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Case Note

A SHAREHOLDER'S RIGHT TO APPOINT A DIRECTOR

The Wellness Group Pte Ltd v Paris Investment Pte Ltd
[2018] 2 SLR 973

It is common to find a right, given to a shareholder to appoint a director, in shareholders' agreement or joint venture agreements. *The Wellness Group Pte Ltd v Paris Investment Pte Ltd* [2018] 2 SLR 973 provides important guidance on the interplay between a shareholder's right to nominate a director which is contained solely in a shareholders' agreement (but not the constitution) and the board of directors' right to appoint directors which is contained in the company's constitution. The decision is significant because it displays judicial willingness to facilitate and enforce agreements that the parties have entered into and bargained for around established company law principles governing the statutory contract.

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I. Introduction

1 The Singapore Court of Appeal, in *The Wellness Group Pte Ltd v Paris Investment Pte Ltd*[1] ("*Wellness*"), had the occasion to consider the scope of a shareholder's right to appoint a director to the board. The court had observed that "[i]t is somewhat surprising that there is no reported local precedent in which the court has had to decide on the precise contours of the shareholder's right or the corresponding obligations of the other parties to the agreement in relation to the appointment of directors".[2] Given the importance of such a right and its ubiquity in shareholders' agreements and joint venture agreements, it is timely that the Court of Appeal rules on its legal effect.

1 [2018] 2 SLR 973.
2 *The Wellness Group Pte Ltd v Paris Investment Pte Ltd* [2018] 2 SLR 973 at [1].

2 Shareholders' agreements and joint venture agreements tend to be entered into at the company's formation or at a subsequent time when a new shareholder joins the company. The contract may supplement the company's constitution, its main advantage being that normal contractual principles apply. On the one hand, contractual obligations are generally enforceable as of right, and by injunction, where applicable. Enforcement of provisions in the constitution, on the other hand, may pose a problem for individual members if they enforce a right not *qua* member but in some other capacity; and because most company law remedies are discretionary in nature.

3 A main disadvantage of a shareholders' agreement is that being subject to the rules of privity of contract, it binds only parties to the contract and not a transferee of shares or a new member of the company. To achieve different aims, a shareholder's agreement may be entered into by all the shareholders or only by some of the shareholders, and the company itself may or may not be a party to the contract.

4 *Wellness* provides important guidance on the interplay between a shareholder's right to nominate a director contained in a shareholders' agreement and the board of directors' right to appoint directors contained in the company's constitution. It is submitted respectfully that the Court of Appeal had defined the shareholder's right as a right to nominate a director in a pragmatic fashion but in a few respects went further than previously reported decisions.

II. The decision

5 TWG Tea Company Pte Ltd ("TWG") was incorporated as a wholly owned subsidiary of The Wellness Group Pte Ltd ("Wellness") in 2007. Paris Investment Pte Ltd ("Paris"), a wholly owned subsidiary of OSIM International Pte Ltd ("OSIM"), acquired a stake in TWG in 2010. This acquisition was followed closely in 2011 by OSIM's acquisition of a 35% stake in TWG from Wellness and Paris. Pursuant to OSIM's acquisition, TWG and its three shareholders, namely, Wellness, OSIM and Paris, entered into a shareholders' agreement ("Shareholders' Agreement") which contained the following cl 5:

> Board of Directors
>
> 5.1 Number: The Board shall comprise three Directors.
>
> 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 Consequent to a rights issue in 2013, OSIM and Paris together held 69.9% of the shares in TWG. In 2014, Wellness commenced an oppression action against OSIM, Paris and the directors of TWG, which was dismissed by both the High Court[3] and Court of Appeal.[4]

7 One of the findings of the High Court in the oppression action was that a specific term had to be implied in the Shareholders' Agreement, namely, that "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]" ("Implied Term"). Wellness, which had, by 2013, become the minority shareholder holding 30.1% of the shares in TWG, was thus entitled to appoint one director pursuant to the Implied Term.

8 When TWG's board refused to appoint Wellness's nominee as director, Wellness sued OSIM, Paris and TWG. The High Court held that the Implied Term was "in effect a right to nominate a person to be appointed as a director". The Court of Appeal had to determine if the Implied Term entitled Wellness to *appoint* a director to TWG's board, or merely a right to *nominate* a director.

9 The key issue in the case was whether to characterise the Implied Term as giving the shareholder an unfettered right to appoint who they pleased as a director (which was advanced by Wellness); or merely a right to nominate, such that the power to decide if the nominee should be appointed was vested in the board as provided for in Art 91 of TWG's constitution ("Article 91") (which was argued by TWG). Article 91 provided:

> The Board of Directors may, at any time, and from time to time, appoint any person to be a Director, either to fill a casual vacancy, or by way of addition to their number …

3 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729. See also Hans Tjio, "An Empirical Look at the Consequences of Oppression Actions in Singapore" (2017) 17(2) *Journal of Corporate Law Studies* 405.

4 Wellness's appeal against the dismissal of its claims in Suit 187 was dismissed by the Court of Appeal on 25 October 2016.

10 The Court of Appeal took the middle ground and held that the Implied Term gave Wellness a right to *nominate*[5] one person to be a director of TWG, while the board was obliged to appoint that nominee as a director, subject only to two caveats. First, there would be no obligation to appoint a person who was statutorily disqualified under the Companies Act[6] or who did not consent to act as a director. Secondly, there would be no obligation to appoint the nominee if it was able to establish that the nominee would be obviously unfit for office or that his appointment would be obviously injurious to the company. The burden was on the board to prove the unsuitability of the nominee. Thus, it was envisaged that it would be a rare instance where the board could refuse to appoint a nominee put forward by a shareholder exercising their right to nominate a director.

11 The Court of Appeal had adopted a purposive approach to the construction of the Implied Term. A shareholder's right to nominate a director was intended, by the parties to the joint venture, to provide a minimum degree of protection of that shareholder's interests by ensuring their representation on the board. The Court of Appeal approved the proposition that the power "even if conferred on a named shareholder, is not constrained by any fiduciary or similar obligation and may be exercised in the shareholder's own interests".[7] As such, the shareholder could nominate who they wished according to their own interests.[8]

12 The board, although vested with the power to appoint directors under Article 91, would have to exercise its power in accordance with the shareholder's wishes pursuant to the Implied Term. This was because the board's power had to be exercised *bona fide* in TWG's interests, which were invariably connected with the respective shareholders' interest in participating in the joint venture. As such, subject to the two caveats

5 The Implied Term will be referred to in this case note as the right to nominate a director although the Implied Term uses the term "appoint".

6 Cap 50, 2006 Rev Ed.

7 Citing *Palmer's Company Law* vol 2 (Geoffrey Morse gen ed) (Sweet & Maxwell, Looseleaf Ed, 2018) at para 8.520 and *Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore ed) (Oxford University Press, 3rd Ed, 2017) at para 6.49, citing *Santos Ltd v Pettingell* (1979) 4 ACLR 110.

8 There may, however, be constraints placed on the majority's exercise of power of appointment in the general meeting, see, for instance, *Re Harmer Ltd* [1959] 1 WLR 62; the power to alter the company's constitution must be exercised *bona fide* for the benefit of the company as a whole, see, for instance, *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656; and the power to vote at a class meeting in connection with a reduction of capital must have regard to the interests of the class of shareholders as a whole, see, for instance, *Re Holders Investment Trust* [1971] 1 WLR 583. See also P Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384.

mentioned earlier, the board had a very limited discretion *not* to appoint a nominee.

13 The masterful reconciliation of the Implied Term (which protected the shareholder's interest in ensuring their representation on the board) and Article 91 (which required the board to fulfil its fiduciary duties to the company) allowed the Court of Appeal to strike a balance between the two interests. It is submitted respectfully that the Court of Appeal's construction of the shareholder's right to nominate a director is certainly sensitive to the commercial context in which such a right subsists and would accord with the businessman's understanding of the effect of the right which they have negotiated for.

14 The Court of Appeal had concluded that by refusing to appoint Wellness's nominee, the Implied Term had been breached. The Implied Term was enforced through an order for specific performance wherein the company had to execute the necessary documents to effect the appointment of Wellness's nominee.

15 A few observations may be made in relation to cl 5 of the Shareholders' Agreement from which the Implied Term was derived. First, the right to nominate a director found expression *only* in the Shareholders' Agreement and there was *no* equivalent right in TWG's constitution. There was no grant to the nominating shareholder to fill a vacancy in the board or that shareholders agree in the shareholders' agreement to vote for the director so nominated. The only relevant provision in TWG's constitution was Article 91, which gave the board the power to appoint directors. Secondly, it is not clear from the judgment whether there remained in TWG's constitution the typical provision that the general meeting may by ordinary resolution elect directors to the board,[9] and concomitantly the provision that the general meeting may by ordinary resolution remove directors from the board.[10] In the absence of contrary provisions in the constitution, TWG would be able, pursuant to s 149B of the Companies Act, to appoint, and, pursuant to s 152(9) of

9 Section 149B of the Companies Act (Cap 50, 2006 Rev Ed) provides: "Unless the constitution otherwise provides, a company may appoint a director by ordinary resolution passed at a general meeting." See, for instance, Art 70 of the Model Constitution (Companies (Model Constitutions) Regulations 2015 (S 833/2015) which stipulates the company may at the general meeting elect a person to be director.

10 Section 152(9) of the Companies Act (Cap 50, 2006 Rev Ed) provides: "Subject to any provision to the contrary in the constitution, a private company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in any agreement between the private company and the director." See, for instance, Art 73 of the Model Constitution (Companies (Model Constitutions) Regulations 2015 (S 833/2015) which stipulates only an ordinary resolution is required.

the Companies Act, to remove a director at its general meeting. Thirdly, there was no mention of other clauses in the Shareholders' Agreement which required the other shareholders to vote their shares to elect the nominating shareholder's nominee; or required the other shareholders not to vote their shares to remove the nominating shareholder's nominee; or required a grant of a proxy to the nominating shareholder by the other shareholders to allow the nominating shareholder to vote the other shareholders' shares in favour of their nominee.

16 These suggest that the draftsman in *Wellness* did not ensure the efficacy of the shareholder's right to nominate and to actually effect the appointment of their nominee as director, such that on the facts of the case, in order to carry out the shareholders' intentions, an Implied Term had to be resorted to, and that Implied Term had to then be reconciled with Article 91. It is likely that in other cases where the parties' intention is to effectively grant a right to a shareholder to appoint a director, the procedure to nominate and the agreement of the shareholders to vote their shares to elect that nominee will be set out in both the shareholders' agreement and the company's constitution; or one document will incorporate the other by specific reference, and in these cases the situation that presented itself in *Wellness* may not arise.

III. The right

17 What is the legal basis of the shareholder's right to nominate a director? Unlike the right to attend a meeting and to speak,[11] the right of a shareholder to nominate a director is not found in the Companies Act. It appears to be accepted that the right to nominate a director is tied to the shareholder's ownership of shares, as evidenced by the practical arrangements often made to confer on a shareholder such a right. A shareholder who wishes to ensure that they have the right to nominate and then appoint their nominee may provide in the constitution that they have weighted voting rights when voting to elect their nominee; or may provide for the right to be conferred as a class right attached to the shares they hold. The advantage of conferring the right as a class right is that consent of the holder of the class right has to be sought before the class right can be varied.[12]

18 In *Wellness*, the intention was to tie the right to nominate with the shareholder's ownership of shares since the right to nominate was

11 Companies Act (Cap 50, 2006 Rev Ed) s 180(1).

12 Companies Act (Cap 50, 2006 Rev Ed) s 74. See also the recommendation to amend s 74 in the *Report of the Companies Act Working Group* (15 May 2019) ch 4.

predicated on the shareholder holding at least 25% of the shares in TWG. Clause 5, if hypothetically speaking it had been set out in TWG's constitution, should have been enforceable by Wellness against TWG since it was a *qua* member right,[13] given to Wellness in its capacity as a holder of 25% of the shares in TWG.

19 Be that as it may, the right to nominate was provided for *only* in the Shareholders' Agreement, and its legal basis was founded on contract. The Court of Appeal's construction of the Implied Term on contractual principles, consistent with party autonomy and the businessman's intentions and expectations, is intuitively appealing. After all, company law itself is popularly seen as a "nexus of contracts",[14] which favours enabling and default rules and frowns upon mandatory rules. The Companies Act, to a large extent, permits parties to customise their arrangements in the constitution, and there is nothing objectionable for shareholders to agree by way of contract that a specific shareholder has the right to nominate a director.

20 The practical merits of a purely contractual approach were unfortunately undercut to the extent that the special right of Wellness was merely to nominate a director and could not be divorced from the administration of the company. The Court of Appeal had concluded that the appointment of the nominee involved two stages: the nomination pursuant to the Implied Term; and the appointment by the board pursuant to Article 91. Since the board's right to appoint was found in the constitution, which was governed by company law, the interplay between the right of the shareholder contained in the contract and the right of the board contained in the statutory contract has to be examined. It will be recalled that the Shareholders' Agreement was entered into by TWG and its three shareholders. If the board alone had the right to appoint directors under Article 91 of the statutory contract, could the same board (acting as the company) enter into a shareholders' agreement with a specific shareholder, to fetter its discretion to appoint a director? There are a number of difficulties with answering the question in the affirmative.

21 First, the grant of a right to nominate a director whose source is a contract with a specific shareholder would be inconsistent with an established tenet of company law that the rights of the majority

13 *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881.

14 The theory is identified in the seminal work of M C Jensen & W H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structures" (1976) 3 J Fin Analysis 305 at 311, and subscribed to by many leading jurists. See, for instance, F Easterbrook & D Fischel, "The Corporate Contract" (1989) 89 Colum L Rev 1416.

shareholders are usually respected under Company Law.[15] The Shareholders' Agreement bound only the signatories to the contract. If new members replaced OSIM and Paris, they would not be bound by the Shareholders' Agreement. Since the right of Wellness to nominate a director was not provided for in TWG's constitution, there was nothing to alert the new members to such a right and to bind them. It is difficult to reconcile Wellness's contractual right with the members' right to appoint a new director or to remove a director they disapprove of. It would be odious to the new members of TWG to have their company compelled to appoint Wellness's nominee because the company was earlier a party to the Shareholders' Agreement which gave Wellness a right to nominate a director.

22 The crux is not so much a usurpation of the board's power of appointment under Article 91 by the general meeting (which the Court of Appeal's "middle ground" construction of the Implied Term has resolved) but rather the fettering of the board's power by a particular shareholder by way of contract and which could be contrary to the wishes of the majority of members, given that the membership of a company may not be static. The constitution is a very unusual type of contract[16] and to treat the Shareholders' Agreement, just because it was signed by all the shareholders and the company, to be as effective as the constitution does not give sufficient weight to the interests of parties outside the four corners of the Shareholders' Agreement. The constitution is essentially a different creature from contract – it is a relational contract and provides the framework for an ongoing set of dynamic relationships between the company and members of the company as they enter and exit the company.

23 Secondly, if the contractual right given to Wellness were construed as a fetter on TWG, it is uncertain if it could be enforced against the company, notwithstanding the company was a party to the Shareholders' Agreement with Wellness. *Russell v Northern Bank Development Corp Ltd*[17] ("*Russell*") has laid down a long-standing principle that a company

15 See, for instance, the rules on shareholder ratification of breaches of duty or internal irregularities. But this is not that simple an area now with talk of independent shareholder ratification as required under s 239 of the UK Companies Act 2006 (c 46).

16 For instance, the rule in *Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 Ch D 1 that where the constitution limits the powers of the company in general meeting, the constitutional provision cannot be disregarded even by a majority sufficiently large to alter the constitution – a formal alteration to the constitution must be made. See also the other examples given by Coomaraswamy J in *BTY v BUA* [2019] 3 SLR 786.

17 [1992] 1 WLR 588; [1992] BCLC 1016.

cannot by contract deprive itself of the right to exercise its statutory powers. Although the precise scope of "statutory powers" envisaged by the case is not clear, it may extend beyond the company's power to issue share capital in that case and arguably include matters which are required to be resolved by shareholders in general meeting pursuant to ss 149B and 152(9) of the Companies Act.[18] As mentioned above, if Wellness had desired to have the right to appoint a director, it should have placed restrictions on the statutory powers of the company to appoint or remove directors in the constitution itself. The mischief their Lordships in *Russell* had in mind was the concern that the company was bound to act in accordance with the wishes of a named shareholder (in the context of *Wellness*, of Wellness) rather than the shareholders from time to time who should always be free to determine the powers of the company in this regard.

24 Thirdly, it is not incontrovertible that a contractual right prevails over a provision in the constitution. The Court of Appeal had concluded that even if the Implied Term and Article 91 of the constitution were inconsistent, the Shareholders' Agreement prevailed over TWG's constitution pursuant to cl 12 of the Shareholders' Agreement. It may be opportune at this juncture to state cl 12 in full:

> In the event of any inconsistency or conflict between the provisions of this Agreement and the provisions of the Articles, the provisions of this Agreement shall as between the Shareholders prevail (subject to applicable law) and the Shareholders shall, so far as they are able, cause such necessary alterations to be made to the Articles as are required to remove such conflict.

25 The Court of Appeal had relied on its decision in *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd*[19] ("*Golden Harvest*") for the proposition that the shareholders would have been legally obliged to amend the constitution under cl 12 and would not be able to avoid their contractual obligation under the Implied Term to appoint Wellness's nominee. In *Golden Harvest*, Art 118 of that company's articles provided that the directors might from time to time elect a chairman to preside at their meetings, whereas cl 5.1 of the shareholders' agreement stated that the shareholders *would amend the articles* so as to provide for the chairman to be appointed by a particular shareholder ("Village") but the articles were never amended.

26 *Golden Harvest* may be distinguished in two respects. First, cl 5.1 in *Golden Harvest* expressly required the shareholders to amend the articles in order to provide for the chairman to be appointed by Village

18 These sections were discussed earlier at para 15 above.
19 [2007] 1 SLR(R) 940.

whereas cl 12 stated generally that the shareholders would amend the constitution to remove any inconsistencies. The agreement in cl 5.1 for the shareholders to specifically amend the constitution is one enforceable by specific performance. The facts of *Wellness* do not suggest a conflict between cl 5 and Article 91 that required an amendment. Based on the Court of Appeal's reading of Article 91 as obliging the board, save for two caveats, to appoint the nominee of Wellness, both provisions could be reconciled without the necessity of an amendment.

27 Secondly, cl 12 in *Wellness* provided that the prevalence of the Shareholders' Agreement over the constitution was "subject to applicable law" which was absent in *Golden Harvest*'s cl 5.1. It is proffered respectfully that "subject to applicable law" should include the rule that since TWG's constitution did not specifically provide for Wellness's right to appoint a director, the board could not fetter its discretion and the company could not fetter its statutory powers by contract with a third party to appoint their nominee as director.

28 The Court of Appeal's construction of cl 12 and its conclusion of the primacy of the Shareholders' Agreement over TWG's constitution is in stark contrast to recent *dicta* which suggests otherwise. In *BTY v BUA*,[20] the shareholders' agreement had incorporated an arbitration clause but the company's constitution did not. The High Court determined that because the dispute concerned a breach of the constitution, and not the shareholders' agreement, the shareholder's litigation would be outside the scope of the arbitration clause and was therefore permitted to continue. Coomaraswamy J succinctly summed up the differences in the legal effects between the shareholders' agreement and the constitution in his judgment. His Honour then concluded that the shareholders' agreement was subordinate to the constitution, regardless that the shareholders' agreement had a provision stating it prevailed over the constitution, because it is company law that grants the constitution primacy.

IV. The relief

29 The Court of Appeal relied primarily on *British Murac Syndicate Ltd v Alperton Rubber Co Ltd*[21] ("*British Murac*") for the proposition that "[w]here a person has a right by contract to appoint a director, such a right may be enforced by an order of specific performance".[22]

20 [2019] 3 SLR 786.
21 [1915] 2 Ch 186.
22 *The Wellness Group Pte Ltd v Paris Investment Pte Ltd* [2018] 2 SLR 973 at [85].

30 In *British Murac*, the shareholder and the company entered into an agreement which provided that so long as the shareholder held at least 5,000 shares in the capital of the company, the shareholder should have the right of nominating two directors to the board of the company. Article 88 of the company's constitution provided likewise. Article 90 of the company's articles was worded similarly to Article 91 in *Wellness*. The company declined to accept the nominees and called meetings to pass a special resolution to remove Art 88 from the constitution.

31 It appears that the *ratio decidendi* of the case is that where the *constitution* provided for the right of the shareholder to nominate a director to the board, the company may be restrained from amending the constitution if the alteration was contrary to the bargain between the parties. In granting the injunction, Sargant J had relied heavily on the words of Lindley MR in *Allen v Gold Reefs of West Africa Ltd*:[23]

> But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting its shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered.

32 Sargant J had concluded:[24]

> That passage [the quote above] clearly recognizes that if the Court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty to alter that article so as to break that contract.

33 However, Sargant J did not refer to Lindley MR's subsequent statement that:[25]

> It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company, which exclude him from the operation of a subsequently altered article.

34 Sargant J's conclusion in *British Murac* that the company may not alter its articles if it results in the company breaching a contract is

23 [1900] 1 Ch 656 at 672.
24 *British Murac Syndicate Ltd v Alperton Rubber Co Ltd* [1915] 2 Ch 186 at 194.
25 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 673.

inconsistent with the *dictum* of Lord Porter in *Southern Foundries (1926) Ltd v Shirlaw*:[26]

> The general principle, therefore, may, I think, be stated thus: A company cannot be precluded from altering its articles thereby giving itself power to act upon the provisions of the altered articles, but so to act may nevertheless be a breach of contract if it is contrary to a stipulation in a contract validly made before the alteration.

35 Sargant J appeared to have put a gloss on the principle when he held that a company can be restrained from altering its articles, which is quite different from the company not being able to excuse its breach of contract by altering the constitution. Indeed, the authorities[27] Sargant J had relied on did not restrain the company from altering its constitution to remove the disputed right, and once the right was removed there would, as a practical matter, be no provision in the constitution capable of being specifically enforced.

36 Likewise the contractual clause binding the company in *Russell*[28] was held to be unenforceable against the company. Even though the contractual clause binding the shareholders in that case was enforceable, the House of Lords declined to order an injunction against the shareholders. The House of Lords did not order an injunction because an injunction would undoubtedly have the practical effect of fettering the company's exercise of its statutory powers.

37 In *Wellness*, Wellness merely had a contractual right with TWG to nominate (as opposed to appoint) a director which, in and of itself, should not be capable of specific performance.[29] Specific performance may be obtained, for instance, to order the shareholders to elect the nominee if that was what they had agreed to do. But Wellness successfully obtained an order of specific performance of Article 91, which in substance converted its agreed right to nominate into a right to appoint.

26 [1940] AC 701 at 740.

27 Lord Porter's *dicta* in *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 740: "Nor can an injunction be granted to prevent the adoption of new articles." Although these cases focused on directors' service contracts, the implication for shareholders' agreements is similar in that the company is a party to them and has agreed to act in a particular way in the future.

28 *Russell v Northern Bank Development Corp Ltd* [1992] 1 WLR 588; [1992] BCLC 1016.

29 *Plantations Trust Ltd v Bila (Sumatra) Rubber Lands Ltd* (1916) 85 LJ Ch 801.

V. Conclusion

38 The general tenor of the Court of Appeal's ruling in *Wellness* certainly helps to promote a paradigm of a "company" in largely private, contractual terms. The decision is significant because it displays judicial willingness to facilitate and enforce agreements that the parties have entered into and bargained for around established company law principles governing the statutory contract. It is submitted respectfully that although the decision in *Wellness* achieved a just and fair outcome between the parties, the fact that the shareholder's right to nominate a director finds its source in an Implied Term, and the constitution does not contain, not even at the very least, the shareholder's right to nominate, was not underscored – which fact is significant because the nature of the right (to nominate only) and its basis (in contract only) raises a question as to whether specific performance was the appropriate remedy for breach of the Implied Term.