

HONG KONG / JUDGMENT

ALAN HOO v. BENJAMIN LUNG

COURT

Court of Appeal

DECIDED

11 May 2007

CASE / FILE NUMBER

CACV10/2006

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bjbj cacv 10/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 10 of 2006 (on appeal from HCA NO. 3049 of 2001) BETWEEN ALAN HOO Plaintiff BENJAMIN LUNG Defendant Before: Hon Rogers VP, Chu and A Cheung JJ in Court Dates of Hearing: 25-26 April 2007 Date of Handing Down Judgment: 11 May 2007 J U D G M E N T Hon Rogers VP: This was an appeal from a judgment of Chung J given on 9 December 2005 after a trial that lasted some 21 days. In the action the plaintiff claimed an injunction to prevent the defendant from carrying on a restaurant business in Shanghai under the name or trademark Va Bene, various declarations as to rights said to be owned by the plaintiff and damages for breach of contract and breach of fiduciary duty alternatively an account of profits. The judge dismissed the plaintiff's claim and in this appeal the relief sought by the plaintiff is limited to damages to be assessed or alternatively an account of profits. At the conclusion of the hearing of this appeal, judgment was reserved which we now give.

Background

The plaintiff and the defendant were the directors of Va Bene Ltd (). The third director was Mr Tino Kwan (Kwan). As the judge found, VBL ran a successful Italian restaurant in Hong Kong from the early 1990s. Again as the judge found, in 2000 the three directors of VBL started to discuss expanding the restaurant business to Shanghai. Visits were made and various potential sites were explored. One of the disputes that arose in the course of the case was as to the extent to which preparations had been made for opening a restaurant in Shanghai. By early 2001 it became clear that the parties had differences which were, in effect, irreconcilable. The point was reached in early March 2001 when solicitors acting on behalf of VBL, and presumably instructed by the plaintiff and Kwan, wrote what was clearly a letter before action complaining of the defendant's opening of a new restaurant in Hong Kong which was said to be in competition with the Va Bene restaurant business and what was said to have been the taking away of staff from it. Litigation did not ensue as a result of that because there was a settlement. The settlement took the form of two agreements. The first was AGREEMENT for the acquisition of Bene . The parties to that agreement were VBL, another company Regal Well Ltd (Regal Well), the defendant, the plaintiff and Kwan. That agreement was a lengthy and detailed agreement that had been prepared and

considered by solicitors on both sides. It had six schedules and six annexures. The main purpose of the agreement was that VBL would sell the business of the Va Bene restaurant to Regal Well for a total of \$14,250,000. This sum was to be divided between the three directors and shareholders in equal shares save that the plaintiff was to receive his portion of \$4,750,000 in cash. Importantly for the purposes of this case were clauses 13.2 and 14. Clause 14 provided as follows: SHANGHAI PROJECT The parties hereto acknowledge that the proposed Bene restaurant business presently being pursued by the Vendor in Shanghai will, as of the date of this Agreement be pursued exclusively by a new company established for that purpose (the Project Company). The Vendor shall not take any action that may adversely affect the Project Company s pursuit of the proposed restaurant business in Shanghai. Tied in with that was the provision in clause 13.2 that the Project Company would have the right to use and register the trademark Bene only in Shanghai and that Regal Well would not have the right to use or register the trade mark there. It might be noted that as at the date of the agreement there had been in Shanghai no trading activity under the name Va Bene and hence there had been no goodwill developed there associated with the name. Clause 17.2 precluded reference to any earlier discussions or agreements, it provided: This Agreement, together with the documents in the agreed form, represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement between the parties with respect thereto and, without prejudice to the generality of the foregoing, excludes any warranty, condition or other undertaking implied at law or by custom. On the following day, 12 April 2001, the defendant, Kwan, the plaintiff, Combined Resources Ltd and VBL entered into what was termed the SHAREHOLDERS AGREEMENT in respect of COMBINED RESOURCES LIMITED . That agreement dealt with the distribution of the proceeds of the sale pursuant to the previous agreement and it also restricted the business activities of VBL. Importantly for the purposes of this case clause 3.1.1 provided as follows: The proposed Bene restaurant business presently being pursued by Va Bene in Shanghai will, as of the date of this Agreement, be pursued exclusively by a new company established for that purpose and in which AH (i.e. the plaintiff) will have not more than 30% beneficial interest (the Project Company under clause 15.1 it was provided that: Nothing in this Agreement or in any document referred to in it shall constitute any of the parties a partner of any other, nor shall the execution, completion and implementation of this Agreement confer on any party any power to bind or impose any obligations to any third parties or any other party or to pledge the credit of any other party. Clause 15.4 contained almost identical wording to clause 17.2 of the previous agreement. At the trial the plaintiff also relied upon an alleged oral agreement to the effect that the defendant would take over the right of Kwan to take part in the project. It suffices to say that the judge did not accept that there had been such an oral agreement. There was no appeal as to that. It was an accepted fact that the plaintiff was given three offers to participate in the project. Those were on 7 June, 22 August and 3 September 2001 respectively. All three offers were rejected by the plaintiff as being unacceptable. It would also appear that the plaintiff had never made any counter offer or counter proposals for himself as to any participation in the project. The plaintiff also raised an equitable claim on the basis that by virtue of the facts and the parties conduct, the plaintiff and the defendant had become co-promoters of and/or partners in the project and that as such the defendant was in the position of

an agent and/or a fiduciary vis- -vis the plaintiff. Although the matter was pleaded in perhaps more general terms, the specific matters relied on, which were referred to by the judge, were that the defendant was under a duty:

- (a) not to hinder or prejudice the Agreed Project ;
- (b) not to prejudice the plaintiff s interest in the Agreed Project ; and
- (c) to consult the plaintiff and to allow him to take part in making any important decisions relating to the Agreed Project . The plaintiff s allegations were that the defendant had not signed the formal tenancy agreement for the lease of the premises that had been previously considered and had thereby caused the deposit, which had been paid to the landlord liable to be forfeited and the lease to be terminated. Instead of taking up that lease the defendant had caused a new company to enter into a new lease in respect of an enlarged premises that covered the entire ground floor as well as the first floor of the premises. It was said that the project had not been followed and that, not only was there now a mixture of dining as well as nightclub and entertainment facilities that was, in itself, a departure from the original project, but the original decor and layout of the Hong Kong restaurant had been departed from. It was said that a new designer had been employed even though the previous designer had carried out all the necessary work and, importantly, the cost of the project had been increased from around a proposed budget of HK\$5.5 million to US\$1 million and later to HK\$8.4 million In the judgment the judge found that clause 3.1.1 meant that, in so far as there was a project that had constituted an asset of VBL, that was to be transferred under the agreement to what had been termed the Project Company. He went on to hold that if there were any loss occasioned because the project had not been carried out as originally envisaged any loss was a loss to the Project Company. Since the plaintiff was not a shareholder of the Project Company or any other company he had no cause of action. On that basis the judge would have been prepared to dismiss the action for those reasons alone. He went on, however, to consider the case on the basis of the transfer of the so termed assets and the plaintiff s locus to pursue the essential parts of the claim. In doing so he reached the conclusion that on the construction of clause 3.1.1 alone the use of the expression proposed Bene restaurant business meant that it was a proposal but not something that had, as yet, been agreed upon. What was being pursued was a proposal and not a finalised project. The judge then went on to reject the plaintiff s argument that clause 3.1.1 meant that the plaintiff had in effect a right not only to be consulted about how the project was to be pursued but that there could be no changes without the plaintiff s agreement. In summary the judge concluded that that would simply be unfeasible in the context of a commercial venture. The judge then went on to consider the respective parties contentions as to the particular aspects of the project and in particular the question of the location and size of the restaurant; the concept and design of the restaurant and the budget of the project. Quite apart from the fact that the judge considered that the reference to project was something which by definition was liable to change, his conclusion was summarised in paragraph 85 of the judgment where he said: With this important

background fact in mind, I disagree with the plaintiff's contention that the agreement should give the phrase the proposed Bene restaurant business a meaning different from what appears on its face, with the result that cl 3.1.1 should impose an enforceable obligation on the defendant's part to carry the Project into effect as agreed. Rather, I agree with the defendant that, insofar as the plaintiff so contends, he has exaggerated the finality of the Project. Accordingly, I agree with the defendant that the Project was in substance work in progress. In other words, I find that the Project was merely a pending project, and not an Agreed Project. To the extent the testimony of the plaintiff and Tino Kwan contradicts this finding, I reject it. To the extent the defendant's testimony is consistent with this finding, I find it to be truthful. As already indicated the judge rejected the contention that there had been a concluded oral agreement. As regards the claim based on equitable principles, the judge started on the basis that he considered that there was nothing unfair or unreasonable about the offers that the defendant had made in respect of the plaintiff's potential participation. He pointed out that it had not been suggested that the plaintiff had a lack of financial or other capability in taking up the offers and he rejected the suggestion that there was a self-standing duty to consult as opposed to not making it impossible for the plaintiff to take up a 30% interest. This appeal On this appeal, Mr Bartlett, who appeared for the plaintiff in this court but not in the court below, put his main argument on the basis of breach of contract. His contention was that the defendant had been in breach of contract by taking over the project of establishing a Va Bene restaurant in Shanghai and departing from the project, specifically by not taking up the lease, which had been arranged with the landlord, but taking up what was said to have been an entirely new lease and pursuing a different project and had thereby deprived the plaintiff of his right to participate up to 30% in the project. Specifically, it was said that the project had been agreed and had been in advanced stage, the location and size of the restaurant had been agreed; the restaurant was to be an up-market Italian restaurant replicating the Va Bene restaurant in Hong Kong; the interior design was already completed by Doris Chui of Gotomaikan International Limited (G.I.L.); the budget had been agreed at HK\$5.5 million; staff had been recruited and contractors had been appointed. It was said that a proper construction of the contract and specifically clause 3.1.1 meant that the defendant had been obliged when in control of the Project Company to adhere to all those matters and could not deviate from them without the plaintiff's agreement. In so far as it was necessary for the plaintiff's case it was contended that the effect of the agreement was that unless and until a company was set up to operate the project, the project belonged to the plaintiff and the defendant. It was also said that the judge had been in error in not holding that the plaintiff had not been given a reasonable opportunity to take up not more than 30% interest in the Va Bene restaurant in Shanghai. Mr Bartlett argued the appeal in relation to equity far more faintly. It was said the defendant owed fiduciary duties to the plaintiff to consult the plaintiff before making any material changes to the project and to afford the plaintiff an opportunity to participate in the decision making process. The plaintiff also applied to amend the statement of claim and the notice of appeal to raise an argument based on what was termed a *Pallant v Morgan* [1953] Ch. 43 equity. Although the argument was allowed to be put *de bene esse* that argument was put

even more tentatively. It was, in reality, left to Mr SC, who appeared in this court and had appeared below on behalf of the defendant, to explain the argument. Not surprisingly, once that had been done it was clear that there was nothing in the argument. In my view the matter is quite straight forward. The plaintiff's primary case based on clause 3.1.1 must fail. The April 2001 agreements were entered into in order to regulate the way in which Kwan and the plaintiff ceased to have any interest in the Va Bene restaurant business in Hong Kong. It provided that apart from in Hong Kong and Shanghai, any of the parties was free to use the name Va Bene in other countries. As regards Shanghai, it is clear that it had been the intention that VBL would establish, what might be called a sister restaurant there. The April 2001 agreements made clear that VBL would not be doing that. It is also an undisputed fact that Kwan did not want to take any part or interest in a restaurant to be set up under the Va Bene name in Shanghai. That left the plaintiff and the defendant. What was agreed by clause 3.1.1 was that the project of setting up and running a restaurant in Shanghai under the Va Bene name would be pursued exclusively by a new company established for that purpose. That makes sense in the context of what had happened. The letter of intent for a lease had been in favour of Molto Bene Limited. Since Kwan was a shareholder of Molto Bene Limited and he wanted no part of a restaurant in Shanghai and VBL was not going to pursue the project, the obvious alternative was that there should be a new company. That is precisely what clause 3.1.1 indicated was to be the case. Once it is appreciated that there was to be a new company established of which the plaintiff was to have a maximum interest of 30%, it was clear that, effectively, the company was to be set up and run by the defendant. Since there was nothing else in the agreements about the new company, the obvious result was, therefore, that it would be run as a company. Companies are run on the basis of majority rule. For that reason alone the argument put forward on behalf of the plaintiff that he should have an overriding say as to the way the restaurant should set up and that no changes could be made without his agreement is simply unsustainable. When it is then appreciated that the finance for the new restaurant would be the responsibility of the defendant and all the work in running the restaurant would be done by the defendant, the suggestion that the plaintiff would have some overriding say and that nothing could be changed without his permission is astounding. In any event it is clear that the plaintiff was informed as to what was happening with regard to the Va Bene restaurant and was offered opportunities to take an equity interest. The judge held that there was nothing unfair or unreasonable with those offers and there is no ground to disturb that finding. Even if it were necessary to consider whether there had been a project that had been finalised, I consider that the judge's conclusion that in the first place there had been no finalised project, albeit there had been a concept that was being worked upon, was impeccable. The judge did not examine each ingredient in his judgment, in my view rightly so. I would go further and say that the evidence established that the restaurant that was established followed the guidelines of the concept that had been discussed and worked upon between the plaintiff, the defendant and Kwan. This court was taken through each of the points by Mr Bartlett for the plaintiff and with particular precision Mr Fok demonstrated by reference to the evidence that there was no substance in any of the plaintiff's complaints. The so termed budget was no more, as the

judge said, than an estimate. In so holding the judge encapsulated what Kwan said in giving evidence: see transcript Day 9 p. 24 to p.

4. It is clear from both the plaintiff's evidence and Kwan's evidence that the figure of \$5.5 million was a reduced figure from the initial budget. At best it could be said that it was a figure which the plaintiff and Kwan hoped might be achieved, but it had been arrived at without making any detailed analysis. Purely by way of example, at one stage Kwan said: Q. Mr Kwan, I am going to suggest to you that in fact what was discussed and the figure that was arrived at on 5th February, whatever figure it is, whether it is 6.5 million RMB or HK\$5.5 million or HK\$6 million, is nothing more than a loose preliminary first estimate of what target the three of you would like to see as the budget. A. I only agree that the first budget prepared by Miss Yuen in which the figure of 9.7 million-something was arrived at was a loosely made budget. But then, after that, the three of us considered all those figures and made amendments. Q. When you made those amendments, you had not got quotes or you had not approached any suppliers or contractors in order to make those amendments, had you? A. The purpose of making a budget was to set a figure which we can work towards. Q. That was not my question, Mr Kwan. My question was that when you altered Miss Yuen's figures, which came to 9.7 million-odd, to 6.5 million, you did not make the alterations on the basis of having contacted suppliers and made enquiries as to potential figures that you would be quoted by them? A. I agree. (transcript Day 9 p. 76-7) The plaintiff's expert, Mr Grimsdick, readily agreed when giving evidence that he had not attempted to establish that the figure of \$5.5 million was a viable figure. It was clear that he had been put in the position of having to try and justify a figure that had been put to him by the plaintiff and he was not giving evidence of his own belief as to what a reasonable budget would have been. The complaints about failing to take up a lease under the terms of the offer letter, fail if for no other reason than, as mentioned already, the offer to Molto Bene Limited could not be proceeded with in view of Kwan's involvement in that company and his wish not to participate in the Shanghai restaurant. The fact that the whole of the ground floor was taken under the new lease was, in my view, clearly more in keeping with an up market restaurant designed to be reminiscent of the Va Bene restaurant in Hong Kong as it then existed than the proposal, which apparently was favoured by the plaintiff, that there should be an ice-cream shop or gelato (perhaps more accurately gelateria) on the ground floor next to the entrance to the restaurant. More significantly the plaintiff can only be considered fortunate that the judge did not refer in his judgment to the evidence regarding the layout and design. The evidence of the plaintiff's expert witness, Henry Leong, contained in his expert's report was convincingly and thoroughly discredited. The conclusions to which his report was directed were contained in Part V of the report on pages 41-3 of the original report. One by one he admitted that his conclusions were unsupportable. Amongst other matters, Mr Leong had attempted to conclude that the Shanghai restaurant did not follow the concept and design of the Hong Kong Va Bene restaurant as it existed at the time. From the photographs that were shown to this court it clearly did. Not only did Mr Leong change his evidence and concede that under cross-examination, but worse still he admitted that his

evidence had been prepared for him and he had put his name to what the plaintiff and his legal advisers had wanted him to say. Pages 64 to 70 of the transcript of Day 7 would have been set out here in full save for 2 reasons. First it would lengthen this judgment considerably. Second to do so would cause further embarrassment to Mr Leong who is clearly a restaurant designer of some repute. I would confine the citation to one short passage namely page 66 lines 5-9 of Day Q. The fact that -- would you agree with this proposition of fact: the existing restaurant in Shanghai, the current project, is not fundamentally different to the Hong Kong restaurant? A. Not in terms of design replications, no. One further matter on this aspect cannot be left without comment. The original designer, Doris Chui of G.I.L., had not been engaged after the April agreements. Contrary to the plaintiff's protestations whilst giving evidence, it is clear that he, too, had not been content with her work in the early part of 2001. A letter that had apparently been drafted by the plaintiff to be sent to Doris Chui by the plaintiff's solicitors makes that much clear. The draft was faxed to Kwan and the defendant on 24 May 2001 for their agreement. After April 2001 the G.I.L. fees had been left unpaid and Doris Chui had been pressing for payment. This action was commenced in June

2001. One of the key allegations in the statement of claim was that the defendant had departed from the original project. Part of the statement of claim read as follows: Breach of Duties
16. Wrongfully and contrary to or in breach of the express and/or implied terms of: (a) the Transfer Agreement; and/or (b) the Shareholders Agreement; and/or (c) the Oral Agreement and/or the various duties set out above including the Duty Regarding Lease Extension (the Duties) the Defendant has without any prior knowledge or consent from the plaintiff:- ..
 - (4) Entered into an entirely new lease (the Unauthorized Lease) in respect of much enlarged premises covering the entire ground floor and first floor of the Premises;
 - (5) Embarked upon a completely different concept for an entirely new project in Shanghai (the Unauthorized Project) using the trademark Bene which,
 - (a) Provides for a mixture of dining and nightclub/entertainment;
 - (b) Is a fundamental departure from the original decor and layout of the Hong Kong Restaurant;
 - (6) Discarded all of the Agreed Design of the Shanghai Project and caused completely new designs with a new undisclosed architect to be made for the much enlarged premises in furtherance of the Unauthorized Project
 - (7) Failed to carry out, or carry through, the terms of the contracts entered into with the Project's said architect and designer and other contractors; and
 - (8) Substantially increased the previously agreed budget from around HK\$5.5 million to US\$1 million as of 7 June 2001 and to HK\$8.4 million as of 19 July 2001, in respect of which the Plaintiff had never been consulted or asked for his agreement, on account of the new concept pursuant to the Unauthorized Project and unilaterally imposed upon the plaintiff a

payment schedule for the increased budgeted investment, on which payment schedule the plaintiff had not consulted or asked for his agreement. The importance of the plaintiff's case that the concept had been changed was emphasised in the plaintiff's own evidence. On Day 4 the plaintiff was being asked about his rejection of the defendant's offer to him of participation in the Shanghai Va Bene restaurant and at pages 83 and 84 of the transcript there was recorded this exchange: Q. Yes, that is exactly what I am talking about. So here we are, Mr Lung saying, Here is an offer, 20 per cent of the new project company. I have asked you whether you accept that because this was an offer made to you, it was open to you to counter propose and to say, Not 20 per cent, 30 per cent? A. No, I do not want any percentage of a project which is completely strange to what I have agreed to, to what we have been committed to. You do not even begin to talk about percentages -- if you want to go and buy a pair of trousers and somebody says, What about a dress? We can make it cheaper for you, it does not matter about the price if it is not the same product. Given then the importance of what the plaintiff considered was the concept of the restaurant to be set up in Shanghai, the events surrounding a letter from Doris Chui would seem to have some importance. On about 17 August 2001 Kwan faxed the plaintiff a letter signed by Doris Chui addressed to VBL. That read as follows: to my invoice dated 23 March 2001, this is to put on record the following:-

1. Gotomaikan International Limited had been appointed by VaBene as the interior designer of VaBene Restaurant in Shanghai. Our instruction was to basically follow the design style and concept of VaBene Restaurant, Hong Kong with additional elements to suit the location and architecture of the restaurant in Shanghai.
2. Our design had been approved by your directors in February 2001 and all our drawings i.e. plans, elevations, detail drawings, specification and material reference were completed in March 2001.
3. We had finalised all the design work and material after detailed discussion with your landlord, lighting designer, interior contractor and kitchen contractor.
4. Our design was in all aspects ready to build. However, we were requested to put on hold further coordination work by your company in May 2001.
5. The only portion of our services left unfinished is any site coordination which might arise and final site inspection of this project upon completion. Yours sincerely, (signature) Doris Chui Kwan wrote on the copy that was faxed to the plaintiff: Dear Alan, Please Comment. The plaintiff then returned the fax to Kwan with changes to paragraph 1 as follows:
 1. Gotomaikan International Limited had been appointed by VaBene Limited as the interior design of VaBene Restaurant in Shanghai. Instruction was to basically follow fundamentally incorporate and follow the design style and concept of VaBene restaurant, Hong Kong with additional elements to suit the location and architecture of the restaurant in Shanghai. A letter with those changes was then apparently signed by Doris Chui and on this occasion the date was put as 22 March 2001. Those same inserted words, italicised in the paragraph

above, were repeated verbatim in Kwan's witness statement. It was put to the plaintiff and Kwan that the letter dated 22 March 2001 was prepared for the purpose of this case and that Doris Chui had been prepared to send it so that payment would be made for the design work that had been done by her firm. That suggestion was vehemently denied by both the plaintiff and Kwan. It might also be noted that the plaintiff initially denied having signed the relevant cheque in favour of Doris Chui or her company. The plaintiff emphasised the fact that he did not normally sign cheques for VBL. It did not take long to demonstrate that the plaintiff did indeed sign the relevant payment documents. However the witnesses' explanations for the existence of the letter and as to why it was sent to the plaintiff are, in so far as they are explanations, highly unsatisfactory. The plaintiff said when asked: Q. No, I am talking about the letter at page 4169 (i.e. the letter dated 22 March 2001). What was the purpose of that? A. Until you have drawn my attention to it I had forgotten about this letter. It was all something that Tino asked me to comment on. I find that the instructions we gave to her did not use the word basically but fundamentally, and that is what I did. I am even surprised to see that that is part of the files in this case. If I have to rely on Doris as a witness I will be getting her as a witness. (Transcript Day 4 p. 120 ll. 13-22) Despite repeated questioning the closest that any of the plaintiff or his witnesses came to say how or why the letter came into existence was when Kwan said: Q. What was the purpose of this document as far as you can remember, or perhaps you can tell my Lord what was the genesis of this particular document? A. In fact, it was me who asked Doris to write this letter because at the start of this project it was agreed that the design fee for Doris would be converted to equity. So throughout the project, Doris had not received a cent. At the time when I told our contractor, Welland, to stop the work, I also informed Doris that the project was on hold. I think the time was around mid-March. Up to August, we still could not tell her exactly what the situation in respect of the project was, but I had informed her that I had withdrawn from the Shanghai Va Bene project. Since she has sent the invoices to the company on 23rd March and made enquiries as to the situation, I then suggested that she should write a letter to the three of us to tell us about which stage she had come to and what was the amount payable to her at that stage. So this letter merely served as a record to show what stage the design work has got to. Q. Why did you address it to Alan and ask him to comment then? A. I sent this letter to Alan for his comment. My purpose was to ask him, Well, what should be done? Shall we pay her?, as simple as that. Q. We see on the document that there are some other words written apart from the bold print, Dear Alan, please comment. Do you see that somebody has written, Please fax to Doris, and then lower down the page, Fundamentally incorporate and follow, and then another word, Fundamentally. Do you see that? A. Yes. Q. Do you know whose handwriting these are? A. I think Alan wrote down those words before he faxed this document back to me. Q. Any idea why he did that? A. In fact, I do not quite understand why he did that. Well, what he did was to correct some mistakes in the letter, but my intention was to ask him to comment on it and ask for his opinion as to whether we should pay. But I think maybe it is his professional habit to make corrections on a document whenever he sees some errors or grammatical errors, et cetera. So he misunderstood me. Q. At the time when you received the document, when you received the document, had the document been

signed by Doris? A. It was already signed. You can see her signature appearing at the bottom. Q. So when it came to you, it was not a draft; it was a letter? A. Right. (Day 8 p. 56 l. 19-58 l. 21) As will have been noted from the quotation in paragraph REF _Ref166036328 \r \h above, in cross-examination the plaintiff said that he was surprised that the letter of 22 March 2001 had been included in the discovery. This is somewhat baffling since the letter dated 22 March 2001 had been specifically relied on by Henry Leong in his expert's report dated 12 October and filed on 15 October 2002. At paragraph 4 in section B headed Concept and Design of the Original Shanghai Project it was stated: Similarly, I note that GIL Art & Design Consultant (), the interior designer for the Original Shanghai Project, was expressly instructed to fundamentally incorporate and follow the design and concept of Va Bene Hong Kong (TK 11(5)(B); Plaintiff's Discovery: 140). When reference is made to the 2nd supplemental list of documents of the plaintiff filed on 30 September 2002, it can be seen that there is listed;

140. Copy letter from Doris Chui of G.I.L. to Tino Kwan of Va Bene 22.03.01 It can have been no mere coincidence that a fortnight or so before the expert's statement was filed it was found necessary to file the 2nd supplementary list of documents including this very letter. Whether in the passage quoted in paragraph REF _Ref166036328 \r \h the plaintiff had been intending to refer to the letter of 17 March, which Kwan had confirmed was already signed before he faxed it to the plaintiff for comment, is not clear. When re-examined the plaintiff said: Q. M2, sorry. Page 4159 (i.e. the letter dated 17 March 2001). I think you have been asked about this letter? A. Yes. Q. I just want to ask you to confirm that this bundle of document notice M1 and M2 are actually documents disclosed by your side; is that right? A. Yes, in fact it was my decision that these documents ought to be disclosed which are in my possession. As already noted, it was clearly an important part of the plaintiff's case that, according to him, the design and concept of the Shanghai Va Bene had been changed. It was a vital part of the case in the court below and the quotation in paragraph REF _Ref166036470 \r \h above confirms it was the reason the plaintiff gave as to why any offer of participation in the business was rejected. This court made clear during the course of the hearing that it took the matter of the letter dated 22 March 2001 very seriously. Mr Bartlett disavowed the letter. He said it was not the plaintiff's letter, it was Doris Chui's letter and that all the plaintiff did was to make it conform to his idea of what the instructions had been. Counsel submitted that the evidence showed that the plaintiff had not been concerned with the letter. He went on to submit that the date of the letter was a simple mistake. How such a mistake could occur when the first letter was dated 17 March and the second version of the letter was dated 22 March was not explained. He went on to say that in view of the internal reference to dates later than the date of the letter it was almost a joke that any complaint could be made about it. Whether or not the letter was extracted from Doris Chui in return for payment to her being made in lieu of her equity participation in the Shanghai Va Bene is but one aspect. The fact is that the letter was created after the litigation began and related to an important part of the plaintiff's case. Specifically, the part the plaintiff changed in the letter related to the case he had already brought against the defendant, not as to whether

Doris Chui or G.I.L. had done work which merited payment. The letter was back dated to a date prior to the April agreements and a time when G.I.L.'s work had stopped. It was presented in discovery and in the court bundles as having been created on 22 March 2001. It was presented to the expert witness and used by him as part of his evidence presumably on that basis, but given his other evidence, there is room to doubt that he ever read the letter. The court files showed the letter as being dated 22 March 2001. That the plaintiff should have changed the wording in material respects but left the date on the letter of 17 March 2001 without comment was, at its best, putting words in the mouth of Doris Chui and at worst creating a document that was thoroughly deceptive and used for the purpose of the case. Doris Chui was never called to explain why she signed the letters and who inserted the dates of 17 and 22 March and why that was done. This matter has caused grave concern. The judge below made no direct comment on the matter save that he clearly does not seem to have accepted the plaintiff's evidence. Nevertheless, it is a matter which cannot be allowed to pass without observation. The legal process depends upon the utmost integrity in the preparation of cases. As the decision in HCMA 1103/2006, a decision of Beeson J of 28 March 2007, to which the parties' attention was drawn in the course of the hearing, makes clear the court cannot tolerate the creation or use of back dated documents to further a party's case, even if the documents created reflect their own belief. Had it not been for the fact that the references in the letter itself to an invoice of 22 March 2001 and holding further work in May 2001, so undermine the March date I would have had no hesitation in directing that the files be sent to the Secretary of Justice. As it is, this aspect demonstrates a lack of integrity in the preparation of the plaintiff's case. The claim in equity The judge dismissed this part of the plaintiff's claim in a few short paragraphs. In my view he was correct. In the first place having decided the contractual issue there was little, if any, scope left for the plaintiff's claim put on the basis of fiduciary duties. Certainly the plaintiff could have no right to any overriding veto in respect of decisions taken by the new company. The judge held that the project, in so far as it had existed, had belonged to VBL and was never transferred to or devolved upon the plaintiff. He also held that the plaintiff had exaggerated the finality of the project which in substance was work in progress. He also found that the discussions prior to 12 April 2001 were made by the parties and Kwan as directors of VBL and that, in the light of clause 3.1.1, it was clear that the plaintiff had reserved to himself the option of deciding whether to participate in the project and, if so, the extent of participation. Finally he said that if there were any fiduciary duty on the defendant's part, it would have been not to render it impossible for the plaintiff to so participate in the pending project, not the Agreed Project alleged by the plaintiff. The defendant's offers were held, as a matter of fact, not to have been unfair or unreasonable offers. I see no grounds for disturbing any of this. The case based on the *Pallant v Morgan* equity As already noted, application was made at the commencement of the appeal to amend the statement of claim and the notice of appeal. Amendment of the statement of claim at this stage raised the question as to whether any new evidence or documents were required. Since counsel on behalf of the plaintiff disavowed that and indicated that the argument was to be pursued on the basis of the evidence and findings at trial, it appeared that amendment to the statement of claim was

unnecessary and that the matter could be raised in an amended notice of appeal, if appropriate. On that basis argument was heard *de bene esse* in relation to the point sought to be raised based on the *Pallant v Morgan* equity. The *Pallant v Morgan* equity has been said to be a species of constructive trust. It was explained in the case of *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2005] EWCA 1355, [2006] 1 & CR DG20 at p. D55 in the following way which is taken from the digest of that case so reported: The second issue was whether *Targetfollow* held the lease on trust under a *Pallant v Morgan* [1953] Ch. 43 constructive trust. The classic example of when this would arise is where A & B agree that A will acquire some specific property for the joint benefit of A & B, and B in reliance on A's agreement refrains from attempting to acquire the property. In these circumstances, equity will not permit A to acquire the property and keep it for his own benefit to the exclusion of B. Sir Martin Nourse noted: That formulation does not fit the facts of the present case because *Kilcarne* never intended to acquire the lease itself and cannot therefore be said to have refrained from attempting to do so. But it has not been suggested that that in itself is an objection to the application of the principle when applied to this case, the principle required, first, that there be an arrangement or understanding between the parties that A will acquire the property and that if he does so B will obtain some interest in it; and secondly, that B must act in reliance on that arrangement or understanding. Accordingly, the case for a *Pallant v Morgan* constructive trust failed at the first hurdle. At first instance in *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 (Ch), [2005] 2 & CR 8 (p.

- 164) Lewison J had said when rejecting the applicability *Pallant v Morgan*: The existence of the complex network of contracts between the protagonists precludes, or renders unnecessary, the intervention of equity. Chadwick LJ in *Banner Homes v Luff* [2000] Ch. 372 at p. 397-398), considered the equitable principles and sought to identify the features which will give rise to a *Pallant v Morgan* equity. He decried anything in the nature of an exhaustive classification referring to Millett's (as he then was) judgment in *Lonrho plc v Fayed* (No 2) [1991] 4 All ER 961 at 969, [1992] 1 All ER 1 at 9, adopting a reference to the work of distinguished Australian commentators, equity must retain its inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction. Precise analogies were not relevant, what was relevant were the principles invoked. For convenience there is set out below quotations from the five propositions of Chadwick LJ with an indication as to their applicability in the present case:
- (1) A *Pallant v Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one of those parties to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. In this case any pre-acquisition agreement has been superseded by the April 2001 agreements. Reference can be made, in this context, to clause 17.2 cited in paragraph REF_Ref166056161 \r \h above and clause 15.2 respectively. The same

consideration applies also to the second condition:

- (2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the *Pallant v Morgan* equity. The fact that a new company was to take on the setting up and running of the Va Bene restaurant in Shanghai undermines the applicability of the *Pallant v Morgan* equity because of the third proposition:
- (3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party (the acquiring party) will take steps to acquire the relevant property; and that, if he does so, the other party (the non-acquiring party) will obtain some interest in that property. Even on the basis that the acquiring party was not a party to the April 2001 agreements, nevertheless the plaintiff had been offered and could have pursued opportunities to take a capital interest in the company running the Shanghai Va Bene restaurant. These same considerations apply in respect of the fourth and fifth propositions:
- (4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v Morgan* [1952] 2 All ER 951, [1953] Ch 43 itself provides an illustration of this principle.
- (5) That leads to the further conclusions:
 - (i) that, although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that, although there will usually be advantage to the one and co-relative disadvantage to the other, the existence of both advantage and detriment is not essential -- either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Fok submitted that those 5 conditions are not satisfied in the present case. Looked at overall, it is probably fair to ask the question how is it inequitable that the new company should set up and run the Shanghai Va Bene restaurant? As he submitted in the skeleton argument on behalf of the defendant: Thus, once the conclusion is reached as to what the written contract means, and that D did not breach it, there is no room for imposing extraneous agreements or understandings so as to undermine this conclusion, whether under the rubric of an oral agreement implied duty fiduciary duty Costs Two matters of costs fall to be considered. In the first place Mr Fok submitted that, if successful, his client should be awarded costs on a higher scale than party and party costs

because this action and appeal had been pursued out of vindictiveness. In this context he drew this court's attention to various passages in the transcript where the defendant had given evidence that he had been told by the plaintiff in advance that he intended to bring proceedings whatever the merit. Not having had the advantage of seeing and hearing the witnesses it would be difficult for this court to draw the necessary conclusions about the matter albeit there are, clearly, grounds for suspicion that there is considerable merit in those arguments. Nevertheless, I do not consider that it would be appropriate to order costs on a higher scale. The other aspect which merits attention is the fact that the documents prepared for this appeal were contained in 24 box files running to hundreds, if not thousands, of pages. As predicted when the case opened only a handful of pages were referred to by counsel in opening this appeal. It cannot be said that there had been no selection process because relevant documents, in particular some of those referred to in this judgment, were not included in the 24 box files but had to be included in two supplementary box files prepared by the defendant's solicitors. It is quite clear from the correspondence that was shown to this court after the matter was raised that the appeal bundles had been prepared at the very last moment. This prevented the defendant's solicitors from being able to have any input into the matter. In my view an order should be made that the plaintiff's solicitors should show cause as to why the costs of preparing the appeal bundles should not be disallowed. I propose that such an order be made. In those circumstances I consider this appeal falls to be dismissed and that there should be an order nisi of costs in favour of the defendant. Hon Chu J: I agree that the appeal should be dismissed with costs to the defendant on party-and-party basis. I also agree to the order proposed by Rogers VP in connection with the costs of preparing the appeal bundles. Hon A Cheung J: I agree. Hon Rogers VP: There will therefore orders in terms of paragraph REF _Ref166489015 \r \h and that the plaintiff's solicitors should show cause by affidavit within 14 days of the handing down of this judgment as to why the costs of preparing the appeal bundles should not be disallowed. (Anthony Rogers) Vice-President (Carlye Chu) Judge of the Court of First Instance (Andrew Cheung) Judge of the Court of First Instance Mr Jeremy Bartlett, Ms Catrina Lam & Mr Jeremy Chan, instructed by Messrs J. Chan, Yip, So & Partners, for the Plaintiff/Appellant Mr Joseph Fok SC & Ms June Wee, instructed by Messrs Herbert Smith for the Defendant/Respondent PAGE - A B C D E F G H I 1udk 1udk 2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 25 October 2026 · Esheria