

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 298

Originating Summons No 206 of 2017

Between

The Wellness Group Pte Ltd

... Plaintiff

And

- (1) TWG Tea Company Pte Ltd
- (2) OSIM International Pte Ltd
- (3) Paris Investment Pte Ltd

... Defendants

GROUNDS OF DECISION

[Companies] — [Directors] — [Appointment]

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The Wellness Group Pte Ltd
v
TWG Tea Co Pte Ltd and others

[2017] SGHC 298

High Court — Originating Summons No 206 of 2017
Chua Lee Ming J
10 July 2017

16 November 2017

Chua Lee Ming J:

Introduction

1 The plaintiff, The Wellness Group Pte Ltd (“Wellness”), sought, *inter alia*, an order that Associate Professor Mak Yuen Tee (“AP Mak”) be appointed as a director of the first defendant, TWG Tea Company Pte Ltd (“TWG Tea”). The application was based on a Shareholders’ Agreement dated 18 March 2011 (“the SHA”) which Wellness and TWG Tea had signed together with the other two shareholders of TWG Tea, *ie*, the second defendant, OSIM International Pte Ltd (“OSIM”) and the third defendant, Paris Investment Pte Ltd (“Paris”).

2 On 10 July 2017, I dismissed the application. Wellness has appealed against my decision.

Undisputed facts

3 Wellness was established for the purposes of wholesale and/or retail of lifestyle and/or wellness related products. TWG Tea operates Wellness' tea division.

4 In early 2011, the then-director and chief executive officer ("CEO") of TWG Tea, Mr Manoj Mohan Murjani ("Manoj"), started negotiations with Mr Ron Sim Chye Hock ("Ron Sim") regarding an investment by OSIM into TWG Tea. OSIM was then a public company listed on the Singapore Stock Exchange; Ron Sim was the CEO, a director and Chairman of OSIM.

5 On 18 March 2011, OSIM acquired 35% of the shares in TWG Tea. The other two shareholders, Wellness and Paris, held 54.7% and 10.3% respectively. On the same day, Wellness, OSIM, Paris and TWG Tea signed the SHA. Clause 5.2 of the SHA provides for the composition of TWG Tea's board of directors, and reads as follows:

5.2 Composition: The Board shall comprise:

5.2.1 two persons appointed by [Paris] and [Wellness];
and

5.2.2 one person appointed by [OSIM], for so long as [OSIM's] Shareholding Percentage is not less than 25 per cent. That person shall be Mr Ron Sim.

6 Subsequently, disputes arose between Manoj and Ron Sim. In December 2011, Ron Sim called for a TWG Tea board meeting to review the suitability of Manoj continuing as CEO and if thought appropriate to remove him as CEO. For various reasons, the board meeting was not held.

7 On 14 August 2012, Manoj resigned as CEO of TWG Tea. On 28 September 2012, he also resigned as a director of TWG Tea. Wellness did not appoint anyone to replace Manoj on the board of TWG Tea at the time.

8 Subsequently, for reasons which I need not go into, OSIM's shareholding in TWG Tea increased to 45% while Wellness' and Paris' shareholdings decreased to 46.3% and 8.7% respectively.

9 On 18 October 2013, OSIM purchased all the shares in Paris. Their combined shareholding in TWG Tea was 53.7%.

10 In November 2013, TWG Tea had a rights issue to raise capital. Wellness did not subscribe to this rights issue. OSIM and Paris together subscribed for the entire rights issue. Consequently, OSIM and Paris, combined, held 69.9% of the shares in TWG Tea while Wellness' shareholding was diluted to 30.1%. To date, Wellness continues to hold 30.1% of the shares in TWG Tea.

11 In February 2014, Wellness and Manoj commenced a minority oppression action in S 187/2014 against OSIM, Paris and the directors of TWG Tea. On 22 April 2016, I dismissed the claims in S 187/2014 – see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others* [2016] 3 SLR 729. Wellness' appeal in Civil Appeal No 64 of 2016 was dismissed by the Court of Appeal on 25 October 2016.

12 For present purposes, the only relevant finding in S 187/2014 is that there is an implied term in the SHA that the majority shareholder(s) (whoever they may be) would be entitled to appoint two directors to the board of TWG Tea, and the minority shareholder(s) in TWG Tea would be entitled to appoint one director so long as they hold at least 25% of the shares in TWG Tea (“the

Implied Term”) (at [121(c)]). The Implied Term addressed the situation where Wellness, whether by itself or with Paris, ceased to be the majority shareholder/s in TWG Tea. In the present case, Wellness has ceased to be the majority shareholders and OSIM together with Paris form the majority shareholders. Since Wellness (as the minority shareholder) holds 30.1% of the shares in TWG Tea, it is entitled to appoint one director to the board of TWG Tea.

Wellness’ attempts to appoint a director to the Board

13 For some four years, Wellness did not exercise its right to appoint a director to the board of TWG Tea after Manoj resigned on 28 September 2012. On 26 October 2016, Wellness informed TWG Tea that it wished to re-appoint Manoj as a director of TWG Tea, pursuant to cl 5.2 of the SHA and the Implied Term.¹

14 On 1 November 2016, OSIM and Paris wrote to Wellness stating that they were unable to agree to the appointment of Manoj due to, *inter alia*, his wrongful and dishonest actions that damaged TWG Tea’s interests. OSIM and Paris indicated that they would be willing to take steps to appoint either one Ms Kanchan Murjani (“Kanchan”) or Mr Finian Tan (“Finian”), both of whom were also directors of Wellness, if Wellness nominated either of them.²

15 On 3 November 2016, TWG Tea informed Wellness that the board was of the view that Manoj’s appointment to the board would not be in the best interests of TWG Tea, having regard to his prior conduct and all the relevant circumstances. However, the board recognised Wellness’ right to appoint a director to the board, and indicated that it was prepared to accept the appointment of either Kanchan or Finian to the TWG Tea board.³ For reasons

best known to Wellness, it did not take up the suggestion to nominate either Kanchan or Finian.

16 On several other occasions in December 2016 and January 2017, Wellness wrote to TWG Tea, OSIM and Paris reiterating its request to appoint Manoj as director with immediate effect.⁴ However, Wellness' request continued to be rejected.⁵

17 On 13 February 2017, Wellness wrote to TWG Tea (“the 13 February Letter”) and proposed the appointment of AP Mak as a director of TWG Tea.⁶ The 13 February Letter further stated as follows:

6. In connection with the appointment of [AP] Mak as a director of [TWG Tea], we request that:

- (a) [AP] Mak be authorised by the Board to disclose to us information in relation to [TWG Tea] which [AP] Mak will have access to in his capacity as a director, in accordance with Section 158 of the Companies Act (Chapter 50 of Singapore); and
- (b) [TWG Tea] arrange for [AP] Mak to be covered by Director & Officer insurance to the same extent as the other Directors of [TWG Tea], and if [TWG Tea] does not at present purchase Director & Officer insurance for its other Directors, that such insurance be purchased.

7. Please arrange for the appointment of [AP] Mak as a Director of [TWG Tea] and the ancillary matters set out in paragraph 6 of this letter to be formalised as soon as practicable.

18 TWG Tea did not reply to the 13 February Letter.

19 On 17 February 2017, Wellness wrote to TWG Tea (“the 17 February Letter”) reiterating its request that TWG Tea “immediately take all necessary steps to formalise the appointment of [AP] Mak, *including the ancillary matters* set out in paragraph 6 of [the 13 February Letter]” (emphasis added).⁷ Wellness

followed up with another letter dated 21 February 2017 demanding that TWG Tea “take immediate steps to formalise the appointment of [AP] Mak”.⁸

20 On 23 February 2017, TWG Tea informed Wellness that it would not be appointing AP Mak for two reasons: (a) first, the board was “unable to accede” to the two ancillary matters set out in para 6 of the 13 February Letter (“the Ancillary Matters”) and (b) second, in any event, those Ancillary Matters were not in the interests of TWG Tea (“the 23 February Letter”).⁹ TWG Tea also reminded Wellness that it had repeatedly invited Wellness to appoint Kanchan or Finian to the board of TWG Tea.

21 On 27 February 2017, Wellness filed the present application seeking the following:

- (a) A declaration that pursuant to the SHA, Wellness is entitled to appoint one director to TWG Tea’s board of directors so long as Wellness holds at least 25% of the shares in TWG Tea;
- (b) An order that AP Mak be appointed as a director of TWG Tea pursuant to the SHA;
- (c) An order that TWG Tea, OSIM and/or Paris and/or its directors and/or officers execute or procure the execution of the necessary documents to give effect to the appointment of AP Mak as director of TWG Tea; and
- (d) Costs of and incidental to this application to be paid by the three defendants to Wellness.

22 On 28 February 2017, Wellness wrote to TWG Tea stating, *inter alia*, that (a) the refusal to appoint AP Mak was a breach of the SHA, (b) the assertion in the 23 February Letter that the Ancillary Matters were not in the interests of TWG Tea lacked substantiation and justification, and (c) there was no basis for restricting Wellness’ choice of nominee director to Kanchan and Finian.¹⁰

Whether the defendants had breached the Implied Term

23 It was common ground between the parties that Wellness had a contractual right to appoint a director to the board of TWG Tea pursuant to the Implied Term. It was not also disputed that although described as a right to appoint a director, this right was in effect a right to nominate a person to be appointed as a director.

24 Before me, Wellness conceded that it was not entitled to impose “conditions” in respect of AP Mak’s appointment as director. However, Wellness then argued that

- (a) the Ancillary Matters were not “conditions”, but merely “requests”; and
- (b) in any event, the point was moot as the Ancillary Matters were not part of the prayers sought in the present proceedings.

Wellness submitted that it was simply seeking an order that AP Mak be appointed as a director of TWG Tea. Wellness argued that since the unacceptability of the Ancillary Matters was the only reason given by the defendants for not appointing AP Mak as a director, the defendants had no other basis to object to AP Mak’s appointment now that the Ancillary Matters did not form part of the orders sought.

25 I agreed with the defendants that Wellness had in fact changed its position with respect to the Ancillary Matters. In my view, the Ancillary Matters were clearly intended and conveyed to the defendants as conditions that were attached to AP Mak’s appointment:

(a) In para 7 of the 13 February Letter, Wellness asked TWG Tea to arrange for the appointment of AP Mak “and the [Ancillary Matters] to be formalised as soon as practicable”.¹¹

(b) In para 3 of the 17 February Letter, Wellness requested TWG Tea to immediately take all necessary steps to formalise the appointment of AP Mak “including the [Ancillary Matters]”.¹²

(c) TWG Tea stated in its 23 February Letter that its board would not be appointing AP Mak because the Ancillary Matters were not in the interests of the company.¹³ Yet, Wellness did not try to clarify to TWG Tea that the Ancillary Matters were mere requests and that AP Mak could be appointed without the need to give effect to the Ancillary Matters.

(d) There was nothing in the affidavit, filed on 27 February 2017 on behalf of Wellness¹⁴ in support of this application, that sought to explain that the Ancillary Matters were mere requests that did not have to be given effect to.

(e) Even in its reply to TWG Tea dated 28 February 2017, Wellness continued to challenge TWG Tea’s assertion that the Ancillary Matters were not in the interests of the company.¹⁵ Again, Wellness made no attempt to clarify that it was no longer insisting on the Ancillary Matters.

26 The first time that Wellness clarified that it was not insisting on the Ancillary Matters was in its written submissions exchanged with the defendants on 6 July 2017 (two working days before the hearing). It seemed to me that Wellness' actions were calculated to steal a march on the defendants at the hearing before me.

27 The defendants submitted that they had considered the issue of AP Mak's appointment with the Ancillary Matters as conditions for his appointment. The TWG Tea board refused to appoint AP Mak as the Ancillary Matters were unacceptable. The defendants submitted that they did not have to and did not go further to consider whether AP Mak should be appointed as a director of TWG Tea on the basis that the Ancillary Matters could be disregarded. The defendants submitted that, in the circumstances, they ought to be given an opportunity to reconsider AP Mak's appointment afresh.

28 I agreed with the defendants. In my view, the defendants were entitled to reconsider AP Mak's appointment afresh on the basis that the Ancillary Matters were not conditions attached to his appointment. I therefore dismissed Wellness' application.

Conclusion

29 Having dismissed Wellness' application, I ordered Wellness to pay costs fixed at \$5,000 (including disbursements) to TWG Tea, and costs fixed at \$5,000 (including disbursements) to OSIM and Paris.

Chua Lee Ming
Judge

Chua Sui Tong (Rev Law LLC) for the plaintiff;
Siraj Omar and Premalatha Silwaraju (Premier Law LLC) for the first
defendant;
Davinder Singh s/o Amar Singh, SC, Jaikanth Shankar, Tan Ruo Yu,
Charlene Wong Su-Yi and Serena Ng Su-Lin (Drew & Napier LLC)
for the second and third defendants.

- 1 Affidavit of Chua Sui Tong dated 27 February 2017 (“Chua’s affidavit”) at p 122.
- 2 Chua’s affidavit at pp 123–124.
- 3 Chua’s affidavit at p 125.
- 4 Chua’s affidavit at pp 126, 128, 130–133.
- 5 Chua’s affidavit at pp 127, 129.
- 6 Chua’s affidavit at pp 134–135.
- 7 Chua’s affidavit at p 136.
- 8 Chua’s affidavit at p 137.
- 9 Chua’s affidavit at p 138.
- 10 Affidavit of Taha Bou Qdib dated 21 April 2017 (“Taha’s affidavit”), exh TB-1 at p 8.
- 11 Chua’s affidavit at p 134.
- 12 Chua’s affidavit at p 136.
- 13 Chua’s affidavit at p 138.
- 14 Chua’s affidavit.
- 15 Taha’s affidavit, exh TB-1 at p 8.