

HONG KONG / JUDGMENT

RE GOLDEN ELEPHANT HOLDINGS LTD

COURT

Court of First Instance

DECIDED

22 August 2007

CASE / FILE NUMBER

HCCW784/2005

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bjbj W gP dinance, Cap. 32

Before: Hon Kwan J in Court Date of Hearing: 15 August 2007 Date of Judgment: 15 August 2007
Date of Handing Down of Reasons for Judgment: 22 August 2007

REASONS FOR JUDGMENT

This is a petition for winding up on the just and equitable ground and alternatively for an order to buy out the petitioner's shares under section 168A of the Companies Ordinance, Cap. 32. The company concerned, being the W gP, held the remaining 7,000 shares in November 2004. According to the latest annual made up to 9 March 2007, the 2nd respondent has since transferred two of its shares to Yiu Hong Sze (HS Yiu) and Yiu Fat Yuen. The 2nd respondent filed an affirmation by HS Yiu on 19 December 2005. He disputed the matters alleged in the petition and asserted instead there was misfeasance and mismanagement by the petitioner, which led to the breakdown of trust and confidence between the 2nd respondent and the petitioner. He stated that the 2nd respondent would consent to wind up the Company and asked the court to so order, on the basis of his allegations and not those of the petitioner's. On 16 January 2006 and 22 May 2006, directions were given for further affirmations to be filed by the 2nd respondent and the petitioner. The petitioner had filed his affirmation on 19 May 2006 to answer the affirmation of HS Yiu, and as the 2nd respondent chose not to file any supplemental affirmation, no further evidence was filed after May 2006. When leave was given on 31 July 2006 to set down the petition for hearing, it was ordered that all deponents are to attend trial for cross-examination, failing which their evidence may not be relied upon. What happened thereafter was that an order was made by consent on 4 January 2007 that the petitioner was to pay into court within 7 days thereof HK\$250,000.00 as security for the 2nd respondent's costs in these proceedings. Having obtained security for its costs, the 2nd respondent ceased to have legal representation. An order was made on 16 July 2007 that the 2nd respondent's solicitors should

cease to act for it. At the pre-trial review on 19 July 2007, the petitioner's solicitors were directed to inform the 2nd respondent, who was absent, that it is necessary to seek leave from a Master if it was intended that a director of the 2nd respondent should represent it in the proceedings. No application was made for any director to represent the 2nd respondent, nor has it appeared at the hearing of the petition. Under the directions given on 31 July 2006, the affirmation of HS Yiu may not be admitted as evidence in the proceedings. The court has only heard evidence from the petitioner, who has affirmed what he deposed to in his two affirmations and given further evidence to clarify his affirmations. The findings in this judgment are made on the basis of the admissible evidence. The court is not bound to accept all that the petitioner has put forward. The fact that the 2nd respondent chose not to take part in the proceedings and that its evidence is not admitted does not mean that the petitioner's evidence would not be examined properly, as the court would need to be satisfied that the complaints in the petition are established to grant relief on the petition. Nevertheless, as there is no evidence from the 2nd respondent to challenge the petitioner's allegations, the court is inclined to accept, by and large, the petitioner's case, unless there is good reason to indicate otherwise. The background It would be gmi gP surement equivalent to 0.067 hectare). The Land Bureau had issued to Minchang a collective land use permit and at the time of the certificate had issued over 1,000 certificates of other land rights to investors of Minchang. In February 1999, the municipal authority of Huazhou and the Huazhou City Industrial and Commercial Commission granted permission to Minchang to seek investments from overseas. According to the application submitted by Minchang to the authorities in February 1999, it owned 60,000 mu of land, of which 39,800 mu were developed and planted. That Minchang had obtained necessary government approval to seek overseas investors would also seem to be borne out by a letter dated 3 April 2003 issued by the Huazhou City Foreign Trade and Economic Bureau. Minchang was among 235 enterprises in the second list of Pioneer National Agricultural Enterprises in a notice issued by nine ministries including the Agriculture Ministry in December 2002. The Guangdong Import and Export Quarantine Bureau issued a certificate dated 30 August 2002 stating that fruits produced in the orchard of Minchang were found to meet the standards for export and that the orchard was considered to be the biggest producer of a fruit known as longan. Minchang had appointed Trust Properties (Singapore) Pte. Limited (the Singapore Agent RaW) and development transactions. Through the efforts of the petitioner and his companies, one-third of the land developed by Minchang (about 10,000 mu) was sold to foreign investors in that they acquired the land use rights to such land. Domestic investors held the remaining two-thirds of developed land. HS Yiu was one of the foreign investors. Between his family and the family of Yiu Tse Tan (TT Yiu), they acquired the land use rights of about 3,000 mu in the orchard of Minchang. The 2nd respondent represents the interests of these two families in their investments in the orchard. It would appear from the letters of the lawyers for the Singapore Agent to the 2nd respondent's solicitors in January and December 2005 that a total of US\$1,681,400.00 was received directly or indirectly from HS Yiu and/or those connected to him by the Singapore Agent and paid out in accordance with the instructions of Minchang. In 2004, Ng Chiu Yuk was arrested by the authorities in Huazhou when it was discovered there were irregularities and illegal financial activities in the enterprise of Minchang. No records were found to exist in the accounts of Minchang for the foreign funds that

should have flowed into the company. The orchard had not been managed properly, part of it had become derelict, and peasants who had leased their land to Minchang were owed rent for two to four years. Owing to the arrest of Ng Chiu Yuk, the orchard was closed down temporarily in June 2004. It was in these circumstances that the petitioner and the 2nd respondent joined forces, to protect the investments of the foreign investors in the orchard of Minchang. The Company was used as the vehicle for their co-operation to manage the land over which the foreign investors enjoy land use rights. The formation of the Company The Company was incorporated by the petitioner in Hong Kong on 9 March 2004 for other purposes. In September 2004, it was orally agreed between the petitioner and the two families of HS Yiu and TT Yiu that they would use the Company to manage the land of the two families in the orchard and the land of other foreign investors who were to be approached by the petitioner. It was further agreed that the management service was to be provided by the wholly owned subsidiary of the Company to be set up in China under the Foreign Economic Contract Laws as a foreign investment enterprise. The subsidiary duly incorporated was Huazhou Golden Elephant Agricultural Development Company Limited (the Huazhou Subsidiary mi|vU\ gP the working capital of the Company and the Huazhou Subsidiary and they should together hold 70% of the authorised share capital of the Company;

- (2) the petitioner would not be required to contribute towards the initial or working capital of the Company or the Huazhou Subsidiary. He would be responsible for the setting up and registration of the Huazhou Subsidiary and attend to compliance matters including obtaining the approval of the municipal Foreign Trade and Economic Bureau. He agreed to waive all charges and commission which he and his companies would otherwise charge for introducing other foreign investors holding 7,000 mu to engage the Huazhou Subsidiary to manage their land. In return for all that, the petitioner was to hold 30% of the authorised share capital of the Company; and
- (3) the petitioner was to manage the Huazhou Subsidiary. Pursuant to the above agreement, on 15 November 2004, 3,000 shares of the Company were allotted to the petitioner and 7,000 shares were allotted to the 2nd respondent. The shares were issued as fully paid or credited as fully paid. The petitioner was appointed a director of the Company. The other four directors, who were nominated by the 2nd respondent, included HS Yiu and TT Yiu. According to the certificate of approval issued by the Maoming City Industrial and Commercial Administration Bureau on 28 April 2005, the registered capital of the Huazhou Subsidiary was US\$2.5 million, its paid-up capital was US\$375,000.00 and its legal representative was HS Yiu. He was also chairman of the board of directors. The other three directors were the petitioner, the son of HS Yiu and TT Yiu. Since 2004, the petitioner had deployed staff from the Shenzhen Agents to supervise work in those parts of the orchard that came under the management of the Huazhou Subsidiary. He approached foreign investors who have acquired land use rights of the other 7,000 mu to offer management services and succeeded in contacting most of them. By March or April 2005, approximately 90% of these foreign investors had agreed to engage the Huazhou Subsidiary to manage their land. In the documents for registration of the Huazhou Subsidiary, HS Yiu was named as its

general manager. However, the petitioner had discharged the function of the general manager all along, pursuant to the agreement in September 2004. In the letter of the Chinese lawyer engaged by the 2nd respondent on behalf of the Company and the Huazhou Subsidiary dated 9 September 2005, it was also stated that the petitioner had taken up the position of general manager of the Huazhou Subsidiary. The complaints in the petition The complaints in the petition are twofold. Firstly, on 31 August 2005, HS Yiu went to the petitioner's office and dismissed the petitioner as the general manager of the Huazhou Subsidiary with immediate effect. Staff of the Shenzhen Agents deployed by the petitioner to work for the Huazhou Subsidiary was also dismissed summarily. HS Yiu demanded the petitioner to deliver up to him all assets, original documents, chops and seals of the Huazhou Subsidiary. He threatened to dilute the shareholding of the petitioner in the Company if the petitioner should fail to co-operate with him. The dismissal of the petitioner was confirmed by the letter of the Chinese lawyer dated 9 September 2005 mentioned earlier, and a letter dated 27 September 2005 written by HS Yiu on behalf of the Huazhou Subsidiary stating that the board of directors had passed a resolution on the same day to terminate all appointments of the petitioner in that company with effect from the date of the resolution. The petitioner did not receive notice of the board meeting, which would have been held in his absence. Since 1 September 2005, the 2nd respondent had deployed staff from Guangzhou to work for the Huazhou Subsidiary. They took instructions from HS Yiu. Secondly, by a notice dated 2 September 2005 issued by HS Yiu on behalf of the board of the Company, he gave notice to convene an extraordinary general meeting on 14 October 2005 for the purpose of considering and, if thought fit, passing these resolutions: (1) to increase the authorised capital of the Company from HK\$10,000.00 to HK\$20 million by creating an additional 19,990,000 ordinary shares of HK\$1.00 each, to rank pari passu with the existing shares; and (2) the additional shares be allotted to the existing shareholders on a pro rata basis. The meeting was not held in the end. If the petitioner should fail to subscribe to the additional shares, his shareholding would be diluted from 30% to 0.015%. The petitioner claimed that the above actions of the 2nd respondent were taken not with the interest of the Company in mind but for the own selfish interest of the 2nd respondent, which was to reap the benefits of the connections established by the petitioner with the local authorities, the establishment of the Huazhou Subsidiary, and the management business secured by the petitioner with the other foreign investors. This petition was presented on 8 October 2005. The case for relief I find that the Company was a quasi-partnership between the petitioner and the 2nd respondent so that equitable considerations should be superimposed on the association of these shareholders in the Company. The petitioner was excluded from the management of the Huazhou Subsidiary, the only business operated by the Company, contrary to the agreement of the parties in September 2004, and without justification. There was also an attempt to dilute the petitioner's shareholding in the Company, without any sound commercial reason why the authorised capital should be increased to the extent as proposed at that point in time. Mutual trust and confidence between the shareholders had clearly been destroyed. The petitioner seeks an order to wind up the Company instead of an order that his shares are to be purchased by the 2nd respondent. It would be appropriate in

these circumstances to wind up the Company. I have made a winding-up order. As there is no reason why costs should not follow the event, I have ordered the 2nd respondent to pay the petitioner s costs in these proceedings, to be taxed if not agreed. The sum paid into court by the petitioner as security for costs, with accrued interest, is to be paid out to the petitioner. (S Kwan) Judge of the Court of First Instance High Court Mr. Raymond Fong, instructed by Messrs. Kelvin Cheung & Co., for the Petitioner The 2nd Respondent, absent The Official Receiver, attendance excused PAGE - 1udk 1udk H I J K 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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