

HONG KONG / JUDGMENT

CHOW HING ERIC v. WIDE LAND PURCHASING CENTRE LTD AND OTHERS

COURT

Court of First Instance

DECIDED

4 May 2007

CASE / FILE NUMBER

HCCW868/2005

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bjbj HCCW 868/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE COMPANIES (WINDING-UP) NO. 868 OF 2005

IN THE MATTER of WIDE LAND PURCHASING CENTRE LIMITED and IN THE MATTER of the
Companies Ordinance, Cap. 32 of the Laws of HKSAR

BETWEEN CHOW HING ERIC Petitioner and WIDE LAND PURCHASING CENTRE LIMITED 1st
Respondent MA KWOK PO 2nd Respondent YAU WAI KEUNG 3rd Respondent

Before: Hon Kwan J in Court Dates of Hearing: 20-23, 26 and 27 March 2007 Date of Handing
Down of Judgment: 4 May 2007

J U D G M E N T

This is a petition under sections 168A and 177(1)(f) of the Companies Ordinance, Cap. 32. It was presented by Chow Hing Eric, the registered shareholder of 40% of the issued shares in the company concerned, Wide Land Purchasing Centre Limited (the Company). The petitioner sought to wind up the Company; alternatively he sought an order that the respondents are to purchase his shares at a fair price to be determined. The essence of his complaint was that he was wrongfully expelled from the management of the Company, which is a quasi-partnership, contrary to the agreement between him and the majority shareholder. A substantial issue in dispute was whether the petitioner is the beneficial owner of the shares held in his name, or whether he merely holds the same on trust for a government entity in China known as the Fifth

Office of the Municipal Government of Guangdong Province (the Fifth) had no time owned the beneficial interest in the shares he held and has no right of participation in the management of the Company. The Company is the 1st respondent in these proceedings. It is engaged in the provision of hire-purchase finance to customers and is also trading in electrical home appliances. The 2nd respondent, Ma Kwok Po, holds the other 60% shares in the Company. Prior to the removal of the petitioner, there were five directors, being the 2nd respondent, the petitioner, the 3rd respondent Yau Wai Keung, the 2nd respondent's sister-in-law Cheung King Yan, and the 2nd respondent's daughter Ma Wai Wa Bella. The petitioner, the 2nd and 3rd respondents have filed affirmations in these proceedings and were cross-examined. No one from the Fifth Office has filed evidence. I will first set out the matters that were not or should not be in dispute in chronological order, taken largely from the documentary evidence. Matters not in dispute The 2nd respondent and the petitioner came to know each other in 1978 after he came to Hong Kong from China. He is eleven years older than the petitioner, who was born in Hong Kong. The petitioner was employed as the deputy manager of the accounting department in August 1981, at a monthly salary of HK\$3,500.00. In about 1983, Glittering Investment Company Limited (Glittering Investment) was formed. Both the 2nd respondent and the petitioner became employees of Glittering Investment. The 2nd respondent held the position of general manager in the marketing department. The petitioner was the assistant general manager in the same department. The general manager of Glittering Investment was Cheung So. On 25 July 1984, a joint venture agreement was entered into between Guangzhou Foreign Trade Centre Imports and Exports Service Company (the Trade Centre) and Glittering Investment. It was agreed that the Company was to have an authorised share capital of HK\$5 million and each party would take up 50% of the shares and each was to inject HK\$2.5 million towards the capital. Glittering Investment would provide a guarantee to raise a loan from a Chinese owned bank in Hong Kong for the starting up expenses of the Company. Each party was to nominate two to three representatives to the board of directors. Profits and losses would be shared according to the ratio of shares held by each party. The Company was to establish its base in Hong Kong and a liaison office in Guangzhou. The representatives of Glittering Investment and the Trade Centre held a meeting in Guangzhou on 24 to 26 August 1984, and reached agreement on the persons to be appointed as directors of the Company. On the side of Glittering Investment, they were Cheung So, the 2nd respondent and Cho Man Ching. The appointees of the Trade Centre were Li Minyue, Zhang Guangmiao and Xu Siyuan. It was recorded in the minutes that the board of directors was formed with immediate effect, even though the Company had not been incorporated at that time. It was further resolved that the authorised share capital of the Company should be HK\$1 million instead, divided into 1 million shares of HK\$1.00 each, half of which would be taken up by the Trade Centre and the other half by Glittering Investment. Cheung So was appointed chairman of the board of directors and the 2nd respondent was appointed general manager of the Company. It was stated that the scope of business was mainly trading in electrical appliances in Shenzhen, Zhuhai and Guangzhou. On 23 October 1984, the Company was incorporated in Hong Kong. Cheung So and the 2nd respondent were the two subscribers, each taking up one share. They were the first directors. Cheung So was managing director and chairman of the board as well as the company secretary. The authorised capital was

HK\$1 million, divided into 10,000 shares of HK\$100.00 each. On 9 November 1984, three additional directors were appointed to represent the Trade Centre on the board of the Company; they were Li Minyue, Zhang Guangmiao and Xu Siyuan. Not long after the Company was formed, the Committee on Foreign Economics and Trade of the Guangdong Province announced that the Municipal Government in Guangdong had given directions it would not be permissible to form any joint venture with foreign business entities to carry out trading, and import and export business. In accordance with that government policy, the Trade Centre terminated the joint venture with Glittering Investment in the Company. On 25 December 1984, a board meeting of the Company was held and a resolution was passed by which the three directors appointed to represent the Trade Centre resigned with immediate effect. It was further agreed and recorded in the minutes that all proposed business dealings between the Company and the Trade Centre would be cancelled. For the period from September 1984 to 25 December 1984, the Trade Centre would not share in the profits and losses of the business of the Company. Instead, the profits gained from the business in the Trade Centre during this period would belong to the Trade Centre exclusively. Pursuant to the board resolution, Li Minyue, Zhang Guangmiao and Xu Siyuan resigned as directors of the Company with effect from 25 December 1984. In late December 1984, the 2nd respondent left Glittering Investment and went to work for Zhun Hua Trading Company of the Zhuhai Special Economic Zone (Zhuhai Zhun oyr@S/c ly 1984, Zhuhai Zhun Hua was an entity used by the Fifth Office to co-operate with Glittering Investment and Suinan Joint Enterprise Company in setting up an office for the exhibition and sale of goods in the Gongbei District in Zhuhai, known as Zhen Guang Joint Enterprise Company. Zhuhai Zhun Hua set up trading firms in Hong Kong, Macau and Guangzhou, all bearing the name of Zhun Hua or Tsan Wa . The firm in Hong Kong was set up in 1985 (Hong Kong Zhun Hua r. On 5 September 1985, Cheung So resigned as a director and the secretary of the Company. He ceased to hold any share in the Company. The petitioner was appointed a director and the secretary of the Company the same day. On 7 September 1985, the share of Cheung So was transferred to the petitioner. On 10 September 1985, the 2nd respondent was issued an additional share and on 18 September 1985 he was issued 9,997 shares. Hence, as at 18 September 1985, of the 10,000 issued shares, 9,999 were held by the 2nd respondent and one share was held by the petitioner. At an extraordinary general meeting of the Company on 21 November 1985, a resolution was passed to increase the share capital from HK\$1 million to HK\$2 million by the creation of 10,000 new shares of HK\$100.00 each and that the new shares were to rank pari passu in all respects with the existing shares. On 22 November 1985, 8,000 of the new shares were allotted to Tack Roger Company Limited (Tack Roger) and 2,000 new shares were allotted to the 2nd respondent. Thus, of the 20,000 issued shares, the 2nd respondent held 11,999, Tack Roger held 8,000, and the petitioner held the remaining share. Also on 21 November 1985, three additional directors were appointed. They were the appointees of Tack Roger Liu Chi Keung and his son Liu Yu Hang, and Chung Kwei Choi. On 4 January 1986, all five directors of the Company, namely, the 2nd respondent, the petitioner, Liu Chi Keung, Liu Yu Hang and Chung Kwei Choi, executed a joint and several guarantee in favour of Chiyu Banking Corporation Limited (Chiyu Bank) as security for banking facilities provided to the Company to the extent of HK\$12 million. On 23 May 1986, Zhun Hua Trading Company Limited (Zhun Hua Ltd.) was incorporated in Hong Kong to take over the business of

Hong Kong Zhun Hua. As its name in Chinese suggested (s/n/c f gP Hua Ltd. was HK\$500,000.00, divided into 500,000 shares of HK\$1.00 each. Kong Lek, also known as Jiang Hairong, and the 2nd respondent were the subscribers. Its first directors were Kong Lek, the 2nd respondent, the petitioner, and the 2nd respondent's brother Ma Kwok Chun. The 2nd respondent was the managing director, Kong Lek was chairman of the board of directors, and the petitioner was the company secretary. In the annual return of Zhun Hua Ltd. made up to 31 October 1989, of the 500,000 issued shares, 499,998 were held by the 2nd respondent, one share was held by Ma Kwok Chun, and one was held by the petitioner. Kong Lek had ceased to be a director by that time. On 24 March 1988, Liu Chi Keung, Liu Yu Hang and Chung Kwei Choi resigned as directors of the Company and the 3rd respondent and Law Yun Loi were appointed to replace them. Also on the same day, the 8,000 shares held by Tack Roger were transferred to Roodi Limited (Roodi). According to the annual return of Roodi made up to 31 December 1991, of its 1,000 issued shares, 670 shares were held by the 2nd respondent and 330 shares were held by the petitioner; the 2nd respondent and the petitioner were its only directors. Roodi was also engaged in the trading of electrical home appliances. On 16 August 1988, Chiyu Bank released and discharged the guarantors under the guarantee executed on 4 January 1986, in consideration of a deed of undertaking in its favour executed by the 2nd respondent, the petitioner and Ma Kwok Chun. On 13 May 1989, Roodi transferred its 8,000 shares in the Company to the 2nd respondent. At an extraordinary general meeting of the Company on 2 June 1989, a resolution was passed to increase its authorised capital from HK\$2 million to HK\$10 million by the creation of 80,000 shares of HK\$100.00 each, such shares to rank pari passu with other shares already issued. On 7 July 1989, the Company made an allotment of 50,000 new shares as a bonus issue, the payment of which was satisfied by the transfer of HK\$4,580,000.00 from the revaluation reserve account and HK\$420,000.00 from the retained profits account. 22,001 of the new shares were allotted to the 2nd respondent and 27,999 shares were allotted to the petitioner. Thus, as at that date, of the 70,000 issued shares in the Company, the 2nd respondent held 42,000 shares (60%) and the petitioner held 28,000 shares (40%). This ratio of shareholding of the petitioner and the 2nd respondent has been maintained to today. According to the report of directors in the financial statements of the Company for the year ended 31 October 1989, Law Yun Loi resigned as a director on 1 January 1989. Ma Kwok Chun held office as a director during that financial year. It is not clear when he was appointed and when he ceased to be a director. On 15 October 1996, the Company made another allotment of 30,000 new shares by a capitalisation issue in the proportion of three new shares for every seven shares by way of capitalisation of HK\$3 million from the revaluation reserve. The 2nd respondent was allotted 18,000 shares and the petitioner 12,000 shares. As at that date, of the 100,000 issued shares in the Company, the 2nd respondent held 60,000 shares and the petitioner held 40,000 shares. In 1996, both Zhun Hua Ltd. and Roodi ceased business. In August 1997, the 2nd respondent immigrated to the United States with his family. The petitioner, the 3rd respondent and other directors took care of the daily operation of the Company in his absence. At an extraordinary general meeting of the Company on 12 July 2000, a resolution was passed that the authorised capital comprising 100,000 shares of HK\$100.00 each fully paid up be sub-divided into 10 million shares of HK\$1.00 each. As from that date, the 2nd respondent holds 6 million shares and the petitioner holds 4 million shares in the Company.

On 4 June 2001, the petitioner made an application on behalf of Zhun Hua Ltd. to the Registrar of Companies for deregistration, as it had ceased to carry on business and was defunct, having received notice from the Commissioner of Inland Revenue that there was no objection to deregistration. According to the petitioner, Roodi had also been struck off as a defunct company in about 2000. In April 2002, the 2nd respondent returned to settle in Hong Kong. In mid 2004, Viable Health Group Limited (Viable Health) was incorporated in Hong Kong. On 23 June 2004, its first directors were appointed. They were the 2nd respondent, the 3rd respondent, the petitioner, Madam Cheung King Yan, Lau Wai Tung and Ma Zhixiong. The petitioner resigned as a director in October 2004. According to the annual return of Viable Health made up to 23 June 2005, it has an authorised capital of HK\$2 million divided into 2 million shares of HK\$1.00 each, 1,999,999 of which are held by the 2nd respondent and the remaining share is held by the 3rd respondent. On 15 March 2005, the board of directors of the Company issued a notice dated 11 March 2005 stating that owing to the misconduct of the petitioner in his employment with the Company, the board had resolved to remove him from his position as a director and administrative staff of the Company and the resolution was to take effect on the date of the notice. On 16 March 2005, the 2nd respondent made a report to the police that the petitioner had destroyed the books and records of the Company and its associated companies. The police went to the office of the Company to investigate. No action was taken against the petitioner. This petition was presented on 17 November 2005. On 4th January 2006, a validation order was made to enable the Company to continue its hire-purchase business notwithstanding the presentation of the petition. There was no dispute that the Company is solvent. The issues in dispute These are the main issues in dispute:

- (1) whether the petitioner owns beneficially the 4 million shares he holds in the Company or whether he holds them on trust for the Fifth Office and its successors;
- (2) whether the Company was formed or continued on the basis of a personal relationship involving mutual confidence between the petitioner and the 2nd respondent such that equitable considerations should be superimposed; in particular, whether there was an agreement or understanding between them that they would equally participate in the management of the Company;
- (3) whether the 2nd respondent had breached the alleged agreement or understanding and/or whether there was unfairly prejudicial conduct in,
 - (a) excluding the petitioner from the management of the Company in March 2005;
 - (b) closing the telephone banking account of the Company on 1 April 2003 without notifying the petitioner;
 - (c) causing HK\$5 million to be transferred from the Company's overdraft account with Chiyu Bank to its current account with the Hongkong and Shanghai Banking Corporation Limited (HSBC) on 1 April 2003 without the petitioner's consent and without explanation;

- (d) denying the petitioner from access to financial records, books of account and records of the Company since April 2002; and
- (e) allowing Viable Health to use a portion of the premises of the Company without the petitioner's consent;
- (4) whether the petitioner was guilty of any of the alleged misconduct in,
 - (a) causing the Company to enter into a new agreement with a cleaning contractor New Base Service Company Limited (New Base) in September 2001 without disclosing his interest in it to the other directors of the Company;
 - (b) causing the Company to lend him HK\$300,000.00 on 14 March 2001, which he repaid on 17 April 2001 but without paying interest; and
 - (c) using the address of the Company as the correspondence address of himself and his brother-in-law for their private purpose;
- (5) if the petitioner should succeed in establishing his case, what is the appropriate relief that should be granted. There were other allegations of unfairly prejudicial conduct in the petition, such as the failure to hold general meetings since 2002 and the failure to declare dividends since 2002. The petitioner's counsel, Mr. Raymond Lau, confirmed that the petitioner would not rely on these other allegations. The witnesses The petitioner and the 2nd respondent were the principal witnesses. I am unable to form a favourable view of either, for different reasons. The petitioner did not come across as a truthful witness. He is sufficiently intelligent with a diploma in accounting in a tertiary institute and is familiar with company secretarial work. He is sophisticated and shrewd. There is no question of him not understanding the documents filed in these proceedings that were prepared on his instructions. Under cross-examination, he made significant departures from his case as stated in the petition and in the affirmations he made. He did not have a convincing explanation. I am unable to attribute such significant departures to reasons that were non-deliberate. The 2nd respondent also departed in material aspects from his affirmations when he gave oral evidence. Although I do not find the 2nd respondent to be deliberately untruthful, I have difficulty in accepting parts of his evidence without reservation for a number of reasons. In the first place, it is difficult to understand some parts of his testimony, and as Mr. Lau has justifiably remarked, his evidence was all over the place. He has mentioned several times he had studied a course in law in a university in Macau, and might have given the facile impression that he understood his affirmations prepared by his solicitors, which have been translated in writing in Chinese for his benefit. In actual fact, he has very little understanding of the law and most of what he had understood was erroneous. To his thinking, a person who has shares registered in his name is the beneficial owner, and such beneficial owner would hold the shares on trust for the person who provided the money for the shares. It was unfortunate that this erroneous thinking did not come to light until in cross-examination. He was quite incapable of giving an intelligible account of how and why certain things were done in the long history of the Company that I have set out.

Secondly, he was simply a poor witness. I do not think he was deliberately evasive. He was just not capable of answering a question in a direct way and seemed to have limited power of understanding what was asked of him. He was bent on giving his perception and opinion of events oblivious of the questions put to him. Thirdly, he has a poor memory of dates, and a poor grasp of details and sequence of events. This would seem not to be part of his personal make-up, whatever other laudable qualities he may possess which brought him success in business. He had concentrated on big things and broad strategy, leaving his subordinates to attend to details. He struck me as an impatient, impulsive and trusting character. He referred to his affirmations as a collaborative effort in creation. He failed to appreciate this might be taken as fabrication of evidence. This was just one of many examples of the things he said unwittingly that might be construed as damaging to his case. It showed how naive he was in some respects. The 3rd respondent was a reliable witness. But as his involvement was limited, his evidence did not assist much in resolving the factual disputes. The genesis of the Company as stated in the petition It was alleged in the petition that the Company was incorporated by the petitioner, the 2nd respondent and Cheung So, based on mutual trust of the three of them. It was further alleged that at the time of incorporation, there was an agreement and/or understanding between the petitioner and the 2nd respondent that they would equally participate in the management of the Company, that the petitioner was to concentrate on internal affairs and would not subscribe to any share or become a director. The reason why the petitioner did not subscribe to the shares was to avoid complications and because doing business with mainland partner required good personal relationship. Only the 2nd respondent and Cheung So became the subscribers, as Cheung was the general manager of Glittering Investment and the 2nd respondent's brother Ma Kwok Chun enjoyed good relationship with the Trade Centre, so Cheung and the 2nd respondent could use their relationship to build up business for the Company. It was claimed that the petitioner had beneficial interests in part of the shares held by Cheung by reason of the fact that all moneys for investment came from the petitioner and the 2nd respondent. When Cheung retired from the business of the Company in September 1985, it was alleged that the petitioner and the 2nd respondent immediately negotiated and reached an oral agreement on these terms: they would acquire Cheung's share in the Company at the nominal price of HK\$100.00; they would jointly carry on and manage the business and all material decisions should be made jointly by them including the payment of significant amounts for whatever purpose by the Company; the petitioner would be responsible for finance and administrative work and the 2nd respondent would be responsible for marketing work; capital would be injected to the Company through the profits derived from other business in which they jointly invested. Thus the Company was carried on based on their mutual trust and understanding despite Cheung's retirement. The genesis of the Company as stated in the petitioner's affirmation The petitioner did not dispute the participation of the Trade Centre in the incorporation and inception of the Company. He could not, as these matters, which I have outlined earlier, were amply supported by the documents produced by the 2nd respondent. He admitted in his 3rd affirmation that the Company was established as a corporate vehicle for the joint venture between the Trade Centre and Glittering Investment. This did not sit well with his

allegation in the petition that the Company was incorporated by him, the 2nd respondent and Cheung So, based on the mutual trust of these three individuals, or with his allegation of the initial agreement or understanding between him and the 2nd respondent why he was not to become a subscriber or director of the Company. The petitioner has plainly shifted ground in his 3rd affirmation. He deposed that although the joint venture collapsed, the business of the Company continued and the Trade Centre was a main business associate. To keep matters simple and make it easier to gain the trust from them, it was decided to have Cheung and the 2nd respondent as the shareholders and directors of the Company initially. For good measure, he added that it was he who had picked the name Wide Land for the Company, as these words sound like the first two characters of the Company's name in Putonghua. He went on to say that after the termination of the joint venture, Glittering Investment decided to withdraw from the Company and Cheung resigned as a director of the Company in September 1985 as directed by Glittering Investment. It was then that he and the 2nd respondent reached the agreement as alleged in the petition that I have mentioned earlier. He stated that in September 1985, they had not come to a decision exactly how much their respective interests in the Company should be, but it was their understanding that the 2nd respondent would have a majority stake. As to the time in which he and the petitioner reached agreement that he should have 40% interest in the Company whereas the 2nd respondent should have 60%, he claimed in his 3rd affirmation that it was in June or July 1989, after the June 4th incident in China that year. He claimed that before the demise of the joint venture at the end of 1984, neither party had injected any capital into the Company. He asserted that the Fifth Office did not have any interest in Zhun Hua Ltd., that he and the 2nd respondent were in control of that company and they did not need to heed the bidding of the Fifth Office or any one else. He also claimed that between 1995 and 2002, dividends were regularly paid to him and the 2nd respondent, who were and are the only shareholders of the Company after 1989. If the petitioner owns the shares beneficially The petitioner's case that he is the beneficial owner of the shares he holds would appear to rest on two matters. Firstly, he claimed that he had contributed to the starting up capital of the Company in 1985. There was no dispute that the petitioner did not pay anything for the subsequent allotments of additional shares to him in July 1989 and October 1996, by which his shareholding was increased to and maintained at 40%. Secondly, he alleged that he had an agreement with the 2nd respondent by which he was to own 40% of the shares and the 2nd respondent was to own 60%. Mr. Anson Wong for the respondents accepted that the respondents would need to adduce evidence to displace the prima facie position that notwithstanding the petitioner was registered as a shareholder, the beneficial ownership did not go with the legal title (Re Superyield Holdings Ltd. [2000] 2 HKC 90 at 110G to H). It is the case of the 2nd respondent that all moneys for investing in the capital of the Company were provided by the Fifth Office through Hong Kong Zhun Hua, not by the petitioner and the 2nd respondent as alleged, and that the presumption of a resulting trust has not been rebutted. There is no requirement as such for the transferee to share or participate in the intention of the transferor (Lewin on Trusts, 17th ed., para. 9-07), so whether the petitioner was aware he was holding his shares on trust for the Fifth Office is immaterial. I reject the petitioner's evidence that all moneys

for investment in the Company had come from profits of other businesses jointly invested in by him and the 2nd respondent. I find that the petitioner did not have sufficient means to contribute to the initial capital of HK\$1 million. On his evidence, his earnings and means in 1985 could only be described as modest. Although the petitioner claimed he had many business dealings with the 2nd respondent well before 1985 and had the means to invest in the Company, he was unable to give any particulars of such business dealings or the profits allegedly made. Later, he changed his evidence and stated that he did not need to inject any money into the Company even at the earlier stage, as the Company could make use of the credit period and there were sufficient profits generated from the Company's own business. I find this evidence contradictory and unbelievable, bearing in mind that the Company was carrying on the business of hire-purchase finance. It is also not borne out by the audited accounts from incorporation up to 31 October 1985, which showed that the Company had a huge volume of sales of HK\$16 million, with expenses of over HK\$1.1 million and had suffered a net loss. When the petitioner was asked why 9,998 shares were allotted to the 2nd respondent in September 1985 and 8,000 shares were transferred from Roodi to the 2nd respondent in May 1989, he said they were done according to plans and discussions to attract new investors. He was not able to explain how the allotment or transfer of shares to the 2nd respondent would assist in attracting new investors. Besides, the allotment of 9,998 shares to the 2nd respondent and the transfer of 8,000 shares from Roodi to the 2nd respondent were inconsistent with the petitioner's case that he should have 40% shareholding in the Company. There was no satisfactory explanation from the petitioner that from the position of not holding any share at the inception, how he came to be allotted 40% of the issued shares in 1989. For the reasons given in the subsequent part of this judgment when I consider the issue of quasi-partnership, I reject the petitioner's allegation of an agreement between him and the 2nd respondent that he should own 40% of the shares. The petitioner's reliance on the issue and receipt of dividends between 1995 and 2002 was of no help to his case, even though it was stated in the directors report in the audited accounts for some years that dividends were paid. I prefer the evidence of the 2nd and 3rd respondents that the alleged dividends were in fact bonuses shared between the four directors, in accordance with the same ratio that had been adopted for many years. The alleged dividends were paid not just to the two registered shareholders, but also to the 3rd respondent and Madam Cheung King Yan, who are the other directors. The reason why these payments were stated to be dividends in the directors report was at the suggestion of the petitioner, and was done to reduce the tax liabilities of the petitioner and the 2nd respondent. I turn to consider the evidence adduced by the 2nd respondent. The 2nd respondent gave evidence that in the beginning, when the joint venture of Glittering Investment and the Trade Centre was in existence, he and Cheung So each took up one share in the Company as the subscribers on behalf of Glittering Investment. They understood that the shares they held did not belong to them; the Company was but a small project under Glittering Investment and occupied part of the premises of the latter at Room 1112A, Park-In Commercial Centre, No. 56 Dundas Street, Kowloon. I accept his evidence on this, which would seem to accord with the documents. I also accept his testimony that the funds

injected into the Company for its operation during the initial months did not come from him, the petitioner or Cheung So and could only have come from Glittering Investment. He explained that the shares in the Company were registered in the names of Cheung So and himself due to political sentiments in China in the 1980s in that it was considered inappropriate for business entities in China to have shares in Hong Kong companies registered in their names. After the joint venture of Glittering Investment and the Trade Centre came to an end, according to the affirmation of the 2nd respondent, the Fifth Office invested in the Company through Hong Kong Zhun Hua and appointed him its representative to manage the Company. There was in late 1984 a power struggle in Glittering Investment between Cheung So, the general manager, and Cho Man Ching, the assistant general manager. The 2nd respondent sided with Cheung So. Cho Man Ching took away all the business except for the marketing or development department that was under the 2nd respondent. Cheung So then approached Zhuhai Zhun Hua to invest in the Company, which was one of the projects undertaken by Glittering Investment. The 2nd respondent played a subsidiary role in the negotiations, as he was subordinate to Cheung So. Although this evidence was somewhat inconsistent with the 2nd respondent's affirmation, I am inclined to believe him, as this evidence would seem to have a ring of truth about it. Under cross-examination, he said it would not be against government policy for the Fifth Office to invest in the Company. The policy which led to the withdrawal of the Trade Centre from the joint venture with Glittering Investment in the Company (i.e. not to form joint venture with foreign entities to carry out trading business) could be circumvented by the Chinese entity setting up a window company abroad and doing business through the window company. As there were restrictions at the time against Chinese nationals leaving the country, it was necessary to appoint an individual as an agent in Hong Kong and the 2nd respondent became the agent for the window company of the Fifth Office. The next matter that happened was the setting up of Hong Kong Zhun Hua in early 1985. The 2nd respondent explained there was insufficient time to establish a limited company. He was made its sole proprietor. He purchased premises at Room 10, 13th Floor, Hoi Yuen Industrial Centre, No. 55 Hoi Yuen Road, Kwun Tong, for the Company to operate the hire-purchase business which it took over from Glittering Investment. At the same time, Hong Kong Zhun Hua carried on trading as the window company of Zhuhai Zhun Hua, at the former premises of Glittering Investment in Dundas Street. In March 1985, Hong Kong Zhun Hua prepared a total sum of about US\$2 million, part of which was for the purpose of injecting working capital into the Company to carry on business in Hong Kong. Two interest tax deduction certificates issued by Chiyu Bank dated 20 and 22 March 1985 were produced, showing that Hong Kong Zhun Hua made two deposits in the sums of US\$999,982.00 and US\$999,972.00 in March 1985. I am satisfied that the funding of the Company in 1985 had come from the Fifth Office. The 2nd respondent also gave evidence how he had used part of the US\$2 million to purchase the business premises of the Company, part as security for the overdraft of the Company, and part as operating expenses to pay the wages of staff. According to the 2nd respondent, that was not the extent of the financial assistance the Fifth Office made to the Company. When Cheung So left the Company in September 1985, Kong Lek (also known as

Jiang Hairong) replaced Cheung as his new superior. He said that the share capital of the Company was increased under his directions, as the representative of Zhuhai Zhun Hua. He explained how and why Tack Roger became a shareholder in November 1985, why Tack Roger withdrew in March 1988, and why the shares transferred by Tack Roger to Roodi by mistake were transferred back to him in May 1989. Without the officials of the Fifth Office or the officers of Zhuhai Zhun Hua working behind the scenes, it was not likely that in the early days of the Company, Liu Chi Keung would agree to acquire a significant stake in the Company through Tack Roger and thus enable the Company to secure banking facilities to the extent of HK\$12 million. The 2nd respondent has produced documents showing directions given to him as the general manager of Hong Kong Zhun Hua from Zhuhai Zhun Hua in December 1985 on the deployment of profits, of which 30% was to be given to senior authorities. Other receipts of Zhuhai Zhun Hua showed that in accordance with directions, HK\$203,000.00 were transferred from the entity in Hong Kong for the use of the entity in Macau in 1985 and HK\$300,000.00 was received from the Hong Kong entity for the head office in March 1986. There is also documentary evidence to show that Zhuhai Zhun Hua directed HK\$490,000.00 to be withdrawn from Hong Kong Zhun Hua as investment monies in Zhun Hua Ltd. in June 1987. The petitioner also admitted in his affirmation that the sum of HK\$490,000.00 was given by the Fifth Office to Zhun Hua Ltd., although he claimed he had no idea what the investment was about and denied that the Fifth Office had any control over Zhun Hua Ltd. I am satisfied that Hong Kong Zhun Hua and Zhun Hua Ltd. were controlled by the Fifth Office through Zhuhai Zhun Hua, notwithstanding that the 2nd respondent was the sole proprietor of Hong Kong Zhun Hua and that the 2nd respondent held all but two shares in Zhun Hua Ltd. and was its managing director. There is no reason to doubt his evidence that Kong Lek, Wong Bun and Tsang Man were officials of the Fifth Office. The petitioner claimed that the internal affairs of Hong Kong Zhun Hua had nothing to do with the Company or the issues in these proceedings, and that the management and operation of the Company were totally separate and independent from Hong Kong Zhun Hua or Zhun Hua Ltd. There is not a lot as far as documentary evidence goes. But I do not find this as surprising or inherently suspicious. Besides, it was admitted by the petitioner that he had destroyed old accounting documents of the Company, Zhun Hua Ltd. and Roodi in March 2005. Hong Kong Zhun Hua, Zhun Hua Ltd. and Roodi all shared business premises with the Company, after the Company purchased the present premises at Unit 7, 5th Floor, Po Lung Centre, No. 11 Wang Chiu Road, Kowloon Bay, Kowloon. There was evidence from the 2nd respondent that Zhun Hua Ltd. had injected funds into Roodi, which was acquired as a shelf company. It was probable that all these entities had at one time or other received financial support from the Fifth Office. Although the petitioner was a director of Zhun Hua Ltd., he admitted that he was not at the centre of things and did not participate in the management of that company. He was merely an employee of Hong Kong Zhun Hua and his duties were to attend to accounting matters and company secretarial work. I find that he was made a director of the Company and of Zhun Hua Ltd. with a nominal shareholding in each initially, to fulfil the statutory requirement at the time on the minimum number of shareholders and directors. In cross-examination, the 2nd respondent stated repeatedly that all along all the

shares in the Company are beneficially owned by Zhuhai Zhun Hua and are state assets , and that both he and the petitioner have held their shares as trustees. Thus, the shares they held in the Company are not their personal assets; the shares merely signified their power and responsibility in the Company and are to be handed over to another person if they should cease to be employed by Zhuhai Zhun Hua or Hong Kong Zhun Hua. This is a material departure from the 2nd respondent's affirmation, in which he said in June 1987, the Fifth Office had agreed with him that 51% shares in the Company would be beneficially owned by him and the remaining 49% would be held on trust for the benefit of the Fifth Office. I appreciate that the 2nd respondent had an erroneous understanding of beneficial ownership when he made this affirmation, and this error did not come to light until he expanded on his understanding in giving evidence. I am however not able to make any sense of his explanation in cross-examination why, in his affirmation, he mentioned some kind of differentiation between 51% and 49% of the shares in the Company. He was aware of but not too concerned about the subsequent increase of the petitioner's shareholding in the Company to 40% (which the petitioner did not pay for). Again, I am not able to make much sense of his answers why he and the petitioner were allotted the additional shares in July 1989 and October 1996. Notwithstanding these matters, on the totality of the evidence, I find that the presumption of resulting trust has not been rebutted and that the petitioner does not have beneficial ownership of the shares he holds in the Company. There is no acceptable evidence of actual intention of the provider of funds to benefit the petitioner of the beneficial interest in the shares he held. Was there a quasi-partnership I accept that even if the petitioner had made no or no substantial financial contribution to the Company when it was set up, it did not necessarily mean that he could have no expectation that the exercise of legal rights may be subjected to equitable considerations, provided that there were relevant circumstances giving rise to a quasi-partnership within the principle established in *In re Westbourne Galleries Ltd.* [1973] AC 360. I reject the petitioner's evidence that the Company was incorporated on the basis of mutual trust between him, the 2nd respondent and Cheung So. The genesis of the Company, which started as a joint venture of two other entities, and the subsequent involvement of Tack Roger, do not support that claim. As pointed out by Mr. Wong, the petitioner gave four different versions as to his interest in the Company at its inception. In the petition, it was stated that Cheung So and the 2nd respondent each held a share and he had beneficial interest in part of the share held by Cheung. After the 2nd respondent deposed to the joint venture between Glittering Investment and the Trade Centre in setting up the Company, the petitioner admitted in his affirmation in reply that the Company was a corporate vehicle for this joint venture. In cross-examination, he maintained however he had an interest in the Company when it was established, notwithstanding that it was set up as a joint venture between Glittering Investment and the Trade Centre. He could not give a sensible answer to explain how he could maintain an interest in the Company in such circumstances. He said he had a beneficial interest as to half of the share held by the 2nd respondent, which is different from what was stated in the petition. He later said the extent of his beneficial interest in the share held by the 2nd respondent was 40% and not half of it. He also gave two inconsistent versions as to when

there was an alleged agreement between him and the 2nd respondent that he should own 40% of the shares in the Company. In his 3rd affirmation, he stated that this agreement was made some time in 1988, after Tack Roger withdrew as a shareholder. In cross-examination, he said the alleged agreement was made in 1985, shortly after Cheung So resigned from the Company in September 1985. I reject his evidence that after Cheung So retired from the Company in September 1985, he and the 2nd respondent had reached an agreement as alleged in the petition that they would equally participate in the management. There was no satisfactory explanation why the alleged agreement that the petitioner was to own 40% of the shares was not part of the agreement or understanding alleged in the petition. The alleged agreement that he was to own 40% shares in the Company was a fabrication. When Tack Roger took over 40% shares in the Company in November 1985, it was allowed to appoint three directors to the board. This militated against the allegation that the petitioner and the 2nd respondent had an agreement or understanding that they would equally participate in the management of the Company. Furthermore, the subsequent constitution of the board of directors did not bear out the claim of equal participation in management. Since the 1990s, the Company has five directors, two of which are close relatives of the 2nd respondent. Apart from himself, the petitioner did not appoint any associate to the board. There was no quasi-partnership between the petitioner and the 2nd respondent. The fact that the petitioner had a close working relationship with the 2nd respondent, that he had looked after the Company during the years when the 2nd respondent was in the United States, and that the 2nd respondent had plans to groom him as successor are not sufficient. All along, the petitioner was just a subordinate of the 2nd respondent. Exclusion from management There was no unjustified exclusion of the petitioner from management, as there was no understanding or agreement that he was entitled to participate in the management of the Company, as alleged or at all. According to the 2nd respondent, whose evidence on this I accept, he has had serious arguments with the petitioner in the past and had threatened to dismiss him several times. But after he vented and got over his anger, he would just leave the matter. This was borne out by the fact that as late as 2004, when he set up Viable Health, he still asked the petitioner to be one of its directors. The incidents which led to his confrontation with the petitioner and the latter's dismissal in March 2005 would appear to be relatively minor and were the straw that broke the camel's back. Denial of access to books The petitioner said in cross-examination that the 3rd respondent had denied him access to the Company's books and documents since April 2002, after the 2nd respondent's return from the United States. No such complaint was ever raised by the petitioner against the 3rd respondent. I find the petitioner's evidence incredible. I accept the 3rd respondent's evidence that at all material times, the accounting documents and financial records were kept within the Company's office and the petitioner had free access to such documents. Closure of telephone banking account and transfer of HK\$5 million In April 2003, HK\$5 million was transferred from the Company's overdraft account with Chiyu Bank to its current account with HSBC. Soon after that, its telephone banking account with Chiyu Bank was closed. The petitioner's complaint was that these measures were taken without notifying him and he was unable to know the operation of the accounts with the

closure of the telephone banking account. The 2nd respondent explained that the transfer of funds was made for the purpose of utilising the overdraft facility. The petitioner accepted in cross-examination that it was necessary to utilise the facility from time to time so that the bank would not reduce the Company's credit limit. The Company's overdraft facility was fully secured by its properties. There is no suggestion of any prejudice to the Company or to the petitioner. As for the closure of the telephone banking account, this was due to the updating of technology by Chiyu Bank in changing to Internet banking. I accept the 3rd respondent's evidence and reject the petitioner's allegation that he did not have access to the financial records after the change. Allowing Viable Health to occupy premises The complaint that Viable Health was allowed to occupy part of the Company's premises without the petitioner's consent was not made out. In cross-examination, the petitioner accepted that he did not object to the use of the premises by Viable Health. The petitioner's misconduct It is strictly not necessary to consider the allegations of misconduct made against the petitioner to justify his removal from the management, as I have ruled against the petitioner that he was entitled to participate in the management. Nevertheless, as evidence has been led on these allegations, I will state my findings briefly. The only complaint made out against the petitioner is causing the Company to enter into a new office cleaning agreement with New Base in September 2001 without disclosing his interest in that company. The petitioner held one-third of the issued shares in New Base and his brother-in-law held one-third. He knew there was need to disclose his interest to other directors of the Company. It was not in dispute that this issue was raised by the 2nd respondent when the petitioner was removed from the management of the Company in March 2005. The 2nd respondent said he only discovered the petitioner's interest in New Base when the latter threatened to sue the Company for breach of contract in early 2005. I accept the evidence of the 2nd and 3rd respondents on this issue. Whether New Base had over-charged the Company or not is beside the point. I find there was no misconduct regarding the loan of HK\$300,000.00 in March 2001, which the petitioner repaid within time albeit without interest. It was common ground that the 2nd respondent was not in Hong Kong at the time the petitioner borrowed from the Company. It was also not disputed that the petitioner telephoned the 2nd respondent to ask for his consent and the latter had consented, although the 2nd respondent claimed he gave his consent reluctantly. The petitioner was asked by Madam Cheung King Yan to sign a loan agreement and he did so. It was provided in the loan agreement that the repayment period was 15 days from the time the loan was made. As he received the funds only on 2 April 2001, not on the date of the loan agreement, he was not late in making repayment on 17 April 2001. Nobody had asked him to pay interest on the loan, notwithstanding there was an obligation to pay interest in the loan agreement. The petitioner also mentioned an earlier occasion in August 1996 when he borrowed HK\$1 million from the Company as a short-term loan to finance his purchase of a property, which he repaid. On that occasion, the 2nd respondent did not request him to pay interest or to sign any loan agreement. The cheque in favour of the petitioner was signed by the petitioner and the 2nd respondent jointly and there was a payment approval form signed by the petitioner alone authorising payment to himself of this amount. I find it incredible the 2nd

respondent was not aware or was mistaken that the cheque he co-signed was for making a substantial loan to the petitioner. It is more likely that the 2nd respondent had simply forgotten about this incident. Using the Company's address as correspondence address for private purpose is a trivial matter. In any event, the petitioner agreed to stop this practice when this was raised by the 2nd respondent in March 2005. It is not necessary to go into the evidence about the petitioner's destruction of old documents of the Company and related companies in March 2005, or the evidence relating to the proposed appointment by the 2nd respondent of a conduct examiner in February 2005.

Conclusion

The petitioner has failed to establish a case that he was wrongfully excluded from the management of the Company. There was no entitlement to participate in the management. There was no unfairly prejudicial conduct; his exclusion from management was not unjustified. The petitioner has not made out a case for relief under section 168A or for winding up. The petition is dismissed. I make an order nisi that the petitioner should pay the costs of the 2nd and 3rd respondents in these proceedings. (S Kwan) Judge of the Court of First Instance High Court Mr. Raymond W.K. Lau, in 1udk 1udk L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G T![> hccw (for Susan Kwan only).dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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