**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 154**

Companies Winding Up No 62 of 2018

In the Matter of Section 254(1)(i) of the Companies Act (Cap 50)

And

In the Matter of The Wellness Group Pte Ltd

Between

EQ Capital Investments Ltd

… *Plaintiff*

And

The Wellness Group Pte Ltd

… *Defendant*

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# GROUNDS OF DECISION

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[Companies] — [Winding up] — [Directors acting in own interests]
[Companies] — [Winding up] — [Just and equitable winding up]
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# v
# The Wellness Group Pte Ltd

**[2019] SGHC 154**

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Chua Lee Ming J
29, 30 April; 2 May 2019

25 June 2019

**Chua Lee Ming J:**

## Introduction

1 These proceedings involved an application to wind up the defendant, The Wellness Group Pte Ltd ("Wellness"), under s 254(1)(*f*) and s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed). The original plaintiffs were two shareholders of Wellness – Vickers Private Equity Fund VII LP and Vickers Venture Fund II LP (together, "the Vickers Funds").

2 Wellness and the majority shareholder, Sunbreeze Group Investments Ltd ("Sunbreeze"), opposed the winding up application. The remaining holder of ordinary shares in Wellness, EQ Capital Investments Ltd ("EQ Capital"), supported the application.

3 On the first day of the hearing, the Vickers Funds sought leave to withdraw their application. EQ Capital applied to be substituted as the plaintiff

in place of the Vickers Funds. Sunbreeze and Wellness objected. On 29 April 2019, I granted the Vickers Funds leave to withdraw their application. I also granted EQ Capital's application in Summons No 2232 of 2019 to be substituted as the plaintiff, and proceeded to hear the winding up application.

4 On 2 May 2019, I ordered Wellness to be wound up. Both Wellness and Sunbreeze have appealed against my decision. There is no appeal against my decision in respect of Summons No 2232 of 2019.

## Background

5 On 22 December 2003, Mr Manoj Mohan Murjani ("Manoj") incorporated Wellness.[1] Manoj and his wife, Mrs Kanchan Manoj Murjani ("Kanchan") were the initial shareholders. In 2006, the Vickers Funds became shareholders of Wellness, and in 2008, EQ Capital followed suit. In 2010, Manoj and Kanchan transferred their shareholdings in Wellness to Sunbreeze, a company that was wholly owned by, and under the directorships of, Manoj and Kanchan.

6 As at the date these proceedings were commenced, the shareholding in Wellness was as follows:

| | **Vickers Funds** | **Sunbreeze** | **EQ Capital** | **Manoj** |
|---|---|---|---|---|
| Ordinary shares | 2,789,526 (11.83%) | 19,000,000 (80.62%) | 1,778,658 (7.55%) | 0 |
| Preference shares | 5,600 | 0 | 4,000 | 2,500 |

7 A shareholders' agreement dated 21 August 2007[2] supplemented by an addendum dated 21 August 2008[3] (together, "the SHA") governed the rights and obligations of Wellness and its shareholders. Sunbreeze and EQ Capital became parties to the SHA by way of accession. The directors of Wellness were Manoj, Kanchan and Dr Finian Tan Seng Chin ("Dr Finian Tan"). Dr Finian Tan represented the Vickers Funds.

8 By an employment agreement dated 12 October 2007, Manoj was employed by Wellness as the chief executive officer ("CEO") for a period of five years (*ie*, until 12 October 2012). Under this agreement, Manoj's remuneration was to be determined in accordance with the SHA. Manoj tendered his resignation as CEO on 14 August 2012.

9 Wellness had been established for the purposes of wholesale and/or retail of lifestyle and/or wellness related products. However, it appeared that its only substantial asset was its shareholding in TWG Tea Company Pte Ltd ("TWG Tea") which Manoj had incorporated in 2007. In early 2011, Manoj started discussions with OSIM International Ltd ("OSIM") in relation to an investment by OSIM into TWG Tea. At that time, the shareholders of TWG Teawere Wellness and Paris Investment Pte Ltd ("Paris"). Paris was then owned by Mr Taha Bou Qdib ("Taha") and two employees of TWG Tea. Taha was the former CEO of Wellness' tea division which was subsequently corporatized and became TWG Tea.

10 During the negotiations with OSIM, Manoj presented profit projections which showed that TWG Tea would achieve profit before tax and minority interests ("PBT") of S$29m for the financial year ending on 31 March 2013 ("FY2013").

11 Pursuant to a sale and purchase agreement dated 18 March 2011 ("the OSIM SPA"), OSIM International Limited ("OSIM") became a 35% shareholder of TWG Tea. After the sale to OSIM, Wellness' and Paris' shareholdings in TWG Tea were 54.7% and 10.3% respectively. Mr Ron Sim Chye Hock ("Ron Sim") was the CEO of OSIM. He was also the principal of EQ Capital.

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

13 TWG Tea's audited PBT for FY2013, which was signed off by its auditors on 11 June 2013, was just above S$5m. Pursuant to the Profit Swing Clause, the combined shareholding of Wellness and Paris in TWG Tea was diluted by 10% in favour of OSIM. The dilution reduced Wellness' shareholding in TWG Tea from 54.7% to 46.3%.

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

15 In November 2013, TWG Tea proposed a rights issue to raise capital ("the Rights Issue"). Wellness did not subscribe to the Rights Issue. Consequently, OSIM and Paris together subscribed for the entire Rights Issue and the combined shareholding of OSIM and Paris in TWG Tea increased from

53.7% to 69.9% while Wellness' shareholding was diluted further from 46.3% to 30.1%.

***Suit No 187 of 2014***

16 In February 2014, Wellness and Manoj commenced Suit No 187 of 2014 against OSIM, Paris and the directors of TWG Tea ("Suit 187"). Wellness' claim was for minority oppression, conspiracy to injure and breach of contract whilst Manoj's claim was for conspiracy to injure. Among other things, Wellness and Manoj alleged that OSIM, Ron Sim and the directors of OSIM, Paris and TWG Tea acted wrongfully to enable OSIM to take control of TWG Tea through the following acts, among others:

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

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

17 On 22 April 2016, I dismissed the claims in Suit 187 – see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others* [2016] 3 SLR 729. Among other things, I found as follows (at [95], [107] and [200]):

(a) OSIM did not cause TWG Tea's failure to meet the performance target in the Profit Swing Clause and OSIM was entitled to exercise its rights under that clause. TWG Tea failed to achieve its project profit target for FY2013 because the profit projections presented by Manoj were (as Manoj knew) unreliable.

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

18 Wellness' appeal in Civil Appeal No 64 of 2016 ("CA 64") was dismissed by the Court of Appeal on 25 October 2016.

***Suit No 545 of 2014***

19 Suit No 545 of 2014 ("Suit 545") was a separate defamation action by Wellness and Manoj against OSIM and its directors (including Ron Sim). Suit 545 was heard before me together with Suit 187. I dismissed Suit 545 on the ground that the offending words which formed the subject-matter of the claim, were clearly not defamatory and that even if they were, the defendants would have succeeded on their defences of qualified privilege and justification. Wellness and Manoj did not appeal against the dismissal of Suit 545.

**Winding up under ss 254(1)(*f*) and 254(1)(*i*)**

***The law***

20 Under ss 254(1)(*f*) and 254(1)(*i*) of the Companies Act,

> (1) The Court may order the winding up if —
>
> …
>
> (*f*) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members;
>
> …
>
> (*i*) the Court is of the opinion that it is just and equitable that the company be wound up;
>
> …

21 The law was not in dispute. With respect to s 254(1)(*f*):

(a) the directors are not acting in the interests of the members as a whole if they are seen not to have been acting in the interests of all the members; and

(b) the words "unfair and unjust" refer to commercial morality or integrity which the law ought to uphold or sustain having regard to all the circumstances.

See *Re HL Sensecurity Pte Ltd (formerly known as HL Integral Systems Pte Ltd)* [2006] SGHC 135 at [28].

22 As for s 254(1)(*i*), it is well established that the "notion of unfairness is the foundation of the court's jurisdiction under s 254(1)(*i*)": *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*") at [40]. Section 254(1)(*i*) is a jurisdiction permitting the court to superimpose equitable considerations on the exercise of legal rights: *Perennial* at [41]. The test for unfairness is an objective one, *ie*, whether a reasonable bystander would regard the majority shareholder's conduct as having unfairly prejudiced the minority's interests: *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 at [5]. It is also well established that the court can wind up a company under s 254(1)(*i*) where it is found that the company's business has been carried on in a fraudulent manner or there is a lack of probity in the directors' conduct: *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others and another appeal* [2019] 1 SLR 1046 ("*Kathryn Ma*") at [38].

***Whether grounds established***

23 I was satisfied that EQ Capital had established sufficient grounds under both ss 254(1)(*f*) and 254(1)(*i*).

*Accounts and Annual General Meetings*

24 Wellness' auditors had qualified the company's accounts for FY2010 on the basis that:[4]

> (a) they were not able to examine the accompanying financial statements of Wellness for FY2010 because Wellness had not maintained proper accounting records and no adequate supporting documents were made available to the auditors for inspection; and
>
> (b) they had not been able to obtain all the relevant information and explanations they considered necessary for the purpose of their audit.

25 Wellness' auditors had also qualified the company's accounts for FY2009 on the same basis.[5]

26 There had been no audited accounts of Wellness since the audited accounts for FY2010. No accounting books or records had been produced by Manoj or Kanchan either.

27 No annual general meeting ("AGM") of Wellness had been held since 20 May 2012 when the accounts for FY2010 were laid before the company. As EQ Capital submitted, the audited accounts of a company are the principal source of a shareholder's understanding of a company's financial affairs, and the AGM is the occasion for the shareholders to consider various matters including the company's financial affairs. The duty of directors to prepare proper accounts for presentation to shareholders has been described as being "the most significant of the duties imposed by [the Companies Act] on directors": *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.125.

28 Although Dr Finian Tan was a director of Wellness, it was clear that the affairs of Wellness were managed by Manoj. In any event, the fact that Dr Finian Tan was also a director of Wellness was irrelevant insofar as EQ Capital was concerned. The failure to hold AGMs, file annual returns, keep proper accounts records, and send audited financial statements to Wellness' shareholders, caused Wellness to breach:

(a) ss 175, 197, 199 and 203 of the Companies Act, and exposed Wellness to penalties;

(b) the SHA, which required Wellness to:[6]

(i) maintain accurate and complete accounting records;

(ii) keep its accounts in accordance with generally accepted accounting principles;

(iii) have its accounts audited annually; and

(iv) submit its audited accounts to the board of directors in any case not later than 90 days from the end of the relevant financial year (*ie*, 31 March of each calendar year); and

(c) Wellness' Articles of Association,[7] which required:

(i) AGMs to be held at least once in every calendar year (Articles 73 and 74);

(ii) the directors to cause true accounts to be kept (Article 153);

(iii) the directors to lay a profit and loss account and a balance sheet before the company at its AGM at least once in every calendar year (Article 155);

(iv) a balance sheet to be made out in every year and laid before the company in general meeting and a copy of the balance sheet together with the auditors' report to be sent to its shareholders at least 14 days prior to the date of the AGM (Articles 156 and 157); and

(v) Wellness' accounts to be examined by auditors at least once in every year (Article 158).

*Taking loans from Sunbreeze*

29 Manoj caused Wellness to borrow S$1.05m and S$3.1m from Sunbreeze. The loan of S$1.05m was used to pay the party-and-party costs ordered against Wellness and Manoj in Suit 187 (including the appeal) and Suit 545. The loan of S$3.1m was used to pay the costs of the lawyers acting for Wellness and Manoj in Suit 187 and Suit 545. Under the SHA, Wellness required the Vickers Funds' consent to take the loans.[8] The Vickers Funds refused to give consent to the loans,[9] but Manoj caused Wellness to proceed to take the loans anyway. Manoj alleged that the Vickers Funds acted unreasonably in refusing to give consent. In my view, even assuming that the Vickers Funds could not refuse consent unreasonably, it was debatable whether the Vickers Funds had acted unreasonably given that Manoj had caused Wellness to commence Suit 187 and Suit 545 without even consulting the Vickers Funds or Dr Finian Tan (in his capacity as a director of Wellness). In any event, there was also no reason why Wellness had to borrow monies to pay the costs and disbursements ordered against, or incurred by, *Manoj personally*. In his letter dated 14 August 2017, Dr Finian Tan objected to the use of Wellness' funds to pay Manoj's personal liability for the costs.[10] Manoj did not respond to this objection in his reply on 5 September 2017.[11]

*Payment of excessive remuneration to Manoj*

30 Under the SHA, the Vickers Funds' prior written consent was required before Manoj's salary could exceed US$400,000 a year, and any salary in excess of US$250,000 could not exceed 10% of Wellness' net profits.[12] The total remuneration and professional fees paid to Manoj for FY2009–FY2011 amounted to S$1.105m, S$750,000 and S$1.07m respectively.[13] The payments to Manoj were made without the Vickers Funds' prior written consents. Manoj pointed out that Dr Finian Tan (as a director of Wellness) had approved the accounts for FY2009 and FY2010. However, even so, there was no prior written consent from Vickers Funds for the payments in FY2011.

31 In his letter to Dr Finian Tan on 30 June 2016, Manoj also drew a distinction between his remuneration as a director and his salary as an employee of Wellness.[14] However, Manoj did not respond to Dr Finian Tan's request for a breakdown of the payments shown in the financial statements. In any event, to the extent that any of the payments were in the form of director's remuneration, Manoj did not obtain any approval at a general meeting, as required under Article 108(1) of Wellness' Articles of Association.[15]

*Distribution of excessive dividends*

32 On 31 March 2011, the shareholders of Wellness passed a resolution authorising the distribution of dividends to Sunbreeze (S$20,557,375.15), the Vickers Funds (S$3,018,175.40) and EQ Capital (S$1,924,449.46). This was after the Wellness' sale of shares in TWG Tea to OSIM pursuant to the SPA. On 12 April 2011, Raymond Kong, who was the Chief Financial Officer of one of the Vickers Funds, queried whether there were sufficient profits for the distribution of dividends.[16] Manoj replied on the same day, confirming that the amount was "fine".[17]

33 However, it transpired that the dividends had exceeded Wellness's accumulated profits. On 4 November 2013, Manoj informed Wellness' shareholders that the amount of dividends that had been paid in excess was S$10,997,730.49.[18] Manoj suggested that the excess dividends be treated as advances to the shareholders. On 11 November 2013, EQ Capital asked for an explanation as to how the distribution of excessive dividends came about, describing the distribution as "highly unusual".[19] Dr Finian Tan suggested seeking legal advice.[20] Manoj agreed and informed Dr Finian Tan that he would proceed to instruct legal counsel to advise Wellness.[21] Subsequently, Dr Finian Tan signed a Board resolution dated 31 December 2013, authorising Manoj to appoint lawyers to advise Wellness "on all and any matters including the issue of excess dividend payments raised by [EQ Capital]".[22]

34 Manoj did appoint lawyers for Wellness. However, the lawyers were apparently not appointed to advise on the excessive dividends issue or the reply to EQ Capital. Instead, Manoj appointed the lawyers to commence Suit 187. The issue of the excessive dividends was not resolved.

*Suit 187 and the appeal, and Suit 545*

35 It was not disputed that Manoj did not consult Dr Finian Tan before commencing Suit 187 or Suit 545. He also did not consult Dr Finian Tan before filing the appeal against the decision in Suit 187.

36 Manoj relied on the Board resolution dated 31 December 2013 (see [33] above) as having authorised him to commence Suit 187 and Suit 545.[23] In my view, Manoj's attempt to rely on the Board resolution was wholly unmeritorious. Dr Finian Tan signed the Board resolution in the context of discussions with Manoj about obtaining legal advice on the issue of the

excessive dividends. Although the Board resolution was worded in broader terms, clearly, it was no excuse for Manoj's action in commencing Suit 187 and Suit 545 without consulting Dr Finian Tan who was at all material times a director of Wellness.

*Dilution caused by the Profit Swing Clause*

37 As stated earlier, TWG Tea's audited PBT for FY2013 was just above S$5m. This allowed OSIM to exercise its rights under the Profit Swing Clause which in turn resulted in Wellness' shareholding in TWG Tea being diluted from 54.7% to 46.3%. In Suit 187, I had found that Manoj had no reasonable basis for believing that TWG Tea could achieve the original projected profits of S$29m for FY2013. Manoj had recklessly disregarded the many warnings by his own finance executive that the projections were unreliable, in his bid to obtain a loan from OSIM for TWG Tea as well as to cash out his investment in TWG Tea by selling part of Wellness' holdings in TWG Tea to OSIM (see the Suit 187 judgment, at [95]).

*Dilution in connection with the Rights Issue*

38 As stated earlier, Wellness did not subscribe to the Rights Issue and this resulted in Wellness' shareholding being diluted further from 46.3% to 30.1%.

39 The excess dividends that had been distributed (see [33] above) amounted to S$10.997,730.49 and would have provided Wellness with a very substantial part of the S$11.59m that was needed to subscribe to the Rights Issue and thereby prevent the further dilution of its shareholding in TWG Tea.

40 In his email dated 10 December 2013 to Manoj, Dr Finian Tan said that the Vickers Funds were willing to return the excess dividends received by them

and noted that the other shareholders may be obliged to do so.[24] Sunbreeze had received 80.62% of the excess dividends. Dr Finian Tan also pointed out that the return of the excess dividends would provide Wellness the funds to "mitigate the dilution or even prevent it" if Wellness could raise more capital to take up its full allocation under the Rights Issue. Manoj ignored Dr Finian Tan's email and did not take any steps to resolve the issue of the excess dividends. Instead, in February 2014, Manoj and Wellness commenced Suit 187. Manoj also ignored the Vickers Funds' and EQ Capital's requests[25] that Wellness subscribe to the Rights Issue.

*Manoj's attempts to sell Wellness' shares in TWG Tea*

41 On 24 October 2017 and 16 November 2017, Manoj offered to sell Wellness' shares in TWG Tea to OSIM and Paris.[26] The shares in TWG Tea constituted the whole or substantially the whole of Wellness' property. Under s 160(1) of the Companies Act, such a sale required approval by the company in a general meeting. In addition, under the SHA, the sale required the Vickers Funds' prior written consent.[27] Manoj did not have the requisite approval of either the company in a general meeting or of the Vickers Funds. Neither did he inform Dr Finian Tan that he was making the offers to OSIM and Paris. Manoj asserted that the Vickers Funds had given their "unequivocal consent" to Wellness selling its shares in TWG Tea because Dr Finian Tan had "repeatedly expressed the view that it would be in the interests of [Wellness] as well as that of [the Vickers Funds] and Sunbreeze" for Wellness to sell its stake TWG Tea.[28] I found no merit in Manoj's assertion. Dr Finian Tan did raise the idea of Wellness selling its stake in TWG Tea in his correspondence with Manoj over several unresolved issues. However, this fell far short of constituting consent for the *specific* offers that Manoj subsequently made to OSIM and Paris. The

Vickers Funds could hardly be said to have consented to the terms of those offers.

42 Sunbreeze submitted that it was normal to reach agreement on the sale before seeking the requisite shareholders' approval. However, as EQ Capital pointed out, there was nothing in the either of the offers from Manoj that indicated that any sale of Wellness' shares in TWG Tea pursuant to the offers, were subject to the approval of Wellness' shareholders.

*Conclusion*

43 I agreed with EQ Capital that Kanchan was also responsible for what Manoj and Sunbreeze wrongfully did or failed to do because she allowed Manoj to do as he wished, did nothing to stop him, and went along with and endorsed his improper actions and omissions.

44 I also agreed with EQ Capital that Manoj, Kanchan and Sunbreeze had treated Wellness as if the company belonged to them alone, and Wellness' funds as their own piggy bank.

45 In my view, it was clear from the above that Manoj and Kanchan had conducted Wellness' affairs in their own interests rather than in the interests of the members as a whole, or in a manner which was unfair or unjust to EQ Capital, within the meaning of s 254(1)(*f*) of the Companies Act. It was also clear that there was a lack of probity in Manoj's and Kanchan's conduct of Wellness' affairs, and that their conduct was grossly unfair to EQ Capital within the meaning of s 254(1)(*i*). Having obtained EQ Capital's investment into Wellness, Manoj and Kanchan proceeded to manage Wellness without any regard for EQ Capital's interests as a shareholder of Wellness.

***Whether EQ Capital was able to exit from Wellness on fair terms***

46 Sunbreeze's and Wellness' main argument was that a winding up order should not be made because, according to them, EQ Capital was able to exit from Wellness on fair terms.

*The law*

47 The presence of a buy-out mechanism in the company's constitution would be a vital consideration when examining whether it was just and equitable to order a winding up. In the usual case, an applicant who had not even attempted to invoke the share buy-out mechanism would be unlikely to establish the "unfairness" necessary to invoke the court's just and equitable jurisdiction to wind up a company: see *Perennial* at [56]. This is because a buy-out or exit mechanism can negate any unfairness found to have satisfied s 254(1)(*i*): *Kathryn Ma* at [76].

48 The failure to invoke a buy-out or exit mechanism would not be a bar to a winding up order under s 254(1)(*i*) if the exit mechanism would not provide the aggrieved shareholder an exit at fair value. The Court of Appeal in *Perennial* gave some examples (at [56]), including where the shareholders had conducted the company's affairs in bad faith or improperly or where the valuation mechanism was arbitrary or artificial.

49 Another example where an exit mechanism would not provide an exit at fair value would be if it was unlikely that a fair and proper valuation of the company could be done without a thorough investigation into the company's financial records and activities by a liquidator: *Kathryn Ma* at [79]–[80]. In such a case, it would be just and equitable to wind up the company: *Kathryn Ma* at

[81]. I disagreed with Wellness' submission that the reasoning in *Kathryn Ma* was not clear. It seemed to me that the reasoning was both logical and clear.

50 The winding up application in *Perennial* was based on s 254(1)(*i*). The present application was based on both ss 254(1)(*f*) and 254(1)(*i*). EQ Capital argued its case on the basis that the principle in *Perennial* was applicable to both grounds. It seemed to me that in principle, that was correct. Clearly, there is overlap between ss 254(1)(*f*) and 254(1)(*i*), the latter being broader in scope. In any event, as will be seen below, in my view, the buy-out mechanism in the present case would not have given EQ Capital an exit at fair value.

*Exit mechanism under the Articles of Association*

51 In the present case, Wellness' Articles of Association provided a buy-out mechanism similar to that which was available in *Perennial*. Briefly, under Wellness' Articles of Association,[29] a selling shareholder was required to give the company notice of his desire to sell his shares at a fair value fixed by him, and the company would be constituted as his agent to sell the shares to another shareholder. In case there was no agreement as to the price, the company's auditor would on the application of either the selling shareholder or the purchasing shareholder, certify in writing the fair value of the shares. If the company was unable to find a purchasing shareholder within 28 days, the selling shareholder would be free to sell his shares to any person at any price.

52 EQ Capital did not invoke the buy-out mechanism under Wellness' Articles of Association. However, I agreed with EQ Capital that, on the facts of the present case, a winding up order was still appropriate.

53 In my view, on the facts of the present case, the buy-out mechanism under Wellness' Articles of Association did not allow EQ Capital to exit the

company at fair value. The facts of this case clearly called for a thorough investigation into the company's financial records and activities which only an independent liquidator could achieve. It was true that Wellness' main value was in its shareholding in TWG Tea. However, the valuation of Wellness could not end with just a valuation of TWG Tea.

54 The financial affairs of Wellness were in a real mess. There were no audited accounts for FY2011 or later and even the accounts for FY2009 and FY2010 were qualified. Manoj had also caused Wellness to assume his own personal liabilities as was shown by the loans taken by Wellness to pay the legal costs in Suit 187 and Suit 545. Manoj had been treating Wellness and its funds as his own.

55 More importantly, an auditor certifying the fair value of EQ Capital's shares pursuant to the company's Articles of Association, would not be equipped to decide whether Manoj and/or Kanchan should be held liable to compensate Wellness for:

(a) the dilutions caused by the Profit Swing Clause and the failure to subscribe to the Rights Issue; or

(b) the costs incurred by Wellness in commencing Suit 187 and appealing to the Court of Appeal; or

(c) causing Wellness to assume Manoj's personal liability for the legal costs in connection with Suit 187 (and the appeal) and Suit 545; or

(d) the excess remuneration paid to Manoj in breach of the SHA.

56 I disagreed with Wellness' submission that the auditor acting as an expert could decide whether Manoj and/or Kanchan should be held liable to compensate Wellness for the above matters. The auditor would be acting as an expert for purposes of certifying the fair value of the shares; he was not an arbitrator or judge. He would have no power to decide whether any party should be held liable for legal wrongs. In this case, this limitation was made even clearer by Article 48 of Wellness' Articles of Association, which embodied the parties' agreement that in certifying the fair value, "the auditor shall be considered to be acting as an expect [*sic*] and not as an arbitrator".[30]

57 Wellness, Manoj and Kanchan offered the following undertakings to "aid the auditor … to ascertain Wellness' true financial position":

(a) Wellness offered to undertake to the Court to permit the auditor to inspect all the books and papers of Wellness in its possession, custody or control that may be requested by the auditor.

(b) Manoj and Kanchan offered to undertake to the Court to

(i) permit the auditor to inspect all the books and papers of Wellness or relating to Wellness in their possession, custody or control that may be requested by the auditor; and

(ii) consent to be examined by the auditor on oath to give information concerning the promotion, formation, trade dealings, affairs or property of Wellness, such examination to be held before a Judge in Chambers if the Court so directs.

58 In my view, these undertakings did not address the concerns that I had. First, given the circumstances of the present case where, as I have found, Manoj had treated the company and its funds as his own, it was important that an

independent party took custody and control of the company's property. A liquidator could do this under s 269(1) of the Companies Act; the auditor appointed to value the company could not. In my view, it was not appropriate to let Manoj and Kanchan remain in control of Wellness. It was important that a liquidator took control of the company. The powers of the directors will cease when the court orders the winding up of the company: *Walter Woon on Company Law*, at para 17.122.

59 Second, the undertakings did not address the concern that the auditor would not be equipped to decide whether Manoj and/or Kanchan should be held liable to compensate Wellness in connection with the various matters referred to in [55] above. By contrast, a liquidator had wide powers under the Companies Act to bring or defend legal proceedings on behalf of the company, and/or apply to the court for guidance on matters of law or principle: *Walter Woon on Company Law*, at para 17.148–17.149.

*Sunbreeze's offer to buy out EQ Capital*

60 Sunbreeze argued that a winding up order should not be made because an offer had been made to buy EQ Capital's shares in Wellness at fair value, and that the offer represented a fair exit for EQ Capital.

61 By way of a letter dated 9 May 2018 from their lawyers, Sunbreeze, Manoj and Kanchan had offered to buy EQ Capital's shares in Wellness at the price of S$3.69m. This price was based solely on a valuation of Wellness' 30.1% stake in TWG Tea as at 30 June 2017.

62 I agreed with EQ Capital that it was entitled to take the view that the 9 May 2018 offer did not reflect a fair value.

(a) First, Sunbreeze, Manoj and Kanchan were relying on a valuation of Wellness' stake in TWG Tea that was by then, a year old.

(b) Second, the valuation had been done on a net tangible assets ("NTA") basis for purposes of a Post Hearing Information Pack submitted by V3 Group Limited (OSIM's holding company) in September 2017 in accordance with the requirements for listing on the Stock Exchange of Hong Kong.[31] It did not necessarily reflect the fair value of Wellness' shares in TWG Tea. The NTA was but one of the ways in which the shares could have been valued.

(c) Third, the 9 May 2018 offer did not consider whether Manoj and/or Kanchan should be held liable to compensate Wellness in connection with the various matters referred to in [55] above.

63 I concluded therefore that Sunbreeze's buy-out offer did not represent a fair exit for EQ Capital.

**Conclusion**

64 For the above reasons, I ordered that Wellness be wound up. I also ordered that EQ Capital's costs be paid from the assets of the company. I fixed the costs at S$22,500 plus disbursements to be fixed by me if not agreed.

**Application for stay pending appeal**

65 Sunbreeze and Wellness made an oral application for a stay of my order pending appeal. Both undertook to file their appeals.

66 EQ Capital referred me to *In re A & BC Chewing Gum Ltd* [1975] 1 WLR 579 ("*In re A & BC*"). In that case, the court refused to stay a winding up

order. Plowman J reasoned (at 592G–593A) that if a stay was granted and the appeal against the winding up order failed, the delay would very seriously hamper the liquidator's ability to ascertain (a) the assets of the company as at the date of the winding up order and the date of the application, and (b) the liabilities of the company as at the date of the winding up order. In contrast, assuming a stay was not granted, a profitable business could be carried on and the refusal of a stay would have caused no additional harm (at 593A–B).

67 In the present case, Wellness was a holding company with no business operations. I agreed with EQ Capital that there was a need for the liquidators to step in. However, I agreed with Sunbreeze and Wellness that Wellness' shareholding in TWG Tea ought to be preserved pending their appeal. Otherwise, the shares might be sold by the liquidators under distress sale conditions and a successful appeal would be rendered nugatory.

68 I therefore refused a stay of the winding up order generally but granted a limited stay against a sale of Wellness' shares in TWG Tea pending appeal.

Chua Lee Ming
Judge

Davinder Singh SC, Jaikanth Shankar, Srruthi Ilankathir, Hanspreet Singh Sachdev, Rajvinder Singh Chahal and Avinesh Selvarajah (Davinder Singh Chambers LLC) for the plaintiff;
Toby Landau QC and Calvin Liang (instructed), Chua Sui Tong, Liew Yik Wee and Wong Wan Chee (Rev Law LLC) for the defendant;
Alvin Yeo SC, Koh Swee Yen, Lin Chunlong and Jasmine Low

(WongPartnership LLP) for the 1st Non-Party.

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1 1st Non-Party's Bundle of Documents vol 1 ("1 BD"), tab 3, p 433.
2 1 BD, tab 3, pp 154–169.
3 1 BD, tab 3, pp 189–193.
4 1 BD, tab 3, pp 663–684, at p 668.
5 1 BD, tab 3, p 669.
6 Clauses 7.3 and 7.4 of the SHA; 1 BD, tab 3, p 163.
7 1 BD, tab 3, pp 111–137.
8 Clause 2(k) of the SHA; 1 BD, tab 3, p 156.
9 3 BD, tab 5, pp 1400–1401, at p 1401.
10 3 BD, tab 5, pp 1404–1407, at p 1405.
11 3 BD, tab 5, pp 1430–1433.
12 Clause 2(s) of the SHA; 1 BD, tab 3, p 157.
13 2 BD, tab 4, p 937.
14 2 BD, tab 4, pp 1127–1136, at p 1134 (para 26).
15 1 BD, tab 3, p 127.
16 2 BD, tab 4, p 873.
17 2 BD, tab 4, p 873.
18 2 BD, tab 4, pp 941–945.
19 2 BD, tab 4, p 946.
20 2 BD, tab 4, pp 959–961.
21 2 BD, tab 4, p 963.
22 2 BD, tab 4, p 961.
23 2 BD, tab 4, p 982.
24 2 BD, tab 4, p 954.
25 2 BD, tab 4, pp 962 and 970.
26 3 BD, tab 5, pp 1547–1552.
27 Clause 2(b) of the SHA; 1 BD, tab 3, p 156.
28 Manoj's 3rd Affidavit; 3 BD, tab 6, at paras 53–54.
29 Articles 46–50 of the Articles of Association; 1 BD, tab 3, pp 118–119.
30 Article 48 of the Articles of Association; 1 BD, tab 3, p 118.
31 3 BD, tab 7, pp 9–12, at p 11.