IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 101

Suit No 233 of 2018
(Summons No 2030 of 2018)

Between

(1) 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

(1) Sunbreeze Group Investments Limited
(2) Manoj Mohan Murjani
(3) Kanchan Manoj Murjani

… Plaintiffs in Counterclaim

And

(1) EQ Capital Investments Ltd
(2) Ron Sim Chye Hock

… Defendants in Counterclaim

GROUNDS OF DECISION

[Civil Procedure] — [Striking out of counterclaim]

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v
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18 July 2018

22 April 2019

Chua Lee Ming J:

Introduction

1 The plaintiff, EQ Capital Investments Ltd ("EQ Capital"), brought this action for minority oppression pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") against the first defendant, Sunbreeze Group Investments Limited ("Sunbreeze"), the second defendant, Mr Manoj Mohan Murjani ("Manoj"), and the third defendant, Kanchan Manoj Murjani ("Kanchan"). The fourth defendant, The Wellness Group Pte Ltd ("Wellness"), is the company whose affairs are the subject of these proceedings.

2 Sunbreeze is the majority shareholder (80.62%) of Wellness. Manoj was the former chief executive officer and is a director and a shareholder of Sunbreeze. Kanchan is Manoj's wife and was formerly a director and shareholder of Sunbreeze. Both Manoj and Kanchan are also directors of

Wellness.

3 Sunbreeze, Manoj and Kanchan brought a counterclaim against EQ Capital and Mr Ron Sim Chye Hock ("Ron Sim"), for conspiracy and/or the tort of abuse of process. Ron Sim is the ultimate sole beneficial owner of EQ Capital.

4 On 18 July 2018, I granted the application by EQ Capital and Ron Sim in Summons No 2030 of 2018 and struck out the counterclaim. Sunbreeze, Manoj and Kanchan have appealed against my decision. In these grounds of decision, I will refer to Sunbreeze, Manoj and Kanchan, together, as the "3 Defendants".

Background

5 On 8 October 2010, EQ Capital signed a subscription agreement with Wellness and on 15 October 2010, EQ Capital acquired a 7.55% stake in Wellness for US$4.5m, pursuant to the subscription Agreement. Apart from Sunbreeze, the other shareholders of Wellness were, and are, Vickers Private Equity Fund VII LP ("Vickers Private Equity") (1.41%) and Vickers Venture Fund II LP ("Vickers Venture") (10.42%).

6 At the time when EQ Capital became a shareholder of Wellness, Wellness held 84.7% of a company called TWG Tea Company Pte Ltd ("TWG Tea") which was in the business of producing and selling fine luxury teas. The other shareholder of TWG Tea then was Paris Investment Pte Ltd ("Paris").

7 On 18 March 2011, OSIM International Ltd ("OSIM"), Wellness and Paris signed a Sale and Purchase Agreement ("the OSIM SPA") pursuant to

which OSIM bought a 35% stake in TWG Tea from Wellness and Paris. On the same day, Wellness, OSIM, Paris and TWG Tea signed a Shareholders' Agreement ("the SHA").

8 Clause 4.5 of the OSIM SPA ("the Profit Swing Clause") provided for the shareholding of Wellness and Paris to be diluted in favour of OSIM, or for the shareholding of OSIM to be diluted in favour of Wellness and Paris, depending on TWG Tea's audited net profit- before-tax ("PBT") for its financial year ending 31 March 2013 ("FY2013"). In brief, clause 4.5 was intended to operate as follows:

(a) for every S$1m that the PBT for FY2013 fell below S$17m, Wellness and Paris would together have to transfer 1% of TWG Tea shares to OSIM, up to a maximum of 10%, at a nominal price of S$1;

(b) conversely, for every S$1m that the PBT for FY2013 exceeded S$27m, OSIM would have to transfer 1% of TWG Tea shares to Wellness and Paris, up to a maximum of 10%, at a nominal price of S$1; and

(c) if the PBT for FY2013 fell between S$17m and S$27m, there would be no adjustment.

The Profit Swing Clause was based broadly on profit projections for TWG Tea that Manoj presented during negotiations with OSIM which led to the OSIM SPA.

9 As it turned out the Profit Swing Clause was triggered in OSIM's favour and OSIM acquired an additional combined total of 10% of TWG Tea shares

from Wellness and Paris for a nominal consideration of S$1 to each of them. As a result, OSIM held 45%, Wellness held 46.3% and Paris held 8.7% of the shares in TWG Tea.

10 In October 2013, OSIM purchased all the shares in Paris and became the sole shareholder of Paris. With this acquisition, OSIM took control over 53.7% of the shares in TWG Tea.

11 At an extraordinary general meeting held on 17 December 2013, the shareholders of TWG Tea approved a rights issue of up to 77,000 new shares in TWG Tea at S$325 per share to the existing shareholders in proportion to their shareholdings as at 25 November 2013 ("the Rights Issue"). Wellness did not accept the new shares allocated to it pursuant to the Right Issue. On 18 January 2014, OSIM and Paris together subscribed for the entire 77,000 shares in the Rights Issue. Thereafter, OSIM held 58.6%, Paris held 11.3% and Wellness held 30.1% of the shares in TWG Tea.

Suit No 187 of 2014

12 On 17 February 2014, Wellness and Manoj commenced action in Suit No 187 of 2014 ("S187/2014") against OSIM, Ron Sim and three other directors of TWG Tea. Wellness's claim was for minority oppression, conspiracy to injure and breach of contract. Manoj's claim was for conspiracy to injure and is not relevant to the present case.

13 S187/2014 was tried together with another action, Suit No 545 of 2014 ("S545/2014"). S545/2014 was a claim for defamation and was not relevant to the present case.

14 I heard the trial in S187/2014 and dismissed the claim in its entirety: see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729. Wellness' appeal against my decision was dismissed by the Court of Appeal on 25 October 2016.

Suit No 17 of 2017

15 On 10 January 2017, EQ Capital commenced a minority oppression action in Suit No 17 of 2017 ("S17/2017") against Sunbreeze, Manoj and Kanchan in relation to the conduct of the affairs of Wellness. EQ Capital's allegations included the following:

(a) Manoj and Kanchan caused Wellness not to convene any annual general meetings, annual audited accounts, prepare any annual audited accounts or lay such accounts before shareholders, send to EQ Capital any financial statements or auditors' reports of Wellness, and file any annual returns.

(b) Manoj exposed Wellness to a dilution of its asset (*ie*, its shareholding in TWG Tea) by using profit projections for TWG Tea in his presentation to OSIM although he knew these projections were unreliable. The Profit Swing Clause (which was eventually triggered in favour of OSIM) was based on these projections. In S187/2014, I had found that the projections were unreliable and that Manoj knew this fact.

(c) After Manoj resigned as director of TWG Tea on 28 September 2012, Manoj and Kanchan, as directors of Wellness, chose not to exercise Wellness' right under the SHA to appoint another person as director to the board of TWG Tea and thereby failed to protect Wellness' interests in TWG Tea.

(d) Sunbreeze and/or Manoj and/or Kanchan exposed Wellness to a further dilution by not subscribing to the Rights Issue and instead challenged the Rights Issue on grounds which Manoj and/or Kanchan did not have any *bona fide* belief in. In S187/2014, I had found that the decision to have the Rights Issue had been made in good faith and for commercial reasons. Manoj had also testified in S187/2014 that Wellness could have raised the money to subscribe to the Rights Issue.

(e) Manoj and Kanchan caused Wellness to bring S187/2014 against OSIM, Paris and the directors of TWG Tea, and the appeal against the decision in S187/2014, thereby causing Wellness to incur legal fees and exposing Wellness to the costs order that was made against it in both S187/2014 and the appeal.

16 On 6 February 2017, the 3 Defendants commenced third party proceedings against Ron Sim in S17/2017 for indemnity or contribution in respect of EQ Capital's claim against them. The basis for the third party proceedings was essentially the same as the allegations raised in the 3 Defendants' defence. In summary, the 3 Defendants alleged that the matters which EQ Capital complained of in S17/2017 had been brought about by Ron Sim through OSIM and that it was an abuse of process for Ron Sim, having caused and/or benefited from those matters, to procure EQ Capital to commence S17/2017 in respect of the very same matters. On 5 May 2017, I struck out the third party claim. The appeal by the 3 Defendants has since been dismissed by the Court of Appeal: *Sunbreeze Group Investments Ltd and others v Sim Chye Hock Ron* [2018] 2 SLR 1242.

The present action

17 Clause 6.1 of the SHA provided for a right of first refusal if any shareholder of TWG Tea wished to sell its shares. In summary, under cl 6.1:

(a) any shareholder of TWG Tea that wished to transfer its shares to a non-shareholder must first offer to sell its shares to the existing shareholder by issuing a transfer notice which had to contain certain prescribed information;

(b) the procedures set out in cl 6.1 would then apply; these included timelines for TWG Tea to inform the other shareholders of the transfer notice and for the other shareholders to apply for the shares offered in the transfer notice; and

(c) if the other shareholders do not exercise the right of first refusal, the shareholder that issued the transfer notice would be entitled to sell its shares to third parties within a period of three months, at any price not less than that offered in the transfer notice, and on terms not more favourable than those offered in the transfer notice.

18 By letter dated 24 October 2017, Wellness purported to issue a transfer notice pursuant to cl 6.1 of the SHA offering to sell its entire shareholding in TWG Tea to the other shareholders of TWG Tea, OSIM and/or Paris ("the 1st Transfer Notice").[1] Wellness stated in the 1st Transfer Notice that upon a successful sale of the shares to OSIM and Paris, Wellness would carry out a share buy-back of EQ Capital's shares in Wellness at a price equivalent to EQ Capital's indirect interest (through its shareholding in Wellness) in TWG Tea ("the Proposed Share Buy-Back").

19 On 8 November 2017, OSIM and Paris challenged the validity of the 1st Transfer Notice on the grounds that:

(a) the 1st Transfer Notice did not comply with the terms and/or prescribed process and/or timelines in the SHA; and

(b) Wellness was not entitled to include the Proposed Share Buy-Back as a term of the 1st Transfer Notice.[2]

20 By way of letter dated 13 November 2017, TWG Tea adopted the position taken by OSIM and Paris.[3]

21 On 16 November 2017, Wellness issued a fresh transfer notice pursuant to cl 6.1, again offering to sell its shares in TWG Tea to OSIM and/or Paris, this time without the Proposed Share Buy-Back ("the 2nd Transfer Notice").[4]

22 By way of letters dated 1 December 2017, OSIM and Paris pointed out that Wellness' shareholding in TWG Tea was the whole or substantially the whole undertaking and/or property of Wellness, and the proposed sale would be invalid if it had not been approved by the shareholders of Wellness in a general meeting as required under s 160(1) of the Act.[5] Section 160(1) states as follows:

> 160(1) Notwithstanding anything in a company's constitution, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

OSIM and Paris requested confirmation that shareholders' approval had been obtained for the proposed sale and a copy of the shareholders' resolution.

23 In its replies dated 6 December 2017, Wellness said that there was no basis for OSIM's and Paris' requests and that the shareholders' approval "should not be of any concern" to them.[6] Wellness did not confirm that shareholders' approval had been obtained in a general meeting; neither did Wellness provide OSIM and Paris with a copy of the shareholders' resolution. However, in its carefully crafted replies, Wellness confirmed that the proposed sale had "received majority shareholder approval".

24 By way of letters dated 11 December 2017, OSIM and Paris pointed out that Wellness' assertion that approval had received majority shareholder approval, did not comply with s 160(1).[7] OSIM and Paris took the position that therefore the prescribed process and/or timelines under cl 6.1 of the SHA had not been initiated. On 14 December 2017, TWG Tea informed Wellness that it agreed with the position taken by OSIM and Paris.[8]

25 On 2 March 2018, EQ Capital commenced the present action to plead, as part of its oppression action, the 3 Defendants' conduct in causing Wellness to offer to sell its shares in TWG Tea to OSIM and Paris, without first obtaining the requisite shareholders' approval as required under s 160(1) of the Act. EQ Capital could not amend its statement of claim in S17/2017 to plead these matters as they arose after the commencement of S17/2017. Both S17/2017 and the present action have since been consolidated.

26 In their counterclaim in the present action, the 3 Defendants alleged that

(a) Ron Sim and EQ Capital conspired to injure the 3 Defendants and/or conspired to abuse civil process; and

(b) in furtherance of the conspiracy, Ron Sim commenced (through EQ Capital) and/or caused and or directed and/or assisted EQ Capital to commence this present action in bad faith and for a collateral and/or improper purpose.

27 The counterclaim repeated several paragraphs in the defence. Some of those paragraphs pleaded allegations in respect of S17/2017. However, it should be noted that the conspiracy pleaded in the counterclaim was in relation to the commencement of the *present action* only.

28 The 3 Defendants pleaded that they have been injured by being put to substantial loss and expense in defending this action. Manoj and Kanchan further pleaded that they have suffered distress and hurt to their feelings and reputational loss in having to defend proceedings brought against them personally.

The application to strike out the counterclaim

29 EQ Capital and Ron Sim applied to strike out the counterclaim by the 3 Defendants on all of the grounds set out under O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") and/or the inherent jurisdiction of the court. The legal principles that were applicable are well established and were not in dispute.

Conspiracy to injure

30 The counterclaim pleaded both conspiracy by lawful means as well as conspiracy by unlawful means. The law was not in dispute. To succeed in a claim for conspiracy by unlawful means, the following elements must be established:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

See *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112].

31 A claim for lawful means conspiracy does not require an unlawful act, but there is the additional requirement of proving a predominant purpose by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved: *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 at [62]

32 The 3 Defendants claimed that the conspiracy was to injure them by commencing the present action in bad faith and for a collateral and/or improper purpose. The bad faith and collateral and/or improper purposes were alleged to take the following forms:

(a) causing Manoj and Kanchan annoyance by pursuing a minority action against them despite them not being shareholders of Wellness;

(b) obstructing Wellness from exiting TWG Tea on terms which were fair and in compliance with the SHA; and

(c) putting improper pressure on the 3 Defendants to sell Sunbreeze's shares in Wellness and/or Wellness' shares in TWG Tea to EQ Capital, Ron Sim, OSIM and/or Paris at a price below valuation.

Causing Manoj and Kanchan annoyance

33 The allegation that the present action was commenced to cause Manoj and Kanchan annoyance was premised on the assertion that Manoj and Kanchan were not proper parties to EQ Capital's oppression claim since they were not shareholders of Wellness.

34 I agreed with EQ Capital and Ron Sim that this allegation was not legally sustainable. It is indisputable that s 216 of the Act permits an oppression action to be brought against directors where they have exercised their powers in an oppressive manner.

35 The present action (as with S17/2017) was commenced against Manoj and Kanchan in their capacities as directors of Wellness. The allegations pleaded in the statement of claim were that Manoj and Kanchan had exercised their powers as directors of Wellness in a manner which is oppressive to and/or unfairly prejudicial to and/or in disregard of EQ Capital's interests as a minority shareholder of Wellness. The improper purpose alleged by the 3 Defendants had no leg to stand on.

36 I also agreed with EQ Capital and Ron Sim that in any case, if the action against Manoj and Kanchan as directors had no basis, their remedy was to apply to strike out the claim against them rather than to bring a counterclaim. It cannot be right that a claim that is baseless would, by virtue that fact, give rise to a counterclaim.

Obstructing Wellness from exiting TWG Tea

37 Manoj and Kanchan alleged that Ron Sim / EQ Capital were using the present action as another means of thwarting Wellness' proposed sale of its shares in TWG Tea and to obstruct Wellness' exit from TWG Tea. Manoj and Kanchan relied on the events set out at [18] to [24] above.

38 I agreed with EQ Capital and Ron Sim that the present action could not possibly have obstructed Wellness from exiting TWG Tea in any way. All that the present action did was to assert that the 3 Defendants' conduct in causing Wellness to offer to sell its shares in TWG Tea to OSIM and Paris, without first obtaining the requisite shareholders' approval as required under s 160(1) of the Act, was oppressive. I noted that the 3 Defendants did not contend that Wellness' proposal to sell its shares in TWG Tea had been approved by its shareholders in a general meeting. In any case, even if EQ Capital was wrong about s 160(1) not having been complied with or about the 3 Defendants' conduct being oppressive, the 3 Defendants were unable to show me how the present action could be said to have obstructed Wellness from selling its shares and exiting TWG Tea.

39 Whether Wellness could sell its shares and exit from TWG Tea depended, firstly, on whether it had issued a valid transfer notice pursuant to cl 6.1 of the SHA. In this case, what stopped Wellness' 2nd Transfer Notice from proceeding further under cl 6.1 was not the present action but TWG Tea's decision (agreeing with OSIM and Paris) that there was no valid transfer notice and that therefore cl 6.1 had not been triggered. However, if TWG Tea was correct, Wellness clearly had no reason to complain. On the other hand, if Wellness disputed TWG Tea's position, it was still open to Wellness to challenge that position, including if necessary by way of legal proceedings.

Either way, the present action did not and could not have obstructed Wellness from selling its shares. There was no suggestion as to how the present action could have hindered Wellness from exercising its rights under cl 6.1 to issue a valid transfer notice, and to sell the shares to third parties if OSIM and Paris were not inclined to buy them. The present action also did not prevent Wellness from challenging TWG Tea's decision that cl 6.1 had not been triggered.

40 In fact, the evidence showed that even the dispute over the validity of Wellness' transfer notice did not obstruct Wellness from seeking to sell its shares in TWG Tea:

(a) In its letters dated 19 December 2017 to OSIM, Paris and TWG Tea, Wellness took the position that it was entitled to sell its shares to third parties.[9]

(b) In a letter sent on 25 January 2018 by Manoj to Dr Finian Tan (representing Vickers Private Equity and Vickers Venture, the other two shareholders of Wellness), Manoj took the position that as OSIM and Paris had not accepted the offer set out in the 2nd Transfer Notice, Wellness was at liberty to sell its shares in TWG Tea to any third party and that Wellness will be taking steps to do so.[10]

41 Whether cl 6.1 of the SHA had been triggered had a direct impact on whether Wellness was entitled to sell its shares to third parties. Yet, the dispute over this issue did not obstruct Wellness from trying to sell its shares to third parties. Wellness certainly did not consider itself so obstructed. The present action is even further removed from the dispute over cl 6.1 of the SHA. There was no reason to think that it could have obstructed Wellness in any way.

Putting improper pressure on the 3 Defendants

42 The 3 Defendants alleged that the present action was intended to put improper pressure on the 3 Defendants to sell Sunbreeze's shares in Wellness and/or Wellness' shares in TWG Tea to EQ Capital, Ron Sim, OSIM and/or Paris at a price below valuation.

43 I agreed with EQ Capital and Ron Sim that this allegation was factually unsustainable. First, there was no suggestion, and it was not pleaded, that there were even any discussions between the 3 Defendants and EQ Capital and Ron Sim on a sale of Sunbreeze's shares in Wellness or Wellness' shares in TWG Tea to OSIM, Paris, EQ Capital or Ron Sim.

44 Second, in the present action (and in S17/2017), EQ Capital sought an order to wind up Wellness, alternatively, an order that the 3 Defendants buy out EQ Capital. How would the present action put pressure on the 3 Defendants to sell either Sunbreeze's shares in Wellness or Wellness' shares in TWG Tea at an undervalue? The 3 Defendants' allegation was, in my view, short on logic.

Conspiracy to abuse civil process

45 The claim for conspiracy to abuse civil process was based on the same grounds as those relied upon for the claim for conspiracy to injure. For purposes of the striking out application, EQ Capital and Ron Sim proceeded on the assumption that the tort of abuse of process was part of Singapore law and that the reliefs claimed were recoverable. I agreed with their submission that even so, the claim was factually unsustainable.

46 Since then, the Court of Appeal has decided that abuse of process as a tort is not part of the law in Singapore: *Lee Tat Development Pte Ltd v*

Management Corporation Strata Title Plan No 301 [2018] 2 SLR 866 ("*Lee Tat*") at [161]. Therefore, the counterclaim based on conspiracy to abuse civil process would be struck out in any event because it is legally unsustainable.

Conclusion

47 The counterclaim for conspiracy to injure and the counterclaim for conspiracy to abuse civil process were both clearly unsustainable.

48 Accordingly, I struck out the counterclaim. I also ordered the 3 Defendants to pay costs to EQ Capital and Ron Sim, which I fixed at $12,000 plus disbursements to be fixed by me if not agreed.

Chua Lee Ming
Judge

Davinder Singh s/o Amar Singh SC, Jaikanth Shankar, Srruthi Ilankathir, Hanspreet Singh Sachdev and Rajvinder Singh Chahal (Davinder Singh Chambers LLC) for the plaintiff and the first and second defendants in counterclaim;
Yeo Khirn Hai Alvin SC, Koh Swee Yen, Lin Chunlong, Jasmine Low and Sim Mei Ling (WongPartnership LLP) for the first, second, and third defendants and the first and second plaintiffs in counterclaim.

[1] Counterclaim Defendants' Bundle of Documents ("CDBOD"), tab 3, at pp 45-47.
[2] CDBOD, tab 6, at pp 76-77.
[3] CDBOD, tab 7, at pp 79-81.
[4] CDBOD, tab 8, at pp 85-87.
[5] CDBOD, tab 10, at pp 94-95.
[6] CDBOD, tab 11, at pp 97-98.
[7] CDBOD, tab 12, at pp 100-101.
[8] CDBOD, tab 13, at p 103.
[9] CDBOD, tab 14, at p 113-116.
[10] CDBOD, tab 18, at pp 130-131.