IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 64

Civil Appeal No 105 of 2017

Between

(1) **SUNBREEZE GROUP INVESTMENTS LTD**
(2) **MANOJ MOHAN MURJANI**
(3) **KANCHAN MANOJ MURJANI**

… *Appellants*

And

RON SIM CHYE HOCK

… *Respondent*

Summons No 31 of 2018

Between

(1) **SUNBREEZE GROUP INVESTMENTS LTD**
(2) **MANOJ MOHAN MURJANI**
(3) **KANCHAN MANOJ MURJANI**

… *Applicants*

And

RON SIM CHYE HOCK

… *Respondent*

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In the matter of Suit No 17 of 2017

Between

EQ CAPITAL INVESTMENTS LTD

… *Plaintiff*

And

(1) **SUNBREEZE GROUP INVESTMENTS LTD**
(2) **MANOJ MOHAN MURJANI**
(3) **KANCHAN MANOJ MURJANI**
(4) **THE WELLNESS GROUP PTE LTD**

… *Defendants*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Amendment]
[Civil Procedure] — [Pleadings] — [Striking out]
[Civil Procedure] — [Third party proceedings]

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Sunbreeze Group Investments Ltd and others
v
Sim Chye Hock Ron

[2018] SGCA 64

Court of Appeal — Civil Appeal No 105 of 2017 and Summons No 31 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
17 August 2018

22 October 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The appellants are three of the four defendants in Suit No 17 of 2017 ("Suit 17"). They commenced a third party action against the respondent, who applied to strike out that action. The striking out application came before a High Court judge ("the Judge"), who agreed with the respondent and struck out the third party proceedings pursuant to O 18 r 19(1)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") on the grounds that they were redundant, disclosed no reasonable cause of action for an indemnity or contribution and were not required for the determination of common issues under O 16 r 1(1)(*c*) of the Rules of Court: see *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd and others (Sim Chye Hock Ron, third party)* [2017] SGHC 271 ("the GD"). The appellants filed the present appeal, Civil Appeal No 105 of 2017, against the Judge's decision. They also applied directly

to this court by way of Court of Appeal Summons No 31 of 2018 ("SUM 31") for leave to amend their third party statement of claim in a further attempt to save the third party proceedings. After hearing the parties' oral arguments, we dismissed SUM 31, but reserved our decision on the substantive appeal. In this judgment, we explain our reasons for dismissing SUM 31 as well as deliver our decision on the appeal.

Background facts

2 Suit 17, which has yet to be heard, is a minority oppression action brought by EQ Capital Investments Ltd ("EQ Capital") against four defendants: (a) Sunbreeze Group Investments Ltd ("Sunbreeze"), the first appellant in this appeal; (b) Manoj Mohan Murjani ("Mr Murjani"), the second appellant; (c) his wife, Kanchan Manoj Murjani ("Mrs Murjani"), the third appellant; and (d) The Wellness Group Pte Ltd ("Wellness"). Sunbreeze and EQ Capital are shareholders of Wellness, holding 80.62% and 7.55% respectively of Wellness' shares, with the remaining shares in Wellness being held by two private equity funds. Mr and Mrs Murjani are directors and shareholders of Sunbreeze as well as directors of Wellness. Wellness is a nominal party in Suit 17, having been joined only because the plaintiff, EQ Capital, seeks reliefs concerning it. The third party proceedings were instituted only by the first three defendants in Suit 17 (the appellants in this appeal), but not Wellness, and Wellness is not a party to this appeal.

3 The claims in Suit 17 are closely related to a joint venture between Wellness, OSIM International Pte Ltd ("OSIM") and Paris Investment Pte Ltd ("Paris"). These parties are now shareholders in a joint venture company known as TWG Tea Company Pte Ltd ("TWG"). TWG was originally incorporated as a wholly-owned subsidiary of Wellness in October 2007. In 2010, Paris

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acquired 15.8% of the shares in TWG. In early 2011, OSIM was considering investing in TWG. OSIM's founder, chairman and Chief Executive Officer, Ron Sim Chye Hock ("Mr Sim"), is the respondent in this appeal as well as the ultimate sole beneficial owner of EQ Capital. During the negotiations with OSIM, Mr Murjani presented Mr Sim with profit projections showing that TWG expected to achieve profit before tax and minority interests ("PBT") of $29m for the financial year ending 31 March 2013 ("FY2013"). OSIM decided to invest in TWG. This culminated in the signing of two agreements dated 18 March 2011:

(a) a sale and purchase agreement ("the SPA"), pursuant to which OSIM purchased a 35% stake in TWG from Wellness and Paris; and

(b) a shareholders' agreement between Wellness, OSIM, Paris and TWG ("the SHA"), under which the parties agreed to operate TWG as a joint venture and envisaged the establishment of future joint ventures between TWG and OSIM in other countries in Asia.

4 Following OSIM's investment, Wellness, OSIM and Paris held TWG's shares in the respective proportions of 54.7%, 35% and 10.3%. Clause 4.5 of the SPA ("the Profit Swing Clause") provided for the following changes in shareholding depending on TWG's audited PBT for FY2013:

(a) If the audited PBT was less than $17m, Wellness and Paris would transfer some of their shares in TWG (an aggregate of 1% of TWG's shares per $1m shortfall, up to a maximum of 10%) to OSIM at a nominal price of $1.

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(b) If the audited PBT exceeded $27m, OSIM would transfer some of its shares in TWG (1% of TWG's shares per $1m excess, up to a maximum of 10%) to Wellness and Paris at a nominal price of $1.

5 TWG's audited PBT for FY2013 turned out to be about $5.5m. On 9 April 2013, OSIM invoked the Profit Swing Clause and acquired 10% of the total shares in TWG from Wellness and Paris for a nominal consideration of $1 to each of them. TWG's shareholding after this transaction ("the Profit Swing Transaction") was as follows: Wellness (46.3%), OSIM (45%) and Paris (8.7%). On 18 October 2013, OSIM purchased all the shares in Paris, thereby acquiring a majority of TWG's shares. OSIM also appointed two persons as directors of TWG, thereby acquiring control of TWG's board.

6 In November 2013, TWG proposed a rights issue ("the Rights Issue") to raise capital. This was approved by Paris and OSIM. Wellness did not subscribe for the Rights Issue. On 18 January 2014, OSIM and Paris together subscribed for the entire 77,000 shares available under the Rights Issue, as a result of which their combined shareholding in TWG became 69.9% (58.6% to OSIM and 11.3% to Paris), while Wellness' shareholding was further diluted to 30.1%.

7 In February 2014, Wellness and Mr Murjani commenced Suit No 187 of 2014 ("Suit 187") against OSIM, Paris and the directors of TWG (including Mr Sim) for minority oppression, conspiracy to injure and breach of contract. They sought to set aside the Profit Swing Transaction and the Rights Issue. Suit 187 was dismissed by the High Court: see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729 ("*Wellness v OSIM*"). That decision was upheld in Civil Appeal No 64 of 2016 ("CA 64"), and costs orders were made against Wellness in respect of both the appeal and Suit 187.

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8 On 10 January 2017, EQ Capital filed Suit 17. Its claims are fivefold:

(a) First, Mr and Mrs Murjani caused Wellness to breach its obligations under the SHA, its Memorandum and Articles of Association and the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") by causing Wellness not to convene any Annual General Meeting ("AGM"); not to file any annual returns with the Registrar of Companies; and not to prepare, file and provide EQ Capital with Wellness' audited accounts from the financial year ending 31 March 2011 ("FY2011") to date. Consequently, EQ Capital has been and continues to be deprived of its right to attend and participate in AGMs and to review the audited accounts of Wellness. We refer to this as "the AGM/Accounts Claim".

(b) Second, Mr Murjani caused Wellness' shareholding in TWG to be diluted as a result of the Profit Swing Transaction. The Profit Swing Clause was based on the profit projections which Mr Murjani had presented to OSIM (see [3] above), and which he knew to be unreliable or unsupported. The dilution of Wellness' shareholding in TWG as a result of the Profit Swing Transaction in turn damaged EQ Capital's interest in TWG as a shareholder of Wellness. We refer to this as "the Profit Swing Claim".

(c) Third, Mr and Mrs Murjani caused Wellness' shareholding in TWG to be further diluted by failing to cause Wellness to subscribe for the Rights Issue. We refer to this as "the Rights Issue Claim".

(d) Fourth, Mr and Mrs Murjani failed to protect Wellness' interests by failing to cause Wellness to appoint a director to TWG's board after Mr Murjani resigned from the board on 28 September 2012. We refer to

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this as "the Appointment Claim". (In this regard, we should point out that one of the High Court's findings in Suit 187, which was undisturbed in CA 64, was that the following term should be implied into the SHA: "the majority shareholder(s) (whoever they may be) would be entitled to appoint two directors, and the minority shareholder(s) would be entitled to appoint one director so long as they hold at least 25% of the shares in TWG" (see *Wellness v OSIM* at [121]). Since Wellness held 30.1% of the shares in TWG at the time the decision in CA 64 was rendered, it was entitled to appoint one director to TWG's board. In October 2016, Wellness sought to appoint Mr Murjani as a director of TWG, but this was rejected by TWG, OSIM and Paris. Subsequently, in February 2017, Wellness sought to have another person, Associate Professor Mak Yuen Teen ("Associate Professor Mak"), appointed as a director of TWG, but this was rejected by TWG as well. Wellness then applied to the court for an order that Associate Professor Mak be appointed to TWG's board. Its application was dismissed at first instance (see *The Wellness Group Pte Ltd v TWG Tea Co Pte Ltd and others* [2017] SGHC 298), but it was allowed on appeal (see *The Wellness Group Pte Ltd v Paris Investment Pte Ltd and others* [2018] SGCA 47).)

(e) Fifth, Mr and/or Mrs Murjani caused Wellness to commence Suit 187 and CA 64 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 bringing Suit 187, thereby exposing Wellness to the costs orders made against it in Suit 187 and CA 64. Mr and/or Mrs Murjani also caused Wellness to obtain loans amounting to $3.1m from Sunbreeze in order to foot Wellness' legal fees. We refer to this as "the Costs Claim".

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9 On the basis of these claims, EQ Capital seeks the following reliefs:

(a) an order that Mr and Mrs Murjani compensate and pay Wellness the loss in value which Wellness suffered by reason of the dilution of its shareholding in TWG;

(b) an order that Sunbreeze and/or Mr Murjani and/or Mrs Murjani repay Wellness to the extent that Wellness' funds were used to pay the costs and disbursements ordered against it in Suit 187 and CA 64;

(c) an order that Sunbreeze and/or Mr Murjani and/or Mrs Murjani reimburse Wellness such part of the $3.1m worth of loans that Wellness repaid to Sunbreeze using its own funds; and

(d) an order that Wellness be wound up, or that Sunbreeze and/or Mr Murjani and/or Mrs Murjani be made to purchase EQ Capital's shares in Wellness at a fair value.

10 The appellants in turn commenced third party proceedings against Mr Sim for a contribution or an indemnity. Their position is that Mr Sim was the "*alter ego* and/or controlling mind and will" of EQ Capital as well as the "*alter ego* and/or controlling shareholder" of OSIM at the material time. In both their defence and their third party statement of claim ("TPSOC"), the appellants attribute various acts undertaken by EQ Capital and OSIM to Mr Sim. Their defence to the five claims set out above and their corresponding third party claims against Mr Sim may be stated briefly as follows.

11 First, the appellants' defence to the AGM/Accounts Claim is that Mr Sim and/or OSIM deliberately delayed the finalisation of TWG's audited accounts for FY2011 when they disagreed with Wellness over the price at which

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TWG would sell its products to OSIM-TWG Tea (North Asia) Pte Ltd ("the JV Company"), a joint venture set up between OSIM and TWG. This in turn delayed the finalisation of Wellness' audited accounts for FY2011 as those accounts had to reflect TWG's revenue and profits. Moreover, in November 2013, when Wellness was in the process of finalising its audited accounts, Mr Sim and/or EQ Capital alleged that a $25.5m dividend payment by Wellness which they had approved more than two years earlier by way of a shareholders' resolution dated 31 March 2011 was wrongful. This was done in order to illegitimately pressurise the appellants into agreeing to a sale of Wellness' shares in TWG to OSIM. The TPSOC repeats these allegations.

12 Second, the appellants' defence to the Profit Swing Claim is that Mr Sim and/or OSIM brought about the dilution of Wellness' shareholding in TWG by invoking the Profit Swing Clause. Moreover, as Mr Sim benefited from the Profit Swing Transaction through OSIM, it would be an abuse of the court's process for him to bring the Profit Swing Claim through EQ Capital for *the latter's* alleged loss arising from the same transaction. The appellants' argument appears to be that any such loss should be attributed to Mr Sim as the *alter ego* of EQ Capital, while the corresponding gain from the Profit Swing Transaction was also made by Mr Sim, but this time as the *alter ego* of OSIM. In any event, any dilution of EQ Capital's interest in TWG is not in itself unfairly prejudicial to EQ Capital's interests as a shareholder of Wellness. The TPSOC repeats the allegation that Mr Sim and/or OSIM brought about the Profit Swing Transaction. According to the TPSOC, the Profit Swing Clause was based on profit projections which were in turn premised on TWG selling its products to the JV Company at a certain franchise price. However, Mr Sim and/or OSIM caused TWG to sell its products to the JV Company at levels which were substantially below that franchise price. This reduced TWG's audited PBT for

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FY2013 to about $5.5m, thereby enabling OSIM to invoke the Profit Swing Clause.

13 Third, the appellants' defence to the Rights Issue Claim is that they honestly believed that it was not in Wellness' interests to subscribe for the Rights Issue. Moreover, Mr Sim caused TWG to initiate the Rights Issue despite knowing that Wellness was not in a position to subscribe for any shares thereunder. Mr Sim also failed to provide Wellness with adequate notice of the extraordinary general meeting convened to approve the Rights Issue; did not address Wellness' concerns in relation to the Rights Issue; and did not give Wellness adequate information pertaining to the Rights Issue. The appellants further contend that the Rights Issue ultimately benefited Mr Sim and was brought about by him and/or Paris and OSIM, and it would therefore be an abuse of the court's process for Mr Sim to bring the Rights Issue Claim through EQ Capital for loss allegedly suffered by the latter arising from the Rights Issue. In any event, any dilution of EQ Capital's interest in TWG is not in itself unfairly prejudicial to EQ Capital's interests as a shareholder of Wellness. The appellants also argue that Mr and Mrs Murjani owed no duty to EQ Capital to cause Wellness to subscribe for the Rights Issue, and EQ Capital therefore lacks the standing to sue them. The TPSOC repeats each of these allegations in so far as they relate to Mr Sim.

14 Fourth, the appellants' defence to the Appointment Claim is that they did not cause Wellness to appoint a director to TWG's board while Suit 187 was underway, and their attempts to have Wellness appoint a director after CA 64 concluded were obstructed by Mr Sim and/or OSIM, who refused to accept Wellness' appointment of Mr Murjani in October 2016. In any event, any failure to cause Wellness to appoint a director to TWG's board is not in itself unfairly prejudicial to EQ Capital's interests as a shareholder of Wellness. The TPSOC

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repeats the allegation that Mr Sim and/or OSIM obstructed Wellness from appointing a director to TWG's board following the disposal of CA 64.

15 Fifth, the appellants' defence to the Costs Claim is that EQ Capital is not a proper party and/or lacks the standing to claim the costs and disbursements which Wellness was ordered to pay in Suit 187 and CA 64. Further, the appellants contend that EQ Capital is not acting in good faith or in Wellness' best interests in bringing Suit 17. They also aver that the Costs Claim, if upheld, would give rise to double recovery of the costs and disbursements which Wellness was ordered to pay in Suit 187 and CA 64 since EQ Capital and Mr Sim have not undertaken to pay any amounts recovered in Suit 17 to Wellness. We observe in passing that it is not clear to us why any such undertaking should have been forthcoming, given that what EQ Capital prays for in its statement of claim in Suit 17 is (among other reliefs) payment to *Wellness* of the sums which Wellness paid in respect of the costs and disbursements ordered against it in Suit 187 and CA 64 (see [9(b)] above), but nothing turns on this for the purposes of the present appeal. The appellants also plead in their defence that Mr Murjani and Wellness commenced Suit 187 because they honestly and reasonably believed that the Rights Issue was engineered by Mr Sim and/or OSIM as an act of minority oppression. The TPSOC states that the appellants commenced Suit 187 and CA 64 in order to set aside and/or invalidate the Profit Swing Transaction and the Rights Issue in that honest and reasonable belief.

16 The TPSOC also avers that EQ Capital's veil of incorporation should be lifted because Mr Sim, who is EQ Capital's *alter ego* and/or controlling mind and will, is using it as a facade to benefit from the very acts which he brought about through OSIM. Further and/or in the alternative, the TPSOC avers that Mr Sim acted in bad faith and/or in an unconscionable manner and/or in abuse

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of the court's process in bringing Suit 17 through EQ Capital with a view to unjustly enriching himself. In this regard, it is said that the benefits which Mr Sim derived from the Profit Swing Transaction, the Rights Issue and the costs orders made in Suit 187 and CA 64 form the subject of the reliefs which he seeks through EQ Capital in Suit 17 (see [9] above), and it would be unconscionable for him to be allowed to benefit from these reliefs.

The decision below

17 The Judge struck out the appellants' third party proceedings for three principal reasons.

18 First, he considered that the appellants' third party claims against Mr Sim were redundant because they would, if true, constitute a complete defence to EQ Capital's claims against the appellants, thereby obviating the need for the appellants to bring any claim against Mr Sim for an indemnity or contribution. As regards the first four claims brought by EQ Capital (the AGM/Accounts Claim, the Profit Swing Claim, the Rights Issue Claim and the Appointment Claim), the substance of the appellants' defence and that of their third party claims against Mr Sim were the same, namely, that the matters complained of were not caused by the appellants, but were instead caused by Mr Sim and/or OSIM (see the GD at [56]). Where the Costs Claim was concerned, although the appellants' third party claim did not mirror their defence, it was likewise based on the same allegation that the Profit Swing Transaction and the Rights Issue were brought about by Mr Sim and/or OSIM (see the GD at [57]). If the appellants succeeded in proving that allegation, the Costs Claim would fail because it could not then be said that Suit 187 and CA 64 were brought improperly or were known to be without merit. This would in turn render it unnecessary for the appellants to seek any indemnity or contribution

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from Mr Sim in respect of the Costs Claim. In the Judge's view, there was no reasonably arguable situation in which the appellants might be liable to EQ Capital *even if* they proved that Mr Sim and/or OSIM had caused or brought about the matters complained of (see the GD at [60]). The averments in the appellants' TPSOC of bad faith, unconscionability and abuse of process on Mr Sim's part did not change the fact that the third party proceedings were redundant. Those averments had already been made in the appellants' defence, and were in any event based on the same allegation that Mr Sim and/or OSIM had brought about the very same matters that were the subject of EQ Capital's complaints in Suit 17 (see the GD at [61]).

19 Second, the Judge considered that the TPSOC disclosed no basis for any indemnity or contribution from Mr Sim for the following reasons:

(a) The TPSOC did not plead any express or implied contract, statute or other legal obligation pursuant to which Mr Sim would be liable to indemnify the appellants (see the GD at [64]–[65]).

(b) The Judge rejected the appellants' submission that they would be entitled to a contribution from Mr Sim pursuant to s 15(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"). If the appellants succeeded in proving that Mr Sim and/or OSIM had caused the matters complained of by EQ Capital, their defence would succeed and they would not be "liable in respect of any damage suffered by [EQ Capital]" for the purposes of s 15(1) of the CLA. If they failed to prove this, then they would fail in their third party claim. Either way, given the nature of the allegations made by the appellants, it was impossible for *both* the appellants *and* Mr Sim to be liable to EQ Capital in respect of the same damage (see the GD at [69]).

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(c) The Judge also rejected the appellants' submission that Mr Sim could not be permitted to use EQ Capital as his personal vehicle to bring Suit 17 after having personally benefited (through OSIM) from the dilution of Wellness' shareholding in TWG in so far as such dilution had resulted in a corresponding increase in OSIM's shareholding in TWG. Mr Sim would not benefit from Suit 17 unless Mr and Mrs Murjani were found liable for causing the dilution of Wellness' shareholding in TWG. But if that were the case, there would have been nothing unconscionable about Mr Sim's conduct or his benefiting through OSIM (as a result of OSIM's increased shareholding in TWG) or EQ Capital (as a result of any damages which Mr and Mrs Murjani might be ordered to pay Wellness for the loss occasioned by the dilution of its shareholding in TWG). On the contrary, it would be wrong to allow the appellants to escape having to compensate Wellness for any loss that they might in fact have caused (see the GD at [76]).

20 Third, the Judge held that the third party proceedings could not be justified on the basis of O 16 r 1(1)(*c*) of the Rules of Court. In this regard, the appellants had submitted that there were certain issues common to both EQ Capital's claims against them in the main action and their third party claims against Mr Sim which should be decided not only as between EQ Capital and them, but also as between them and Mr Sim. These issues included: (a) whether Mr Sim was the *alter ego* and/or controlling mind and will of EQ Capital and OSIM; and (b) whether Mr Sim's actions (either in his personal capacity or through OSIM) had caused the matters which EQ Capital complained of in Suit 17. In the Judge's view, the determination of these issues as between EQ Capital and the appellants would obviate any need to determine them as between the appellants and Mr Sim (see the GD at [79]).

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SUM 31

21 In that light, we turn first to explain our reasons for dismissing SUM 31. This was the appellants' application for leave to amend their TPSOC to: (a) include two new causes of action, namely, the tort of abuse of process and the tort of conspiracy; and (b) expressly plead ss 15 and 16 of the CLA. It seemed to us that these amendments were intended to overcome the Judge's finding of redundancy, in that they appeared to raise allegations against Mr Sim that were seemingly distinct from the allegations made against the appellants in Suit 17. Specifically, the amendments made the following allegations:

(a) First, Mr Sim, EQ Capital and OSIM conspired and combined together wrongfully with the predominant intention of injuring the appellants and/or with the intention of causing loss to them by unlawful means, and/or conspired and combined together to abuse the civil process.

(b) Second, Mr Sim commenced or caused EQ Capital to commence Suit 17 in bad faith and for the collateral and/or improper purpose of: (i) unjustly enriching himself; (ii) putting improper pressure on Mr and Mrs Murjani and causing them annoyance by pursuing Suit 17 against them personally despite their not being shareholders of Wellness and therefore not proper parties to a minority oppression action; and (iii) putting improper pressure on the appellants to compel them to agree to sell Sunbreeze's shares in Wellness and/or Wellness' shares in TWG to EQ Capital and/or Mr Sim at an undervalue.

(c) Third, Mr Sim conspired and combined wrongfully with OSIM with the predominant intention of injuring EQ Capital and/or causing loss to it by unlawful means, and/or caused EQ Capital loss by lawful

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means. Mr Sim is therefore liable to EQ Capital for the same damage as the appellants, thereby entitling them to a contribution or an indemnity from him under ss 15 and 16 of the CLA.

22 The amendments also included a prayer for damages to be assessed "for lawful or unlawful means conspiracy and for the tort of abuse of process" [underlining in original omitted]. These damages included the appellants' legal costs in Suit 17, distress and hurt to Mr and Mrs Murjani's feelings, as well as reputational loss to Mr and Mrs Murjani in having to defend proceedings brought against them personally.

23 The appellants submitted that we had the jurisdiction to hear SUM 31 pursuant to s 29A(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), which provides that the Court of Appeal shall, "[f]or the purposes of and incidental to … the hearing and determination of any appeal", have "all the authority and jurisdiction of the [High Court]". They also relied on s 37(2) of the SCJA and O 57 r 13 of the Rules of Court, which provide that the Court of Appeal has, "[i]n relation to" appeals, "all the powers and duties, as to amendment or otherwise, of the High Court". Mr Sim, on the other hand, submitted that we had no jurisdiction to hear SUM 31 because it was not "incidental" to the present appeal within the meaning of s 29A(3) of the SCJA, and that in any event, we ought not to hear this summons because its filing constituted an abuse of process.

24 The Court of Appeal's general power to hear and allow an application for leave to amend pleadings in relation to an appeal before it is not in doubt. Order 20 r 5(1) of the Rules of Court states that "the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading". This "gives the court a wide discretion to allow pleadings to be

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amended at any stage of the proceedings on such terms as may be just", including before a trial, during a trial, after judgment is delivered or on appeal (see *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [110]–[112]). But whether the court *can be persuaded* to exercise that discretion will depend on the facts of the case. The critical question in particular is whether it is "just to grant such leave, having regard to all the circumstances of the case", and this extends to considering (among other factors) whether the amendment would cause the other party prejudice which cannot be compensated in costs and whether the party applying for leave to amend is, in truth, seeking a second bite of the cherry (see *Review Publishing* at [113]).

25 In the present case, we did not think it was appropriate to allow SUM 31 for the following reasons.

26 First, SUM 31 was an application that could and should have been made before the Judge at first instance. Section 35 of the SCJA and O 57 r 16(4) of the Rules of Court state that where an application may be made to either the High Court or the Court of Appeal, it shall be made in the first instance to the High Court, save where "special circumstances" make it "impossible or impracticable" to do so. The appellants did not suggest that there were any such circumstances in the present case; indeed, they offered no explanation at all for their failure to apply to the Judge for leave to amend their TPSOC. Even after the Judge decided to strike out the TPSOC, the appellants could have applied to make further arguments pursuant to s 28B of the SCJA, and in particular, they could have advanced the argument that the TPSOC ought not to be struck out because it could be cured by amendment. But they did not do so, and did not point us to any special circumstances that might have justified their failure to do so.

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27 Second, the amendments sought to be made in SUM 31 were substantial and, if allowed, would have put the third party claims against Mr Sim on a wholly different footing. The amendments went beyond merely clarifying or specifying in more precise terms matters which had already been pleaded in the TPSOC. Rather, they sought to introduce two new causes of action against Mr Sim. If these amendments had been allowed, it would have meant that in determining the merits of the appellants' appeal against the Judge's striking out order, we would have been deprived of the Judge's assessment of whether the amended TPSOC was susceptible to the same criticism of redundancy as the original TPSOC. This was undesirable because the Judge's finding that the original TPSOC disclosed no reasonable cause of action constituted the whole of the decision appealed against. It followed that any decision on our part to allow the amendments would result in our having to decide this appeal based on an entirely different set of arguments from those canvassed before the Judge. In other words, we would have had to decide *not only* SUM 31, *but also material aspects of the striking out application itself* (the very subject matter of the present appeal) as a first instance court in substance. This would have been at odds with the exercise of appellate jurisdiction. As Lord Birkenhead LC stated in *North Staffordshire Railway Company v Edge* [1920] AC 254 at 263–264 in relation to a new argument raised on appeal which had not been set out in the pleadings (cited by this court in *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 at [32], *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*") at [48] and *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [36]):

> … The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. *The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are*

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> *increased and strengthened by the opinions of learned judges who have considered these matters below*. To acquiesce in such an attempt as the appellants have made in this case [*ie*, to raise an argument not put forward in their pleadings] is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below. … [emphasis added]

28 The considerations underpinning an appellate court's discretion to grant leave to amend pleadings on appeal are similar in nature to those articulated in the passage above in respect of an appellate court's discretion to allow a new point to be raised on appeal (see *Susilawati* at [59]). Had we allowed SUM 31, we would have had to assume the position of a first instance court in deciding whether the amended TPSOC disclosed any reasonable cause of action. This would have been inimical to the division of powers and competencies between original and appellate courts. It would also have encouraged the poor use of judicial resources by allowing the appellants to drip-feed their third party claims, putting forward their claims first on one basis before the High Court, and then, that basis having proved hopeless, on a different basis on appeal.

29 In support of their application in SUM 31, the appellants submitted that where a statement of claim "discloses no cause of action because some material averment has been omitted, the court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend …, unless the court is satisfied that no amendment will cure the defect" (see *Singapore Civil Procedure 2018* vol I (Foo Chee Hock editor-in-chief) (Sweet & Maxwell, 2018) ("*Singapore Civil Procedure*") at para 18/19/2). They also submitted that amendments ought generally to be allowed if this would enable the real question and/or issue in controversy between the parties to be determined (see *Review Publishing* at [113], *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ("*Wright Norman*") at [6] and *Susilawati* at [57]). We do not disagree with these well-established principles on the

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amendment of pleadings. However, these principles relate to the grant of leave to amend pleadings generally. Both *Review Publishing* and *Wright Norman* concerned appeals against a *lower court's* decision on an amendment application made to the lower court in the first instance. They were not decided in the context of an application made to the Court of Appeal *in the first instance* for leave to amend pleadings which had been struck out in the court below, and so did not engage the concerns that we have highlighted at [26]–[28] above. *Susilawati* did involve an application for leave to amend pleadings on appeal, but leave was *refused* in that case, albeit on a different ground, namely, that the proposed amendments would cause the respondent severe prejudice which could not be compensated in costs (at [60]). The fact remains, however, that it does not support the appellants' case. Although we have on previous occasions granted leave for pleadings to be amended on appeal despite the amendment application having been made to this court in the first instance, those cases are distinguishable. In *Soon Peng Yam and another (trustees of the Chinese Swimming Club) v Maimon bte Ahmad* [1995] 1 SLR(R) 279 (cited in *Review Publishing* at [112(c)]), for instance, the amendment was allowed because it did not change the substance of the respondent's case or the basis on which the case had proceeded before the lower court, and therefore would not have occasioned any injustice (at [25]). By contrast, in *Asia Business Forum Pte Ltd v Long Ai Sin and another* [2004] 2 SLR(R) 173 (cited in *Review Publishing* at [112(c)]), the amendments were disallowed because (at [16]):

> … [W]ith the proposed amendments, while the nature of the claim remained substantially the same, the premises upon which the claim was based would be altered. … If we had allowed the amendments, what would be before the Court of Appeal would not be the same as what was before the trial judge. The appeal court would not be deciding whether the trial judge was correct because the premises would have changed. … Thus, the grounds of decision of the judge would become immaterial and this court would be deprived of the benefits of

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> the opinion of the court below. We would have had to examine the claim almost from scratch.

30 The same is true here, in that because SUM 31 was brought before us in the first instance, we did not have the benefit of the Judge's opinion on either its merits or the merits of the amended TPSOC. Given our decision to dismiss SUM 31 in these circumstances, we do not consider it appropriate to evaluate or otherwise comment on the merits of this application. We therefore say nothing about whether the amendments proposed by the appellants would have been effective to cure any redundancy in the TPSOC and/or would have enabled the real question between the parties to be determined, save to the extent that certain aspects of our reasoning on the matters which we deal with in this judgment might inevitably have an impact on the merits of any fresh attempt by the appellants to cure any such redundancy.

Our decision on the appeal

The redundancy of the third party proceedings

31 Having explained our reasons for dismissing SUM 31, we now consider the appellants' appeal against the Judge's decision to strike out their third party action purely on the basis of the TPSOC as it stood before the Judge.

32 A third party claim will not be allowed if it is redundant (see *Singapore Civil Procedure* at para 16/6/1). The test for redundancy is whether there is any conceivable scenario, not so fanciful or inherently improbable that it should not be taken into account, in which the defendants might fail in their defence in the main action and yet, on the same facts, succeed in their third party claim (see *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673 at [49] and [53]). The appellants did not dispute the Judge's holding (at [62] of the GD) that a third party claim which is redundant may properly be

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struck out pursuant to O 18 r 19(1)(*a*) of the Rules of Court. We agree. If a third party claim is redundant, there is no possibility of it being allowed: either the facts pleaded in support of the third party claim will vindicate the defence such that the third party claim does not arise, or the rejection of the defence will necessarily entail the failure of the third party claim. A redundant third party claim is therefore *not* a "cause of action which has some chance of success when only the allegations in the pleading are considered" (see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]), and does not disclose a reasonable cause of action for the purposes of O 18 r 19(1)(*a*). In line with these authorities, in *Nganthavee Teriya (alias Gan Hui Poo) v Ang Yee Lim Lawrence and others* [2003] 2 SLR(R) 361, the High Court upheld the striking out of the third party proceedings for disclosing no reasonable cause of action on the basis, among others, that the proposed amendments to the third party statement of claim would be redundant (at [23]–[24]).

33 Turning to the facts before us, we agree with the Judge that there is no reasonably conceivable situation in which the appellants might fail in their defence *and yet* have a viable basis for seeking relief against Mr Sim (see the GD at [56]–[57]). The appellants' defence and their third party claims both rest on the same basis: namely, that Mr Sim (through OSIM) both brought about and benefited from the very matters which he (through EQ Capital) now complains of in Suit 17. The *defence* alleges on this basis that it would be an abuse of the court's process in these circumstances for Mr Sim (through EQ Capital) to now bring this suit, having (through OSIM) procured and benefited from the very matters which are said to constitute minority oppression. At the same time, the allegation that Mr Sim (through OSIM) brought about and benefited from the matters complained of in Suit 17 is also the basis for the appellants' *third party claims* against Mr Sim. It is alleged that given that he caused and/or benefited

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from these matters, his commencement of Suit 17 (through EQ Capital) is in bad faith and/or unconscionable and/or an abuse of the court's process. There is also the fact, as the Judge noted, that the TPSOC did not plead the *legal basis* for an indemnity from Mr Sim (see the GD at [64]–[65]). But, leaving that aside, even if we take the appellants' case at its highest and accept that the facts pleaded in their TPSOC would entitle them to an indemnity or contribution from Mr Sim, those same facts would also vindicate their defence, thereby obviating the need for them to claim any contribution or indemnity from Mr Sim. The fact that the TPSOC repeats many sections of the defence (see [11]–[15] above, as well as the GD at [39]–[40], [42]–[43], [45]–[46], [48]–[49] and [54]–[55]) reflects just how interconnected they are.

34 When we asked counsel for the appellants, Mr Alvin Yeo SC ("Mr Yeo"), to identify the circumstances in which the appellants' third party claims might succeed *without* vindicating their defence, he advanced two possible situations:

> (a) The first would arise if the trial court were to find that Mr Sim was the controlling mind and will of EQ Capital, but the latter nonetheless retained its separate legal personality, such that the corporate veil is not pierced. In that situation, Mr Yeo submitted, the fact that Mr Sim had procured (through OSIM) the matters complained of by EQ Capital and/or had benefited (likewise through OSIM) from the dilution of Wellness' shareholding in TWG might not necessarily afford the appellants a defence to EQ Capital's claims as a matter of law. However, by virtue of Mr Sim's procurement of EQ Capital (as its controlling mind and will) to commence Suit 17, the appellants would nonetheless be entitled to a contribution or an indemnity from Mr Sim pursuant to: (a) ss 15 and 16 of the CLA; (b) the doctrine of abuse of

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process; and/or (c) the principles which the appellants say were enunciated in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 ("*Raffles Town Club*").

(b) The second situation would arise if the trial court were to find that Mr Sim was *neither* the controlling mind and will of, *nor* the same legal person as, EQ Capital. Mr Yeo submitted that even in that scenario, the mere fact that Mr Sim had benefited from the dilution of Wellness' shareholding in TWG and stood to benefit from a successful prosecution of Suit 17 would entitle the appellants to an indemnity or contribution from him on the grounds of unjust enrichment.

35 We are not persuaded that either of these situations would afford the appellants any basis of recourse against Mr Sim. We will explain our reasons for so holding by addressing in turn each of the four possible bases for seeking an indemnity or contribution from Mr Sim identified in these situations, namely: (a) the doctrine of abuse of process; (b) the doctrine of unjust enrichment; (c) the principles said to have been articulated in *Raffles Town Club*; and (d) ss 15 and 16 of the CLA.

36 Before we do so, however, we would highlight that a defendant should not have recourse to third party proceedings where his claim can be made by way of a counterclaim (see O 16 r 8(2) of the Rules of Court and *Singapore Civil Procedure* at para 16/0/2). The appellants claim that Mr Sim, as the *alter ego* and/or controlling mind and will of EQ Capital, is liable to them on the bases of abuse of process, unjust enrichment and the principles said to have been enunciated in *Raffles Town Club* for having procured EQ Capital to commence Suit 17 against them. As a procedural matter, it seems to us that the proper course of action for the appellants to take would have been to pursue these

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claims by way of a counterclaim, with Mr Sim joined as a defendant to the counterclaim. That said, for the reasons which we set out below, we are satisfied that none of these three bases of liability could give rise to any liability to the appellants on Mr Sim's part.

Abuse of process

37 We first address the doctrine of abuse of process, which the appellants say entitles them to claim an indemnity or contribution from Mr Sim. It should first be noted that the appellants' TPSOC does *not* plead the tort of abuse of process as a cause of action. Although the TPSOC contains various references to "abuse of process", these contemplate "abuse of process" in the sense in which it usually arises in civil proceedings, that is, in the sense of commencing proceedings "for the predominant purpose of achieving something other than what the legal process was designed to achieve" (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50 ("*Lee Tat*") at [136]). Proof that a claim constitutes an abuse of process in this sense has long been recognised as a ground for striking out and for refusing the grant of equitable relief. Hence, if the facts pleaded by the appellants in their defence in Suit 17 are made out, it may be that this would defeat EQ Capital's claims against them. But the question is whether, if the appellants *fail* to resist EQ Capital's claims, they can nonetheless raise the doctrine of abuse of process as a basis for establishing liability on the part of Mr Sim. The problem which the appellants run into here is that, as we have just noted, the TPSOC does not allege *tortious liability* on Mr Sim's part for committing an abuse of the court's process and does not plead any damage arising from any such abuse. This presumably explains why the appellants felt the need to bring SUM 31, which, if allowed, would have seen them amend the TPSOC to include the allegation that Mr Sim is liable to them for the tort of abuse of process and a prayer for

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damages to be assessed in respect of that tort (see [21]–[22] above). Given that we dismissed SUM 31, the question of Mr Sim's possible liability in tort for abuse of process is not before us. In any case, in view of our recent decision in *Lee Tat* at [161] not to recognise abuse of process as a tort in Singapore, Mr Sim cannot be tortiously liable to the appellants for having commenced Suit 17 (through EQ Capital) for a collateral purpose, even assuming the factual basis for such a finding were made out.

38 Returning to the allegation of abuse of process in the sense in which it was originally pleaded in the appellants' TPSOC, we do not see how the appellants can succeed on this basis. First, if abuse of process is not a basis on which a claim for relief can be mounted against Mr Sim, it cannot support a claim for an indemnity or contribution from him either. Second, and in any case, if the allegation of abuse of process is made out, it would constitute a defence to EQ Capital's claims against the appellants, and there would then be no basis for the appellants to pursue their third party claims against Mr Sim. Mr Yeo suggested in this context that if the court were to find that Mr Sim was the controlling mind and will of EQ Capital *but not the same legal person*, then the appellants' defence to EQ Capital's claims might fail, but their third party claims against Mr Sim might nonetheless succeed (see [34(a)] above). We disagree. We do not see how the mere fact of EQ Capital's separate legal personality can preserve the viability of the appellants' third party claims against Mr Sim, but not their defence to EQ Capital's claims. Either EQ Capital's commencement of Suit 17 is so clearly attributable to Mr Sim and infected by his collateral purpose that it constitutes an abuse of process, or it is not. In deciding this question, the trial court will no doubt have regard to many of the factors that also have a bearing on whether the corporate veil should be pierced and whether Mr Sim was EQ Capital's controlling mind and will. But a finding of separate legal personality does not enable the trial court to somehow

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find an abuse of process in relation to Mr Sim (such that the appellants' third party claims succeed), but not in relation to EQ Capital (such that the appellants' defence fails). Suit 17 either is or is not an abuse of process. If it is, EQ Capital's claims against the appellants ought to be dismissed, and there would then be no occasion or need for the appellants to seek any contribution or indemnity from Mr Sim. But if Suit 17 is not an abuse of process, then EQ Capital's claims against the appellants cannot be dismissed on this basis; nor would Mr Sim be liable to the appellants on the basis of their pleaded case on abuse of process for any involvement on his part in EQ Capital's decision to commence Suit 17.

39 The doctrine of abuse of process is even less likely to apply in Mr Yeo's second scenario (see [34(b)] above), which involves the court finding that Mr Sim was neither the controlling mind and will of, nor the same legal person as, EQ Capital. If Mr Sim did not control EQ Capital, then still less would its commencement of Suit 17 be attributable to Mr Sim, and there would therefore be no basis for the appellants to allege abuse of process on Mr Sim's part to begin with.

Unjust enrichment

40 We turn now to the appellants' submission that Mr Sim would be liable for an indemnity or contribution on the basis of unjust enrichment. The problem with the appellants' pleaded case in this regard is that neither their defence nor their TPSOC pleads unjust enrichment as a cause of action. Rather, what the appellants have pleaded is that Suit 17 is an abuse of process *because* it would, if allowed, unjustly enrich Mr Sim. The words "unjustly enrich" are included only to support the allegation of abuse of process. This can be seen from para 66 of the TPSOC, which states:

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> … [Mr Sim] has acted in bad faith and/or in an unconscionable manner and/or in an abuse of this Court's process in commencing … and/or causing and/or directing and/or assisting [EQ Capital] to commence the present action with a view of unjustly enriching itself. …

41 Similarly, the Appellants' Case states at para 54:

> In the circumstances, the [appellants] are entitled to claim against [Mr Sim] for abusing the court process by acting unconscionably and in bad faith in causing EQ [Capital] to commence this minority oppression action … for the collateral and/or improper purpose of unjustly enriching himself, and to put improper pressure on the [appellants] … to sell Sunbreeze's shares in Wellness and Wellness' shares in [TWG] at a price lower than their value, rather than to genuinely seek the reliefs claimed in the [statement of claim].

42 It is evident from these passages that the appellants do not claim that Mr Sim should be liable in unjust enrichment in respect of the benefits that he received from past transactions. It is not, for example, pleaded that it was unjust for Mr Sim to benefit through OSIM from the Rights Issue and the Profit Swing Transaction. Rather, the appellants claim that Suit 17 is an abuse of process *because* it was commenced by Mr Sim through EQ Capital for an improper purpose (namely, to enrich himself unjustly). The true nature of the appellants' claim is that it would be unjust for Mr Sim, having profited from the matters which EQ Capital complains of in Suit 17, to *further* profit from a successful prosecution of the suit; and on this basis, it is contended that Suit 17 constitutes an abuse of process to which Mr Sim is party by reason of his involvement in controlling and directing the affairs of EQ Capital. No cause of action in unjust enrichment is in fact mounted against Mr Sim in the appellants' TPSOC. We therefore do not accept that Mr Sim could be liable to the appellants for any contribution or indemnity on the basis of unjust enrichment in either of the two scenarios outlined at [34] above.

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The decision in Raffles Town Club

43 The appellants submit that even if Mr Sim is not the same legal person as EQ Capital, they would nonetheless be entitled to a contribution or an indemnity from him on the authority of *Raffles Town Club*. However, their formulation of the holding in *Raffles Town Club* is not entirely clear. The Appellants' Case and the appellants' written submissions for this appeal cite *Raffles Town Club* for the proposition that a party may seek an indemnity or contribution from another party who has acted unconscionably and/or in bad faith in commencing proceedings. At the hearing before us, however, Mr Yeo advanced the different proposition that an indemnity could be ordered against the directors of a company where they used the company to commence an action which was really for their own benefit. In the context of this case, the appellants say that Mr Sim is using EQ Capital to bring claims against them in relation to matters which he himself orchestrated and benefited from, and the unconscionability of his doing so entitles them to an indemnity or contribution from him.

44 In our judgment, a close study of the decision in *Raffles Town Club* will reveal that it does not stand for the propositions advanced by the appellants. We first summarise the facts and the findings in that case before explaining why we reject the appellants' interpretation of it.

45 In *Raffles Town Club*, Raffles Town Club Pte Ltd ("RTC") sued four of its former directors (collectively, "the Former Directors"), who were also shareholders of RTC at all material times, for, among other things, breaching their directors' duties by: (a) accepting a large number of membership applications to the proprietary social club owned and operated by RTC, thereby causing RTC to be liable to the club's members for failing to provide a

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"premier" and "exclusive" club; (b) causing RTC to pay excessive management fees to another company; (c) causing RTC to pay them (the Former Directors) excessive directors' fees, expenses and consultancy/incentive fees; and (d) causing RTC to loan $33m to a subsidiary, which sum the Former Directors applied to earn interest for themselves. Three of the Former Directors ("PL", "LA" and "WT") commenced third party proceedings against RTC's current directors ("the Current Directors"), who had acquired shares in RTC pursuant to a sale and purchase agreement entered into with LA and WT ("the Share Agreement"). PL, LA and WT sought, among other things, an indemnity and/or contribution from the Current Directors. The High Court dismissed RTC's claims against the Former Directors as well as the Former Directors' third party claims against the Current Directors (see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163). We dismissed RTC's appeal, but allowed the Former Directors' third party claims in part in so far as they pertained to the costs of the proceedings, as we will explain below.

46 In their third party claims against the Current Directors, LA and WT argued that the court should lift RTC's corporate veil and treat RTC's claims against them as the personal claims of the Current Directors. They contended that the Current Directors were using RTC's separate legal personality to advance claims which, in substance, were for the Current Directors' own benefit. These were claims that the Current Directors could not have brought as purchasers of shares in RTC pursuant to the Share Agreement, under which the Current Directors undertook not to commence any action or proceedings against LA and WT in relation to RTC and/or the shares which were the subject of the agreement (see *Raffles Town Club* at [49]). The Current Directors had also executed a deed pursuant to which they irrevocably released and discharged LA and WT from (among other things) their entire obligations and liabilities

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howsoever arising from, related or connected to or under the Share Agreement (see *Raffles Town Club* at [50]). To allow the Current Directors to use RTC as a vehicle to recover damages or losses said to have been suffered by RTC as a result of the Former Directors' alleged breaches of duty would, so LA and WT argued, unjustly enrich the Current Directors. We accepted this argument. In addition to this, we observed that the Current Directors had acquired their shares in RTC at prices which took into account the matters complained of by RTC. We thus held at [57]:

> The evidence shows that [the Current Directors] agreed to acquire the RTC shares at prices which took into account the net asset value of RTC, and that such value had been arrived at after discounting the management fees, consultancy fees, directors' fees and the [p]rofits the Former Directors obtained in relation to the [l]oan. As purchasers of RTC shares from the Former Directors, they therefore have no claim whatsoever arising from the sale of those shares. However, if they were allowed to use RTC to claim damages against the Former Directors, and if RTC were to succeed in its claim, there is no doubt that [the Current Directors] would benefit personally as shareholders of RTC from any damages awarded to RTC. *This would be an unfair and unjust outcome in the circumstances of this case.* For this reason, we do not see any reason why we should allow the separate legal personality of RTC to assist [the Current Directors] in such a manner as to unjustly enrich them. Based on the evidence before the Judge, it is evident to us that [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. [emphasis added]

47 We further added at [59]:

> In our view, [the Current Directors] clearly acted unconscionably and in bad faith in causing RTC to commence [the suit] against the Former Directors for no reason other than to increase the assets of RTC directly and, correspondingly, the value of their shareholdings in RTC. In our view, RTC's action is in substance [the Current Directors'] action as their economic interests are entirely aligned. If RTC were to succeed in its action, [the Current Directors] would effectively be able (with appropriate corporate actions) to retrieve the judgment proceeds for themselves.

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48 We therefore held that RTC's suit was "in substance an action by [the Current Directors] which ha[d] been disguised as an action by RTC" (at [60]). On the facts of the case, the Current Directors were indistinguishable from RTC, and we held on this basis that RTC should not be permitted to mount its action against LA and WT (at [59]–[60]).

49 Unlike LA's and WT's third party claims, PL's third party claim was not premised on the Share Agreement or the deed mentioned at [46] above. PL contended that RTC's suit essentially consisted of personal claims by the Current Directors, and that they had engaged in lawful and/or unlawful means conspiracy to injure him by causing RTC to commence the suit against him. PL sought, among other things, an indemnity or contribution from the Current Directors in the event that RTC succeeded in its claims against him, and damages for the Current Directors' conduct in causing and/or conspiring with RTC to commence the suit to injure him. We accepted PL's (as well as LA's and WT's) case on conspiracy. However, because RTC's claims against all the Former Directors were dismissed, PL suffered no loss other than the costs of defending the suit. Accordingly, we did not order damages to be assessed, but instead held that PL's, LA's and WT's costs of defending the suit were to be borne personally by the Current Directors on an indemnity basis (see *Raffles Town Club* at [71]).

50 The first point to note about *Raffles Town Club* is that no order for any contribution or indemnity was made against the third parties (the Current Directors). No question of any contribution or indemnity could arise because the claims against the defendants (the Former Directors) were dismissed in their entirety. The only relief ordered in respect of the third party claims was for the third parties to bear LA's, WT's and PL's costs of defending the suit on an indemnity basis because those costs constituted the only damage which the latter

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had suffered as a result of the tort of unlawful means conspiracy committed against them by the third parties. Importantly, as we note below, that order was made as a consequence of the finding of conspiracy, rather than by way of an order for a contribution or an indemnity. In the circumstances, no proposition about the legal basis for claiming a contribution or an indemnity from a third party can be extrapolated from the facts and the decision in *Raffles Town Club*.

51 The second point to note about *Raffles Town Club* is that it did not treat unconscionability or unjust enrichment as the legal basis of any liability on the part of the third parties. The third parties were held to be liable to the defendants only for the tort of conspiracy. This is clear from *Raffles Town Club* at [68], [71] and [72], particularly the following passages:

> 71 … As we have found that the predominant purpose of [the Current Directors] in causing RTC to commence [the suit] was to cause financial harm to the Former Directors by way of an actionable conspiracy in tort, we accept PL's contention and allow this aspect of [his appeal]. However, as we have decided to dismiss RTC's appeal …, PL has suffered no loss other than the costs of defending [the suit] against RTC, and accordingly, we will not order damages to be assessed, but that PL's (and for that matter, LA's and WT's as well, in so far as they have succeeded in their contention of conspiracy under [their appeal] (see [61]–[68] above)) costs of defending [the suit] … be personally borne by [the Current Directors] on an indemnity basis.
>
> …
>
> 72 For the reasons stated, we make the following orders:
>
> …
>
> (b) [LA's and WT's appeal] is partially allowed in so far as LA's and WT's claim of conspiracy against [the Current Directors] is concerned, with costs and no order for assessment of damages;
>
> (c) [PL's appeal] is partially allowed in so far as PL's claim of conspiracy against [the Current Directors] is concerned, with costs and no order for assessment of damages;

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> (d) PL's, LA's and WT's costs [of] defending [the suit] … be personally borne by [the Current Directors] on an indemnity basis …
>
> …

52 The decision of this court to order costs against the Current Directors on an indemnity basis as a result of the finding of conspiracy should not be confused with the court's reasoning on unconscionability and unjust enrichment. Unjust enrichment was not advanced as a cause of action. Rather, the fact that the Current Directors had acted unconscionably and in bad faith in causing RTC to commence the suit against the Former Directors, and would be unjustly enriched if the suit succeeded, was a consideration that the court took into account in deciding to *dismiss RTC's claims*. This is clear from *Raffles Town Club* at [59]–[60]:

> 59 In our view, [the Current Directors] clearly acted unconscionably and in bad faith in causing RTC to commence [the suit] against the Former Directors for no reason other than to increase the assets of RTC directly and, correspondingly, the value of their shareholdings in RTC. In our view, RTC's action is in substance [the Current Directors'] action … If RTC were to succeed in its action, [the Current Directors] would effectively be able (with appropriate corporate actions) to retrieve the judgment proceeds for themselves.
>
> 60 For the above reasons, we find that the action below … is in substance an action by [the Current Directors] which has been disguised as an action by RTC. On the facts of this case, [the Current Directors] and RTC are indistinguishable, and *therefore RTC should not be permitted to mount such an action against [the Former Directors].*
>
> [emphasis added]

53 The portion which we have emphasised in the extract above shows that unconscionability and bad faith operated as objections to *RTC's claims in the main action*, rather than as grounds for ordering a contribution or an indemnity in *the third party action*. *Raffles Town Club* therefore does not stand for the proposition that where the directors of a company act unconscionably and/or in

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bad faith in causing the company to commence an action for the purposes of unjustly enriching themselves, an indemnity or contribution may be ordered against the directors as third parties on that basis alone. The most that can be said is that it might be unjust to allow *the plaintiff company's* claims in such circumstances. Even then, in *Raffles Town Club*, RTC's claims were dismissed primarily for other reasons (see [17]–[18], [21]–[23], [27]–[29] and [40]–[46]), and this court's remarks about the injustice of allowing RTC's action to succeed were contextualised to the unique facts and circumstances of that case (see [57] and [60]). We therefore do not think that *Raffles Town Club* was intended to establish a new legal basis of liability where the directors of a company act unconscionably and/or in bad faith in causing the company to commence legal proceedings; still less can this be the case given our recent decision in *Lee Tat* not to recognise abuse of process as a tort in Singapore (see [37] above).

Sections 15 and 16 of the CLA

54 Given our finding that Mr Sim is not liable to the appellants on any of the foregoing bases discussed at [37]–[53] above, we turn to consider whether the appellants may nevertheless seek a contribution or an indemnity from him pursuant to ss 15 and 16 of the CLA. Mr Yeo described s 15 of the CLA as creating a statutory right of contribution. While that is true, s 15 creates a statutory right of contribution *where the defendant and the third party are both liable to some other person in respect of the same damage*. Section 15 of the CLA does not remove the need to identify some legal basis or cause of action in respect of which both the defendant and the third party are liable to the same person for the same damage. *If* and only if this can be shown may the defendant then seek a contribution from the third party notwithstanding that the third party is not liable to the defendant for any civil wrong.

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55 As we noted in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Sakae*") at [214], although the person to whom both the defendant and the third party are liable ("the relevant person") will usually be the plaintiff or the claimant in the main action, this need not necessarily be so. In the context of a minority oppression action under s 216 of the Companies Act, the defendants might not be able to avail themselves of s 15(1) of the CLA if they have to show liability to the plaintiff shareholder. In *Sakae*, we therefore construed the relevant person as extending to the company where the plaintiff shareholder seeks remedies for the benefit of the company (see [216]). The same applies in this case because, as can be seen from the reliefs sought by EQ Capital as summarised at [9] above, these reliefs are all sought for the benefit of Wellness. The three-step test applicable for the purposes of s 15(1) on the present facts would therefore be as follows:

(a) What damage was suffered by Wellness as a result of the appellants' actions?

(b) Are the appellants liable to Wellness in respect of that damage?

(c) Is Mr Sim also liable to Wellness in respect of some or all of that very same damage?

56 As regards this last requirement, s 15 of the CLA does not require identity in the *legal basis* of the defendant's and the third party's liability to compensate the relevant person (see *Sakae* at [220]). It would, for example, suffice if the defendant is liable to the relevant person in tort while the third party is liable to that person in contract. Notwithstanding that, we are not satisfied in this case that Mr Sim could be liable to Wellness "in respect of the same damage" as the appellants, whether on the basis of abuse of process or unjust enrichment.

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57 In the first place, we have great difficulty seeing how Mr Sim could be liable to Wellness for the same damage as the appellants given the findings made in Suit 187 and upheld in CA 64. As we noted above, EQ Capital's statement of claim in Suit 17 alleges that the appellants caused Wellness three kinds of damage: (a) the dilution of Wellness' shareholding in TWG as a result of the Profit Swing Transaction and the Rights Issue; (b) the costs and disbursements which Wellness was ordered to pay in Suit 187 and CA 64; and (c) the exposure of Wellness to liabilities of $3.1m as a result of the loans that it obtained from Sunbreeze in order to pay the legal fees which it incurred in Suit 187 and CA 64.

58 To recapitulate, Suit 187 was brought by Wellness and Mr Murjani against seven defendants, including Mr Sim and OSIM, for minority oppression, conspiracy to injure and breach of contract. They alleged, among other things, that the defendants had acted wrongfully to enable OSIM to take control of TWG through: (a) OSIM wrongfully exercising its rights under the Profit Swing Clause to obtain more shares in TWG; and (b) Mr Sim proposing and OSIM and Paris approving the Rights Issue, which was undertaken not for commercial reasons but with the intention of diluting Wellness' shareholding in TWG.

59 The High Court found that OSIM was entitled to invoke the Profit Swing Clause (see *Wellness v OSIM* at [107]). It also found that there was no commercial unfairness in respect of the Rights Issue, which had been undertaken for commercial reasons, and that any intent to dilute Wellness' shareholding in TWG was not a dominant purpose of the Rights Issue (see *Wellness v OSIM* at [146], [149], [169], [187], [191], [195] and [200]). These findings were not disturbed in CA 64. Given that there was nothing improper about OSIM's invocation of the Profit Swing Clause, or Mr Sim's proposal and

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OSIM's and Paris' approval of the Rights Issue, we struggle to see how Mr Sim could be liable to Wellness in respect of the dilution of its shareholding in TWG as a result of those two transactions. As regards the second and third types of damage pleaded by EQ Capital in Suit 17 (see [57] above), it is inconceivable that Mr Sim could be liable to Wellness for the very costs and disbursements which Wellness was ordered *to pay him* in Suit 187 and CA 64, or for the $3.1m worth of liabilities which Wellness incurred in order to pay its legal fees arising from those two actions.

60 The appellants suggest that Mr Sim may be liable to Wellness on two grounds: abuse of process and unjust enrichment. We do not think that either of these can succeed. Where abuse of process is concerned, we have already pointed out above that it is not a recognised tort in Singapore. Even if it were, and even if Mr Sim is indeed found to have abused the court's process in causing EQ Capital to commence Suit 17, Mr Sim could only be liable to the appellants, who are the defendants in that suit, but not to EQ Capital, which is the plaintiff, or to Wellness, which is the beneficiary of a successful prosecution of that suit. (We reiterate here that although Wellness is also a defendant in Suit 17, it is a nominal party and EQ Capital has not made any claim against it: see [2] above.) And even if Mr Sim could hypothetically be liable to Wellness for acting in abuse of the court's process in procuring the commencement of Suit 17 by EQ Capital, he would be liable not for the types of damage said to have been suffered by Wellness, but for the *wholly distinct* damage of (for example) causing Wellness to incur fresh legal fees in defending the suit. Section 15 of the CLA is therefore inapplicable because there is no reasonably conceivable scenario in which Mr Sim could be liable to Wellness on the basis of abuse of process for the same damage as the appellants.

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61 Similarly, even if unjust enrichment had been pleaded as a cause of action in the TPSOC, the nature of the damage caused to Wellness would be different from the three types of damage which the appellants are said to be liable to Wellness for. The appellants allege that it would be unjust for Mr Sim to benefit from Suit 17 (through EQ Capital) after having profited (through OSIM) from the matters which EQ Capital complains of in the suit. The "enrichment" here refers to the gains that Mr Sim would derive (through EQ Capital) from a successful prosecution of Suit 17. It does not refer to his *past* gains from damage suffered by Wellness, particularly the losses caused to Wellness as a result of the dilution of its shareholding in TWG and/or the legal fees and costs that it incurred as a result of Suit 187 and CA 64, which are the types of damage that EQ Capital seeks to hold the appellants liable for in Suit 17. It therefore cannot be said that Mr Sim would be liable to Wellness "in respect of *the same damage*" [emphasis added] as the appellants for the purposes of s 15(1) of the CLA. Moreover, Mr Sim would be enriched in the manner alleged by the appellants only if EQ Capital succeeds in Suit 17. However, a successful prosecution of this suit would in fact *benefit* Wellness – rather than cause it *damage* – in view of the reliefs prayed for in EQ Capital's statement of claim (see [9] above). The only possible damage that Mr Sim might conceivably be said to be liable to Wellness for in the event of a successful prosecution of Suit 17 would be the legal fees incurred by Wellness in defending the suit. But again, such damage would be *different* from the damage which the appellants are allegedly liable to Wellness for.

62 For these reasons, the TPSOC simply does not disclose any basis on which both Mr Sim and the appellants could be liable to Wellness in respect of *the same damage* for the purposes of s 15(1) of the CLA. The appellants therefore cannot rely on ss 15 and 16 of the CLA to claim any contribution or indemnity from Mr Sim.

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Conclusion

63 Since none of the four bases advanced by Mr Yeo in support of the appellants' third party claims could possibly lead to success in the third party proceedings without simultaneously vindicating the appellants' defence, thereby obviating the need for the appellants to claim any indemnity or contribution from Mr Sim, we agree with the Judge that the third party proceedings are redundant. It follows that there is no need for the issues which have to be determined as between EQ Capital and the appellants in the main action to be determined as between the appellants and Mr Sim (see the GD at [79]). We therefore affirm the Judge's decision to strike out the third party proceedings.

64 For these reasons, we dismiss both SUM 31 and the appeal. The appellants are to pay the respondent's costs, fixed in the aggregate sum of $35,000 inclusive of reasonable disbursements. We also make the usual consequential orders for the payment out of the security for costs.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

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Yeo Khirn Hai Alvin SC, Koh Swee Yen, Sim Mei Ling, Lin Chunlong and Jasmine Low (WongPartnership LLP) for the appellants in Civil Appeal No 105 of 2017 and the applicants in Summons No 31 of 2018;
Davinder Singh s/o Amar Singh SC, Lydia Ni Manchuo, Loh Yu Chin Deborah and Srruthi Ilankathir (Drew & Napier LLC) for the respondent in Civil Appeal No 105 of 2017 and the respondent in Summons No 31 of 2018.

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