IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 271

Suit No 17 of 2017
(Summons No 1356 of 2017)

Between

EQ Capital Investments Ltd

… *Plaintiff*

And

(1) Sunbreeze Group Investments Limited
(2) Manoj Mohan Murjani
(3) Kanchan Manoj Murjani
(4) The Wellness Group Pte Ltd

… *Defendants*

And

Ron Sim Chye Hock

… *Third Party*

GROUNDS OF DECISION

[Civil procedure] — [Third party proceedings] — [Striking out]

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EQ Capital Investments Ltd
v
Sunbreeze Group Investments Ltd and others (Sim Chye Hock Ron, third party)

[2017] SGHC 271

High Court — Suit No 17 of 2017 (Summons No 1356 of 2017)
Chua Lee Ming J
5 May 2017

2 November 2017

Chua Lee Ming J:

Introduction

1 The plaintiff, EQ Capital Investments Ltd ("EQ Capital"), commenced this action against the 1st to 3rd defendants for minority oppression in relation to the affairs of the 4th defendant, The Wellness Group Pte Ltd ("Wellness"). The 1st to 3rd defendants in turn commenced third party proceedings against Mr Ron Sim Chye Hock ("Ron Sim") for an indemnity or contribution ("the third party claim").

2 I granted Ron Sim's application to strike out the third party claim against him, pursuant to O 18 r 19(1)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), on the ground that the third party statement of claim did not

disclose a reasonable cause of action. The 1st to 3rd defendants have appealed against my decision.

Background

3 At all material times, the 1st defendant, Sunbreeze Group Investments Limited ("Sunbreeze"), was the majority shareholder of Wellness, with a shareholding of 80.62%. EQ Capital held 7.55%. The remaining 11.83% was held by two private equity funds.

4 At all material times, the 2nd defendant, Mr Manoj Mohan Murjani ("Manoj"), and his wife, the 3rd defendant, Ms Kanchan Manoj Murjani ("Kanchan"), were directors of Wellness and shareholders and directors of Sunbreeze. Manoj was also the chief executive officer ("CEO") of Sunbreeze.

5 Wellness was established for the purposes of wholesale and/or retail of lifestyle and/or wellness related products. In October 2007, TWG Tea Company Pte Ltd ("TWG Tea") took over Wellness' tea division. In October 2010, EQ Capital acquired a 7.55% stake in Wellness. EQ Capital is an investment holding company and Ron Sim was at all material times its ultimate sole beneficial owner.

6 In early 2011, Manoj (on behalf of TWG Tea) started discussions with Ron Sim in relation to an investment by OSIM International Ltd ("OSIM") into TWG Tea ("the OSIM Negotiations"). The shareholders of TWG Tea then were Wellness and Paris Investment Pte Ltd ("Paris"). OSIM was then a public company that was listed on the Singapore Stock Exchange and Ron Sim was the CEO, a director and the Chairman of OSIM. During the OSIM Negotiations, Manoj presented profit projections which showed that TWG Tea would achieve

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profit before tax and minority interests ("PBT") of $29m for the financial year ending 31 March 2013 ("FY2013").

7 On 18 March 2011, OSIM, Wellness and Paris signed a Sale and Purchase Agreement ("the SPA") and Wellness, OSIM, Paris and TWG Tea signed a Shareholders' Agreement ("the SHA"). Pursuant to the SPA, OSIM became a 35% shareholder of TWG Tea; the other two shareholders were Paris (10.3%) and Wellness (54.7%).

8 The SHA envisaged that joint ventures between TWG Tea and OSIM would be set up in China, Hong Kong, Taiwan and South Korea. It was contemplated that OSIM would hold 60% and TWG Tea would hold 40% of the shares in each joint venture. On 1 June 2011, OSIM and TWG Tea incorporated the first joint venture, OSIM-TWG Tea (North Asia) Pte Ltd ("the JV Co"). OSIM held 60% and TWG Tea held 40% of the shares in the JV Co.

9 Subsequently, a disagreement arose between Manoj and Ron Sim over the price that TWG Tea was to charge the JV Co for its products ("the Transfer Pricing Issue"). Manoj wanted to charge the JV Co the same price that TWG Tea charged its franchisees ("the Franchise Price") whereas Ron Sim's position was that the JV Co should be charged at cost since TWG Tea held a 40% stake in the JV Co. Eventually, the TWG Tea board agreed on a transfer price of cost plus a mark-up of 20%.

10 Soon after the JV Co opened its store in Hong Kong, Ron Sim discovered that TWG Tea did not have all the necessary trade mark registrations to open stores in North Asia, including Hong Kong.

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11 In July 2011, Manoj said that he wanted to update the profit projections. A revised set of TWG Tea projections which was prepared in October 2011 showed that TWG Tea's projected PBT for FY2013 would only be around $11m.

12 In December 2011, Ron Sim called for a TWG Tea board meeting to review the suitability of Manoj continuing as CEO and if thought appropriate to remove him as CEO. Manoj was then the CEO and a director of TWG Tea. For various reasons, the board meeting was not held although Manoj and Ron Sim had email exchanges on the matter.

13 On 14 August 2012, Manoj resigned as CEO of TWG Tea with effect from 15 September 2012. On 28 September 2012, Manoj also resigned as a director of TWG Tea. Wellness had a right under the SHA to representation on the board of TWG Tea. However, Wellness did not appoint anyone else to replace Manoj on the board of TWG Tea until October 2016 when it nominated Manoj. Manoj's nomination as director was not accepted by OSIM, Paris and the TWG Tea board.

14 Clause 4.5 of the SPA ("the Profit Swing Clause") provided for the combined shareholding of Wellness and Paris to be diluted (by up to 10% of TWG Tea shares) in favour of OSIM if TWG Tea's audited PBT for FY2013 fell below $17m, or for the shareholding of OSIM to be diluted (by up to 10% of TWG Tea shares) in favour of Wellness and Paris if the audited PBT for FY 2013 exceeded $27m.

15 TWG Tea's audited PBT for FY2013, which was signed off by its auditors on 11 June 2013, was just above $5m. Pursuant to the Profit Swing Clause, the combined shareholding of Wellness and Paris in TWG Tea was

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diluted by 10% in favour of OSIM ("the Profit Swing Clause Transaction"). The result was that OSIM's shareholding increased to 45% while Wellness' shareholding decreased from 54.7% to 46.3%.

16 On 18 October 2013, OSIM purchased all the shares in Paris. The shareholding structure of TWG Tea then became as follows: OSIM and Paris (53.7%) and Wellness (46.3%).

17 In November 2013, TWG Tea proposed a rights issue to raise capital ("the Rights Issue"). Wellness did not subscribe to the Rights Issue. Consequently, OSIM and Paris together subscribed for the entire Rights Issue and the combined shareholding of OSIM and Paris in TWG Tea increased to from 53.7% to 69.9% while Wellness' shareholding was diluted from 46.3% to 30.1%.

Suit 187 of 2014

18 In February 2014, Wellness and Manoj commenced Suit 187 of 2014 against OSIM, Paris and the directors of TWG Tea ("S187/2014"). Wellness' claim was for minority oppression, conspiracy to injure and breach of contract whilst Manoj's claim was for conspiracy to injure. Wellness and Manoj alleged as follows:

> (a) That OSIM, Ron Sim and two other directors of TWG Tea, *ie*, Khor Peng Soon ("Peng Soon") and Lee Hwai Kiat ("Peter Lee"), acted to damage the profitability of TWG Tea by, among other things, acting in concert to procure TWG Tea to supply products to the JV Co at a price lower than that allegedly agreed.

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(b) That OSIM, Ron Sim and the directors of OSIM, Paris and TWG Tea acted wrongfully to enable OSIM to take control of TWG Tea through the following acts, among others:

(i) OSIM's exercise of its rights under the Profit Swing Clause to obtain an additional 10% of TWG Tea shares from Wellness and Paris;

(ii) Ron Sim's actions to remove Manoj as CEO of TWG Tea;

(iii) Ron Sim's proposal and OSIM's and Paris' approval of the TWG Tea Rights Issue, which was, *inter alia*, not for commercial reasons and intended to dilute Wellness' shareholding.

19 On 22 April 2016, I dismissed the claims in S187/2014 – see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others* [2016] 3 SLR 729. Among other things, I found as follows:

(a) Ron Sim's negotiations over the Transfer Pricing Issue were for commercial reasons and not aimed at damaging TWG Tea's profits.

(b) OSIM, Ron Sim, Peng Soon and Peter Lee did not act to damage the profitability of TWG Tea.

(c) OSIM did not cause TWG Tea's failure to meet the performance target in the Profit Swing Clause and OSIM was entitled to exercise its rights under that clause.

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(d) OSIM and Ron Sim encountered several issues which caused concerns about the future of TWG Tea and Manoj's management of the same.

(e) Ron Sim had genuine and reasonable grounds for wanting to remove Manoj as CEO.

(f) The Rights Issue was undertaken *bona fide* and for good commercial reasons.

20 Wellness' appeal in CA/CA 64 of 2016 ("CA64/2016") was dismissed by the Court of Appeal on 25 October 2016.

The present action and the third party claim

21 On 10 January 2017, EQ Capital filed the present action, claiming minority oppression. On 6 February 2017, Sunbreeze, Manoj and Kanchan issued a third party notice against Ron Sim, claiming to be indemnified against any liability in respect of EQ Capital's claim, or contribution. For ease of reference, I shall refer to Sunbreeze, Manoj and Kanchan, together, as "the 3 Defendants". The fourth defendant, Wellness, is a nominal defendant.

22 On 24 March 2017, Ron Sim applied to strike out the third party notice and statement of claim. On 5 May 2017, I granted Ron Sim's application.

EQ Capital's claim

23 EQ Capital's claim for minority oppression was based on the following matters:

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(a) Manoj and Kanchan caused Wellness not to convene any annual general meeting ("AGM"), file annual returns and prepare, file and provide EQ Capital with the audited accounts of Wellness for FY2011 to date. Consequently, EQ Capital has been and continues to be deprived of its rights to attend and participate at AGMs and to review the audited accounts of Wellness.[1]

(b) Manoj brought about the dilution of Wellness' shareholding in TWG Tea caused by OSIM's exercise of the Profit Swing Clause because

(i) the Profit Swing Clause was based on the projections which Manoj presented to OSIM in the course of the OSIM Negotiations; and

(ii) Manoj knew that the projections were unreliable and/or not supported by TWG Tea's numbers and/or based on junk numbers.

The dilution of Wellness' shareholding in TWG Tea correspondingly resulted in a dilution of EQ Capital's interest in TWG Tea.[2]

(c) Manoj and Kanchan caused Wellness' interest in TWG Tea to be further diluted by failing to

(i) take steps to cause Wellness to subscribe to the Rights Issue despite EQ Capital having specifically asked Wellness to do so; and

(ii) request Wellness' shareholders for funds to enable Wellness to subscribe to the Rights Issue.

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The further dilution of Wellness' shareholding in TWG Tea resulted in a further dilution of EQ Capital's interest in TWG Tea.[3]

(d) Manoj and Kanchan, as directors of Wellness, chose not to exercise and gave up a fundamental right which Wellness had to appoint another person as director to the board of TWG Tea, thereby failing to protect Wellness' interests and consequently unfairly prejudicing EQ Capital's interests as a minority shareholder of Wellness.[4]

(e) Manoj and Kanchan, as directors of Wellness, caused Wellness to bring S187/2014 and CA64/2016 even though they knew and/or ought to have known that the proceedings were without merit and/or were reckless as to whether Wellness had good grounds for S187/2014, thereby exposing Wellness to the costs orders made against Wellness in S187/2014 and CA64/2016.[5]

24 EQ Capital sought the following orders:

(a) That Manoj and Kanchan pay Wellness the loss in value which Wellness suffered by reason of

(i) the dilution of Wellness' shareholding in TWG Tea as a result of the Profit Swing Clause being triggered in OSIM's favour; and

(ii) the further dilution of Wellness' shareholding in TWG Tea as a result of Wellness not subscribing to the Rights Issue.

(b) That the 3 Defendants repay Wellness to the extent that Wellness' funds were used to pay the costs ordered against it in S187/2014 and CA65/2016.

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(c) That Wellness be wound up, alternatively that the 3 Defendants purchase EQ Capital's shares in Wellness at fair value.

(d) Costs of the present action.

The defence

25 The 3 Defendants' main defence was that the matters complained of by EQ Capital were caused or brought about by Ron Sim / OSIM.

The third party claim

26 In their third party notice, the 3 Defendants claimed that Ron Sim was liable to indemnify them or provide contribution on the following grounds:

(a) Ron Sim was the ultimate sole beneficial shareholder, alter ego and/or controlling mind and will of EQ Capital;

(b) Ron Sim solely or primarily caused the losses (if any) occasioned by the matters alleged in EQ Capital's claim; and/or

(c) Ron Sim acted in bad faith and/or in an unconscionable manner and/or in an abuse of the court's process in bringing or causing EQ Capital to bring this action against them.

The 3 Defendants also required that the above questions or issues be determined not only as between EQ Capital and them but also between either or both of them and Ron Sim.

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27 In their third party statement of claim, the 3 Defendants pleaded that Ron Sim was liable to indemnify them in respect of EQ Capital's claim, or provide contribution, by reason of the following:[6]

(a) Ron Sim had acted in bad faith and/or in an unconscionable manner and/or in an abuse of this Court's process in commencing (through EQ Capital of which he is the ultimate sole beneficial owner/shareholder, alter ego and/or controlling mind and will) and/or causing and/or directing and/or assisting EQ Capital to commence the present action. In support of this contention, the 3 Defendants alleged that the matters complained of by EQ Capital were caused or brought about by Ron Sim / OSIM.[7]

(b) EQ Capital's veil of incorporation should be lifted because Ron Sim had engineered, brought about, caused, procured and/or was responsible for the very same acts for which Ron Sim, using EQ Capital as a façade, was seeking reliefs in the statement of claim.[8]

(c) Ron Sim had acted in bad faith and/or in an unconscionable manner and/or in an abuse of this Court's process in commencing (through EQ Capital of which he is the ultimate sole beneficial owner/shareholder, alter ego and/or controlling mind and will) and/or causing and/or directing and/or assisting EQ Capital to commence the present action to unjustly enrich itself. In support of this contention, the 3 Defendants pleaded as follows:[9]

(i) OSIM increased its shareholding in TWG Tea through its exercise of the Profit Swing Clause and the Rights Issue.

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Consequently, Ron Sim had increased his indirect shareholding in TWG Tea;

(ii) Ron Sim was awarded costs to be paid by Manoj and Wellness in S187/2014 and CA64/2016; and

(iii) The above benefits received by Ron Sim formed the subject of the claims which Ron Sim made through EQ Capital in the present action. It was unconscionable for Ron Sim to be allowed to benefit from EQ Capital's claims.

Whether the third party claim should be struck out

28 Although some of the allegations made by the 3 Defendants appeared to be inconsistent with findings made in S187/2016, Ron Sim's application to strike out the third party claim against him did not rely on this. Instead, Ron Sim submitted that the third party claim should be struck out because (a) the statement of claim did not disclose any cause of action for any indemnity or contribution against him, and (b) it was redundant.

29 I will deal with the redundancy ground first.

Whether the third party claim was redundant

30 A third party claim will be struck out if it is redundant: *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) ("*Singapore Civil Procedure*") at para 16/6/1. A third party claim is redundant if it is based on allegations which if proved, would defeat the plaintiff's claim (in which event there would be no need for the third party claim), and if not proved, would mean that the third party claim fails anyway.

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31 *Yong Kheng Leong and another v Panweld Trading Pte Ltd* [2013] 1 SLR 173 ("*Panweld*") is authority for, and provides a good illustration of, the redundancy principle. In that case, the plaintiff company sued the first defendant, who was its director (and 20% shareholder), for breach of fiduciary duty in having placed his wife, the second defendant, on the company's payroll and paid her salaries for over 17 years even though she was never an employee of the plaintiff. The defence was that the second defendant was an employee of the plaintiff, alternatively that the payments had been made with the approval of the only other shareholder, Loh. The first defendant brought a third party claim against Loh, and argued that he would be entitled to an indemnity or contribution from the third party because the payments had been made with Loh's approval.

32 The Court of Appeal affirmed the High Court's dismissal of the third party claim against Loh because if Loh had agreed to the salary payments, then the first defendant would not be liable in the first place. On the other hand, if Loh had not agreed to the payments, then there would be no basis for seeking any indemnity or contribution from Loh (at [84]).

33 Ron Sim submitted that the third party claim was redundant because both the defence and the third party statement of claim alleged that the matters complained of by EQ Capital were caused by Ron Sim / OSIM and not by the 3 Defendants. Thus, if the 3 Defendants proved this allegation, EQ Capital's claim would fail and no question of a third party claim would arise. On the other hand, if the 3 Defendants could not prove this allegation, then the third party claim must fail.

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34 The 3 Defendants did not dispute the redundancy principle but sought to distinguish *Panweld* on the ground that the third party claim in that case was dismissed on the merits and not in the context of a striking out application. In my view, the fact that *Panweld* did not involve an application to strike out the third party claim did not in any way diminish the redundancy principle. It is unarguable that if a third party claim is shown to be in fact redundant, then it ought to be struck out since there could be no reason to still allow it to proceed to trial.

35 The 3 Defendants next referred to *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673 ("*Airtrust*"). In that case, Airtrust sued Linda for breaches of director's duties. Linda's defence was that the transactions complained of were carried out on the instructions of one Peter who was then a shareholder and the chairman of Airtrust. Linda's third party claim against the estate of Peter was based on the same allegation. The High Court decided that Linda's third party claim against Peter should proceed to trial because it could not be said to be redundant at that stage.

36 I agreed with the 3 Defendants' submission that reliance on the same facts in the third party claim and the defence did not necessarily mean that the third party claim was redundant. Clearly, however, each case must depend on its own facts. In *Airtrust*, the court was of the view that (a) even if Peter was the controlling mind of Airtrust, it did not follow that as a matter of law, Peter was free to do as he wished (at [54]), and (b) even though a director could avoid liability for breach by making a full disclosure and obtaining unanimous approval from all shareholders for that transaction, it did not appear that Peter and Linda owned all the shares in Airtrust at the relevant times and there was therefore a possibility that not all the shareholders would have necessarily

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agreed with all the transactions in issue (at [58]). The court therefore concluded that the fact that Linda acted on Peter's instructions would "not necessarily, as a matter of law, absolve Linda from liability *vis-à-vis* [Airtrust]" (at [49]). Accordingly, the court refused to strike out the third party claim.

37 The question in the present case remained whether the third party claim against Ron Sim was redundant as a result of the overlap between the third party claim and the defence such that regardless of whether the defence succeeded or failed, the third party claim would either not arise or would fail. The answer depended on an analysis of the pleadings.

AGMs and audited accounts of Wellness

38 In its statement of claim EQ Capital claimed that Manoj and Kanchan caused Wellness to breach its obligations under the SHA, its Memorandum and Articles of Association and the Companies Act (Cap 50, 2006 Rev Ed) by causing Wellness not to convene any AGM, file annual returns and prepare, file and provide EQ Capital with the audited accounts of Wellness for FY2011 to date.[10]

39 In their defence, the 3 Defendants alleged that

(a) Ron Sim / OSIM had deliberately delayed the finalisation of the audited accounts of TWG Tea for FY2011 because of the Transfer Pricing Issue and consequently, the audited accounts of Wellness could not be finalised as they had to reflect the revenue and profits of TWG Tea; and

(b) In November 2013, when Wellness was finalising its audited accounts, Ron Sim / EQ Capital alleged that a dividend payment of

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> $25.5m for FY2011 was wrongful although they had executed a shareholders' resolution dated 31 March 2011 approving the payment of the dividends. The allegation was raised to illegitimately pressurise the 3 Defendants into agreeing to Wellness selling its shares in TWG Tea to OSIM.[11]

40 In their third party statement of claim, the 3 Defendants repeated the same allegations set out at [39] above.[12]

Dilution caused by exercise of Profit Swing Clause

41 In its statement of claim, EQ Capital claimed that:

> (a) the Profit Swing Clause was based on the projections which Manoj presented to OSIM in the course of the OSIM Negotiations;
>
> (b) Manoj knew that the projections were unreliable and/or not supported by TWG Tea's numbers and/or based on junk numbers;
>
> (c) OSIM's exercise of the Profit Swing Clause resulted in a dilution of Wellness' shareholding in TWG Tea which correspondingly resulted in a dilution of EQ Capital's interest in TWG Tea; and
>
> (d) the dilution was brought about entirely by Manoj in breach of his duties to Wellness.[13]

42 In their defence, the 3 Defendants alleged that Ron Sim / OSIM had brought about the Profit Swing Clause Transaction in the following circumstances:

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(a) the Profit Swing Clause was broadly based on the profit projections presented to Ron Sim / OSIM and these projections were based on sale of products to the JV Co at the Franchise Price;

(b) Ron Sim / OSIM procured TWG Tea to supply to the JV Co at a price that was substantially lower than the Franchise Price thereby significantly reducing the profits of TWG Tea;

(c) consequently, TWG Tea's PBT for FY2013 allowed OSIM to bring about the Profit Swing Clause Transaction which led to the dilution of Wellness' shareholding in TWG Tea; and

(d) any dilution of Wellness' shareholding in TWG Tea and/or EQ Capital's interest in TWG Tea was brought about by OSIM / Ron Sim.[14]

43 In their third party statement of claim, the 3 Defendants alleged that Ron Sim / OSIM had engineered and/or brought about the Profit Swing Clause Transaction which resulted in the dilution of Wellness' shareholding in TWG Tea[15] and relied on the same allegations set out at [42] above.[16]

The Rights Issue

44 In its statement of claim, EQ Capital claimed that:

(a) Manoj and Kanchan, as directors of both Wellness and its majority shareholder Sunbreeze, failed to take any steps to cause Wellness to subscribe to the Rights Issue despite EQ Capital having specifically asked Wellness to do so;

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(b) the 3 Defendants did not request Wellness' shareholders including EQ Capital for funds so that Wellness could subscribe to the Rights Issue; and

(c) consequently, Manoj and Kanchan failed to protect Wellness' rights with the result that Wellness' interest in TWG Tea was diluted. This in turn damaged EQ Capital's interests as a minority shareholder of Wellness.[17]

45 In their defence, the 3 Defendants alleged that:

(a) Ron Sim had caused TWG Tea to initiate the Rights Issue without providing adequate notice to Wellness of the extraordinary general meeting which was held on 10 December 2013 for the purposes of approving the Rights Issue;

(b) Ron Sim / the board of TWG Tea also failed to address the legitimate concerns that Wellness had in relation to the Rights Issue and/or failed to provide Wellness with the information pertaining to the Rights Issue;

(c) Ron Sim / EQ Capital would have been aware at the material time that Wellness was not in a position to subscribe to the Rights Issue and that it would have needed more time to raise funds if it were to subscribe to the Rights Issue; and

(d) The Rights Issue and any dilution of EQ Capital's interest in TWG Tea were brought about by the conduct of OSIM, Paris and/or Ron Sim.[18]

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46 In their third party statement of claim, the 3 Defendants claimed that Ron Sim had caused and/or procured TWG Tea to initiate and carry out the Rights Issue in a manner which led to a dilution of Wellness' shareholding in TWG Tea.[19] The 3 Defendants relied on the same allegations in their defence as set out at [45] above.[20]

Wellness' right to appoint a director to the board of TWG Tea

47 In its statement of claim, EQ Capital claimed that Manoj and Kanchan as directors of Wellness chose not to exercise and gave up a fundamental right which Wellness had to appoint another person as director to the board of TWG Tea, thereby failing to protect Wellness' interests and consequently unfairly prejudicing EQ Capital's interests as a minority shareholder of Wellness.[21]

48 In their defence, the 3 Defendants alleged that Ron Sim / OSIM had obstructed Wellness' attempts to appoint a director to the board of TWG Tea by not accepting Wellness' nomination of Manoj as a director of TWG Tea.[22]

49 In their third party statement of claim, the 3 Defendants repeated the same allegation set out at [48] above.[23]

50 I should add that in their third party statement of claim, the 3 Defendants also pleaded that in February 2017, Wellness nominated one Associate Professor Mak Yuen Teen ("Associate Professor Mak") as director of TWG Tea but TWG Tea did not appoint him. These averments were not relevant for present purposes since EQ Capital's claim that Manoj and Kanchan failed to appoint a director to the board of TWG Tea was necessarily based on the position as of the date the writ was filed, *ie*, 10 January 2017, which predated the nomination of Associate Professor Mak.

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51 In any event, on 27 February 2017, Wellness made an application by way of HC/OS 206 of 2017 ("OS 206/2017") seeking, *inter alia*, an order that Associate Professor Mak be appointed as director pursuant to the SHA. On 10 July 2017, I dismissed OS 206/2017. I found that the nomination of Associate Professor Mak was made subject to certain conditions which TWG Tea was entitled to reject. Wellness withdrew those conditions during the hearing of OS 206/2017 but I agreed with the defendants that they should be given an opportunity to reconsider the nomination of Associate Professor Mak on the basis that there were no conditions attached. Wellness has appealed against my decision in OS 206/2017.

S187/2014 and CA64/2016

52 In its statement of claim, EQ Capital claimed that Manoj and Kanchan, as directors of Wellness, caused Wellness to bring S187/2014 and CA64/2016 even though they knew and/or ought to have known that the proceedings were without merit and/or were reckless as to whether Wellness had good grounds for S187/2014, thereby exposing Wellness to the costs orders made against Wellness in S187/2014 and CA64/2016.[24] EQ Capital sought an order that Sunbreeze and/or Manoj and/or Kanchan repay Wellness to the extent that Wellness' funds were used to pay those costs.[25]

53 In their defence, the 3 Defendants alleged that EQ Capital had no standing to claim any of the costs ordered against Wellness, that EQ Capital was not acting in good faith or in the best interests of Wellness in bringing the action against Manoj and Kanchan, and that the claim amounted to double recovery because EQ Capital and Ron Sim had not undertaken to pay any amounts recovered in the action to Wellness.[26]

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54 In their third party statement of claim, the 3 Defendants alleged that

(a) Manoj and Wellness had commenced S187/2014 because they honestly and reasonably believed that the Rights Issue was engineered by Ron Sim / OSIM as a form of minority oppression;[27] and

(b) Manoj and Wellness commenced S187/2014 and CA64/2016 in order to set aside and/or invalidate the Profit Swing Clause Transaction and the Rights Issue which were brought about by Ron Sim / OSIM.[28]

55 In this instance, the third party claim in respect of EQ Capital's claim relating to S187/2014 and CA64/20176 did not mirror the defence. Nevertheless, the third party claim was based on the same allegation that the Profit Swing Clause Transaction and the Rights Issue were brought about by Ron Sim / OSIM.

Conclusion on whether the third party claim was redundant

56 The above analysis of the pleadings showed that with respect to EQ Capital's complaints regarding

(a) Wellness' failure to hold AGMs and provide audited accounts;

(b) the dilution of Wellness' shareholding in TWG Tea (as a result of the Profit Swing Clause Transaction and the Rights Issue); and

(c) the failure to exercise Wellness' right to appoint a director to the board of TWG Tea,

the substance of the defence and the third party claim was the same, *ie*, that the above matters were not caused by the 3 Defendants (as EQ Capital claimed) but

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by Ron Sim / OSIM. It was clear that if the 3 Defendants succeeded in proving that the above matters were caused by Ron Sim / OSIM, that had to mean that EQ Capital would have failed to prove its case (with respect to these matters) against the 3 Defendants and the question of a third party claim would not arise. Conversely, if the 3 Defendants failed to prove that the above matters were caused or brought about by Ron Sim / OSIM, that had to mean that the 3 Defendants would also have failed to prove their case in their third party claim. In my view, the inescapable conclusion was that the third party claim (with respect to the above matters) was redundant.

57 As for EQ Capital's claim with respect to the bringing of S187/2014 and CA64/2016, as noted earlier (at [55] above), even though the third party claim did not mirror the defence, it was based on the same allegation that the Profit Swing Clause Transaction and the Rights Issue were brought about by Ron Sim / OSIM. Again, if the 3 Defendants succeeded in proving that the Profit Swing Clause Transaction and the Rights Issue were caused by Ron Sim / OSIM, then EQ Capital's claim would fail since then it could not be said that S187/2014 and CA64/2016 had no merit. However, if the 3 Defendants failed to prove that the Profit Swing Clause Transaction and the Rights Issue were caused by Ron Sim / OSIM, then the third party claim had to fail. In my view, therefore, the third party claim with respect to S187/2014 and CA64/2016 was also redundant.

58 The 3 Defendants relied on *Airtrust* and submitted that the third party claim should not be struck out because it was conceivable that the 3 Defendants might not be absolved from liability even if they proved that Ron Sim / OSIM caused the losses suffered by Wellness. In that event, the court would still have to decide whether Ron Sim was liable to indemnify or provide contribution.

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59 In my view, it was not sufficient for the 3 Defendants to simply assert that this was conceivable. It was incumbent upon them to make out an arguable case by explaining why or how the 3 Defendants might still be liable to EQ Capital even if they proved that the matters complained of by EQ Capital had been caused by Ron Sim / OSIM and not by them. The 3 Defendants were not able to do so. In contrast, in *Airtrust*, the court clearly explained why it was arguable that Linda's reliance on Peter's instructions may not absolve her from liability *vis-à-vis* the company (see [36] above).

60 In my judgment, on the facts as pleaded in this case, the 3 Defendants simply had no arguable case that they might still be liable to EQ Capital even if they proved that the matters complained about had been caused by Ron Sim / OSIM and not by them.

61 The 3 Defendants also argued that in their third party claim, they had pleaded that Ron Sim acted in bad faith and/or in an unconscionable manner and/or in an abuse of the court's process in bringing or causing EQ Capital to bring this action against them. In my view, the averments of bad faith, unconscionability and abuse of process did not make the third party claim any less redundant. First, these same averments were also made in the defence. Second, and more importantly, the averments of bad faith, unconscionability and abuse of process were all based on the same allegation that the matters complained of by EQ Capital were caused or brought about by Ron Sim / OSIM. This much was plain from the third party statement of claim.[29]

62 For completeness, I would add that the 3 Defendants (in my view, rightly) did not take issue with the third party claim being struck out for redundancy, pursuant to O 18 r 19(1)(*a*) of the Rules. Whether a third party

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claim is redundant can be determined based on the pleadings, without requiring any evidence to be admitted and if it is found to be redundant, the third party claim can properly be described as disclosing no cause of action.

Whether the third party statement of claim disclosed any cause of action for indemnity or contribution

63 The question was whether the third party statement of claim disclosed any basis for the claim for indemnity or contribution against Ron Sim.

Indemnity

64 A right to indemnity may arise (a) from express or implied contract, (b) from statute, or (c) by implication of law where the relationship between the parties is such that either in law or in equity there is an obligation upon one party to indemnify the other: *Singapore Civil Procedure* at para 16/1/3.

65 I agreed with Ron Sim that the third party statement of claim did not disclose any basis upon which Ron Sim was liable to indemnify to the 3 Defendants. The third party statement of claim did not plead any express or implied contract or any statute pursuant to which Ron Sim was liable to indemnify the 3 Defendants. Neither did it plead that such liability arose by implication of law or what facts were relied on to imply such a liability in law or in equity.

Contribution

66 A claim to contribution is a claim to a partial indemnity; it is fixed on general principles of justice and does not spring from contract, though contract may qualify it. A right to contribution usually arises as between joint debtors, or joint contractors, or joint trustees, or joint sureties, or joint wrongdoers, and

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it may be created by statute. The entitlement to contribution has been extended by s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed) which provides that, subject to the provisions of that section, "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)". Section 15 of the CLA involves a three stage test: (a) what damage was suffered by the plaintiff, (b) whether the defendant is liable to the plaintiff in respect of that damage and (c) whether the person from whom contribution is sought is also liable to the plaintiff in respect of that very "same damage" or some of it. See *Singapore Civil Procedure* at para 16/1/2 and *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 at [49].

67 As stated earlier, EQ Capital's claims against the 3 Defendants were for

(a) Manoj and Kanchan to pay Wellness the loss in value which Wellness suffered by reason of the dilution of its shareholding in TWG Tea as a result of the Profit Swing Clause Transaction and the Rights Issue;

(b) the 3 Defendants to repay Wellness to the extent that its funds were used to pay the costs ordered against it in S187/2014 and CA64/2016;

(c) Wellness to be wound up, alternatively for the 3 Defendants to purchase EQ Capital's shares in Wellness at fair value; and

(d) Costs of the present action.

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68 The third party statement of claim did not allege that Ron Sim was liable to EQ Capital in respect of the same damage that the 3 Defendants may be held liable to EQ Capital for, much less how Ron Sim might be so liable. Be that as it may, the 3 Defendants submitted that as Ron Sim's actions had caused the damage which formed the subject matter of EQ Capital's claim, Ron Sim would also be liable to EQ Capital if the 3 Defendants were found liable to EQ Capital for the same damage.[30]

69 I disagreed with the 3 Defendants' submission. The 3 Defendants' case was that the matters complained of by EQ Capital were caused by Ron Sim / OSIM and not by them. As explained earlier, if the 3 Defendants prove this, then their defence succeeds and they would not be liable to EQ Capital. If the 3 Defendants cannot prove this, they would also fail in their third party claim. Either way, on the 3 Defendants' own case, Ron Sim could not possibly be also liable to EQ Capital for the very same damage that the 3 Defendants were liable to EQ Capital for.

Unconscionability / bad faith

70 The 3 Defendants submitted that Ron Sim was the alter ego of EQ Capital and that he had acted in bad faith in commencing this action through EQ Capital. The 3 Defendants clarified that they were claiming an indemnity against Ron Sim on the basis that Ron Sim's own actions were the primary cause of the losses and/or damages which constituted EQ Capital's claim.[31] However, as discussed earlier, this meant that the third party claim was redundant.

71 The 3 Defendants next submitted that Ron Sim could not be allowed to use EQ Capital as his personal vehicle to make a claim against the 3 Defendants after having personally benefited from the dilution of Wellness' shareholding

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in TWG Tea in that the dilution of Wellness' shareholding resulted in a corresponding increase in OSIM's shareholding in TWG Tea and Ron Sim was also the alter ego of OSIM.

72 The 3 Defendants referred me to *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 ("*Raffles Town Club*"). In that case, the plaintiff ("RTC") sued its former directors for breach of directors' duties relating to (a) acceptance of membership applications for which RTC had in earlier separate proceedings been found liable to pay damages, (b) payment of management fees, (c) payment of directors' and other fees, (d) transfer of a loan to a subsidiary company. The former directors commenced third party proceedings against the former directors *inter se* and against the current directors, seeking indemnity and contribution. The Court of Appeal affirmed the High Court's decision dismissing RTC's claims but found that the current directors, who were also the current sole shareholders, had committed an actionable conspiracy in tort against the former directors by causing RTC to commence the action against the former directors.

73 The Court of Appeal found (at [57]) that

(a) the current shareholders/directors had acquired the RTC shares at prices which had taken into account the four matters complained of in the action;

(b) as purchasers, the current shareholders/directors therefore had no claim arising from the sale of the shares to them;

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(c) if they were allowed to use RTC to claim damages against the former directors, and if RTC were to succeed, the current shareholders/directors would benefit personally as shareholders of RTC;

(d) this would be an unfair and unjust outcome and there was no reason why the separate legal personality of RTC should be allowed to unjustly enrich them in such a manner. The current directors were using RTC as a nominee to claim against the former directors for breaches of duties which the former directors as shareholders of RTC had already accepted or ratified over many years.

74 In my view, *Raffles Town Club* did not assist the 3 Defendants. In *Raffles Town Club*, the Court of Appeal found that the current shareholders/directors had acted unconscionably because they were using RTC to make a claim which they (as purchasers) could not and for breaches which had been ratified over many years.

75 In the present case, the 3 Defendants submitted that

(a) the dilution of Wellness's shareholding in TWG Tea (arising from the Profit Swing Clause Transaction and the Rights Issue) resulted in an increase in OSIM's shareholding in TWG Tea;

(b) as the alter ego of OSIM, Ron Sim therefore benefited from the dilution;

(c) EQ Capital's claim was for Manoj and Kanchan to pay Wellness the loss in value which Wellness suffered by reason of the dilution of its shareholding in TWG Tea;

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(d) if EQ Capital succeeded in its claim, it would benefit EQ Capital and in turn Ron Sim (as the alter ego of EQ Capital); and

(e) it was therefore unconscionable for Ron Sim to enrich himself by using EQ Capital to claim damages for Wellness' losses caused by the same dilution which had benefited OSIM.[32]

76 In my view, the 3 Defendants' submissions were flawed. Ron Sim could not benefit through EQ Capital in this action unless Manoj and Kanchan were found liable for causing the dilution of Wellness' shareholding in TWG Tea. However, if Manoj and Kanchan were liable for causing the dilution, there was clearly nothing unconscionable in respect of (a) Ron Sim's conduct or (b) OSIM's increased shareholding in TWG Tea as a result of the Profit Swing Clause Transaction or the Rights Issue or (c) any benefit to EQ Capital as a result of Manoj and Kanchan being ordered to pay damages to Wellness for causing the dilution suffered by Wellness. On the contrary, it would be unconscionable to allow the 3 Defendants to escape having to compensate Wellness for the loss caused by them.

Whether there were common issues to be determined

77 Finally, the 3 Defendants submitted that the third party claim should not be struck out because there were common issues arising in EQ Capital's claim and in the third party claim. The 3 Defendants submitted that the common issues included

(a) whether Ron Sim was the alter ego and/or controlling mind and will of EQ Capital and OSIM; and

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(b) whether Ron Sim's actions (personally or through OSIM) had caused the matters on which EQ Capital was claiming against the 3 Defendants.

78 Order 16 r 1(1)(*c*) of the Rules allows a defendant to issue a third party notice where he "requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action".

79 I disagreed with the 3 Defendants. In my view, there was no reason for the alleged common issues to be determined as between either EQ Capital or the 3 Defendants and Ron Sim. For reasons set out earlier, the determination of these issues as between EQ Capital and the 3 Defendants (regardless of whether these issues are decided in favour of EQ Capital or the 3 Defendants) would render it unnecessary to determine these issues as between either EQ Capital or the 3 Defendants and Ron Sim.

Conclusion

80 I agreed with Ron Sim that any way that one looked at the third party claim, it simply could not succeed. I therefore struck out the third party claim. I also ordered the 3 Defendants to pay costs to Ron Sim fixed at $16,000 inclusive of disbursements.

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Chua Lee Ming
Judge

Yeo Khirn Hai Alvin, SC, Koh Swee Yen, Lin Chunlong, Mak Shin Yi (Wong Partnership LLP) for the first to third defendants; Davinder Singh s/o Amar Singh, SC, Jaikanth Shankar, Tan Ruo Yu and Charlene Wong Su-Yi (Drew & Napier LLC) for the third party.

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1 Statement of claim, paras 25–27 and 31.
2 Statement of claim, paras 39, 40 and 43.
3 Statement of claim, paras 53, 54 and 57–58.
4 Statement of claim, para 46.
5 Statement of claim, paras 62–63.
6 Third party statement of claim, para 67 read with paras 64–66.
7 Third party statement of claim, para 64.
8 Third party statement of claim, para 65.
9 Third party statement of claim, para 66.
10 Statement of claim, paras 25–27.
11 Defence, para 52.
12 Third party statement of claim, para 64(d)–(e).
13 Statement of Claim, paras 39, 40, and 43.
14 Defence, paras 67 and 69.
15 Third party statement of claim, para 64(a).
16 Third Party Statement of Claim, para 36.
17 Statement of claim, paras 53, 54 and 57.
18 Defence, paras 86 and 93.
19 Third party statement of claim, para 64(b).
20 Third party statement of claim, paras 48, 49, 50 and 64(b).
21 Statement of claim, para 46.
22 Defence, para 81.
23 Third party statement of claim, paras 61(a)–(h) and 64(c).
24 Statement of claim, paras 62 and 63.
25 Statement of claim, prayer (2) on pp 36–37.
26 Defence, para 113.
27 Third party statement of claim, para 55.
28 Third party statement of claim, para 64(f).
29 Third party statement of claim, paras 64 and 65.
30 The 3 Defendants' submissions, para 65.
31 The 3 Defendants' Note of Oral Arguments, para 17.
32 The 3 Defendants' Note of Oral Arguments, paras 18–19.

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