct. The court found at [96] that the Respondent's dominant motive for publishing the defamatory statements was to injure the Four Members, whether out of personal spite or as follow-up actions after having made the ratification of the expenditure an election issue during the 2008 AGM. The court found that there was overwhelming evidence that the Respondent had gone on a "witch-hunt" and was determined to soil the reputation of the Four Members in the eyes of the members of the Club.[44] The court took into account the following pieces of evidence in coming to this conclusion:

(a) The Respondent had repeatedly insinuated that the Four Members were guilty of wrongdoing, and had done so even before the report of the Audit Committee was completed.[45]

(b) The Respondent had repeatedly attempted to formally censure the Four Members after the members of the Club voted at the 2008 AGM not to ratify the expenditure.[46]

(c) Even after the Audit Committee had exonerated the 2007 MC, the Respondent and the 2008 MC went on to conduct investigations into the expenditure and repeatedly beseeched the Audit Committee to amend its report. When that failed, the 2008 MC even prepared an addendum to the report and released it at the 2009 AGM despite the Audit Committee's request for three to four months to conduct further

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[43] CA Defamation Judgment at [91].

[44] CA Defamation Judgment at [96].

[45] CA Defamation Judgment at [92]–[93].

[46] CA Defamation Judgment at [95].

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investigations. The court found that it was evident from the correspondences that the 2008 MC, including the Respondent, had, from the beginning, decided to indict the Four Members of wrongdoing, and was determined to proceed to do so themselves when they failed to persuade the Audit Committee to take their position.

Events after the release of the CA Defamation Judgment

Two special confidential meetings of the 2011 MC

37 On 14 December 2011, about three weeks after the release of the CA Defamation Judgment, a "special confidential management committee meeting" was convened to discuss the judgment. The composition of the management committee had changed by this time. The management committee that held office in 2011 ("the 2011 MC") was made up of six members of the 2008 MC (including the Respondent, who was at that time still the president of the Club) and five new members. Five members, including the Respondent, were absent from this special meeting. The Respondent was excused from attending the meeting because the subject matter of the meeting involved him.

38 The six members of the management committee who were present considered the issue of legal representation at the assessment of damages, and decided that there was no need to engage Mr Nair, a senior counsel, for the assessment of damages hearing. They decided instead to engage the services of an experienced senior lawyer from another firm. The six members also considered D&N's request for them to provide confirmation that the Club would continue to indemnify the Respondent's legal expenses if the Club wanted Mr Nair to act for the Respondent in another suit that had just been

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commenced. The six members did not think there was a need to provide a further confirmation and noted that "the ability of the Club to provide such an indemnity to its officials ... had been upheld by the High Court when a member challenged it [in OS 469]".[47] The six members further agreed that the Club "shall and must provide such an indemnity to any and/or all members who serve in the Club's [management committee] or [s]ub-[c]ommittees]".[48]

39 Another "special confidential management committee meeting" was convened on 19 December 2011 to allow the four members (excluding the Respondent) who were previously absent to express their view on the matter. At this meeting, the four members expressed their agreement with the decisions and actions that had been taken in the previous meeting.[49]

Two payments made to D&N in January 2012

40 The Club paid $58,720.26 and $20,000 to D&N on 12 and 17 January 2012 respectively.[50] These payments bear mention because they were made after the release of the CA Defamation Judgment.

Requisition of the EGM

41 On 18 January 2012, the Club received a requisition for an EGM signed by 531 members for the purposes of passing the following three resolutions ("the EGM Resolutions"):[51]

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[47] CB Vol II (Part A) at p 149.

[48] CB Vol II (Part A) at p 150.

[49] CB Vol II (Part A) at p 151.

[50] ROA Vol III (Part G) at p 145 (AEIC of Jennifer Wee at paragraph 29).

[51] CB Vol II (Part A) at p 152, para 2.1; p 186.

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(a) that the Club seeks the return of all monies it paid, including legal costs and expenses arising out of or in connection with Suit 33 and the Suit 33 Appeals, from the Respondent;

(b) that no Club funds be authorised to pay for the legal costs, expenses and damages arising out of, or in connection with, Suit 33 and the Suit 33 Appeals; and

(c) that the members of the Club have no confidence in the Respondent.

42 The members stated on the requisition that the Respondent could not be said to have made the defamatory statements in the discharge of his duty as an office bearer of the Club as he had acted out of malice. They contended that the Club was therefore not bound to pay for the Respondent's defence in Suit 33 and the Suit 33 Appeals.[52] Selected pages of the CA Defamation Judgment were attached to the requisition.

43 The 2011 MC convened another "special confidential management committee meeting" that very night at 11.15pm. This meeting was chaired by the Respondent, even though the subject of the meeting (*ie*, the requisition for the EGM) concerned him. When the members of the management committee were invited by the Respondent to express their views on the requisition and on the EGM Resolutions, they unanimously reaffirmed the Indemnity Resolution and agreed that they did not support the EGM Resolutions.

44 The minutes of the meeting recorded:[53]

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[52] CB Vol II (Part A) at p 152, para 2.1; p 186.

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> … The [management committee] viewed that the Indemnity Resolution remained legally valid. At the Special Confidential [management committee] Meeting held on 18 January 2012, the [management committee] was unanimous in upholding the principle of the Club to indemnify all committee members if they are sued in the course of duty to the Club. The [management committee] reaffirmed the validity of the indemnity resolution of 14 January 2009 that the Club pays for the defen[c]e of the President in [Suit 33]. The [management committee] was unanimous in that they did not support [the EGM Resolutions].

Further payments made after the requisition

45 Before the EGM, which was scheduled on 4 March 2012, took place, further payments were made pursuant to the Indemnity Resolution. On 27 January 2012, the Club sent a cheque for the sum of $51,000 to Bajwa & Co, the solicitors whom the 2011 MC had newly appointed to act for the Respondent in the assessment of damages hearing.[54]

46 On 3 February 2012, WongPartnership LLP ("WongPartnership"), solicitors for the Four Members, sent a letter to Bajwa & Co demanding payment of the taxed costs from the Respondent. The letter was forwarded by Bajwa & Co to the Respondent on 10 February 2012 via email. Bajwa & Co also gave the following advice to the Respondent:[55]

> …
>
> 4) As there is no stay of the cost order, the said sums are payable otherwise [interest] will keep mounting.
>
> 5) Since we are not reviewing the appeal cost, there is no reason not to pay it now.

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[53] CB Vol II (Part A) at p 154, para 2.5.

[54] ROA Vol V (Part D) at pp 52, 54.

[55] CB Vol II (Part B) at p 72.

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> 6) For the trial costs we have file[d] for review but even then there is no harm in paying now and getting a refund if the amount is reduce[d].
>
> 7) We will leave it to you to decide.
>
> …

47 On 13 February 2012, the Respondent forwarded Bajwa & Co's email and the letter of demand from WongPartnership to WT Tan, who was the Club's treasurer, and Ms Jennifer Wee ("Jennifer Wee"), who was and presently is the financial controller of the Club. The Respondent wrote in his email to them:[56]

> …
>
> As the amounts are due on 31 Jan 2012, and interest is payable, we should take the lawyer's advice and settle the amounts payable now to avoid accruing interest.
>
> We can still get a refund for the trial costs if we succeed to get the costs reduced subsequently at the appeal.
>
> Please consult with the Treasurer on this matter and if payment is to be made, on booking into which account payment year since the payment was due on 31 Jan 2012, ie in the last financial year.
>
> …

48 On the same day, WT Tan called Jennifer Wee to remind her to make payment as soon as possible so as to prevent more interest from accruing.[57] The following day, Eric Ng suggested in an email to WT Tan, Jennifer Wee and the Respondent that they should put the money in escrow pending the outcome of the review of taxation, to avoid "collection issues" with the Four

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[56] CB Vol II (Part B) at p 76.

[57] ROA Vol III (Part T) at p 237 (The Club's closing submissions in the court below at paragraph 145).

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Members if the costs order was later varied by the court. This suggestion was not taken up.[58]

49 On 14 February 2012, a cheque of $1,021,793.48 drawn in favour of WongPartnership, which was signed by Jennifer Wee and WT Tan, was hand-delivered to WongPartnership.[59]

50 Thereafter on 1 March 2012, the Club paid another $60,297.90 in legal costs to Bajwa & Co.[60] The payments noted at [40], [45], [49] and this paragraph shall be collectively referred to as the "post-CA Defamation Judgment payments".

The EGM and the events that followed

51 At the EGM on 4 March 2012 ("4 March EGM"), the members of Club passed the EGM Resolutions set out at [41] above.[61] Pursuant to the EGM Resolutions, the Respondent stepped down as the president of the Club, and the Club stopped making any further payments for the Respondent's legal costs and damages in Suit 33 and the Suit 33 Appeals.

52 On 21 March 2012, the 2011 MC, without the Respondent, as he was no longer the president of the Club, held an emergency meeting to consider the resolutions passed at the 4 March EGM and the legal advice from Legal Solutions LLC on the validity of the resolutions. Mr Kevin Kwek from Legal

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[58] Eric Ng sent an email to Freddie Koh, WT Tan and Jennifer Wee at 1.09am on 14 February 2012: CB Vol II (Part B) at p 77.

[59] ROA Vol V (Part B) at pp 279–280.

[60] ROA Vol V (Part D) at p 54.

[61] CB Vol II (Part A) at p 199.

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Solutions LLC was present at the meeting to elaborate on the legal advice that he had earlier given. Mr Kwek expressed the view that the first resolution seeking the return of money from the Respondent was invalid because it undermined the Indemnity Resolution, which was immune from challenge. This led to a discussion on whether the Indemnity Resolution could still apply despite a finding of malice. The 2011 MC thought it should still apply. The minutes of the meeting recorded that the 2011 MC[62] "unanimously agreed that when the [Indemnity Resolution] was passed on [14 January 2009], the entire [management committee] was clear then about the intentions of the [Indemnity Resolution] and the [Indemnity Resolution] was passed to cover everything and there is no reason to exclude themselves from any acts in discharging their duties as the [management committee] of the day". The 2011 MC also stated that "there was no mention of malice then".

53 At the Club's next AGM on 27 May 2012 ("the 2012 AGM"), a new management committee, led by Mr Chua Hoe Sing, was elected.[63]

The proceedings below

Commencement of proceedings

54 On 27 March 2012, the Respondent filed Originating Summons No 309 of 2012 ("OS 309") for declarations that the Indemnity Resolution is valid and binds the Club and that the EGM Resolutions are null and void.[64] On 18 June 2012, the Club filed Suit No 510 of 2012 ("Suit 510") to recover the

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[62] CB Vol II (Part A) at p 160, para 3.1.4.

[63] ROA Vol III (Part E) at p 30.

[64] CB Vol II (Part B) at pp 174–175.

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monies which the Club had paid on the Respondent's behalf in respect of Suit 33 and the Suit 33 Appeals.

55 OS 309 and Suit 510 were consolidated into Suit No 634 of 2012 ("Suit 634") on 27 July 2012. As the Club had not been paying the Respondent's legal costs since the 4 March EGM, the Respondent added a claim for reimbursement of the legal costs he had personally paid to Bajwa & Co and a further claim for damages and interest ordered to be paid to the plaintiffs in Suit 33. In total, he claimed $248,900.91 from the Club.[65]

56 As noted, the Club denied that the Respondent was entitled to the relief he claimed and counterclaimed for the sums which the Club had paid on his behalf in respect of Suit 33 and the Suit 33 Appeals. After deducting the amounts that had been refunded to the Club pursuant to the court's orders in the appeal for the assessment of damages in Suit 33 as well as the taxation review for the costs for the suit, the Club claimed a total of $1,520,685.44 from the Respondent.

The decision below

57 The Judge dismissed both the claim and the counterclaim. The detailed grounds for his decision is reported as *Koh Sin Chong Freddie v Singapore Swimming Club* [2015] 1 SLR 1240 ("the GD").

58 The Respondent's claim was dismissed, as the Judge found that the Indemnity Resolution was not a contract between him and the Club and that the Club was not contractually obliged to continue paying his legal costs and

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[65] CB Vol II (Part A) at p 13.

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damages in Suit 33. The Judge held that the Club was entitled to change its mind at any time, as it had in the present case. He further held that the Respondent could not rely on the doctrine of estoppel to enforce his alleged right to be reimbursed for payments, as that would amount to an impermissible use of the doctrine as a sword, in the sense of a free-standing cause of action. The Respondent did not appeal the Judge's decision to dismiss his claim.

59 The Club sought to argue for the purposes of its counterclaim that the Indemnity Resolution was void because it had been passed under a fundamental mistake. It took the position that the 2008 MC, by the deliberate design of the Respondent, was not made aware of the contents of the Members' Letter and the fact that Suit 33 was not covered under the Club's insurance policy when it passed the Indemnity Resolution at the 14 January MC meeting. In the alternative, the Club argued that the resolution was voidable (i) because it had been procured through the Respondent's "sharp practice" and acts of deceit; or (ii) due to the various breaches of fiduciary duties on the part of the Respondent and some members of the 2008 MC. The Club asserted that it had elected to rescind the resolution when the members passed the EGM Resolutions (see [41] above). Lastly, the Club submitted that even if the Indemnity Resolution was valid, it was only intended to cover instances where office bearers were acting in the proper discharge of their duties. It argued that the Club had made the payments under the mistake that the Respondent had acted in the discharge of his duty when he made the two defamatory statements, and was thus entitled to restitution of the sums that had been paid under the law of unjust enrichment.[66]

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[66] [86] of the GD.

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60 The Judge was not persuaded by the Club's submissions. He held that there was no basis to find that the Indemnity Resolution was void or voidable on the ground of a fundamental mistake or unconscionability on the part of the Respondent because the 2008 MC would have passed the resolution even if it had been privy to the two pieces of information. As for the second issue of whether the Indemnity Resolution was voidable for breach of fiduciary duties, the Judge held that the Club had not discharged its burden of proving that the 2008 MC had passed the Indemnity Resolution in self-interest or in the Respondent's interest. Crucially, seven of the 12 members of the 2008 MC were not called as witnesses. Without their evidence, the Judge was in no position to decide what their motivations were in passing the Indemnity Resolution.

61 The Judge was, however, of the view that the 2008 MC acted in a position of *potential* conflict of interest in passing the resolution, because each member stood to benefit from it. But he held that it did not follow that the Indemnity Resolution was voidable at the Club's instance, as the resolution had been impliedly affirmed by the Club through its inaction over the intervening years. In any case, the Judge noted that the Club did not attempt to revoke the Indemnity Resolution even at the 4 March EGM.

62 The Judge also rejected the Club's contention that the Respondent had procured payment of his legal costs in breach of his fiduciary duties to the Club. He found that the Respondent neither had *de jure* nor *de facto* control over the decision to pay his legal costs, and thus could not be said to have procured the payment of his legal costs. In addition, the Judge held that the Club had failed to show that the Respondent did not honestly believe that he

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was entitled to rely on the Indemnity Resolution, which would have been necessary to establish the Respondent's breach of fiduciary duty.

63 The Judge also dismissed the Club's claim in unjust enrichment, as he took the view that the Indemnity Resolution covered the Respondent's legal costs and damages in the defamation action. The Judge noted that the Indemnity Resolution was precipitated by Suit 33, and he concluded from the evidence that the 2008 MC had not intended the Respondent's entitlement to an indemnity to be in any way contingent upon the outcome of Suit 33. Rather, it appeared to the Judge that the 2008 MC had intended the phrase "discharge of their duties" in the Indemnity Resolution to bear a broad meaning with the distinction drawn between acts done in personal capacity and acts done in capacity as management committee members. As the defamatory statements were made by the Respondent in his capacity as president of the Club, the Judge found that those acts would have fallen within the scope of the Indemnity Resolution, and concluded that the payments of the Respondent's legal costs were not made under a mistake.

64 Dissatisfied with the Judge's decision to dismiss its counterclaim, the Club has appealed.

The parties' cases on appeal

The Club's case

65 The Club's arguments on appeal would appear to be largely similar to those it advanced before the Judge. Its primary argument on appeal is founded in unjust enrichment. In the alternative, it argues, as before, that the Indemnity

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Resolution was void or voidable as result of the deception of the Respondent or his or the 2008 MC's breaches of fiduciary duties.

66 In respect of its primary claim in unjust enrichment, the Club argues that the Indemnity Resolution did not cover the legal costs incurred in Suit 33 and the Suits 33 Appeals because the Respondent had acted with malice and was thus not acting in proper discharge of his duty in making the defamatory statements.[67] The Club argues that the Judge had erred in: (i) adopting a subjective, as opposed to an objective, interpretation of the Indemnity Resolution according to the evidence of the Respondent and the other members of the 2008 MC that were in his "inner circle";[68] and (ii) considering the subjective intentions of the 2008 MC in deciding whether there was a mistake in making the payments. Relying on the principle set out in *In re Hampshire Land* [1896] 2 Ch 743 ("*In re Hampshire Land*"), the Club argues that the knowledge of the 2008 MC, which was acting in breach of their fiduciary duties, should not be imputed to the Club.

67 As for the defences to the unjust enrichment claim, the Club argues that the Respondent cannot rely on estoppel or change in position because he did not come to this court with clean hands, having procured the passing of the Indemnity Resolution by deception.[69] Further, the Respondent had made the decision to hire Mr Nair from D&N even before the Indemnity Resolution was passed.[70]

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[67] Appellant's Case at para 20.

[68] Appellant's Case at para 28.

[69] Appellant's Case at para 102.

[70] Appellant's Case at para 103.

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68 Aside from the unjust enrichment claim, the Club argues that the Indemnity Resolution had been passed as a result of the Respondent's unconscionable conduct and acts of deception, and is thus void at law or voidable in equity. In addition, it makes the following further arguments on why the resolution is voidable in equity:

(a) The Respondent had acted in breach of fiduciary duties by participating in the passing of the Indemnity Resolution even though he knew that he was in a position of conflict of interest, and he ought to have recused himself from the discussion of the Indemnity Resolution pursuant to r 31 of the Club's Rules;[71]

(b) The re-affirmation of the Indemnity Resolution by the 2011 MC after the CA Defamation Judgment was released was not in the best interests of the Club.

(c) The Indemnity Resolution cannot be said to have been ratified by the members of the Club through their acquiescence over the years, because the members were not apprised of all the material facts during the respective annual general meetings when the resolution was raised or when the accounts were approved.[72]

(d) The Respondent had acted in breach of fiduciary duties in wrongfully procuring the payments.[73] In particular, the Club asserts that the Respondent had procured the post-CA Defamation Judgment payments of more than $1m in haste in order to pre-empt the EGM

[71] Appellant's Case at paras 63–64.

[72] Appellant's Case at paras 72–73.

[73] Appellant's Case at p 35.

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Resolutions, and argues that Judge had erred to have found that the Respondent had no control over the payments.

The Club also points out that it was not necessary for it to have prayed specifically for a declaration that the Indemnity Resolution is void or voidable, as the validity of the Indemnity Resolution had been a "live issue at the trial", and the material facts pertaining to this issue had already been pleaded by the Club.[74]

The Respondent's case

69 As a preliminary issue, the Respondent points out that the Club's case on appeal is significantly different from its pleadings as the Club appeared to have abandoned its unjust enrichment claim in its Appellant's Case. The Respondent also argues that the Club's case that the Indemnity Resolution is invalid had not been pleaded.

70 Leaving the preliminary objections aside, the Respondent's case centres on the following arguments:

(a) First, that the Club's reliance on the finding of malice in the CA Defamation Judgment is misplaced because (i) the 2008 MC had intended for the Indemnity Resolution to cover the legal costs of Suit 33 regardless of the outcome of the suit; and (ii) the 2008 MC and the 2011 MC were entitled to hold to their belief that the Respondent had not acted in malice despite the Court of Appeal finding to the contrary.

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[74] Appellant's Case at para 98.

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(b) Second, that the Club had not proven that the Indemnity Resolution was procured by "sharp practice" or passed under a mistake and should thus be void or voidable. In this regard, the Respondent points out that the Indemnity Resolution remains in existence and has not been revoked by the Club. He also asserts that the resolution is valid even though the 2008 MC was in a position of conflict of interest when it passed the resolution because it had been subsequently reaffirmed by the Club.

(c) Third, contrary to what the Club alleges, he had not breached his fiduciary duties to the Club. In particular, the Respondent points out that he did not procure the payments and that the payments had been effected through proper channels and clearance processes.

(d) Fourth, he argues that even if the Club's case was accepted by the court, he should still be entitled to rely on the defences of estoppel and change in position, which would bar the Club from asking for the return all the sums that had been paid towards Suit 33 and its related matters.

The appeal hearing

71 At the hearing before us, counsel for the Club, Mr Tan Chee Meng SC ("Mr Tan"), focused his oral submissions almost exclusively on the claim in unjust enrichment and the argument that the Club had made the payments under the mistaken belief that the Respondent's conduct fell within the scope of the Indemnity Resolution. When queried, Mr Tan also agreed that the crux of his case was on the construction of the Indemnity Resolution.

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72 We find it significant that Mr Tan did not raise the argument that the Indemnity Resolution was void or voidable at any point during the hearing. In fact, the arguments made by Mr Tan during the hearing presume that the Indemnity Resolution is valid. However, we do not take this to mean that the Club is no longer challenging the validity of the Indemnity Resolution, especially given that this issue had formed the bulk of its written submissions. As we indicated in response to counsel for the Respondent, Mr Paul Seah ("Mr Seah"), when he pointed out that this issue had been conspicuously omitted from Mr Tan's address, we recognised that the hearing had developed in the manner it did partially because of the line of questioning from the Bench.

Issues before us

73 The following two issues lie at the core of the parties' dispute:

(a) whether the Indemnity Resolution is void or voidable, and thus invalid; and

(b) whether the Club had made the payments to the Respondent under a mistake of fact and is thus entitled to claim repayment of the same from the Respondent on the ground of unjust enrichment.

74 Additionally, the Club is seeking to rely on a third cause of action premised on the Respondent's alleged breach of fiduciary duties to the Club in procuring the post-CA Defamation Judgment payments, even though it has not argued this in a consistent and satisfactory manner. In its submissions in the court below and in its Appellant's Case, the Club appears to be relying on this not as a standalone cause of action, but as a ground to support its overarching argument that the Indemnity Resolution is voidable and invalid. Despite this,

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we consider that it is sufficiently clear from its pleadings (see [133] below) and from Mr Tan's submissions at the hearing before us that the Club is relying on the Respondent's alleged breach of fiduciary duties as a separate cause of action to claim the post-CA Defamation Judgment payments. We will address this issue at [132] below after discussing the first two issues.

Whether the Indemnity Resolution is valid

75 By way of recapitulation, the Club contends that the Indemnity Resolution is void *ab initio* or voidable in equity because it had been passed under a mistake arising from the Respondent's deceptive and unconscionable conduct. It argues that the Respondent and some of the 2008 MC members, who were in cahoots with the Respondent, had concealed the following two pieces of vital information from the 2008 MC at the 14 January MC Meeting when the Indemnity Resolution was passed:

(a) the fact that the Respondent's defence in Suit 33 fell under the "Insured v Insured Exclusion" of the Club's insurance policy and would thus not be covered (see [13] above)

(b) the Members' Letters, in which the views of ten members of the Club who disapproved of the use the Club's funds to finance the defence of Suit 33 were set out (see [15] above).

It further contends that the Indemnity Resolution is voidable in equity by virtue of the breaches of fiduciary duty of the Respondent and the members of the 2008 MC.

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Issue was not pleaded by the Club

76 As pointed out by the Judge, the issue of the validity of the Indemnity Resolution had not been properly pleaded by the Club in its defence and counterclaim. The Club had only pleaded that (i) it had made the payments under a mistake; and (ii) that the Respondent had acted in breach of his fiduciary duties in respect of the post-CA Defamation Judgment payments. Although the Club had set out some of the allegations at paragraphs 19 to 23 of the defence and counterclaim, the pleadings did not sufficiently disclose that the Club was going to assert that the Indemnity Resolution is void or voidable because of these reasons. Neither was there a prayer in the pleadings for a declaration that the Indemnity Resolution is void or voidable, whether for mistake, unconscionability or for breach of fiduciary duty. In these circumstances, we agree with the Respondent's submission that the Club cannot attempt to circumvent the rules of pleading by arguing that the validity of the Indemnity Resolution was always "a live issue" between the parties.[75] This is especially so in the light of the requirement in O 18 r 15(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) that a party has to state specifically the relief or remedy which he claims in his pleadings.

77 In any event, as we will discuss in a moment, quite apart from the issue that the Club's pleadings are deficient, the Club's claim that the Indemnity Resolution is void or voidable would still fail on the merits.

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[75] Respondent's Case at paragraph 37.

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Whether the Indemnity Resolution is void

78 There are a few difficulties with the Club's submission that the Indemnity Resolution is void. For the Club to succeed in its argument that the Indemnity Resolution is void because it had been passed under a fundamental mistake, the Club must be able to prove that the two pieces of information (noted at [75] above) would have materially affected the decision of the 2008 MC. In our view, the Judge had correctly concluded from the evidence that the 2008 MC would have passed the Indemnity Resolution even if the two pieces of information had been made known at the 14 January MC Meeting (at [132]–[144] of the GD). Although it is unclear if all the members of the 2008 MC knew about the "Insured v Insured Exclusion", it can be gathered from the discussion recorded in the meeting transcripts that it was within the 2008 MC's contemplation and intention that the Indemnity Resolution is to cover the members of the management committee even where the acts in question were not covered by the insurance policy. This can be seen, in particular, from the following exchange that was recorded in the transcripts of the meeting:[76]

> …
>
> ERIC NG: Yah, we will reaffirm. Reaffirm that all [management committee] members will be defended by the Club.
>
> ASHOK KUMAR: Wholly are covered, are covered.
>
> ERIC NG: I'm not using "covered", I said "will be defended by the Club", okay? Even if there was no insurance policy, the Club will still have to defend, so we are talking about, yah, we are talking about the Club defending the [management committee] for -- when they are being

[76] CB Vol II (Part A) at pp 263–264.

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	sued in the course of executing their duties and responsibilities.
FREDDIE KOH:	You see, here we might not get insurance coverage, all right.
ERIC NG:	Yah.
FREDDIE KOH:	So you are now implying that because we have insurance coverage, we are covered.
ERIC NG:	Yah, correct.
FREDDIE KOH:	What if we are faced with a situation, come renewal, they say, "I'm sorry, I don't want to insure Singapore Swimming Club" –
ERIC NG:	I –
FREDDIE KOH:	-- but the Club still has to cover the [management committee], whoever the [management committee], it may not be me. It could be, you know, Mr A, Mr B, who comes to the [management committee].
ASHOK KUMAR:	Allow me to clarify that. Allow me to clarify that. I never said we are covered because we have a policy. I am saying we have a policy because we are meant to be covered. That's what I'm saying.

…

79 The discussion that the members of the 2008 MC had at the 14 January MC Meeting showed that the management committee members held the view that the Club had an overarching policy of protecting its management committee members by an indemnity from the Club for acts done in the discharge of their duties to the Club, and that this commitment to indemnify the members of the management committee extended beyond the scope of the insurance policy that the Club had purchased for the members of the management committee. The logical conclusion from this is that the 2008 MC

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would have passed the Indemnity Resolution *even if* they were informed that Suit 33 was not covered by the insurance policy.

80 Similarly, we are inclined towards the view that the 2008 MC would still have passed the Indemnity Resolution even if they had known about the Members' Letter. As noted by the Judge at [137]–[143] of the GD, the members of the 2008 MC must have known about the Members' Letter by 17 February 2009, when one of its members, Gary Oon, brought up the letter when he was objecting to the insurance coverage and the Indemnity Resolution covering defamation actions, including Suit 33. The fact that none of the members of the 2008 MC, even after they knew about the contents of the Members' Letter, raised any point that he or she had been misled into approving the Indemnity Resolution or sought to rescind or amend the resolution demonstrates that the letter and its contents had little, if any, bearing on their decision-making process in respect of the Indemnity Resolution and its scope.

81 As for the Club's argument that the Respondent's unconscionable conduct would make the Indemnity Resolution void, we agree with the Judge's finding (at [130] and [145]–[154] of the GD) that the Club had not adduced sufficient evidence to prove that the Respondent had deliberately concealed the two pieces of information from the 2008 MC in order to mislead them into passing the resolution.

Whether the Indemnity Resolution is voidable

82 In our judgment, the Club's argument that the Indemnity Resolution is invalid because it is voidable also lacks merit. Even if we accept the Club's case that the Indemnity Resolution is voidable for the reasons it puts forward,

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the fact that it remains in existence necessarily means that it has not been set aside by the Club. This would in turn mean that it is still valid. The EGM Resolutions that were passed at the 4 March EGM were to, *inter alia*, (i) stop further payments being made to indemnify the Respondent's expenses in Suit 33 and the Suit 33 Appeals; and (ii) reclaim the sums that had been paid out in relation to the same (see [41] and [51] above). No action has been taken by the Club – either at the EGM or in the three intervening years leading up to the present appeal – to revoke the Indemnity Resolution or to propose a change in the Club's policy to indemnify members of the management committee of legal expenses incurred in the discharge of their duty and responsibility to the Club.

83 Further, the evidence shows that the Indemnity Resolution has been re-affirmed by the inaction of the members of the Club from the time it was passed at the 14 January MC Meeting. Five foregone opportunities which the members of the Club could have revoked the Indemnity Resolution, if they had wished to do so, had been listed by the Judge at [175] of the GD):

(a) when the Indemnity Resolution was first published to the members on the notice board (see [18] above);

(b) when PC Poh filed OS 469 to challenge the validity of the Indemnity Resolution (see [19] above);

(c) when the Indemnity Resolution and OS 469 were discussed during the 2009 AGM (see [22] above);

(d) when the payments made pursuant to the Indemnity Resolution towards the Respondent's legal costs in Suit 33 were presented to the

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members for approval at the 2010 AGM, during which the issue was discussed at length (see [27] above); and

(e) when further payments made pursuant to the Indemnity Resolution towards the Respondent's legal costs in Suit 33 were presented to the members for approval at the 2011 AGM (see [33] above).

84 As discussed at [82] above, the members had a further opportunity to rescind the Indemnity Resolution at the 4 March EGM but did not do so. In these circumstances, we agree with the Judge's finding (at [179]–[180] of the GD) that it must be taken that the members had impliedly affirmed the Indemnity Resolution. In fact, we would go even further to say that the members' conduct amounted to acquiescence and an endorsement of the Indemnity Resolution, or more specifically, of the Club's decision to indemnify the Respondent in Suit 33. Therefore, even if we accept the Club's submission that the Indemnity Resolution may have been voidable at the time of its passing because of the various reasons that have been put forward (in particular, because the 2008 MC had been in a position of a potential conflict of interest when they passed the resolution which benefitted them), the members had reaffirmed and adopted the resolution thereafter with their acquiescence and conduct.

Concluding observations

85 We make two concluding observations on this issue. First, it bears highlighting that the Indemnity Resolution is worded in broad terms and is not meant to apply only to Suit 33. In fact, the Indemnity Resolution does not even explicitly refer to Suit 33. Even though D&N's request for the Club's

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assurance that it would indemnify the Respondent for his legal costs in Suit 33 (see [14] above) was the catalyst for the passing of the resolution, the evidence suggests that the passing of the Indemnity Resolution was no more than a formal process to set out what was already a clear policy of the Club. This weakens the Club's arguments that the Indemnity Resolution, in its entirety, should be void or voidable because of the Respondent's conduct. In this regard, we observe that many of the Club's arguments in respect of the validity of the Indemnity Resolution are targeted at portraying that the Club had been unconscionably misled and influenced by the Respondent to pay for his legal costs of Suit 33 and the Suit 33 Appeals. Such arguments may assist the Club in its alternative cases that the payments had been made by it (i) under a mistaken belief that it fell within the scope of the Club's policy, which is encapsulated in the Indemnity Resolution, or (ii) as a result of the Respondent's breaches of fiduciary duty to the Club. But, in our judgment, it does little to support the Club's case that the Indemnity Resolution is void or voidable. Unfortunately, the Club's submissions have, more often than not, failed to make a distinction between:

(a) the Indemnity Resolution *per se* and the specific decision to indemnify the Respondent in respect of Suit 33; and

(b) the Indemnity Resolution *per se* and the payments that were subsequently made in respect of Suit 33 and the Suit 33 Appeals pursuant to the resolution.

86 Second, there may be a fundamental problem with the Club's submission on this issue which has not been raised by either party. The Club relies on principles or concepts that apply to contracts in arguing that the resolution is void or voidable. It is well-established that a contract may be void

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if it was made under a fundamental mistake, or may be voidable in equity for other reasons (*per Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502). The Club's arguments presuppose either that a resolution is a contract, or that contractual principles should apply in the same manner to resolutions. The first assumption is clearly wrong. As the Judge had rightly pointed out (at [74]–[75] of the GD), resolutions are not contracts and have no legal effect in and of themselves. The Indemnity Resolution records the formal decision of the Club, or more specifically the decision reached by its management committee. It is not a contract between the Club and its members or any third party. In these circumstances, it is not immediately clear to us whether, and why, contractual principles should be transplanted and applied to resolutions. We would, however, say no more on this issue given that it had not been raised by either party and given that, in any event, the claim would fail even if we assume that the legal principles that have been raised are sound.

87 We turn now to address the Club's claim in unjust enrichment.

Whether the Respondent had been unjustly enriched

88 Before we set out the applicable legal principles and discuss the claim proper, we have a brief comment to make on the manner in which the Club has argued this claim on appeal. In its pleadings and submissions in the court below, the Club had quite clearly framed a significant part of its case as an unjust enrichment claim. However, the same cannot be said for its submissions on this issue on appeal. It is unclear from the relevant sections in its Appellant's Case and skeletal submissions whether the Club is still relying on a cause of action in unjust enrichment. The way the Club has put forward this argument on appeal prompts the Respondent to comment in his Respondent's

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Case that the Club "appears to have abandoned its argument at trial based on unjust enrichment on the ground of mistake". The words "unjust enrichment" or "unjustly enriched" do not appear in the Club's submissions on appeal (save for Mr Tan's oral submissions when he was asked by the court about the cause of action that he was seeking to rely on).

89 Leaving the issue of semantics aside, the point we are making is that the Club should have focused its arguments within the framework of an unjust enrichment claim, particularly on whether the Club had made the payments under a mistake, instead of focusing on proving that the Respondent's conduct fell outside the scope of the Indemnity Resolution without linking this back to the mistake that was allegedly operating on the Club's mind. As much as we recognise that the issue of whether the Respondent's conduct fell outside the scope of the resolution is relevant to the question of whether the payments had been made under a mistake and may even be seen as the flip side of the same coin in the context of this case, the fact remains that the connection between the two must be set out. Although this is not fatal to the Club's case because it is sufficiently clear from the entirety of its arguments in the court below and on appeal that it is pursuing a claim in unjust enrichment, its case could have been clearer and its arguments more targeted if the correct framework had not been lost sight of.

The law on unjust enrichment

90 To make out a cause of action in unjust enrichment, a claimant must demonstrate the following elements (*per Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 ("*Anna Wee*")):

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(a) that a benefit has been received or an enrichment has accrued to the defendant;

(b) that the benefit or enrichment is at the claimant's expense; and

(c) that the defendant's enrichment is "unjust".

If these three elements are satisfied, the further question to consider is whether there are any defences to the claim.

91 The dispute in the present appeal lies in whether the third element (*ie*, whether the defendant's enrichment is "unjust") is satisfied and, if so, whether there are any defences that the Respondent can rely on. It is undisputed that the first and second elements are satisfied in that the Club had benefitted the Respondent by paying on his behalf from its funds the legal costs and expenses which he had incurred in Suit 33 and the Suit 33 Appeals.

92 As this court sought to emphasise in *Anna Wee* (at [130]), unjust enrichment is not based on a general or broad notion of unconscionability or unjustness. Unjust enrichment focuses on the claimant's loss or deprivation, and not on the fault of the recipient. In contrast with the approach of civilian and other mixed systems of law, the common law approach has been that claimants in unjust enrichment must demonstrate a positive reason for restitution. The contrast between the two approaches was discussed by Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at [21], where he observed that:

> … unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. In the Woolwich case [1993] AC 70, 172 Lord Goff said that English law might have developed so as to recognise such a

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> general principle—the condictio indebiti of civilian law—but had not done so. In England, the claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recogni[s]es as sufficient to make retention by the recipient unjust. …

93 The common law approach thus requires a claimant to identify specific ground(s) of restitution, which are legally recognised factors that make the defendant's enrichment unjust and are thus often referred to as "unjust factors" (see Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones*") at paras 1-21 and 1-22). The list of recognised "unjust factors" includes mistake, duress, undue influence, failure of basis, illegality *etc* (*Goff & Jones* at para 1-22). The categories of unjust enrichment are not closed, but the courts are generally cautious not to recognise new grounds of recovery too freely (see Laws LJ's observations in *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 at [26]–[27], and *Goff & Jones* at para 1-23 and 1-24).

94 In the present case, the Club relies on mistake of fact, which is a well-established unjust factor. The principles governing the recovery of mistaken payments in the context of an unjust enrichment claim are summarised in *Goff & Jones* at para 9-31 as follows:

> (a) First, the claimant must prove, as a threshold matter, that he had made a mistake, in that he had believed that it was more likely than not that the true facts (or the true state of law where mistake of law is pleaded) were otherwise than they in fact were.

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(b) Second, the claimant's belief must have caused him to confer the benefit on the defendant. In other words, the mistake must be causative.

(c) Third, even if a causative mistake can be shown, the claimant maybe denied relief if he had responded unreasonably to his doubts, and had thus unreasonably ran the risk of error.

(d) Fourth, a claimant who had doubts may be denied relief on the distinct grounds that he has compromised or settled with the defendant, or on the basis that he is estopped from pleading the mistake.

Whether the Club had paid the sums under a mistake of fact

95 The Club argues that it had made the payments in respect of Suit 33 and related matters on behalf of the Respondent because it was under the mistaken belief that the Respondent had been sued as a result of the discharge of his duties and responsibilities for and on behalf of the Club. Putting it another way, the Club's case is that it had paid the legal costs for the Respondent thinking that the circumstances of the case brought against him in Suit 33 fell within the scope of the Indemnity Resolution. Mr Tan submits that the Club only found out that it had been operating under a mistake when they realised from the CA Defamation Judgment that the Respondent had made those statements with malice and for his personal purposes, and thus could not have been acting in the interest of the Club or in the discharge of his duties to the Club.

96 In our view, the reaction of members of the Club to the CA Defamation Judgment strongly supports the Club's case. Shortly after the

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release of the judgment, over 500 members of the Club acted to requisition an EGM in order to pass the EGM Resolutions (see [41] above). The EGM Resolutions were eventually passed at the 4 March EGM and thereafter, the Club ceased making payments and commenced proceedings to seek the return of the sums that had already been paid on behalf of the Respondent.

97 The fact that the CA Defamation Judgment sparked off such a reaction within the Club indicates that the members had no prior knowledge of the true nature of the Respondent's acts and that they would not have been willing to indemnify the Respondent if they had known that he had made those defamatory statements for his personal vendetta and not in the discharge of his duty towards the Club. This supports the Club's case in two ways:

(a) First, it supports the Club's position that the payments had been made under the mistaken premise that the Respondent was properly discharging his duty to the Club when he made the defamatory statements, and that the Club only realised its mistake when the CA Defamation Judgment was released in November 2011.

(b) Second, assuming that we accept that the Club had made a mistake in making the payments, this would go towards showing that the mistake was causative in nature, in that the Club would not have made the payments (*ie*, the members would have voiced out their objections and exercised their voting rights to prevent the payments from being made) if it had known about the true nature of the Respondent's acts. As set out at [94(b)] above, the Club has to show that the mistake was an operative and causative in order to succeed in its claim.

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98 Additionally, the fact that these events within the Club had occurred while the Respondent and the 2011 MC (which was led by him) were still in office weakens the Respondent's case theory that the Club's claim against him was a "change [in] course" and was due to a "sea change" in the Club's internal politics and management.[77] The objective evidence shows instead that it was the members of the Club, and not the new management that had assumed office after the 2012 AGM held on 27 May 2012, that were pushing for the return of the payments and the cessation of further payments after the release of the CA Defamation Judgment.

99 We turn next to examine the arguments raised by Mr Seah to refute the Club's claim that it had made the payments under a mistake.

100 Mr Seah's first argument is that the 2008 MC, which had drafted and passed the resolution, had intended that the Respondent would be indemnified for any costs and expenses he incurred in relation to Suit 33 regardless of the outcome of the suit. He submits that this had to be the case given that the 2008 MC had full and intimate knowledge of the facts leading to Suit 33, including the fact that the Four Members had alleged malice against the Respondent in the statement of claim for Suit 33. He thus argues that the Club had not made the payments under a mistake, as it had meant to indemnify the Respondent even if he was found, as he was, to have acted with malice and for his personal vendetta in making the defamatory statements.

101 Given that the Indemnity Resolution clearly states that the Club will indemnify its management committee members for legal costs that have been

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[77] Respondent's Case at paragraph 2.

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incurred "as a result of the [member] *discharging ... his or her duties and responsibilities for and on behalf of the Club*" [emphasis added], we find it difficult to accept that the Respondent's acts would fall within the scope of the resolution. At [96] of the CA Defamation Judgment, this court found that:

> … the [Respondent's] dominant motive for publishing the Statements was to injure the [Four Members], *whether out of personal spite or as follow-up actions after having made ratification of the expenditure an election issue during the 2008 AGM*. Indeed, there is overwhelming evidence that the [Respondent] was determined, on the pretext that the expenditure was irregular, to soil the reputation of the [Four Members] in the eyes of the members of the Club. Therefore the defence of qualified privilege is not available to the [Respondent] on account of malice.
>
> [emphasis added]

102 In our judgment, an act that is motivated by malice and by one's personal vendetta is inherently irreconcilable with an act done in *bona fide* discharge of duty. We cannot see how the Respondent can be said to be acting for and on behalf of the Club when he was motivated by his own agenda and personal vendetta in publishing the defamatory statements.

103 The Respondent tries to circumvent this conclusion by arguing that such an objective interpretation of the resolution should not be adopted because the Club (i) had intended to indemnify the Respondent regardless of the outcome in Suit 33 and (ii) had intended the phrase "discharging … [their] duties" to bear a broad meaning, in that it was only meant to distinguish between acts done in a personal capacity and acts done in the capacity of a member of the management committee. Both of these arguments were accepted by the Judge (at [220] and [224] of the GD respectively).

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104 We are not persuaded by either submission. It is undisputed that the Club intended to indemnify the Respondent even if he eventually lost Suit 33. In fact, this had been contemplated and conveyed to members at the 2010 AGM by WT Tan (see [29] above). To this extent, the Respondent is correct to assert that the Club did not intend for the Respondent's entitlement to the indemnity to be contingent on the *outcome* of Suit 33. But the evidence does not show that the Club intended to indemnify the Respondent regardless of the *findings* of the court in Suit 33 such that they were willing to indemnify him even if the court finds, as it had, that he had not acted *bona fides* in the discharge of his duty to the Club. The contents of the requisition notice for the EGM that was tendered by the members to the Club on 18 January 2012 showed that what the members took issue with was not the fact that the Respondent had been found liable for defamation, but the specific finding of the court that the Respondent had been on a "witch hunt", had "an agenda of his own" and "had acted with malice". The members who signed the notice expressed the view that as the Respondent "had acted with malice, the defamatory statements made by him cannot be said to have been made in the discharge of his duty [or] responsibility as an office bearer".[78]

105 As for the Respondent's argument that the Club had intended the phrase "discharging … their duties" to be defined in such a broad manner that it would include any act as long as it is done in the capacity as an officer of the Club, we are of the view that such a reading of the phrase is neither consistent with the natural and plain meaning of those words nor with reason and logic. It is also not supported by any evidence. Indeed, the reactions of the members of

[78] CB Vol II (Part A) at p 186.

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the Club, as we summarised at [96] above, militate against the Respondent's arguments.

106 Given the above, we are unable to accept the Respondent's submission that the Indemnity Resolution is broad enough to cover the Respondent's acts in relation to the defamatory statements even in the face of the finding of this court in the CA Defamation Judgment that there existed malice on the part of the Respondent when he uttered those defamatory statements.

107 Mr Seah submits, in the alternative, that the management committees of the Club (specifically, the 2008 MC and the 2011 MC) were not bound by this court's finding in the CA Defamation Judgment that the Respondent had acted with malice when he made the defamatory statements. He argues that the CA Defamation Judgment being a "judgment *in personam*" was *inter partes* and was conclusive only as between the parties in that litigation. He submits that the Judge was correct to have found that the management committee was entitled, even after CA Defamation Judgment had been delivered, to take a different view from this court on the Respondent's actions (at [227] of the GD). Although Mr Seah was careful to remain respectful and deferential towards the court, he is essentially submitting that the Court of Appeal's finding that the defamatory statements had been made by the Respondent with malice may not have been correct given that the court was two steps removed from the events of the day whereas the 2008 MC had personal and first-hand knowledge of what was happening.

108 We do not think that this submission has any real merit. Although the court's finding in the CA Defamation Judgment was made nearly three years after the fact, the finding of the court is not prospective in nature. The court

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was not saying that this is the position henceforth. The finding is a finding of the state of the mind of the Respondent *at the time* he was making those defamatory remarks. The argument that the 2008 MC was a better judge of the Respondent's motivations, as it was closer to the ground and thus more privy to the events surrounding the defamation is a non-starter. The fact remains that the finding of malice on the part of the Respondent by this court in the CA Defamation Judgment is conclusive and has legal effect regardless of what the 2008 MC thought or thinks. The litigants or other parties may disagree with what the court finds, but that cannot change the legal consequences and status of a finding by a court.

109 With respect, the Judge had erred in downplaying this court's finding of malice. The Judge had expressed the following view at [230] of the GD:

> … Instead, the Club premised its case on mistake almost entirely on the Court of Appeal's finding of malice in Suit 33. Had the Court of Appeal not found that the defence of qualified privilege was defeated by the [Respondent's] malice, the Club's case on mistake would have no legs to stand on. In my view, it would be both artificial and contrary to principle to find that the Club had paid the [Respondent's] legal costs under a mistake merely because the Court of Appeal had drawn its own inferences from the same set of facts known to the 2008 MC, and had attached the legal label of malice to the [Respondent's] conduct.

110 We cannot agree that this court's finding of malice on the part of the Respondent was a mere "legal label" or a legal fiction. On the contrary, the finding carries legal consequences and is binding on the parties. It is a definitive finding as to the state of mind of the Respondent when he made the defamatory remarks. In these circumstances, it is neither artificial nor contrary to principle to find that the Club had paid the Respondent's legal costs under a mistake. If a finding by this court as to a fact is not determinative of that fact,

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we do not know what is. In a country governed by the rule of law, a finding of fact by this court must necessarily be the last word. Most importantly, the Club, and its general body, would not have known what the state of mind of the Respondent was when he made those defamatory utterances. The Club and its members in general would naturally have assumed that the Respondent did not have any malicious motive when he made those comments.

111 Mr Seah's second argument raises another issue even though he had not expressly argued it as such. Given that the 2008 MC had been closely involved in the events that led up to the making of the defamatory statements and Suit 33, there is a possibility that at least some of the members of the 2008 MC might have been aware of the Respondent's state of mind when he was making the defamatory remarks. The court had made the following observations at [94] of the CA Defamation Judgment:

> … notwithstanding that the Audit Committee charged by the 2008 AGM to look into the expenditure had exonerated the [2007 MC], the [Respondent] *and the rest of the [2008 MC]* were determined to embark on a "witch-hunt" against the [Four Members] by conducting their own investigations into the expenditure, and repeatedly beseeching the Audit Committee to amend the Audit Report, despite the Audit Committee's repeated refusal to do so. … From this chain of correspondences, it is evident that the *[2008 MC]*, including the [Respondent], had, from the beginning, decided to indict the [Four Members] of wrongdoing, and was determined to proceed to do so themselves when they failed to persuade the Audit Committee to their position.
>
> [emphasis added]

112 These observations made by the court in the Suit 33 Appeals allude to the possibility that the 2008 MC, or at least some members in the said committee, might have known of the true nature of the Respondent's acts. This in turn raises the question as to whether the Club can still be said to be

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labouring under a mistake if some of its members, or more specifically members of its management committee, had such knowledge at the time.

113 However, what is significant is that no one at the meetings of the management committee or of the general body had raised the point that the Respondent would still be covered by the indemnity even if the court was to find not only that the statements were defamatory but that they were made with malice. We have no doubt that if anyone were to have raised this very query at a meeting, the general response would have been "of course not". It is simply unthinkable that any responsible member of the management committee, or of the Club, would have said yes. It is probably true to assume that many in the management committee would not have thought when they approved the Indemnity Resolution that the Respondent had a personal agenda against the Four Members. In this regard, it is pertinent to note that Gary Oon, who was part of the 2008 MC, had reservations about the Club indemnifying the Respondent in relation to Suit 33 (see [24] above) on the basis that defamation was a tortious act, what more if the Respondent had uttered those statements with malice and for personal motives.

114 Having said that, the possibility that some of the members of the 2008 MC, who were actively on the "witch-hunt" with the Respondent to indict the plaintiffs in Suit 33, might have had knowledge of the Respondent's motives and state of mind in making the statements cannot be discounted. However, in our judgment, the breach of duty exception will operate to prevent the knowledge of such members to taint the state of mind of the Club. There is nothing to indicate that the general body knew of the surrounding circumstances leading to the making of the defamatory statements by the Respondent.

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115 The breach of duty exception is commonly referred to as the "*Re Hampshire Land* principle", as it is often associated with the case of *In re Hampshire Land* even though there is some controversy as to whether the application of this principle was the true ground of the decision. The principle was recently discussed and clarified by the United Kingdom Supreme Court in *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168 ("*Bilta*") and the Hong Kong Court of Final Appeal in the case of *Moulin Global Eyecare Trading Ltd (In Liq) v Commissioner of Inland Revenue* [2014] 3 HKC 323 ("*Moulin*"). The principle was also discussed at some length in the High Court case of *United Overseas Bank Ltd v Lippo Marina Collection Ltd and others* [2016] 2 SLR 597 at [47]–[55].

116 In essence, the breach of duty exception applies in certain circumstances to prevent the attribution of an agent's knowledge of his breach of duty or acts to the principal even though in other contexts or circumstances, the agent's state of mind and acts would be attributable to the principal. This exception, which is motivated by reasons of public policy, only applies as against the agent who is in breach of his duty to the principal, or a third party who is complicit in the breach. It has no application as against an innocent third party (see *Moulin* at [131], *Bilta* at [84]).

117 In our judgment, the breach of duty exception would apply in the present case. A member of the 2008 MC – if any at all, apart from the Respondent – who had knowledge about the true nature of the Respondent's acts would most certainly be in breach of his fiduciary duty to the Club in allowing the Club to make the payments in respect of Suit 33 despite knowing that the Respondent's acts fell outside the scope of the Indemnity Resolution. Further, the Respondent is not an innocent "third party" but is the very party

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who was in breach of duty towards the Club. Given these circumstances, the Respondent cannot rely on the knowledge of any member of the 2008 MC who might have known of the true nature of the Respondent's acts to argue that the Club thus had knowledge and could not have been mistaken.

118 In the result, we find that the Club had made the payments *before* the release of the CA Defamation Judgment under the mistaken belief that the Respondent was properly discharging his duty to the Club in making the defamatory statements and that Suit 33 fell within the scope of the Indemnity Resolution. It was only when the CA Defamation Judgment was released that the Club realised its mistake.

119 But the Club can no longer be said to be labouring under such a mistake when it made the post-CA Defamation Judgment payments *after* the release of the CA Defamation Judgment (see [50] above). By the time these five payments were made, the Club was already cognisant of the fact that the Respondent was motivated by personal vendetta and malice when he made the defamatory statements. Pertinently, by the time of the last two payments (*ie*, the payments of $1,021,793.48 to WongPartnership on 14 February 2012 and $60,297.90 to Bajwa & Co on 1 March 2012), over 500 of its members had attempted to stop any further payments in respect of Suit 33 by requisitioning for the EGM (refer to [41] above). It may be argued – as the Club has (see [132] below) – that the persons who had allowed these payments to be made, despite the impending 4 March EGM and the clear objections from a significant number of members, had done so in breach of their fiduciary duty towards the Club. We will address the Club's submissions in respect of the breach of fiduciary duty by the Respondent in a moment. For the purposes of the analysis on the Club's claim in unjust enrichment, it is sufficient to say

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that the Club was no longer operating under any such mistake when it made the post-CA Defamation Judgment payments. But as we shall see in a moment, this does not mean that the Club cannot recover those payments.

120 Before we end off on this portion of the analysis, we will just touch on the point made by the Judge at [225] of the GD that "the 2011 MC's decision to re-affirm the Indemnity Resolution and continue paying the [Respondent's] legal costs after the CA [Defamation] Judgment was delivered also goes against the notion that the Club had made previous payments under a *causative* mistake". With respect, we are unable to agree with the Judge on this issue. As we have pointed out at [97(b)] above, the mistake, in our judgment, was causative in nature. The events that had transpired following the release of the CA Defamation Judgment, in particular the fact that the 4 March EGM was held, that the EGM Resolutions were passed, and that thereafter the Club stopped making payments in respect of Suit 33, clearly demonstrated that the mistake was causative and operative. The post-CA Defamation Judgment payments took place before the members of the Club could react and convene an EGM – as they eventually did – to stop the Club from making any further payments. In our view, it is clear that the Respondent as well as those in the 2011 MC who were sympathetic to him were acting to pre-empt any action which the general body of the Club could take by arranging and allowing for the payments to be made before the 4 March EGM could be held.

121 For the reasons above, we find that:

(a) The payments made by the Club *before* the release of the CA Defamation Judgment were effected as a result of the Club's mistaken

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belief that the Respondent's conduct in making the defamatory statements fell within the scope of the Indemnity Resolution.

(b) But the payments made *after* the release of the judgment, were not made under such a mistake.

122 In these circumstances, we hold that the Club would be entitled to the repayment of the sums that were paid before the release of the CA Defamation Judgment from the Respondent under its unjust enrichment claim unless the Respondent can successfully raise any defences.

Whether the Respondent can rely on any defences

123 In this regard, Mr Seah argues that the Respondent can rely on the defences of (i) estoppel *simpliciter,* (ii) estoppel by convention and (iii) change in position. We note that the Respondent attempted to rely on the defence of settled position of law in the court below but appears to have dropped this defence on appeal.

124 We will first briefly set out the law on the three defences.

125 The defence of estoppel generally requires that the claimant had made a representation of fact to the defendant that the latter is entitled to the benefit that he has received, and that the defendant had changed his position to his detriment in reliance on the representation, making it inequitable for the claimant to resile from it (*Goff & Jones* at para 30.01).

126 The defence of estoppel by convention requires that there be an assumed state of fact or law in the course of dealing, which was shared by both parties or made by one party and acquiesced to by the other party, and

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that it would be unjust or unconscionable to allow a party to go back on that assumption (*per Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR (R) 474 at [31]).

127 Moving on to the defence of change in position, this requires the defendant to have changed his position so much that it would be inequitable in all the circumstances to require him to make restitution, or alternatively restitution in full (*per* Lord Goff in *Lipkin Gorman* [1991] 2 AC 548 ("*Lipkin*") at 580 and *Goff & Jones* at 27-01). The defence of change in position would not apply where the defendant has changed his position in bad faith, *eg*, where a defendant paid the money away with the knowledge of the facts entitling the claimant to restitution (*per* Lord Goff in *Lipkin* at 580). The courts have cautioned that the analysis in relation to this defence must proceed in a principled way such that a fair balance is struck between the claimant's interest in restitution and the defendant's interest in making spending decisions freely, without fear that a claim in unjust enrichment might later invalidate the assumptions that he makes about the means at his disposal (*Goff & Jones* at para 27-03).

128 Mr Seah submits that all three defences, which have overlapping requirements, are satisfied because the Club had represented to the Respondent that it would cover his legal costs in relation to Suit 33, which representation the Respondent relied on in appointing Mr Nair from D&N, whom he would not otherwise have hired as he could not afford to do so.[79] This, Mr Seah submits, caused the Respondent to incur a substantial amount of legal costs and it would thus now be unjust and unconscionable to compel him

[79] Respondent's Case from para 133.

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to repay the Club the sums, which the latter had paid for as his legal fees in respect of Suit 33 and the Suit 33 Appeals.

129 Mr Tan, on the other hand, submits that the Respondent cannot rely on the defences, as he has not come to this court with clean hands and cannot be allowed to benefit from his unconscionable conduct.[80] In addition, Mr Tan points out that the Respondent had met up with Mr Nair from D&N even before the Indemnity Resolution was passed and thus cannot argue that he had relied on the Indemnity Resolution in engaging D&N's services.[81]

130 In our judgment, the Respondent cannot rely on the above defences given that he always had the knowledge that he was acting with malice in making the defamatory statements, and that he would not have been indemnified by the Club had the members known about the true nature of his acts. In these circumstances, the Respondent, who had not acted in good faith, cannot seek to rely on those defences.

Conclusion on the unjust enrichment claim

131 For the above reasons, the Club has succeeded in proving its unjust enrichment claim against the Respondent on the basis of mistake in respect of the payments made *before* the release of the CA Defamation Judgment. Although a total of $1,053,815.31 had been paid by the Club up to that point, $20,004.96 had been refunded to the Club by D&N in June 2012.[82] The total

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[80] Appellant's Case at para 102.

[81] Appellant's Case at para 103.

[82] Table A of the Appellant's Skeletal Submissions.

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amount that the Club was out of pocket before the judgment was released was thus $1,033,810.35.

Whether the Club can claim the post-CA Defamation Judgment payments by virtue of the Respondent's alleged breach of fiduciary duty

132 We now move on to address the Club's claim that it is entitled to a refund of the post-CA Defamation Judgment payments on the ground that these payments had been procured by the Respondent in breach of his fiduciary duty to the Club. By way of recapitulation, the post-CA Defamation Judgment payments that were made before the passing of the EGM Resolutions were as follows:[83]

(a) a sum of $58,720.26 to D&N on 12 January 2012 (see [40] above);

(b) a sum of $20,000 to D&N on 17 January 2012 (see [40] above);

(c) a sum of $51,000 to Bajwa & Co on 27 January 2012 (see [45] above);

(d) a sum of $1,021,793.48 to WongPartnership on 14 February 2012 (see [49] above); and

(e) a sum of $60,297.90 to Bajwa & Co on 1 March 2012 (see [50] above).

In total, the Club paid $1,211,811.64 after the release of the CA Defamation Judgment.

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[83] Table A of the Appellant's Skeletal Submissions.

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133 The Club's case in this regard, as set out in paragraph 49 of its defence and counterclaim, is as follows:

(a) The Respondent had authorised, approved and/or procured the Club to pay out various sums amounting to $1,211,811.64 after the CA Defamation Judgment was released despite knowing that these payments were not covered by the Indemnity Resolution (at paragraph 49(b)).

(b) The Respondent had procured these payments through the treasurer and financial controller of the Club, without the management committee's approval. Three of these payments had been made after the members of the Club had on 18 January 2012 requisitioned for an EGM to, *inter alia*, prohibit the Club from making further payments in connection with Suit 33 (at paragraph 49(d)).

(c) The haste in which the Respondent had procured the payment of $1,021,793.48 to WongPartnership after having knowledge that the Club members had requisitioned for an EGM was intended to pre-empt the adverse outcome on the draft resolutions that had been tabled (at paragraph 49(f)).

(d) In acting in such a manner as to procure the five payments, the Respondent had abused his position as president of the management committee and of the Club (at paragraph 49(e)).

In essence, the Club's case is that the Respondent had acted in breach of his fiduciary duties to the Club by procuring the post-CA Defamation Judgment payments even though he knew that he would not be covered by the Indemnity Resolution in view of the finding of malice on his part in the CA Defamation

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Judgment. Further, we would underscore that three of the payments, one of which was for the substantial sum of $1,021,793.48, had been procured after some 500 members had requisitioned for an EGM in order to prevent further payments from being made.

134 The Judge did not allow this claim as he found that the Respondent did not have *de jure* or *de facto* control over the payments (at [189]–[190] of the GD), and was "only forwarding invoices to Jennifer Wee requesting her further action" (at [191] of the GD). He concluded from the evidence that the Respondent had neither instructed nor approved the payments and that the Club had not pleaded or adduced any evidence at trial to prove that the Club's treasurer, WT Tan, and its financial controller, Jennifer Wee, were acting at the Respondent's behest when they approved or made the payments in relation to Suit 33 (at [196] of the Judgment). Further, the Judge found that the Club's claim would have failed even if the Club succeeded in proving that the Respondent had procured the payments because the Club had failed to show that the Respondent did not honestly believe that he was entitled to rely on the Indemnity Resolution (at [197] of the GD).

135 With respect, we do not think that the Club's claim in this regard should be interpreted in such a narrow manner. In our opinion, the Respondent cannot distance himself from the Club's making of the payments simply by saying that he did not sign the cheques or that he had no authority to approve the payments and was merely tendering the invoices to Jennifer Wee for the Club to make its own decision on whether the payments should be made. In viewing the actions of the Club's treasurer and financial controller, it must be borne in mind that the Respondent was the president and a fiduciary of the Club at all material times when the post-CA Defamation Judgment payments

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were made. Barring any decision to the contrary by the management committee or the general body at an AGM or an EGM, he was the executive head of the Club. The Respondent does not deny – and rightly so, as this argument would have had no merit – that he owed fiduciary duties to the Club as its president. What he disputes is the Club's contention that he had acted in breach of his fiduciary duties.

136 Millett LJ (as he then was) described a fiduciary as follows in *Bristol and West Building Society v Mothew* [1998] Ch 1 (at 18):

> … A fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner or circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. …

It is trite that the various fiduciary duties such as the duty not to profit from position, the duty not to place oneself in a position of conflict of interest arise from this core obligation of loyalty that the fiduciary owes to the principal (see Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 6.034).

137 In our judgment, the Respondent had acted in breach of his fiduciary duties to the Club as he had acted with the intention of furthering his own interests rather than the interests of the Club. There could have been no doubt after the release of the CA Defamation Judgment and even more so after the

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receipt of the members' letter requisitioning an EGM that stated that no further payments should be made towards Suit 33 and related matters until the Club's position on this issue was clarified by the general body. In particular, the significance of the requisition by some 500 members for an EGM to consider and approve the three draft resolutions, one of which was to ensure that hereafter no payment would be made by the Club in respect of the legal costs incurred by the Respondent in Suit 33 and the appeals therefrom, could not have been lost on him.

138 We recognise that the Club's practice in relation to the payments of the Respondent's legal expenses under the Indemnity Resolution had been to channel the invoices to the treasurer and the financial controller for action in accordance with section 4.3.2 of the FOM. But the situation was clearly different after the release of the CA Defamation Judgment and, without a doubt, after the receipt of the requisition notice. By then, the question of whether the Respondent's legal costs fell within the scope of the Indemnity Resolution and whether the members were still willing to indemnify him had arisen. This question was not one that should, or could, have been resolved by the Respondent or the treasurer and financial controller alone. The conflict between the Respondent's duty to the Club and his self-interest in respect of the post-CA Defamation Judgment payments was obvious. In these circumstances, the Respondent should have, at the very least, asked the vice-president, who was the next senior person in the Club, to take control of this matter and either call for a meeting of the management committee or an EGM in order to ascertain the Club's position post-CA Defamation Judgment or take any other action he deems fit. This was not done. Instead, the Respondent continued to hand invoices over to the treasurer and financial controller for payments to be made on the pretext that this was pursuant to the Club's usual

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protocol. In our view, no responsible president of a club in such a situation should have done so. Further, we also note that, despite his clear interest in the matter, the Respondent had chaired the special confidential management committee meeting on 18 January 2012 (see [43] above) during which the management committee discussed the requisition and the proposed EGM Resolutions and unanimously re-affirmed that the Indemnity Resolution should still apply in respect of the Respondent.

139 In our view, the way in which the Respondent had acted in the face of an impending EGM can hardly indicate good faith. The circumstances of the payments, in particular the payment of $1,021,793.48 to WongPartnership, show that the Respondent was anxious to obtain payments of those legal bills before the guillotine came down and the members of the Club reacted – as they eventually did – to stop further payments from being made. While no direct threat or direction was uttered by the Respondent to WT Tan or Jennifer Wee, implicit in the email sent by the Respondent in respect of the invoices sent by WongPartnership was an obvious message that they should make the payments speedily ostensibly on the ground that delay in making payment could result in more interest being incurred (see [47] above). We find it difficult to believe the Respondent's assertion that he had sought the payment to WongPartnership in such a hurried manner just so as to prevent the Club from incurring further interest.

140 In these circumstances, we have to respectfully disagree with the Judge and instead find that the Respondent had acted in breach of his fiduciary duty to the Club in procuring the post-CA Defamation Judgment payments, which were not in the Club's interest to make.

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Conclusion

141 For all the reasons stated above, we allow the Club's appeal with costs here and below, to be taxed if not agreed. The Respondent is to repay the Club a total amount of $1,520,685.44, consisting of:

(a) the sum of $1,033,810.35, which is the amount of $1,053,815.31 paid by the Club before the release of the CA Defamation Judgment less the refund of $20,004.96 that had been made to the Club by D&N; and

(b) the further sum of $486,875.09, which is the amount of $1,211,811.64 paid by the Club post-CA Defamation Judgment, less the refund of costs effected by the Four Members who were the plaintiffs in Suit 33 pursuant to orders of court.

The sum of $1,520,685.44 shall bear interest at 5.33% per annum with effect from 18 June 2012, the date of the writ in Suit 510. The usual consequential orders are also to follow.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Steven Chong Judge

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