

CLASS AND PUBLIC INTEREST LITIGATION : THE RAFFLES TOWN CLUB SAGA

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I. GLOBALIZATION AND CLASS ACTIONS

In whatever form or definition it may be given, “globalization” has no doubt left an indelible economic and social impact on various countries, cultures and people. It has been used, in certain circumstances, to describe “corporate imperialism”, where a corporate entity “tramples over the human rights of developing societies, claims to bring prosperity, yet simply amounts to plundering and profiteering”¹.

Picture the following situations:

1. a telecommunications company serving thousands of customers unjustly charges those customers, each by a small imperceptible sum, certain so-called regulatory fees, thereby unjustly enriching itself²;

2. a public listed pharmaceutical company fails to disclose vital information regarding the approval of a drug that they had intended to market, thereby maintaining the artificially inflated value of its stock. Subsequently when the price of its stock drops, losses were suffered by many investors³; and

¹ See Wikipedia, the Free Encyclopedia – “Globalization”

² See the plaintiffs’ allegations in *Benney v Sprint* (Case No. 05CV-1422 Division No. 3 Chapter 60) and *Lundberg v Sprint* (Case No. 02CV-4551 Division No. 3 Chapter 60), both cases from the District Court of Wyandotte County, Kansas, 29th Judicial District

³ See the plaintiff’s claims in *Dura Pharmaceuticals v Broudo*(03-932) 544 US 336 (2005) 339 F.3d 933

3. a tobacco company conceals from its customers (that is, smokers) the effects of smoking which led these customers to smoke and as a consequence they contracted a variety of diseases.⁴

The above situations are not unique unto themselves. They are merely representative of a large and growing number of cases in which a single wrongdoer causes the same, similar or common harm or loss to a large number or class of people.

The identified harm or loss caused may sometimes be small or minor to each particular affected individual or may be difficult to assess or quantify; however, when the sum total of the harm or loss to each and every particular individual is added up, this might result in a seemingly large and disproportionate gain for the wrongdoer. How does one bring the wrongdoer to justice? How does one particular individual, having suffered perhaps a small monetary loss or inconvenience, reclaim such loss and get the wrongdoer to disgorge his profit? One solution is to find similar individuals to collectively initiate a mass litigation suit. However, initiating and managing such litigation is fraught with numerous difficulties, given that is not common nor is there any suitable framework in this part of the world.

This paper will briefly discuss the benefits and pitfalls of mass litigation, the various forms of mass litigation in a few selected jurisdictions as well as a case study of a recent mass litigation action in Singapore, giving a practical glimpse of how such an action was conceived, its life and finally, its conclusion.

II. MASS LITIGATION : THE BENEFITS AND PITFALLS

INTRODUCTION

Mass litigation, be it by way of a class action in the USA or a representative action in Singapore (more later on the various systems), in its simplest explanation is

⁴ See the plaintiff's claims in *In re Simon II Litigation* 212 F. Supp. 2d 57

simply a mechanism for an individual or a large number of people to sue, collectively or on behalf of the others, a single wrong-doer for *a common harm* inflicted upon all of them.

Mass litigation was originally envisaged as a mechanism to combine thousands of nickel and dime claims into a single lawsuit so that it would become financially practical for the collective group to seek recourse to the courts. Mass litigation was also aimed to help the vulnerable and unsophisticated to vindicate their rights even though they may not even realize that they have been harmed.

Since then, mass litigation has evolved into a tool frequently used in diverse circumstances ranging from tackling mass tort and security fraud to enhancing environmental and consumer protection. Some of the benefits and pitfalls using mass litigation will be explored below.

It is often queried whether mass litigation mechanisms are necessary since more often than not, the commission of mass tort, security fraud and violation of consumer protection laws, etc would inevitably violate some statutory duty which would enable the government to commence criminal proceedings against the wrongdoers. However, in countries where criminal enforcement is weak, it is foreseeable that cash-strapped government agencies may lack the resources or the will to step in and enforce the law. In addition, while the criminal sanctions may punish the wrongdoers, the individual victims who have suffered the “real” loss are not compensated.

EMPOWERMENT OF THE MASSES

Mass litigation can be seen as a tool for the empowerment for the masses so as to afford them better access to justice⁵. For example, multiple consumers may be injured by defective products manufactured by a multi-national company but they, individually, may not find it economically feasible to enforce their rights against the wrongdoer, since the damage suffered by them individually may be minor or modest at best. Mass

⁵ Ontario Law Reform Commission, *Report on Class Actions* (1982), noted in Garry D. Watson, *Class Actions: The Canadian Experience* (2001) Duke Journal of Comparative & International Law volume 11(2) 269

litigation thus overcomes the problem where small recoveries versus legal costs do not provide any incentive for an individual to bring a legal action prosecuting his or her rights⁶. In such a situation, the aggregation of claims and the pooling of resources enable the group to retain the services of the necessary legal services to conduct complex litigation. The result of such pooling of resources could then force the wrongdoer to return or disgorge their ill-gotten gains⁷. Mass litigation thus becomes a strong equalizing factor in the battle between the “Davids” and the “Goliaths”.

JUDICIAL EFFICIENCY

Mass litigation may also improve judicial efficiency⁸. Where there are multiple victims, allowing them to bring individual actions against the single defendant wrongdoer might overwhelm the courts’ judicial system and lead to a duplicity of lawsuits⁹. Mass litigation would avoid this. The corollary is that since a single trial judge would hear the evidence and legal arguments, it would reduce the duplication and repetition of the witnesses, exhibits and issues from trial to trial¹⁰; tangible time and costs savings will result for all parties involved, including the courts. If mass litigation is not available, the sheer number of legal proceedings in such cases could simply cripple the courts. Furthermore, mass litigation avoids the risk that different judges may reach different judgments after hearing cases with similar facts that may be plainly inconsistent and irreconcilable with one another¹¹.

⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)

⁷ Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, (2001) *Duke Journal of Comparative & International Law*, Volume 11(2) 179

⁸ *Supra* note 4.

⁹ Jacob B. Weinstein, *Compensating Large Numbers of People For Inflicted Harms*, (2001) 11(2) *Duke Journal of Comparative & International Law* 165; Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, (2001) 11(2) *Duke Journal of Comparative & International Law* 179

¹⁰ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986)

¹¹ Edward H. Cooper, *Class Action Advice in the Form of Questions*, (2001) 11(2) *Duke Journal of Comparative & International Law* 215

Mass litigation may also provide benefits to the defendant wrongdoer; it allows them to bring to a close multiple disputes with the many plaintiffs such that they can continue with their commercial activities without being bogged down with various multiple lawsuits over long periods of time¹².

SHARING THE REMEDY

Mass litigation also ensures that everyone who has a claim similar or identical to everyone else's would not be left without a remedy since all plaintiffs would receive an equal share. This ensures that the unjust enrichment accrued by the defendant wrongdoer from all its victims would not be "lost" to plaintiffs who were first in time in filing their suits and enforcing their claim.

BEHAVIORAL MODIFICATION

When the wrongdoer is allowed to keep their ill-gotten gains by causing multiple petty injuries to victims without being made to account for them by individual enforcement, the wrongdoer will be unjustifiably enriched. By allowing a collective vindication of rights by the victims, the law acts as a strong deterrent to potential wrongdoers and as such mass litigation may achieve behavioral modification¹³.

LACK OF LITIGATION CONTROL AND INDIVIDUAL REMEDY

Clients in mass litigation come from different backgrounds and very frequently have a myriad of interests and considerations but yet are represented by a lawyer or a team of lawyers. As mass litigation actions need to be resolved in a common manner that precludes attention to the more personal nature of individual claims, class actions can become a liability in certain types of emotional distress and/or negligence actions.¹⁴

¹² Ibid.

¹³ Supra note 4.

¹⁴ Cohelan, *Cohelan on California Class Action*, available at <http://classaction.findlaw.com/research/cohelan/sec0104.html>

The consolidation of cases and assignment of counsel to different individuals eliminates direct litigation control.¹⁵ To win the case or to reach a settlement, the lawyer may choose to compromise the interests of some plaintiffs over others. There is a danger that some represented clients do not have any influence over the solicitor, and their individual needs are compromised for the sake of the majority.

LAWYERS' FEES

Successful plaintiffs sometimes end up with the feeling that at the end of the day the only winners in the lawsuit are the lawyers.¹⁶ This perception is caused no doubt by the fact that in mass litigation, the judgment sum usually has to be divided among the numerous plaintiffs with the result that each plaintiff only receives a token or nominal sum. In contrast, the lawyer who successfully argues the case gets a much larger sum of money relative to the individual plaintiffs themselves¹⁷.

Furthermore, where lawyers work on a contingency or contingency-like basis (which is not allowed in Singapore and some other jurisdictions), they have a strong economic interest in settling the matter, thereby ensuring themselves of large payment of fees while the individual class members may receive payment in kind or cash which may have little or no value to the individual members.¹⁸

UNDUE PRESSURE ON THE WRONGDOER

The stakes in mass litigation are usually much higher for the defendant; where each victim need only contribute a small sum to fund the mass litigation, the potential payout by the wrongdoer should they fail in the action would be devastating. Because

¹⁵ Ibid.

¹⁶ Supra note 1, where the proposed award was \$5 mil in attorney fees compared to the meager amount received by victims, who would only receive pre-paid phone cards of nominal value.

¹⁷ Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, (2001) Duke Journal of Comparative & International Law, Volume 11(2) 179

¹⁸ Schofield & Smith, *Class Actions: Efficiency or Exploitation*, International Commercial Litigation Sept 1995

the potential costs of litigation and the risks of loss are so much greater for the wrongdoer, a plaintiff who can make a colorable claim on behalf of a class of potential plaintiffs is able to increase his settlement leverage. The pressure is on the alleged wrongdoer to find ways to settle the claims, regardless of the merits underlying the claims.¹⁹

CONSUMERS ULTIMATELY PAY THE PRICE?

One view is that even if the victims are successful in their mass litigation action and are able to make the wrongdoer pay a large sum of money as compensation, the ultimate losers may yet be the consumers and the public at large since the wrongdoer will have to foot increased insurance premiums and/or factor the costs of the lawsuits and the damages awarded into the price of their existing/future products.

III. MASS LITIGATION : THE VARIOUS MECHANISMS

THE DIFFERENT APPROACHES

As a result of the different considerations discussed above, different jurisdictions have adopted various particular approaches to mass litigation. The US has embraced the concept whole-heartedly; the UK and some continental European countries have viewed mass litigation with suspicion. Others like Australia have adopted a novel approach by combining some of the US provisions together with the more traditional rules of representative actions. Below is a brief description of the various mass litigation mechanisms.

The US : Rule 23 of the Federal Rules of Civil Procedure (“FRCP”)

Rule 23 of the FRCP allows for a class action to be taken on behalf of a defined class of plaintiffs who may or may not be ascertainable. The prerequisites to a class action can be found in Rule 23(a):

¹⁹ Ibid.

“One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

When action has been taken by numerous plaintiffs, the court must then make an order whether to certify the action as a class action²⁰. If it does so, the court would then direct that notice be given to the classes of plaintiffs to both mandatory classes – defined in Rule 23(b)(1) and (b)(2) and to all the opt-out class of plaintiffs who can be reasonably identified in Rule 23(b)(3)²¹.

The importance of a class of plaintiffs who can opt-out cannot be underestimated. When a potential plaintiff can choose to opt-out of the class action, it allows them to consider their own interests instead of having their interests bound up with a myriad of the interest of different individuals and to commence legal action separately if they wish to. The most important aspect of the opt-out provision is that class members have to affirmatively choose to be excluded from the class. Considering the nature of human inertia, the percentage of people who actually do opt out is very low. As such, it may provide an incentive for the defendant to settle a case if they know that it will resolve the entire dispute²².

Other than Rule 23 itself, there are other reasons why class actions have mushroomed in the US:

1. the US legal system allows for the lawyer’s fees to be paid on a contingency basis. This means that lawyers can get a percentage of the class action award and thus

²⁰ Rule 23(c)

²¹ Rule 23(c)

²² Quinn Emanuel, *Class Actions Abroad Opening Pandora’s Box* March 2005. See also Edward H. Cooper, *Class Action Advice in the Form of Questions*, (2001) *Duke Journal of Comparative and International Law*, Volume 11(2) 215.

provides an incentive for lawyers to actively source for potential plaintiffs and to finance the early expenses of a class action suit²³. This incentive is further reinforced by the US legal system of jury trials where jury conscience may sometimes result in the award of large punitive damages aimed at punishing the wrongdoer²⁴; and

2. the US implements the no-cost rule whereby parties have to bear their own costs regardless of the outcome of the litigation. Without having to pay for the costs of the defendants which can be an astronomical sum in the context of a class action, the potential class action plaintiffs when considering whether to commence a class action suit has one less disincentive when the prohibitive consideration of having to pay for the defendant's costs in the event that they lose their claim is removed²⁵.

THE UK : REPRESENTATIVE ACTION

The UK Representative Action allows for an individual to litigate on behalf of others with whom he shares a common interest²⁶, a common grievance and where the relief sought will be beneficial to all. Unlike the US provisions, plaintiffs may commence a representative action without any judicial sanction.

Further, represented persons do not need to be informed of the intention to bring the representative action or of the actions' progress. The representative claimant is *dominus litis* and the representative can decide the conduct of the claim or defence and may even compromise the claim or defence without consulting the represented members²⁷.

²³ Quinn Emanuel, *Class Actions Abroad Opening Pandora's Box* March 2005.

²⁴ Edward H. Cooper, *Class Action Advice in the Form of Questions*, (2001) Duke Journal of Comparative and International Law, Volume 11(2) 215.

²⁵ Jacob B. Weinstein, *Compensating Large Numbers of People For Inflicted Harms*, (2001) 11(2) Duke Journal of Comparative & International Law 165; Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, (2001) 11(2) Duke Journal of Comparative & International Law 179.

²⁶ Rule 19.6 Civil Procedure Rules (UK)

Safeguards however are available to both the represented plaintiffs and the represented defendants. For the represented plaintiffs, if he disagrees with the conduct of the proceedings by the representative, he may break away from the representative and be named as a co-defendant²⁸. Furthermore, the represented plaintiff or defendant can also seek fuller consideration of his position before the relevant judgment is enforced against him by virtue of Rule 19.6 of the Civil Procedure Rules, which provides that the judgment “may only be enforced by or against a person who is not a party to the claim with the permission of the court.”²⁹”

The UK representative action however has not enjoyed the same level of proliferation as the class action in the US. The reasons are pragmatic.

Damages in UK cannot be awarded at large or globally without reference to the particular loss and damage suffered by the members of the represented persons. Individual losses must be calculated precisely³⁰. As a result, only declaratory relief was available in a representative action. This was the result of the early case of *Market v. Knight*³¹, where it was stated that the plaintiffs could not represent each of the persons whose cargo had been lost because the cargo had been loaded at different ports, with different destinations and under different bills of lading. Fletcher Moulton LJ said that :

“The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject matter... It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man’s contract where he has no common interest. To my mind, no representative action can lie where the sole relief sought is

²⁷ Neil Andrews, *Multi-Party Proceedings In England: Representative and Group Actions*, (2001) Duke Journal of Comparative & International Law Volume 11(2) 249.

²⁸ Ibid.

²⁹ Rule 19.6 Civil Procedure Rules (UK)

³⁰ Ibid.

³¹ [1910] 2 KB 1021

damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases”³².

An award of damages in England is subject to the compensatory principle. Punitive or non-compensatory damages are generally not available for a breach of contract or for a tort claim³³. As a result, all that the plaintiffs receive is the sum sufficient to compensate him for his loss. Even if he wins his claim, all that he will get as legal costs is on a “party to party” basis; thus he might actually be out of pocket for his “solicitor and client” costs. This out of pocket sum will then have to be deducted from the damages which he receives.

Further, the default cost rule in UK is the “loser pays” principle³⁴. If the plaintiffs’ claim were to fail, the individual plaintiffs would then have to face the prospect of an action for legal costs, because they would have to pay the defendants’ costs, which could be quite substantial in a representative action. This problem is further exacerbated by the limited use of contingency fees in the UK³⁵. Without the use of contingency fees, the plaintiffs before commencing a representative action would have to be able to muster sufficient resources upfront.

Perhaps mindful of the limitations of the representative action, the UK has in the 2000 amendments to its Civil Procedure Rules introduced the Group Litigation Orders which allows the English Courts to consolidate numerous cases which give rise to related issues of fact or law³⁶.

³² Ibid at page 1041. Note however, that this view has been doubted but not overruled in the England Court of Appeal case of *Irish Shipping Ltd v. Commercial Union Assurance Co. Plc, The Irish Roman* [1991] 2 QB 206. Professor Pinsler in his book, *Civil Practice in Singapore and Malaysia* (2001, Vol. 2) has called for a reform in this area.

³³ Supra note Neil Andrew’s Article.

³⁴ Quinn Emanuel, *Class Actions Abroad: Opening Pandora’s Box?* March 2005

³⁵ Ibid.

³⁶ Ibid. Section III of the Civil Procedure Rules at 19.10-19.15

IN AUSTRALIA : A MIXED APPROACH

The Australian position as adopted in the Federal Court of Australia Act of 1976 is an interesting example of how a Commonwealth country greatly influenced by the common law has moved away from the traditional representative action and towards a more US-styled Class Action with the result that the Australian position has been praised as being more “plaintiff-friendly” than the US Rule 23³⁷.

To commence a class action or representative proceedings in Australia, there must be (1) seven or more persons who have a claim against the same person that (2) are in respect of or arise out of the same, similar or related circumstances and which (3) gives rise to a substantial common issue of law or of fact³⁸.

As a general rule, the members of the claimant group members need not be identified by name³⁹. Neither is it necessary for the representative party to obtain the consent of group members for including them in the representative action⁴⁰. However, the representative party must notify the people who falls within the definition of the class and must allow those people who do not want to be associated with the proceeding to opt-out⁴¹.

As a matter of law, the judgment in the class action binds all members who have not opted out of the class including those who do not know about the proceedings⁴².

³⁷ S. Stuart Clark and Christina Harris, Multi-Plaintiff Litigation in Australia: A Comparative Perspective, (2001) *Duke Journal of Comparative & International Law* Volume 11(2) 289 at page 296. See also the paper delivered by Justice Charles, “Class Action in Australia” at the 21st Annual Banking and Financial Services Law and Practice Conference held in Hobart on 1 August 2004

³⁸ Section 33C of the Federal Court of Australia Act 1976

³⁹ Section 33H(2) of the Federal Court of Australia Act 1976

⁴⁰ Section 33(H)(1)(a) of the Federal Court of Australia Act 1976. See Justice Murray Wilcox, “Class Action in Australia” (2003) obtained online at www.conferences21.com/index.cfm?main=papers/download&Paper=25.

⁴¹ Justice Murray Wilcox, “Class Action in Australia” (2003) obtained online at www.conferences21.com/index.cfm?main=papers/download&Paper=25

Depending on the circumstances, the court may award damages consisting of (1) specified amounts, (2) amounts calculated in a particular manner, or (3) an aggregate amount without specifying the amounts to be awarded with respect to individual class members⁴³. Such flexibility given to the courts to award damages clearly alleviates the archaic rule in *Market v. Knight*⁴⁴ which had severely restricted the use of representative actions to declaratory relief.

From a financial perspective, law reforms in 1990s have swept away many historical rules that had constrained the activities of the legal profession including the prohibition on contingency fee agreements⁴⁵.

In addition, although Australia applies the “loser-pays” principle whereby the losing party has to pay the cost of the successful party, Section 43(1A) of the Federal Court of Australia Act expressly prohibits a cost order being made against the class members other than the plaintiffs who have actually commenced the proceedings. In a way, the costs consideration is substantially removed when a member of a class decides whether or not to opt-out of the action.

It has been suggested that as a result of the Australian cost rule, the plaintiffs’ lawyer would always select a man of straw to represent the plaintiffs; but this aspect may be countered by the Court’s power to order security for costs, including the power to stay the proceedings pending compliance with that order⁴⁶.

Finally, to protect the interests of the represented party and to prevent the representative from coming to an arrangement that will sacrifice the group members’ interest, Section 33V of the Federal Court of Australian Act expressly provides that a

⁴² Section 33ZB(b) of the Federal Court of Australia Act 1976. See S. Stuart Clarke and Christina Harris, *supra* at page 301

⁴³ Section 33Z(2) of the Federal Court of Australia Act 1976

⁴⁴ See above, [1910] 2 KB 1021

⁴⁵ For example, section 187 of Legal Profession Act, 1987 (New South Wales)

⁴⁶ Section 33ZG(c)(v). See Justice Murray Wilcox, “Class Actions in Australia”, *supra* note 40.

representative proceeding may not be settled or discontinued without the approval of the court.

IN SINGAPORE : WHICH WAY FORWARD?

The Singapore civil procedure on representative actions can be found in Order 15 Rule 12 of the Rules of Court. Essentially, subject to the qualification that the numerous parties must have the same interests in the proceedings, one or more of the parties may represent all or all except one or more of them in the proceedings⁴⁷.

As Singapore's representative action is substantially the same as the UK's representative action, no more would be said about the procedural rules of Order 15 Rule 12 of the Rules of Court, except to note that in the recent case of *Raffles Town Club Pte Ltd v. Tan Chin Seng & others*⁴⁸, the Court of Appeal of Singapore awarded damages of \$3,000 each to all 4,895 plaintiffs, who were members of the Raffles Town Club, in their action against the owners of the club, for a breach of an implied term of the club membership contract that the club would be a "premier" and "exclusive" club. Further details of this case are discussed below.

In reaching this decision, the Court recognized that all the plaintiffs had suffered the same loss due to the club's failure to deliver a "premier" and "exclusive" club, which it had promised in its promotional material and brochures. The facts of this case were special and as a result, it was not affected by the UK decision of *Market v. Knight*⁴⁹ that has restricted the remedies available in a representative action to that of declaratory relief only.

⁴⁷ Halsbury's Laws of Singapore, Volume 4 at paragraph [50.180]

⁴⁸ [2005] 4 SLR 351

⁴⁹ [1910] KB 1021

IV. TAN CHIN SENG & ORS V RAFFLES TOWN CLUB PTE LTD⁵⁰

BRIEF FACTS

The facts of the case are as follows.⁵¹ *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* (“*TCS v RTC*”) was an action brought by 10 plaintiffs representing themselves as well as for 4,885 other named members of the Raffles Town Club (“the Club”) for breach of contract and misrepresentation.

Raffles Town Club Pte Ltd (“RTCPL”) is a private exempt company. It was incorporated to own and manage the Club as a proprietary club.

In November 1996, while the Club premises were still at the drawing board stage, RTCPL initiated an introductory launch to selected members of the public inviting them to join the Club as founder members at the discounted price of \$28,000. A number of financial institutions, credit card companies and other bodies were enlisted to help with the launch and promotion.

Each of these “agents” wrote to its own customers and clientele stating that the addressee was specially selected and invited to apply for the founder membership of the Club, to form the “crème de la crème” of society. The invitees were told that after this launch, others would have to pay \$40,000 to become members. Enclosed with each invitation letter was a brochure describing the Club’s facilities, a document containing questions and answers to give more information to the invitee and a priority application form. The promotional materials made many representations extolling the virtues of the Club, stating that “Club members will enjoy unparalleled privilege and facilities”, it would be there “exclusive and limited membership” to the “most prestigious private city club ... of Singapore”; and that it was “without peer in terms of size, facilities and sheer opulence”.

⁵⁰ [2002] SGHC 278 at first instance and [2003] 3 SLR 307 on appeal.

⁵¹ The facts found by the court, available in the reported decisions of [2002] SGHC 278 at first instance, and [2003] 3 SLR 307 on appeal, are reproduced here.

Each of the 4,895 plaintiffs, having received such an invitation letter, applied for membership, placed a down payment of \$3,000 and duly became founder members.

Subsequently, sometime in March 2001, in an unrelated action in the High Court between the shareholders of RTCPL, evidence was adduced that in total some 18,992 persons had been admitted as founder members and another 56 persons as “ordinary” members, making a grand total of 19,048 members.

These 4,895 plaintiffs were naturally upset. Previously, they had experienced overcrowding at the Club premises and were privately unhappy at the situation, but they did not know the actual extent or size of the club membership.

Relying on the statements in the promotional materials, the 4,895 plaintiffs alleged that by the statements in the promotional materials, they understood that they would be joining an exclusive and premier club and that the total number of members would be limited such that at any given time no member would be shut out from or be unable to use the facilities of the Club in the manner or up to the standard as represented in the promotional materials. They were thus induced to become founder members by those statements and prayed for a rescission of the contract and the refund of the membership fee they had paid. In the alternative, they averred that there were breaches of contract and asked for damages.

THE CONCEPTION OF THE ACTION

The mass litigation action against RTCPL did not commence immediately after the revelation that the Club had 19,000 members. Although there was a lot of resentment and unhappiness, it was uncertain if the Club members would have done anything more other than issuing private statements of unhappiness and complaints to the Club’s management.

It is usually the case that where the individual plaintiffs are impecunious and are unable to afford the legal fees involved, or where each individual claim is far too small

for litigation to be worthwhile, or that the individual plaintiff lacks the will to commence action against a huge entity, legal action against the wrong-doer would have to be by way of mass litigation⁵², where a large number of victims aggregate their resources to fuel the engine of litigation⁵³. However, one common thread running through most mass litigation suits is that the even though the large number of people who have suffered similar harm have some idea that there are others like them, in most cases these people do not know each other, much less come together to form a group of potential plaintiffs. The difficulty lay in rounding up potential plaintiffs; how does one contact and gather people who have suffered the same or similar harm and then garner support for a mass litigation suit?

One Club member, Mr X, decided to be pro-active. Together with a fellow Club member, a Mr Y, they decided to start an internet web page in April 2001 providing a public forum for fellow Club members to air their grievances and experiences.

The advent of the internet has basically supplanted the more traditional ways of gathering potential plaintiffs such as personal letters, advertisements and by word-of-mouth. The internet is increasingly becoming more widely used and cheaply available in this part of the world. Never before were potential plaintiffs to a mass litigation suit as easily and as simply gathered by the click of a mouse.⁵⁴

The response to the website was overwhelming. Within days, over 1,500 emails from fellow Club members were received, in which most members expressed their anger and frustration, stating their surprise to learn that there were 19,000 members in Club, their experiences of continued long queues and overcrowding; and how could this be an exclusive club? They felt that the taking in of 19,000 members was contrary to the

⁵² This is not true in the United States of America, which allows contingency fees. However, if the advocate's appetite for risk is low, this will still necessitate finding potential plaintiffs to fund the litigation

⁵³ Even where individual victims are able to afford taking out individual actions against the wrong-doer, this option remains a viable solution to potential plaintiffs who are adverse to risk by spreading the burden of the costs of litigation around.

⁵⁴ Followed by the subsequent sending of a cheque.

statements and representations made by RTCPL in the promotional materials and in the press. They also felt that there was no way in which the Club, given its present facilities and size, could possibly cater to the 19,000 members, their spouses and children as well as their guests.

THE BIRTH OF THE ACTION

Where the individual victims are able to afford legal action against the wrongdoer by themselves, there is no real necessity to commence mass litigation. However, in such cases, there may still be benefits in commencing the action as a mass litigation suit. These benefits have already previously been discussed above.

In the present case, the numerous emails received through the website evinced a sense of helplessness. Most of the members did not know what to do and how to move forward. In most of the emails, there was a cry for someone to organize some form of legal action against RTCPL and all wrongdoers and to help fight the cause.

It was clear that it would not be cost effective for the members to take up legal actions individually. Even if the members could afford to and did decide to proceed against the club on their own, it would be tantamount to taking on a Goliath, as RTCPL had a huge “war chest”, from the more than \$500 million dollars received as entrance fees from the members⁵⁵.

The overwhelming response and shared sentiments of the members drove Mr X and Mr Y to consider a group legal action against RTCPL. With a view to starting this action, they decided to form a pro-tem committee to organize matters until a formal committee was elected by the members participating in the group legal action. As it would have been logistically and practically impossible to take instructions from all members, the pro-tem committee was the essential liaison between the lawyers appointed and all members of the Club interested in commencing the action against RTCPL.

⁵⁵ Estimated \$532 million based on the \$28,000 joining fee multiplied by 19,000 members.

DETERMINING THE COMMON HARM

The first step in starting the group legal action was to determine the class of victims and the common harm that is alleged to have been suffered by all.

In *TCS v RTC*, the members were upset at the revelation that the Club had over 19,000 members, the result of which was constant over crowdedness and the lack of opportunity to use the facilities of the Club. This grievance stemmed from the fact that it was represented to them in the promotional materials that the Club was to be an exclusive club. Based on this common grievance, and after perusing the promotional materials, they were advised that there were two possible causes of action against RTCPL : in misrepresentation and for breach of contract.

As such, the criteria for someone who bought the Club membership to be eligible for the group action was that he or she had to be must be a current member of the Club; had to be a founder member; must have been aware of the representations in the promotional materials; must have relied on the representations in the promotional materials; and must not have participated in any other legal action against RTCPL and/or other parties claiming for the same relief.

Having determined the common harm, the next step was to gather the potential plaintiffs and to determine their eligibility to be included in the group legal action.

DETERMINING INDIVIDUAL ELIGIBILITY AND THE SIZE OF THE GROUP

Gathering a minimal base level number of plaintiffs for the group legal action was essential so as to obtain a certain amount of funds for legal fees; it was also necessary to spread the risk of litigation around. No single member or group of members had the will or had the financial means carry out the action for the benefit of all the members with a similar grievance.

Bearing in mind that it is logistically impossible to interview potentially 19,000 members of the Club to ascertain their inclination for litigation and their eligibility even if they so wished, a written questionnaire was sent to all interested members who paid a small initial deposit to participate in the group legal action.

Not all members were eligible because the common harm was the breach of the contractual term and/or misrepresentation in the promotional materials; as such, if a member had bought his membership from the open market, he was not eligible. In the circumstances, the appropriate questions had to be posed in the questionnaire to identify those who did not share the common harm suffered. Out of perhaps almost 6,000 of those who responded, 4,895 people qualified to form the group legal action. The others were refunded their deposits.

EVIDENCE GATHERING AND WITNESS SELECTION

An important aspect of any litigation is the witness evidence to the claim. It is no different in mass litigation. However, whom do you choose as a witness from the group of almost 5,000? How do you choose?

The questionnaire which was sent out to the participating members again helped tremendously; it provided a list of questions including whether a member was prepared to be a witness in court; whether a member had suffered the common harm, and if so, the particulars thereof; when did the member first become unhappy with the purchase of the membership; and the reason for the unhappiness. The list of witnesses was short-listed from a detailed review and consideration of each of the 4,895 responses and answers to the questionnaire. The short-listed potential witnesses were interviewed and 10 were confirmed as named plaintiffs to the action – the other 4,885 were nevertheless named as plaintiffs as well and were set out in a schedule to the writ of summons.

Each participating member was required to make a declaration that what was stated in the questionnaire was true and correct to the best of his/her knowledge. Subsequently, all of these questionnaires were tendered as evidence in court.

THE TRIAL

The trial of first instance took place over 20 plus days, with a special visit by the trial judge to the Club itself to view the premises.

The 10 named plaintiffs took the stand as witnesses, giving evidence for and on behalf of themselves and the other 4,885 plaintiffs; it would have been extremely time consuming to have called all 4,895 plaintiffs to take the witness stand. Parties agreed that the question of liability be resolved first; once that was established, damages could be assessed.

On the first day of trial, RTCPL raised the preliminary and technical point that the case should not have been begun or continued as a representative action. Order 15 Rule 12 (1) of the Rules of Court provides that representative proceedings may be begun and continued (until and) unless the Court otherwise orders. Fortunately for the 4,895 plaintiffs, the High Court did not agree with RTCPL, thus allowing the proceedings to continue; otherwise, a substantial amount of resources, time and expense would have been incurred for nothing.

THE JUDGMENT

At the first instance, the High Court dismissed the action. On the question of breach of contract, the Court found that on the evidence presented there was no breach. On the question of misrepresentation, the Court found that was no actionable representation.

On appeal however, the Court of Appeal held that RTCPL was in breach of contract, and added that “this judgment does not seek to stifle entrepreneurship or innovation; neither should it. What we seek to ensure is that entrepreneurs who make promises should deliver them. The appellants subscribed to a “premier” club; they should get a “premier” club.” The claim of misrepresentation did not succeed.

RELIEF OBTAINED

Once RTCPL was found liable, the next question was the amount of relief that each plaintiff was to be entitled to. At first instance, the High Court assessed the damages payable to each plaintiff at \$1,000⁵⁶. On a further appeal, the Court of Appeal increased the quantum to \$3,000 for each plaintiff⁵⁷.

It is to be noted that the total judgment sum payable of \$14,685,000 was only available to the 4,895 named plaintiffs.

To avoid the plaintiffs taking enforcement proceedings to execute on the judgment, RTCPL proposed a Scheme of Arrangement that was open to all its founding members (more than 17,000 as at 2005) such that members who sued and members who did not sue were either given the option of compensation equivalent to the judgment sum of \$3,000 in the form of cash, discount in transfer fees on a sale of the membership and/or food and beverage coupons.

They did this to avoid the financial crisis that it would have been placed in if the other non-suing members (about 12,000) issued “piggy-back” claims based on the judgment obtained in *TCS v RTC*.

The end result was that RTCPL’s total payment out to its members, in cash or kind, would have amounted to about \$51 million, assuming all members who were entitled to take part in the Scheme of Arrangement lodged their respective claims.

V. IN SUMMARY

It can thus be said that the unplanned result of the *TCS v RTC* case was that through the insistence and perseverance of the smaller group of 4,895 members who sued and the committee who represented them, the wider interests of all the other

⁵⁶ [2005] 2 SLR 302

⁵⁷ [2005] 4 SLR 351

founding members of the club, who had suffered the similar harm or loss but did not participate in the group legal action, were served.

The non-suing members who might not even have been aware of or concerned with the action in the first place, now found themselves in a better position by reason of group legal action. Within the confines of the Raffles Town Club, it can therefore be said that the “public interest” of all members was served by the group legal action.

If left individually to pursue their own rights, the plaintiffs in *TCS v RTC* may never have seen the case to the end; nor would they have been vindicated. It would be too much of a battle between one David and a Goliath. However, many voices, speaking as one, make a difference.

There is therefore a need to review and renew the existing policies, procedures and rules to allow for mass litigation, class actions, representative actions or group legal actions – by whatever name such actions should be called, to better allow for the protection of the rights the individual within a common group at large.⁵⁸

It has been suggested that once representative proceedings are issued, a relatively short time frame should be set for the defendant to apply to the Court to object to such “representative proceedings” (for example, just after the appearance or the defence is filed), failing which they are deemed to consent to the continuation of such proceedings. This will reduce the costs and expenses incurred by the plaintiffs in such proceedings and remove the risk or possibility of having their action struck out on the first day of trial (as in *TCS v RTC*), given the current wording of the Rules of Court, which provide that the action continues “unless the Court otherwise orders”.

At the time of this article, the writers understand that the relevant authorities in Singapore are looking into amending the rules governing representative proceedings.

⁵⁸ Certain views and opinions expressed in this article are the writers’ own; thanks and appreciation are extended to Diana Lim, Shannon Ong, Chu Hua Yi and Jocelyn Tian for their assistance in this article.