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IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI

SC 5/2021  
[2021] NZSC Trans 13

**BETWEEN**

**DONGLIN DENG**

Appellant

**AND**

**LU ZHENG**

Respondent

**NEW ZEALAND LAW SOCIETY**

Intervener

Hearing: 17 August 2021

Coram: William Young J  
Glazebrook J  
O'Regan J  
Ellen France J  
Williams J

Appearances: J D Turner and L X Huang for the Appellant  
D Zhang and E Tie for the Respondent  
J F Anderson QC, M Chen and  
Y Y Mortimer-Wang for the Intervener

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**CIVIL APPEAL**

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**MR TURNER:**

Tēnā koutou katoa. May it please your Honours. Counsel's name is Turner. I appear for the appellant with my co-counsel Mr Huang.

**WILLIAM YOUNG J:**

Tēnā korua, Mr Turner.

**MR ZHANG:**

May it please the Court, counsel's name is Zhang. I appear with my co-counsel Mr Tie.

**WILLIAM YOUNG J:**

Thank you, Mr Zhang.

**MS ANDERSON QC:**

May it please your Honours, Ms Anderson appearing with Ms Chen and Ms Mortimer-Wang for the intervener Law Society.

**WILLIAM YOUNG J:**

Thank you, Ms Anderson. Right, Mr Turner, so what's the current state of play in terms of order of events? Are you going to start?

**MR TURNER:**

That's right, your Honour. I've discussed with my learned friends and we consider that it would be appropriate for the appellants to start, followed by the intervener at 12.15, and then allowing the respondent to reply after with 15 minutes, and then after the luncheon adjournment, and with a short right of reply thereafter.

**WILLIAM YOUNG J:**

All right, thank you, Mr Turner.

**MR TURNER:**

Your Honours, it's my approach today to canvass four points, four main areas. In fact, five. My learned co-counsel will address you on the relevance of cultural context to this matter. I wish to address partnership, whether the judgment of the Court of Appeal may be sustained on other grounds, the approach of the relevant courts, and the credibility of the witnesses. But, to begin with, it is my submission that this matter can be disposed of quite neatly and simply by your Honours and in favour of the appellant and to do so relying on the evidence of the respondent himself. It will also will focus on the terms at the start, or near the start, of the alleged relationship on this co-operation agreement. The Court of Appeal did refer to this agreement, but it didn't really focus on the terms and from the cases I have read, the start, the parties allegedly agreed that the start of their relationship is quite important.

Now, in evidence, this document was a major issue for Mr Zheng. It is the Bella Vista co-operation agreement, and when one focuses on the terms of that agreement –

**WILLIAM YOUNG J:**

Can you just give a reference to it, please?

**MR TURNER:**

Certainly, Sir. It's COA 301.0140. I will come to this document in more detail, but if your Honours scroll down to the English translation, the point that I wish to make for the simple disposal is under point 6 "unfavourable conditions" and it is the last, it is the penultimate arrow.

**GLAZEBROOK J:**

Sorry, can you give me the page number again, the document number again, sorry?

**MR TURNER:**

The document number is 301.0140 and the page that I'm referring to is 0142. Sorry, 143, the translation.

**GLAZEBROOK J:**

Thank you.

**MR TURNER:**

So, the penultimate point there: "If one party is to transfer shares to others, the consent of the other party is needed." So, this is what allegedly Mr Zheng says is one of the facets of this Bella Vista partner agreement and we say neatly that, fast forward to 2015, Mr Zheng, the respondent, did wish to transfer his indeterminate shares and lots of land to the appellant Mr Deng and in fact he does so, he gives evidence on that, and it's recorded in the principles in separation document, which we will come to. It's recorded in questions from the trial judge Justice Downs, and it's recorded in further documents relied on by the appellant himself to indicate that he has this land or lots, or interest in it, which was indeterminate transferred to him.

So, there is no need for any further reconciliation or claim because at the end of the relationship, the parties are joint shareholders in Orient Construction Ltd and they operate another company Eversolid Construction Ltd as almost de facto shareholders with powers of attorney. At the separation, all of the assets and projects are transferred to the appellant. He takes the shares in Orient Construction. Eversolid Construction is deregistered, no longer trades. There really is no need for any further accounting or reconciliation whatsoever, it's consistent with the approach of Justice Downs. In my submission, that is going to be the simple way of dealing with this matter whether a partnership is found or not. This is what the basis of the respondent's position is. However, we say in fact we don't get there but we don't actually ever get a concluded partnership between the two parties.

Now, we come then to the thrust of the main points on partnership. Section 4(1) of the Act of 1908 applied in this case. It is the relation which subsists between persons carrying on business in common with a view to profit. It's important here that the respondent pleaded this partnership as commencing in 2004. That's not so. That was the relation between the respondent Mr Zheng, the appellant Mr Deng, as members of Orient Homes

Ltd. They were together with a Mr Jingli Zhu, Z-H-U. So, it's apparent that Mr Zheng, the respondent, chooses a company through which to conduct his business of land acquisition for development and all of the companies have registered offices at 18 Gills Road, Albany where the respondent works with his sister Jenny Zheng. Other companies are incorporated. Orient Construction Group, again, we have different directors. We have the appellant and Mr Jingli Zhu. Then Albany Apartments Ltd is incorporated with the respondent as director and by October 2008, the sole shareholder, but all these companies have various shareholders as well including the respondent and the appellant.

Fast forward then through to 2007, there is no Orient Partnership. That, according to the statement of claim, enters into the document your Honours have in front of you. What happens is that Mr Bin Jiang, a third party, is introduced to introduce capital to the group of companies for this land development. I mean this is the time of the global financial crisis, the GFC. The companies and their projects are under capitalised. So it is with Mr Jiang, that Mr Zheng, the respondent, signs this agreement and you will see straightaway from this agreement, if we go up a page, it's headed "This Bella Vista Project Co-Operation Agreement between Bin Jiang and Orient Construction Group". Orient Construction Group is defined there as two companies. It is Orient Homes Ltd and Albany Apartments Ltd. So the project is named to develop land and construct houses under this group umbrella and Mr Jiang is going to be involved in incorporating his own company D&R Homes Ltd. Mr Jiang is going to provide 40% of the fund and stage 1 will be for development of five pieces of land in 2009. The construction process is going to be carried out by the Oriental group of companies. Under management both parties are going to manage their accounts in the sales and then at point 6 we talk of unfavourable conditions. I've already referred your Honours to the point where it refers to a right or an ability of a party to transfer shares to others. Of course at this point it's shares of Mr Bin Jiang or shares of two companies and I'm not talking there of shares in the sense of share capital, it's more of the shares of the interest in this project.

Now saliently Mr Deng at the time of this agreement, which is 27 April 2008, is not solely Orient Homes Ltd, there are other members. Mr Deng is simply a low level project manager working on site. Mr Deng is not referred to at all in this co-operation agreement, nor does he sign it, in fact his evidence he's unaware of it. He only sees it in 2014 when his wife, Ms Xiaofeng Lin or Judy Lin, is asked to become involved with the data input at the Gills Road office in 2014 and there is no reporting to Mr Deng on this or partnership and there's even support for that obliquely in this document at paragraph 5, or point 5 under management, the last arrow there, there's only an obligation to look at a project account settlement sheet and a project profit sheet with a reporting to one of the partners Bin Jiang and his wife Honglan Liu. So there are a number of characters here but there's no reporting to Mr Deng personally. In fact Mr Jiang is not referred to, the respondent in this co-operation agreement. And saliently for a partnership Mr Deng doesn't anywhere agree to be personally responsible for any project losses. There's no reference in this document to any personal profit or a view to profit for Mr Deng. He's blissfully unaware of this agreement and so my submission is nothing that Mr Deng doesn't say in April 2008 relating to this co-operation agreement, there's no mutual intention to partnership. In my submission it doesn't record a business in common between just Mr Jiang and Mr Deng as Orient Construction Group with a view to profit. So saliently Mr Jiang chooses companies to conduct the business of the projects in the land development Albany Apartments and Orient Homes.

**GLAZEBROOK J:**

Can you just remind me of the shareholding in Orient Homes and Albany Apartments Ltd at the relevant time and whether there was ever – because I understand there are some third party shareholders still at that stage and whether there was any evidence about those third parties?

**MR TURNER:**

There are third party shareholders in those companies at that time. There is –

**GLAZEBROOK J:**

Was there any evidence about, it might be asking slightly the wrong person in the sense that you're not the person asserting the partnership but was there any evidence about the position of those other shareholders?

**MR TURNER:**

Yes at that time, there is evidence of shareholding your Honour.

**GLAZEBROOK J:**

Yes we've got the, I'm assuming that chart is right that was attached?

**MR TURNER:**

Yes. We took a lot of time to prepare that chart and it was referred to by his Honour Justice Downs in trial.

**GLAZEBROOK J:**

And we don't seem to have a change of shareholding until October 2008?

**MR TURNER:**

Yes that's correct and that evidence was given by Mr Deng himself and it's also referred to in Mr McKay's expert evidence. I mean Mr McKay was extremely thorough as a forensic accountant to go through and look at the relevant shareholdings at the date. He noted that there were other members of the company's other shareholders at this time and – that's in his brief, I don't have the page reference to hand I'm afraid but it is there.

**GLAZEBROOK J:**

What I was just wondering was there anything that's said from the respondent's position how that joint 50/50 partnership worked in with there being other shareholding at the relevant time?

**MR TURNER:**

Well there is but it's rather confusing. They seem to later on attribute some sort of shareholding of Mr Zheng, the respondent, with others to equate to a

26% and Mr Deng's shareholding with others to a 23%, it's really rather confusing as to somehow that then –

**GLAZEBROOK J:**

I must admit I couldn't work that out, which was one the things I was having difficulty with.

**MR TURNER:**

It's meant to correlate two years later to internal accounts which again Mr Deng is not aware of and doesn't agree but Mr McKay gives evidence to. He looks at Ms Payne, the respondent's expert accountant, and he disagrees with her comments in relation to this agreement with shareholding percentages in apparently conveying percentages for Zheng and Deng personally, and that page reference of Andrew McKay's evidence is 203.0672. His brief starts at 0622 where he disagrees with any sort of –

**GLAZEBROOK J:**

I was having difficulty finding, I have lost my index now, it's really helpful.

**MR TURNER:**

I'll bring it up.

**GLAZEBROOK J:**

Perhaps if you just, if you give me the number again I'll write it down.

**MR TURNER:**

Thank you your Honour, there is so many documents and confusions here. The evidence of Mr McKay starts at 203.0622. He disagrees with Ms Payne's assertion that somehow shareholdings can be attributed personally to Zheng and Deng two years later in 2010 and that is in his brief but saliently at 203.0672. I mean Ms Payne never looked at the internal documents of the various companies to try to correlate them to these internal accounts. I'll come to that later.

If I may continue, the point which I was coming to is Mr Zheng choosing to conduct these businesses using companies is contrary to the partnership, and I refer to *Maruha Corporation and Maruha (NZ) Ltd v Amaltal Corporation Ltd* [2007] NZSC 40, one of the points from that decision, if parties elect to continue in business as members of a company then that's not a partnership in law. I will refer further to that decision.

So in my submission there's nothing in this co-operation agreement to record a view to profit to Mr Deng compared with others and there's no doubt that it talks about after the sale of each property and account clearing or divisional reimbursement to be carried out or a project profit sheet. But in my submission there's just not evidence of a view to profit between Messrs Zheng and Deng personally, and even if there is reference to profit that's not enough. There's no agreement for them both to share equally in expenses and if you don't share equally in expenses you never get a net profit which is the true aim of a partnership, to share net profit. There's no doubt that this co-operation agreement records a management fee per lot, there's no doubt that Mr Deng made money during this time and he gives evidence of him getting wages and payment but an admission of making money's insufficient. On top of that these companies, Orient Homes and Albany Apartments have Earthstar Accounting to prepare financial statements and there's one for the year end March 2008 and this is at 318.4412.

**WILLIAM YOUNG J:**

What sorry?

**MR TURNER:**

318.4412. So saliently these accounts are prepared by Earthstar Accounting on 12 June, so after this Bella Vista co-operation agreement. Is signed by the directors on 30 June 2008. The accounts state assets of 7.24 million, funded by shareholder equity and really the point that I would like to come to is that there is a note that the company owes directors current accounts of 1.8 million, and that reference can be found on page, it's on the ninth page of this document and it's on page 4420, and there is a note to these current

accounts where it shows that the company, Orient Homes, owes Mr Deng \$496,000, to Mr Zhu, \$477,000 and to Mr Zheng, the respondent, \$827,000. There is also – so that's shareholder current accounts, that's showing the interests of these people in this company which this company reports to all the authorities in the world for its business, and at –

**ELLEN FRANCE J:**

On what page are those latter figures?

**MR TURNER:**

So those figures appear at 318.4425.

**WILLIAMS J:**

And 4426.

**MR TURNER:**

Yes. They have been highlighted though in the records. In my submission there's, the company Orient Homes cannot simply be attributed to Mr Deng. It's simply, it has other individuals recorded as having shareholder current accounts or the company owing them monies for their investment in it. This has three directors, it has three shareholders. Relatedly there are inter-company accounts to these other companies, Albany Apartments, Orient Construction Group. Then also at note 9 there's a standard note "related party transactions" standard on any external accounts, that say, where it is relevant: "No transactions of a material nature, not disclosed elsewhere in these financial statements, were entered into with related parties." That's a disclaimer for the account. The accountant is told there are no other relevant transactions with related parties.

Now moving forward to 2010, Orient Homes still continues to trade. It does still present accounts by Earthstar Accounting, and the evidence of this was at 318.4431. Now these are unsigned but again it shows on page 4439 that there are still directors current accounts. It was never quite explained because the respondent at trial never had his accountant give evidence,

which isn't surprising given that these accounts don't really reflect his assertion that there's a partnership, but it still shows that director current accounts, the company still owes directors \$2 million and it's still trading and saliently these companies are all making GST input claims to the IRD for their various project expenses. It's not the case where Deng and Zheng are registered for GST as a partnership and making such claims. Saliently, all of these companies enjoy the benefit of a limited liability status too which these directors enjoy. There's no accounts prepared simply for Deng and Zheng as partners.

Now, as is the evidence went at around about this time, this is when some internal accounts started to be prepared not between Zheng and Deng, but between another company member Mr Ray Yu, Y-U. Now, there was no evidence led of those internal accounts as being relevant in 2008. Moving forward to September 2008, Mr Deng and Mr Jingli Zhu are removed as directors of Orient Homes, so Orient Homes is not simply the company for Deng as a partner and then 10 October Mr Zheng's removed as a director. Then moving forward six months, Mr Deng is reappointed as the sole director of this company and then later in August he becomes a sole shareholder and saliently, this company is still trading. It is still submitting accounts. It's still engaged in projects.

So had the Court of Appeal looked at the salient, referred to all of this evidence as to what the parties did and said in 2008, in my submission, it would've concluded that there was no partnership. At best, it would just simply have been an intention for Deng and Zheng and Mr Bin Jiang to co-operate. In my submission, this allegation of partnership is really amplified when proceedings are first brought in 2017.

The evidence just doesn't show that there's a mutual intention of Mr Deng, the appellant, and Mr Zheng, the respondent, in this unproven Orient partnership allegedly commencing in 2004 to now be partners of a Bella Vista partnership as the respondent claimed in his second amended statement of claim and simply, they don't contribute equally to the acquisition of the lots in Bella Vista.

The evidence that the acquisitions are rather scant. Allegedly, these sections were transferred to three related persons but with the purpose of borrowing from the bank. Mr Jiang paid for these deposits and the sections were used as security and that's from the respondent's own brief of evidence at para 23. Then there's some evidence of a transfer to Mr Deng's mother who then obtains bank finance and the evidence of this was that well, it was during the time that the fallout from the global financial crisis, that companies were undercapitalised, they wanted funding.

Now, the aim to obtain funding in my submission is not a common view to profit and, in any event, these lots of land become, or are subsequently transferred to this company D&R Homes Ltd. That's a company of Mr Jiang. There's no evidence that D&R Homes was controlled by Mr Deng and the evidence led by Mr Zheng that Mr Jiang, or his company D&R Homes, was holding lots of land for him on trust with him as a beneficiary just wasn't accepted. Mr Deng actually acquired a lot of land. He denied holding it on trust for Mr Zheng. Mr Jiang, Bin Jiang, didn't give evidence.

So, when one looks at the evidence, what the parties did and said and the allegations as Mr Deng and Orient Homes never held title to any of these lots of land, then they could not transfer the land, they couldn't fail to render true accounts as alleged or share profits, or fail to realise a profit from such sales, or refuse to pay with Mr Zheng says is his fair share and we've already seen the clause in this agreement that only Zheng was aware in 2008 that permitted him to transfer such indeterminate interest away, which he did.

So moving forward to March 2010, almost all of these former members of the companies, the shareholders leave. Then we have another company incorporated. Mr Deng, the appellant, Mr Zheng, the respondent, become involved with another third party Mr Chenggan, James Zhang, and with another company called Rosedale Apartments Ltd. At that point, only the respondent and James Zhang are directors and they have shareholdings in unequal shares with Mr Deng. There's no real evidence given from the

respondent as to why the holdings in Rosedale Apartments is not part of this alleged partnership with Mr Deng. There's no real explanation in evidence.

What he does say in his evidence that there was these old accounts for the group of companies by Mr Ray Yu that were brought forward, but he doesn't plead this in his statement of claim. He doesn't plead that the old accounts for the group of companies are now the formation of a partnership with just Mr Deng, but a lot of time was spent at trial focusing on these accounts. In fact, Mr Zheng says for the first time in his brief of evidence at paragraph 30 he says: "We both signed this document and this can be taken as starting partnership accounts for Zheng and Deng." So, I'm going to take you now to this document.

**WILLIAM YOUNG J:**

You're going to have to give me the number again, I'm sorry.

**MR TURNER:**

That's fine. It's 304.0966.

**WILLIAM YOUNG J:**

0966, yes.

**MR TURNER:**

So, in relation to this document, you will see that there are, it's in Chinese and that as you scroll down this document, there are some initials on the bottom right of each page and what Mr Zheng alleges in his brief of evidence for the very first time was that this was an initial of Mr Deng and this is what we agree to as partnership accounts.

**WILLIAM YOUNG J:**

So, is it the one on the right or the one on the left? There are two initials, aren't there?

**MR TURNER:**

I'm assisted by co-counsel, the one on the left is allegedly Mr Deng. Mr Deng says it's not his initial. His evidence is that he didn't initial these accounts.

**WILLIAM YOUNG J:**

Who is the signature at 969?

**MR TURNER:**

That is the respondent Mr Zheng. Mr Deng says in his evidence: "I didn't initial these documents. In fact, I don't typically use an initial like that. When I initial for invoices for various projects, I use my English alphabet initials Tony Deng, T-G."

**WILLIAM YOUNG J:**

So the judge didn't make a specific finding on this, is this right?

**MR TURNER:**

His Honour Justice Downs, the trial judge, found these accounts to be enigmatic, byzantine.

**WILLIAM YOUNG J:**

No, but on the signature point?

**MR TURNER:**

No. No, he didn't make a specific finding on this. He preferred the credibility of the evidence overall of Mr Deng and I don't believe the Court of Appeal made a specific finding of fact on this either simply to say that it disregarded the credibility of Mr Deng's evidence and preferred that of Mr Zheng in the material places. So, it's rather unsatisfactory in my submission.

I mean here, when you don't have a pleading that this is the start of the partnership and in fact you want to rely on a document from 2008 as the start of the partnership, it's a rather – or in fact back in 2004, it's rather jumbled and convoluted and very difficult to follow, but this was the claim we were faced

with. So we say the Court of Appeal didn't actually find a time, date or event as to when this partnership actually started and by what the parties did and said, I mean in his initialling. I mean, there's no statement to say well, this initialling, there's no statement on that document to say when you initial, this can be taken as starting of our partnership accounts. In Mr Deng's evidence, which he was examined on, was that he thought it was an invitation. He only found out about this allegation in the brief of evidence and that he usually used his English alphabet initials. Now crucially, this is the only document that is alleged to have Mr Deng's involvement at all in terms of accounts, otherwise he didn't get the accounts. His consistent evidence is that he couldn't understand accounts, couldn't read them and certainly when his wife became involved with these accounts in 2014, she struggled to understand them.

**WILLIAM YOUNG J:**

Just pause there. What did the Court of Appeal say about Mr Zheng's knowledge of these, of this document?

**MR TURNER:**

Well, forgive your Honour, but I don't believe that the Court of Appeal really addressed these accounts in a specific way in terms of a date or event. Obviously it notes that Mr Zheng's unilateral intention by these accounts to perhaps equalise contributions and the benefits and detriments, but we say that's not sufficient. We say that –

**WILLIAM YOUNG J:**

But what, the Court of Appeal must have – I'm just looking through it and struggling slightly, the Court of Appeal must have concluded that your client was a party to this document.

**MR TURNER:**

I will have to come back. I don't recall the Court of Appeal made a reference or a finding in that regard.

**WILLIAM YOUNG J:**

Simpliciter, at least simpliciter on the judgment that he was a party to.

**MR TURNER:**

Yes, but it didn't, in my submission, examine the evidence at that time as to what the parties didn't say when these documents are referred to in a brief of evidence as being the salient partnership. So looking back at these accounts, the English version if you scroll down, I will see if I can bring up on my system here. So the English pages start at 304.0990. So, you have to change the view over to a landscape view, but I mean it starts off at one with a theoretically available capital which is a rather unusual expression. It's unclear, but it's absolutely clear when one goes through this that Mr Deng and Mr Zheng were not contributing equally or 50/50 as had been alleged in the claim. Mr Zheng, in his evidence, says he contributed \$797,000 but later on he alleges he contributes \$900,000 and when one looks at tab 1.1 on that first page "residual value", it says: "A residual value of Mr Deng of only 705,000."

**ELLEN FRANCE J:**

We're just having some trouble.

**WILLIAM YOUNG J:**

I have trouble trying to reorient.

**WILLIAMS J:**

Go to "view" up the top and then rotate clockwise.

**WILLIAM YOUNG J:**

Thank you.

**MR TURNER:**

Obliged, your Honours. So, I will go back. So it's not an equal contribution as alleged 50/50. We have an apparent contribution of Mr Zheng of seven at 1.1 residual value after separation, it's talking about March 2009. I'm not sure

why that's there. It was never explained. We have this, when one follows the row across to the column "company", we have a contribution of 799-odd thousand by Zheng allegedly and by Deng allegedly 705-odd thousand dollars, so not equal contributions there. Later on in the evidence, Mr Zheng, the respondent, wanted to elevate his contribution as being \$900,000. It's just not clear. It's certainly not equal contributions. The best evidence that Mr Zheng presents is that Mr Deng was allegedly told he had an interest in this group of \$800,000.

Now curiously this sum of \$800,000 is more than what he's allegedly initialled to agree of 705,000. Now when Mr Deng's wife Judy Lin discovers these internal accounts and their account, and how Mr Zheng is using the group's money, this leads to a breakdown, and in fact Mr Zheng gives evidence that he's using some of the group's profit, the company's profit, to pay his own personal contributions to Rosedale Apartments, a company that is outside of this partnership. So in my submission this document at 304.0966, this in my submission doesn't record a business in common between them both. It doesn't record a partnership name, it doesn't record what the business in common will be. Going further, in my submission, there was nothing in this document to indicate a view to profit just between those two individuals. There's nothing to indicate any net profit, ie the sharing of losses equally, tax burden equally, interest charges equally –

**WILLIAM YOUNG J:**

Just going back a bit. Is there any forensic evidence as to the origins of the document in terms of a computer.

**MR TURNER:**

The best evidence of this is in the very comprehensive brief by Andrew McKay as to how this document originated. It originated in 2008. Because no other evidence was led in 2008 it then gets transferred through to create it in 2010. It's relevance was elevated, wrongly in my submission, at trial. The evidence dealt with that to say it wasn't agreed, but what Mr McKay struggled to deal with is that there are a multitude of projects undertaken by a multitude of

companies with contributions by a multitude of individuals, and it's incredibly unclear. But when one analyses this, even on the best evidence from Mr Zheng the respondent, all the contributions are unequal between Deng and Zheng.

**WILLIAM YOUNG J:**

But what's the point of preparing the document unless it does provide a basis for a reckoning between the two men?

**MR TURNER:**

Well that is a question that would be for Mr Zheng to deal with. If he's –

**WILLIAM YOUNG J:**

Well he says that it is. I mean on your case this is something to which your client isn't a party.

**MR TURNER:**

Yes.

**WILLIAM YOUNG J:**

So has he got an explanation as to why Mr Zheng would create a document so elaborate and detailed, but so pointless?

**MR TURNER:**

Well he doesn't but then he's not skilled in accounting matters. He's unaware of the content of this document, and the best that could be explained is it's simply Mr Zheng's unilateral attempt to keep a log of transactions, and that is the best evidence that could be obtained of this from Mr McKay who did attempt to reconcile this with the company shareholder accounts and the company balances. He found that it was impossible, that nothing matched up, and that it would be throwing good money after bad to try to make it work, and this is indeed the issue, that Mr Deng and his wife Judy Lin are contributing money to projects. Mr Deng is on site working the various construction sites. He's unaware of the detail, or at least the implications attributed to this

document, or at least how his investments are being controlled and worked. He's unaware until his wife, who is more skilled with accounts, becomes involved in 2014. There is also concerns which Justice Downs raised that Mr Zheng's reply brief of evidence appeared to show some of these transactions were rather wrong, that giving the appearance of lawful transactions with perhaps an intent to deal with difficult tax issues. Justice Downs says it better. He really doubts that any reliance can be placed on these accounts at all, and significant time was placed on these accounts to see if they could equalise or not and the evidence was that they couldn't, they were totally unreliable.

The other point about this is that there's no other document or communication in March 2010 between Deng and Zheng as being partners. There were plenty of other documents where one or both sign out as director of the various companies. There's no agreement for each to be liable for each other's personal debts. All of these companies still trade, they have the benefit of limited liability status. These companies have trade accounts with Bunnings and Mitre 10, PlaceMakers and what have you in which to conduct their business. Earthstar Accounting I've taken your Honours already to one of the external financial statements, it still provides the status for these companies. So there's paucity of evidence of what Messrs Zheng and Deng allegedly do and say to become partners in a partnership in 2010. Justice Downs said, actually the evidence was mechanical, really Mr Zheng gave evidence of Deng on the projects doing the various work, pouring the concrete et cetera and himself working in the office. Curiously Mr Zheng, the respondent, gave no evidence himself of being loyal to Mr Deng or seeking to profit personally only with him and in fact there's a paucity of expert evidence on net profit. I mean none of these individuals discovered their personal tax returns and there was no personal external accountant's statement. Mr Zheng's expert, Ms Payne, doesn't really assess that document that I've taken your Honour's to, she starts looking at documents from 14 June 2010. In my submission this is just not sufficient evidence of a mutual intent to partnership, it may be Mr Zheng says "well I'll create these logbook of entries, keep a running total" because there are, you'll see, many other individuals

referred to in these documents. But it's not just a partnership between Zheng and Deng, it's simply a running log of what the companies are doing.

**WILLIAMS J:**

But it's headed up "Orient Construction Group 10<sup>th</sup> Reconciliation (Zheng Deng 31/3/10)". That's obviously its focus, why would it have that focus if it is what you say it was? If it was really my reconciliation of the amount of money I've put in and what I'm owed generally from this amorphous group of companies why would it say Zheng and Deng.

**MR TURNER:**

That is true, it is headed up in that way. The answer to that is simply Mr Zheng's unilateral intention to record these matters this way. Mr Deng does not – apart from this alleged initialling, does not give evidence that he was aware of the creation of the projects in this way, he's simply told as a very junior person working on site, you have an interest in the companies on the projects of \$800,000 and that's the information he gets.

**WILLIAMS J:**

It tells you something about perhaps what's in Mr Zheng's head doesn't it and it does tell you that he sees some sort of special relationship with Deng and that these companies are porous in the way that they are used as vehicles or as you say the multitude of projects and these parties are looking straight through those corporate veils in almost all they do?

**MR TURNER:**

Well your Honour I take issue with the words "these parties", it may be Mr Zheng's, the respondent's, unilateral intent to do that. It is not Mr Deng's intent so it's not a common intent. Mr Deng is told he's got a common interest in these companies running the projects. He has external accounts prepared for him to show his interest in the company, he's not aux fait, literate with accounting matters, his evidence is very consistent on that, didn't understand them. The evidence is consistent as well with Judy Lin, there's no document that says, from Judy Lin or Mr Deng back to Zheng at this time: "Yes, I agree

that these accounts represent a partnership between us.” There’s nothing like that.

**WILLIAMS J:**

No, but what we can say, that point is very well made. What we can say is this what’s in Zheng’s head at a time when there’s no fight. These are innocent, un-self-serving perspectives from one of the parties?

**MR TURNER:**

It is Mr Zheng’s perspective, I agree, Sir. Whether it’s self-serving or not, I couldn’t say.

**WILLIAMS J:**

Well, there’s no fight in 2010, is there?

**MR TURNER:**

Well, it’s only, Sir, because Mr Deng is unaware of the importance now attributed to these documents to say there’s a partnership. We say these documents by themselves do not show a common view to profit.

**WILLIAMS J:**

Right, so you say if Deng had seen this document in 2010 there would’ve been a fight?

**MR TURNER:**

Well, I can’t say that, but what I could say is that the evidence of when Judy Lin, his wife, and Deng did see these documents and when Judy tells Deng what these documents signify and the payment of Zheng of profits to Rosedale Apartments, Judy says to her husband: “I don’t like these. This just seems wrong to me.” It’s not equal sharing, it’s not equal loss sharing, there’s no view to profit. In fact, your profits are being paid over to Rosedale Apartments by Mr Zheng which there’s a reference to that in his own brief and I want you to disengage from this business relationship.

**WILLIAMS J:**

When was that? In 2014, was it?

**MR TURNER:**

That's in 2014 and that starts progressively as Judy Lin becomes more familiar with these accounts right through until the evidence is that about April or January of 2015 Judy Lin is starting to try to understand and starting to get a detail of who has contributed what and what these documents signify. I'm going to come to that in more detail, but I'm happy to address that right now.

**WILLIAMS J:**

No, no, no, you've made the point that you need to make. That's fine.

**MR TURNER:**

So, I mean even if this was this unilateral intention, it's just a running balance of who is paying what. It does, in my submission, show an intention for mutual profit because one of the cases that I looked at and I've cited in my reference is that profit is really a growth in income recorded year to year and these documents don't show that. It doesn't show how gross profit is calculated to arrive at a net profit. It doesn't show how net profit is to be allocated or distributed in this document. Later on, Mr Zheng gives evidence of all these other subsequent spreadsheets where he unilaterally says: "We're just going to reinvest profit back into the group." But, that's contrary to his own brief of evidence that says: "Actually, some of the profit was paid for my personal investment with Rosedale Apartments."

Also at the other time, there are other companies incorporated by these two. There's an Avondale Village Ltd in June 2001. Then there is another company incorporated Eversolid Construction. I mean this company is quite curious because neither of them are members of this. It's a company of which a Mr Tong Zhu is the director and there's evidence that he contributes \$500,000 and that money is used as a loan for the group of companies. It's not distributed as profit. Really, Deng and Zheng are both shadow

directors of this company. They're using this company to run at least five profit projects; Fonteyn Avenue in Avondale, Neilson Street in Onehunga, Paratai Drive in Orakai, Ormiston Road in East Tamaki, Kerrs Road in Wiri and Omahu Road in Epsom. So, to say this company is a sham is not the case. It's actually Mr Zheng that's using this company for these projects claiming GST input credits from the Inland Revenue Department on the one hand but claiming actually this company is part of a partnership between just Deng and I. Well, in fact, Tong Zhu has an interest in this company as director shareholder in the Companies Office and he provides a loan for the venture and this is why the expert evidence of Mr McKay says this is all really curious. There are – it's consistent with three other Chinese developer styled projects that I have been involved in and analysed. There are many informal intracompany arrangements between alleged partners and non-partners. But at this point Mr Deng is very much a junior, he's simply working on the projects.

**ELLEN FRANCE J:**

Just going back to the internal accounts, the Court of Appeal say at paragraph 99 that: "Mr McKay accepted that the internal accounts revealed an intention to split profits and maintain equal investments between the two," do you, is that not correct?

**MR TURNER:**

Mr McKay says that there is, what he thinks these accounts do is to show that it is in consideration of profit sharing or disjunctive to return a log of capital contributions to the companies. Careful reading of his brief is very difficult because he says: "Really the profit from all of these ventures isn't accurately captured in these internal accounts and there's no –

**ELLEN FRANCE J:**

That's a different point isn't it?

**MR TURNER:**

Yes so, well one explanation is that there's a view to profit which would be one of the facets of partnership. The alternate explanation is that it's simply a log of capital contributions and transactions which is not recording profit or a view to profit and it's hard to see how these can be a view to profit because the Bella Vista project is holding land and then development that –

**ELLEN FRANCE J:**

I'm sorry the, I didn't quite catch that, the Bella Vista?

**MR TURNER:**

Sorry the Bella Vista project is holding 11 lots of land and on Mr Zheng's evidence is using, is transferring those lots of land for the purpose of bank loans to fund the group of companies. That's not a view to profit, or if it's a view to profit it's not between Mr Deng and Zheng, it's between Mr Zheng on behalf of two companies and Mr Bin Jiang. So and then when it comes to these other companies, I mean the companies record profit in their annual financial statements, I mean both of these parties Deng and Zheng are economically dependant on these companies. It's the companies that report to the authorities, it's the companies that make the GST claims, it's the companies that have the profit and there's evidence from Deng that he obtains an income from them. I mean if the two weren't economically dependant on the companies then there might be an argument, but we say not and we say that this wasn't properly analysed by the Court of Appeal. Certainly not, as I said in my submission, the terms of that Bella Vista project. So we then –

**GLAZEBROOK J:**

Do you want to point us to the paragraphs that you think the Court of Appeal might have been relying on in the evidence, in Mr McKay's evidence? So that statement at paragraph 99 because I had marked that up as well?

**MR TURNER:**

Bear with me there's so many details with this matter.

**GLAZEBROOK J:**

Maybe we can do it after, we don't need to do it now, it's just.

**MR TURNER:**

Well in the Court of Appeal we lost an hour in the morning to try to get the audio visual matters working, the Court was taken to Ms Payne's transaction sheets which in her own evidence were from June 2010, not the document that I've taken your Honours to, which is alleged in the evidence to be the start. She says that this was evidence of splitting of profits. Well that's only part of what Mr McKay says, he said: "Well I can concede that this is either in consideration of profits but it's not clear because companies are involved in the company's report." Or to maintain, I don't believe he says "equal investments" what he says is to keep a log of contributions of the various parties.

**GLAZEBROOK J:**

A wall of the projects is that?

**MR TURNER:**

For the projects, I think that the document that I've taken your Honours to does appear to log various different people's inputs, if you like, to these projects of which there are a multitude and again it's not just Deng and Zheng, there's all sorts of employees they're providing loans, there are external parties providing loans, there are some interests held by others, there are payments to, as I said, to Rosedale Apartments, that isn't a partner, I mean when we were presented with these in discovery we couldn't make head or tail. They're not double entry and so when Mr McKay tries to go through and see if they tally up, you can't because they're not double entry accounts. You can't tell whether one is correctly offset by another elsewhere in a ledger. Now I may not using the correct accounting terminology there, but Mr McKay says he's looked at many, many accounts. He can't accurately say if entries are for everything that carried through to other personal ledgers, in the same way that a shareholders' current account will for a company.

So the Court of Appeal says, well, it wouldn't be necessary to do this if people were just using your, you know, company accounts, but that just belies the fact that Mr Deng doesn't have a part in these accounts. He's not aware of the intention attributed to them as partnership. He's keeping the existing relationship as shareholder. He's working as a junior. Told what to do by his senior. Does it. Works on the projects. He's got no idea that actually he's been elevated to partnership status with Zheng. It's as simple as that. When, in fact, he becomes aware of the content, through his wife, alarm bells ring, and she wants him to disengage in this whole relationship.

So intervening the before, you know, before this relationship comes to an end we have Orient Construction Ltd, and this is another company that they incorporate, and we say that if there is any sort of partnership that holds land or what have you, Orient Construction really puts, or engaged in construction process, what happens is Orient Construction takes over. They both become joint director shareholders of this company in July 2013, and the evidence is that projects of Orient Homes, you'll remember back in 2010, are taken over by Eversolid Construction. Eversolid Construction pays for the fixed assets of Orient Homes. It has complications and so they incorporate Orient Construction who takes over many of these projects of Eversolid Construction. In addition Orient Construction is to construct apartments for Rosedale Apartments, this company that's not part of the partnership, for \$6.8 million plus GST, and the equal shareholders and directors, I mean again, Mr Zheng's intention to use the company is inconsistent with partnership and the *Amaltal* decision tells us that.

But moving forwards, by December 2013 Mr Deng has resigned a director. So sole control is with Mr Zheng. This is important. He's the controlling mind, now, of this alleged partnership, not Deng. Then at the end of 2013 Mr Zheng's sister, Jenny Zheng, leaves. So she's no longer doing the data input or assisting with the accounts, and this is when, in 2014, Mr Deng's wife Judy Lin is asked by Mr Zheng to come in and input the data into the MYOB at the Gills Road office, and that's when she discovers this co-operation agreement that I've taken your Honours to, and informs Mr Deng. This is

when she becomes familiar with business matters and how monies are being allocated. She's got not authority to make any payments or bank transfers. So she tells her husband, look, there are problems with this. Mr Zheng is not giving her the underlying documents to look at the transactions. There is always these financial errors which come up, which is at tab 5. When you're taking to these various spreadsheets by my learned friend if you look at tab 5 you'll see that there is a financial errors column. Judy becomes quite upset. Neither of them can understand what these internal accounts are about. But what Judy does discover is that Mr Zheng takes money, profit from this group and is paying it for his own contributions to Rosedale Apartments. He also, Mr Zheng also in his evidence admits that he has drawn more from the group of companies than Deng, and he says this is separate from Bella Vista and Rosedale Apartments, and this is at paragraph 43 of his brief, and what he says is that I have drawn effectively the sum of \$748,000 from these companies and Deng, you have drawn \$626,000 from these companies, and those figures are again at paragraph 44 of Zheng's own brief. So the difference between those two drawings from the companies is \$122,000. So effectively, Mr Zheng admits he owes Deng \$61,000 and that's a debt that's acknowledged in his own evidence, in his own brief of evidence, and then this was noted by the trial judge that Mr Zheng had replied to accept that he owed the sum of \$122,000 for the companies.

**ELLEN FRANCE J:**

Sorry, what's the significance of that?

**MR TURNER:**

Well, it's just that when one looks at this allegation of a partnership, it's drawings from the companies and contributions to the companies that are relevant. It's because they're economically dependent on these companies. They're not in partnership just for themselves and he has, and Mr Zheng has drawn, overdrawn much more comparatively than Mr Deng. At this point, of course, they're both equal shareholders in Orient Construction, so there should be some equality. I mean this is just a contrary way of looking at the whole of the evidence which in my submission was glossed over by the Court

of Appeal and then when the disparate contributions to Rosedale Apartments are taken into account, we have, well actually, first, I would take your Honours, if your Honours would note at paragraph 48 of Mr Zheng's evidence, he notes in paragraph 48 that he's paying Orient, what he calls Orient partnership profit to Rosedale Apartments as his contribution. That's not how partners would equally distribute profit and this is the issue that is discovered by Judy Lin.

Then going forward, when one concludes these non-partner, alleged non-partner interests of Rosedale Apartments, Mr Zheng's sister sends an email of 7 April acknowledging that Zheng owes Deng \$120,313 to 1 March 2015 and we will take you to that document. It's at 306.1485.

**WILLIAM YOUNG J:**

Sorry, 306?

**MR TURNER:**

1485. Forgive me, I'm just trying to get this up. So, the English translation of this document is at 306.1486 and this is an email from the sister of Mr Lu Zheng, the respondent. It's talking to – this is at a time when they're trying to reconcile the contributions to the various companies including the investment to Rosedale Apartments and errors have been found and she's saying, look, the company didn't impose interest on the funds that Lu Zheng had transferred out from all these different companies to invest in Rosedale Apartments, and we say that this is what gave Judy disquiet that Zheng is not using profits to allocate or distribute to the partners, he's using it to pay his own person, his own interest in Rosedale Apartments in that period.

**WILLIAM YOUNG J:**

He's accounting for it though, isn't he?

**MR TURNER:**

Well, this is an attempt to reconcile at this point. It's a big ticket attempt.

**WILLIAM YOUNG J:**

Sorry, what's the date of this, I'm just –

**MR TURNER:**

This is 7 April 2015. So it's very much near the end of the relationship between the two and she's then saying: "Look, there's a wrong formula to calculate interest that Mr Zheng himself should pay to Mr Deng with a mistake," and there's a conclusion there that, in her view, that Mr Zheng should pay Mr Deng principal plus interest of 120,313 and she's asking everyone to check.

**WILLIAMS J:**

What does your client say is the position in relation to this money, does he say he was owed it?

**MR TURNER:**

Yes so he says in fact he's owed more and this is just for Rosedale Apartments' contributions, he says he's actually owed more than that and I'll come to that right now. He says that he's owed \$220,840 so by this email the sister of the respondent is asking parties to check the monies owing to Deng because profits have been paid by Mr Zheng to his interests in Rosedale Apartments. We then see a document 316.3751 and this is where by this stage it's communications in May 2015. The evidence is that Mr Deng, his wife Judy, had no confidence in the reliability of anything prepared by Mr Zheng so they asked Mr James Zhang, the co-director shareholder of Rosedale Apartments to say who had contributed what proportionate to shareholding in Rosedale Apartments, and when one goes down there is an email here which is at 316.3752 and see that at the top it's an email from Judy Lin on 18 May 2015 and it has forwarded the email from James Zhang about the investments in RAL. On Judy's calculation she says: "The total investment into this company was 9.7 million, the fund that should be invested for 5% shares was \$485,000." That correlates to shareholding and what Mr Deng's contribution should be. She says: "We've invested over that, we've invested 220,840 in excess, please pay off this money owed soon." That is

the request that was sent to Mr Zheng in May so if we tie this all in together that when Judy Lin discovers these irreconcilable enigmatic internal accounts they don't signify partnership, they don't signify equal contributions or profit sharing. What they show in the end is that Mr Zheng has taken his profit out and paid it to a non-partner, alleged non-partner Rosedale Apartments. He accepts in relation to companies that he owes 61,000 to Mr Deng, he accepts in relation to use of profits that he has to pay 120,000, we say that it was actually more than that, 220,840, this is the leading up to the separation, this is the background. I mean this level of detail the Court of Appeal didn't get into and it's very difficult, I mean this was 10 hearing days of evidence.

So we then, there's an issue there because the disparity between what our client said was 220,840 owing and what Mr Zheng accepted was owing is that Mr Zheng wanted to deduct an interest charge which, as I'm assisted previously by emails said it shouldn't be done, that's just another peripheral issue. So then what happens is a transfer of funds from Zheng to Deng and this is where he uses companies to make this transfer of funds and it's at 317.4094. So this is an extract of a WeChat communication and if you, the page number is, the English is 4095 and you'll see that this is an amicable communication between Judy Lin and the photograph is of Mr Lu Zheng, and Judy Lin says on 29 May: "200,000 has been received," and she says "ORH," which is a spelling mistake for Orient Homes, "has transferred 160 and Orient Construction, the company of which they are joint shareholders has transferred 40,000."

Then you'll see, saliently, Mr Zheng's reply: "Okay, then the account statement should be made by 31 May," which is the agreed date when they would separate. "Make use of the free time during the week to sort it out." At that stage, Judy is tasked with entering things into MYOB, but saliently, there's no reference there by Lu Zheng saying: "You should not receive \$200,000," or, "that \$200,000 was a loan", or any of these allegations that have subsequently taken so much time before the lower courts. I mean, it's an amicable communication and these are bank accounts that Mr Zheng himself controls.

So, it's in this background then that we get to the separation and of course Orient Construction is still performing this valuable construction contract for Rosedale Apartments 6.8 million plus GST. Mr Deng is going to give his shares in Orient Construction to Mr Zheng. He wants value for those shares and he says that they agreed the value would be \$300,000. But anyway, at this point, he just wants to step out of whatever the relation is and this is where we come to the principles in separation document and that's at 316.3774.

**WILLIAM YOUNG J:**

16?

**MR TURNER:**

3774. Apologies, 3873, 316.3873. My apologies.

**WILLIAM YOUNG J:**

Sorry, I've lost that?

**MR TURNER:**

3873. So, this is a document that Mr Zheng, the respondent himself authored and the salient point, so we can follow this, is that Mr Zheng first sent to the document with the black text to Mr Deng. Mr Deng then replies with the red text. Mr Zheng, then replies with the green text and Mr Deng then replies with the red text.

Now, it's very difficult, and this is Mr Zheng himself never pleads this document as relevant to his claim. In fact, the trial judge took note that he didn't even give evidence on this document in his evidence-in-chief. Certainly Mr Deng did because Mr Deng was saying: "Well, this is how we arranged our affairs." It's not equal splitting of everything as partners in a partnership because this document doesn't talk about any partnership name or firm, or net profit, or anything like that.

So, what it says is the parties are going to separate and this is what Mr Zheng himself proposes. He's going to give his 30% shares of eight pieces of land in Bella Vista to Deng according to the actual amount of investment. So, at this point, I have to say that there was no finding that Mr Zheng held any interest as a beneficiary or title or anything to these pieces of land, but he seems to think he has an interest in it. He's going to give that interest and your Honours have already seen he's entitled to give that interest whatever it is to Mr Deng under the co-operation agreement.

We then have what Mr Zheng wants in exchange and this is the big thing. The loan from Tong Zhu of \$500,000 is going to be the responsibility of Mr Deng. So this was a loan where it had been used by the group of companies which, group of companies they have both used. Tong Zhu was friendly with Deng. Tong Zhu had an interest in Eversolid Construction and those projects that were continuing.

So, evidence was led and Andrew McKay did his best to actually try to decipher this and it's not quite an equal distribution. In fact, the 30% of shares has a value, if it's to be believed which was not proven, of about \$270,000. A half share of \$500,000 is 250. So even then it's not an equal splitting, but Mr Zheng doesn't require an equal splitting. This is what the Court of Appeal said: "Well, this just signified equal splitting of all debts and assets." Well, it's not, and then we get into detail which is very difficult to decipher where Deng replies of what he says through Judy Lin says were losses, but he said: "Not to worry because you Mr Zheng are going to have sole control of Orient Construction, OCL, and you can invoice that to other people in the future." Then Zheng replies about what he says is the three peoples' investment. So it's not a partnership of two. Allegedly, it's of three.

Then we're talking about price per land, looking at losses and looking at waving management fee that the companies were entitled to claim. But what is clear is that when at the end of, is that Mr Zheng in the green talks about: "The eight pieces of land left still has appreciation and should be left uncounted at the moment." I mean it's very clear, very unclear because

Mr Zheng only gave evidence of this in reply, it's not clear what he's talking about an appreciation. One would think that appreciation of land might be considered profit. But he's saying in the same breath: "Well, it should be left uncounted." I mean, the evidence was is that this project wasn't profitable anyway, but I mean, this is why the pieces of land were being used for mortgage finance for continuing the company projects.

So, when we then get to reply in red by Deng at the bottom, we talk about the average price of the pieces of land. I mean that's just the capital contribution, the price, and he's saying: "Well, where does appreciation come from, you know, there is no profit." What is significant about this is that they, this is the end of the exchange on this document and this is the big ticket item that effectively the unproven interest that Mr Zheng has in these Bella Vista lots of land, he's going to give that up. Mr Deng is going to be responsible for repayment of a \$500,000 loan.

We come down to point 3. We talk about then that there is some loans allegedly, and I have to say before we leave that point 1, Mr McKay does his best. He's the only party that does his best to go back behind some, as far as he can, some of the primary documents to understand this because it's just left and in my submission, the Court of Appeal glossed over or disregarded his evidence on this. It's certainly not equal sharing.

We come down to point 3. It's Mr Zheng who proposes that loans be shared, repayment be shared equally, but in red, Mr Deng says: "No, we're not going to share that because the 30,000 is really a rule or something to do with Orient Construction," and Orient Construction is the company they jointly own. Orient Construction, the shares that Mr Deng holds in that are going to go to Mr Zheng so he's going to be responsible, and then there are some minor party loans. What is significant is that it's not considered that these loans will be shared equally, but if they are, it's simply an incidence of these workers working for Orient Construction. It's a company which Zheng and Deng are joint shareholders. They're perfectly able to agree to pay \$5,000 to bring an

end to that liability for that company. It doesn't have to be attributed to a partnership between them personally.

Then we get to the project of Rosedale Road at point 4, that's the project for Rosedale Apartments of building the apartment lots. That, of course, is not allegedly part of this partnership make up so who knows why it's included here but in any event Mr Deng by this stage is stepping away, he's disengaging, he's saying: "I'm going to leave you that project Mr Zheng, we'll look at everything because we're shareholders up to 31 May, we're jointly owned to that point and then after that it's going to be your project". Then there is some sort of issues about various different attribution of problems on the construction site and Deng simply says, well look we'll look at Rosedale Apartments again, it's outside the partnership until the end of June.

Then we come down to what Zheng proposes in, I mean quite amicable because Zheng proposes that Deng works for Orient Construction on wages after 31 May and Deng agrees to do so, so quite amicable. Justice Downs made note that actually in his complaints Mr Zheng didn't talk about these matters that, you know, that they actually worked amicably together for months including into 2016.

Then in relation to point 5 we look at OH, that's Orient Homes, that's going to close down, I mean that company by now is dormant, there's no need to keep it trading. Eversolid Construction is going to belong to Deng, well that's because both parties have used this company for their projects. Mr McKay says the reference to taxes are going to be jointly covered, in fact the evidence is that there's going to be a tax return, there's going to be a payment to them both to share and the two projects are basically almost finished, not quite finished and in fact in the end Mr Deng takes them over. But the significant thing about this document is that ultimately the internal accounts couldn't be reconciled, Mr Zheng gives his interest in land indeterminate to Deng, Deng still works for the companies, Mr Zheng takes the whole or Orient Construction, he's the sole director, he takes all the shares, he takes all the projects and profits, and so when one talks about whether money shall be

owed to each other in point 9 what the Court of Appeal didn't have regard to is that Mr Deng was transferring his interests in Orient Construction of \$300,000, he wanted payment for that and really that there were just minor amounts to be reconciled in terms of companies and these were reconciled. Eversolid Construction paid its taxes and was deregistered, it's no longer trading. Orient Construction still trades, any claim that Orient Construction had against Mr Deng was dismissed at trial following a lot of evidence, there was no appeal on any of those points. So really there's no need for any accounts reconciliation whatsoever.

**WILLIAM YOUNG J:**

Is there a table anywhere that correlates what later happened to the principles in separation document?

**MR TURNER:**

Mr McKay, in the latter part of his evidence, attempts to look at that, in table 10 and table 11 but to add a further layer of complexity at trial in terms of supplementary evidence-in-chief Ms Payne and Mr Lu Zheng tried to introduce evidence of all sorts of cash payments out of bank accounts that were made through the period, from company bank accounts through April through to about June and at great length we had to give Mr McKay all his transactions to try and work out who did what and some of these transactions involved payments by Mr Zheng who controlled the bank accounts to Eversolid Construction, to its bank account possibly with funds paid by that company, all that circulated through Mr Deng and then back to Mr Zheng and so even after Mr –

**WILLIAM YOUNG J:**

What was the purpose of those transactions?

**MR TURNER:**

Well the purpose was to show that somehow Mr Deng owed a debt to Mr Zheng personally, it couldn't be a debt because there was no evidence that

Mr Zheng personally paid any money to Deng and insofar as it was money paid through companies it was circular and unreliable.

**WILLIAM YOUNG J:**

We'll take the adjournment, how are you getting on?

**MR TURNER:**

I'm almost finished on partnership your Honours and there are one or two, and then I wish to address you on the three other points, but perhaps much more succinctly.

**WILLIAM YOUNG J:**

Thank you.

**COURT ADJOURNS: 11.31 AM**

**COURT RESUMES: 11.46 AM**

**WILLIAM YOUNG J:**

So you've got another half hour Mr Turner?

**MR TURNER:**

Well, Sir, there's been some discussions between my friends, and as the time allocations would have it, for equality with my learned friend, I would have to stop at 12. I'm going to ask an indulgence of your Honours, because if I stop at 12, I have three other points to cover, I'd need to cover them at lightning speed, and it wouldn't do justice to the complexity of all of the evidence in this matter. I would ask your Honours if you would consider resuming at two rather than 2.15, and that would allow me another 15 minutes at least to...

**WILLIAM YOUNG J:**

Yes, sure.

**MR TURNER:**

Thank you your Honour, I'm grateful. We were looking at the principles in the separation document and I need to end very quickly on this to move onto other matters, but really there's no allegation by the respondent for a breach of this document because he didn't plead it, and really there is nothing in this document that says that it is, that they are partners on a 50/50 basis with a firm and they're going to separate profit equally. In fact Mr Deng, as a shareholder in Orient Construction, is entitled to prefer his own interests. That's the only obligation he owes, or is in relation to the company. In the end he cannot reconcile these accounts. He cannot get value from Mr Zheng. He works in wages for construction and he steps away, and he goes to work with Mr Jiang. So we say that this claim is really, the motive for it is sour grapes by Mr Zheng, and we say that actually the trial judge was correct to say that all this document was is an indication of casual collaboration and that Mr Deng was entitled to enjoy the rights and benefits according to his shareholding, nothing more. So I could, because of the complexities of this matter, talk at much more length on partnership, but we say that this document is not conclusive evidence of partnership, and I will come back to that approach more quickly later on.

**GLAZEBROOK J:**

At some stage can somebody tell me what was left to be agreed in this principles of separation, because one way of looking at this is to say it really doesn't matter what the relationship was beforehand. What does matter was what was agreed in terms of terminating the relationship.

**MR TURNER:**

Well we say that very little was left to be agreed.

**GLAZEBROOK J:**

Sorry, you'll have to speak into the microphone.

**MR TURNER:**

Sorry, very little, if anything, was left to be agreed. I mean it wasn't a concluded contract. There is oblique reference to some reconciliation, but we say that that was due to some profits of projects that were carried out by companies.

**GLAZEBROOK J:**

It doesn't matter why. What do you say remained to be agreed under this, and what was agreed?

**MR TURNER:**

We say nothing was left – it doesn't matter what was left to be agreed, because in effect Mr Deng transferred his interests in Orient Construction, with all of the projects, to Mr Zheng. So he walked away, he gave everything to Mr Zheng, and Mr Zheng had already agreed to give him this indeterminate interest in the Bella Vista lots. So, he thought that's fine, so there was nothing left to be agreed from Mr Deng's point of view save that this document didn't address his claim for value in Orient Construction. Mr Deng thought he was going to get \$300,000 of value, and you've seen the communications of monies that were owed. In the end the subsequent emails through June, July, even to October had some differences of view and in the end, the trial judge asked Mr Zheng: "When was your last, you know, adverse communication," and the reply was "October 2015". Of course, that's at a period when they're both still working together anyway on these projects. After that point, there's no further comments on this document, there's no further adverse emails until a year later and we say this is the sour grapes part, the motive of this claim, because effectively Mr Zheng cannot be on site doing the construction projects and he's envious that now Mr Deng has walked away and has formed a collaboration with Mr Jiang.

So, we say actually it matters not, this document. It doesn't provide conclusive evidence of police station because of all of the intracompany details. It's not equal sharing, it's not a view to profit, it doesn't have a firm

name, it's not a concluded agreement and in the end, the parties couldn't reach a concluded agreement but –

**GLAZEBROOK J:**

Well they certainly reached agreement on some things because they say “agree”.

**MR TURNER:**

Yes, yes.

**GLAZEBROOK J:**

So, what do you say they didn't agree on?

**MR TURNER:**

Well, we don't say really – well, it doesn't record the value for a \$300,000 split Deng's shareholding in Orient Construction.

**GLAZEBROOK J:**

I understand that.

**MR TURNER:**

Otherwise, everything material is agreed and Mr Deng says: “Big ticket items are agreed.” He gets this indeterminate interest in Bella Vista and the lots of land, not proven.

**GLAZEBROOK J:**

Why was he responsible for that loan?

**MR TURNER:**

Well, he just accepts well Tong Zhu has made the \$500,000 loan which has been used by the companies to trade over the many years.

**GLAZEBROOK J:**

Why is he solely responsible for it through, why isn't it 50/50?

**MR TURNER:**

Well, it's not quite 50/50 because it's two – the liability is a \$250,000 liability on his behalf and Mr Zheng's giving up a \$270,000 asset so to speak unproven. So, it's not equal, but it's just a casual co-operation between the two, but nothing more than that. They're joint shareholders in Orient Construction. They don't need to be partners and they don't need to have a formalised separation agreement. They cannot agree on the contributions to the various companies and projects. In the end, Mr Deng, by October says: "Well, I'm just going to walk away," and Eversolid Construction is shut down. Its taxes are dealt with. There's no issues as to – there's no evidence led that any of these loans were unpaid or causing any adverse, any adversity to Zheng. Really, you know, it's just a form of negotiation and that's how we pleaded it in our defence. It's just a form of negotiation leading to Mr Deng walking away from the ventures and he transfers the shares. He has no confidence in Mr Zheng with his accounts. He just wants big ticket items and get rolling.

**WILLIAMS J:**

Sorry, we have to keep rolling.

**MR TURNER:**

Yes, thank you, Sir. So, can the judgment of the Court of Appeal be sustained on other grounds or my friend's claim is sustained on other grounds? I think your Honours have allowed my friend to raise that argument. I'm going to address that quickly. Mr Zheng claims that the relationship is one of a fiduciary, or one of loyalty or good faith owed to him by Deng. It's not a traditional fiduciary relationship or solicitor, client director, company. If it's not a partnership, then is it a joint venture or a series of joint series is a rhetorical question? The cases say it's unhelpful to define what a joint venture is. It's essentially a commercial concept. Sometimes there's a written contract with sophisticated parties with legal advisors in a loose joint venture which is in the *Amaltal* facts or in the facts of *Paper Reclaim Ltd v Aotearoa International Ltd [2007] NZSC 26*. Sometimes there's no written contract. The parties are close. There's a clear common objective to develop a

property and each contributes a skill or an asset such as in *Chirnside v Fay* [2006] NZSC 68. But *Paper Reclaim Ltd v Aotearoa International Ltd* is authority for the proposition that not every joint venture or series of the mis-inherently fiduciary. In this case there's a hybrid, you have at least five companies, before using Orient Construction to undertake the projects. There are a multitude of parties involved, there's no written contract apart from these alleged obligations between companies in Jiang in the co-operation agreement. Perhaps each of Mr Deng and Zheng contribute something to the relationship but it's not a personal common objective because they owe directors' duties to the companies and it's the companies that undertake the projects. The companies run them, get the GST, they pay the wages and Messrs Zheng and Deng are both economically dependant on those companies and further than that there's no evidence that Mr Zheng depended on Mr Deng personally and then we have RAL, Rosedale Apartments, where they're allegedly not partners but they're just shareholder directors. They can work and get together on casual co-operation. Mr Zheng, there's no evidence Zheng is vulnerable to Mr Deng and of course when Mr Deng resigns as a director of Orient Construction he's no longer owing duties to that company, as a shareholder he's entitled to self-interest and there's no trustee/beneficiary relationship found. So my rhetorical question is well does equity need to intervene in this situation? Well we'd say there's no evidence led that Mr Deng had any power to unilaterally exercise a discretionary power to effect Mr Zheng's interests as a beneficiary and Mr Zheng –

**WILLIAM YOUNG J:**

Again apart from the evidence of Judy Lin isn't, which shows that Zheng doesn't, whichever one it is, doesn't know about what's going on with , you know, the extraction of value out of Rosedale and so forth until four years later when someone who can read the accounts looks at them?

**MR TURNER:**

Quite right, so that's the other way round then.

**WILLIAM YOUNG J:**

Yes.

**MR TURNER:**

I'm saying Mr Zheng is not vulnerable or at the mercy of Mr Deng but –

**WILLIAM YOUNG J:**

The other way around.

**MR TURNER:**

But the converse is true, our client, the appellant Mr Deng, is vulnerable in my submission to Mr Zheng and it's like the *Aotearoa International v Paper Reclaim* situation actually if there was a relationship of loyalty and trust and Deng says he does trust Zheng then really it was up to Mr Zheng to exercise good faith and loyalty to Mr Deng's interests and of course the evidence shows he doesn't because he's paying profit for his own personal interests into Rosedale Apartments. So going on from that we say even if Mr Zheng could show a legitimate expectation that Mr Deng will act in the interests of the companies or perform the projects that doesn't extend further to an expectation that Mr Deng will completely forego or disregard his self-interest or put Mr Zheng's interests ahead of his own. Mr Zheng didn't actually prove any such expectation, he gave no evidence that he actually reposed loyalty and good faith in Deng or put Deng's interests ahead of his own, his evidence is much more mechanical.

**WILLIAM YOUNG J:**

I think we've got all this.

**MR TURNER:**

Sorry Sir thank you. So we say, Sir, look you know there is no requirement to impose a strict fiduciary obligation here, I mean on Mr Deng, in those cases where there are there's been shown to be a breach such as in *Amalta* there was the tax issues, in *Chirnside*, you know, one party unilaterally and surreptitiously took over the project, I mean there's none of that evidenced

here. And we would say equity doesn't need to intervene and in fact there's no evidence sufficient, in my submission, to show any breach by Deng of any such duty. So I'll move on very quickly on that point because –

**WILLIAM YOUNG J:**

Time is on the wing.

**MR TURNER:**

I'm sorry Sir?

**WILLIAM YOUNG J:**

Time is on the wing.

**MR TURNER:**

Yes. So then one looks at this allegation of debt, I mean the first point is that there was no appeal to the Court of Appeal on an alleged debt, it was the first cause of action from the respondent that Mr Deng owed him a debt of \$290,000, well there's no evidence of direct payment from Mr Zheng to Deng of such monies. The High Court says: "Actually the evidence given by Mr Deng varied between 150,000 to 140,000 to 200,000, it wasn't clear and consistent, it wasn't proven. But the Court of Appeal says, well, all of these sort of circular transfers need to be taken into account and some sort of accounting because they're partners. I mean it's just not proven.

We then get to, in my submission, what's relevant is the approach of the lower courts. I mean Justice Downs had 10 hearing days and looked at all of this evidence in detail and he looked at the start of relations going forward. Of course it's pleaded a partnership in 2004, and he looked at the obligations owed to the companies. Of course your Honours are aware of the purpose of companies to achieve economic and social benefits through aggregation of capital with business risks and enjoying limited liability status. Justice Downs had that in his mind as well as the absence of partnership details, a name, how they helped themselves out, agreement, GST, well actually strictly agreement is not required. Justice Downs had regard to then the existing

relations of shareholders and then the prohibition under section 4(2) with members being partners and that needing to be overcome.

Then there is, Justice Downs fairly said, well, perhaps this allegation could be reconceived as a partnership from about March 2010, and this is where the prejudice comes in, because he didn't find the evidence was sufficient. My friend, on appeal, elevates this to a partnership in March 2010. We say not. Of course, when the reliance is on the initialling of documents, that's not pleaded, and it's only introduced in the first brief of evidence and denied with good explanation. So the approach of the Court of Appeal was rather different, but how the Court of Appeal approached leads to uncertainty and, in my view, absence of clarity. It looks at section 4(2) of the Act but it doesn't apply that prohibition to the facts when it finds a partnership in 2008, or in 2010, and in my submission the Court ought to look very carefully at the evidence, and repeated that evidence in the judgment of what the parties did and said in 2008, or in 2010 by what they did or said or the events, and I've already taken you to the co-operation agreement. It didn't look at the terms of that agreement in terms of what was alleged. In fact the approach it takes is actually to look at the evidence on a reverse basis. So it looks at the principles in separation, but that's not even the very end of the relationship. I mean it ought to have looked at a number of other documents to the parties collaborating still but only in casually without obligation to do so and finally Mr Deng walking away without getting value for what he said was owed to him through the group of companies. There's a number of documents that I would take your Honours to. Time is against me, I'm just going to give you the document references if I may.

There are the email communications that the Court ought to look to, to see that Mr Deng performed what he thought were the matters to disengage and doesn't owe money, it starts at document COA 316.3768. Then there is COA 316.3794.

**WILLIAMS J:**

These are all emails are they?

**MR TURNER:**

They're emails, Sir, yes, and then 316.3794, there are replies in red. There is then a handwritten note which Mr McKay gave evidence on regarding when he attempted to apportion who owed what, if he could, at 316.3903, and this was the document sent by James Zhang, Rosedale Apartments, to Judy Lin and Deng. Then, and interestingly about this document, it was given in evidence by Mr McKay. Mr Zheng didn't confirm or deny his involvement in this document and he made no references to it in his evidence, and then we have about a year after in 22 September 2016 we've got this claim back for the \$200,000 of some sort of loan which is at COA 313.3193. So, it's my submission that the Court of Appeal disregards many things in the principles in separation. When it's not looking at the very end and how matters actually played out, that there were still projects to finish and the Mr Deng simply walked away from the relationship as he was entitled to do, didn't breach any duty to Mr Zheng at all. He's no longer a director and the benefits of the Orient Construction were left wholly to Mr Zheng and my learned counsel says that references to these documents are also in the chronology for the appellant as well, thank you.

So, Mr Zheng really retains control of the business going forward and he still enjoys the limited liability status of the companies and simply, it was permissible for Mr Deng to agree and co-operate, nothing more than that. He can't agree these internal accounts or to do some sort of reconciliation. He can't be trusted. They're not double entry. They're enigmatic and irreconcilable. So, in my submission, the Court of Appeal actually didn't critically examine the terms of that co-operation agreement which is relied on by the respondent as the forming of what he's now complaining about, the gifting of an interest in land that he just didn't prove.

So, we now then, the final point that I wish to make is on credibility of witnesses. His Honour Justice Downs gave five reasons after 10 days of evidence as to why he preferred the credibility of the evidence of Mr Deng, the respondent, and not of Mr Zheng. There's no doubt that this court may critically examine Justice Downs reasons and findings, but the case of *Munro*

indicates it's equally true that assessing credibility from a written transcript in many cases will not achieve better results, particularly in the absence of other contemporary evidence. There's real advantage in hearing and seeing the witnesses.

**WILLIAM YOUNG J:**

Yes, we are familiar with appellate principles to review credibility findings.

**MR TURNER:**

Sorry, Sir. So, in my submission, yes, well given the huge amount of evidence and the manner and demeanour of the witnesses that Justice Downs saw, it was an error to simply, when matters couldn't be explained satisfactorily to the Court of Appeal to just simply not accept Mr Deng's evidence and to prefer Mr Zheng's evidence. In fact, we say it's actually quite incredulous. He's, Mr Zheng gave in evidence things that concerned Justice Downs. The treatment of transactions to give an apparent difference to deal with adverse tax consequences, that Mr Zheng denied the authenticity of accounts, external account statements which we use for IRD and to the world and yet he can say: "Well, they're just wrong, to suit his own argument now." To say that Eversolid was simply a sham when there was evidence from Andrew McKay that Eversolid was used to pour concrete for the non-partner Rosedale Apartments. It was used for various different projects and to claim GST. I mean, Mr Zheng uses this company as a shadow director.

So, in my submission, the Court of Appeal also didn't give due regard to the painstaking analysis of Andrew McKay, the truly independent expert who looked at the, who attempted to look at the underlying transactions and he was simply saying: "Look, it's just a series of joint ventures, can't assess net profit." It was just insufficient reasoning, in my submission, to prefer the reasoning of, the evidence of Mr Zheng and what, in my submission, proper foundation.

I'm now going to defer to my friend. Thank you.

**MR HUANG:**

(Māori 12:09:44) tēnā koe koutou. May I please this honourable court, I am tasked with providing submissions on the relevance of cultural issues as it pertains to the parties to this proceeding. The emphasis that the appellant wished to draw is the need to keep a balance on the one hand to account for any evidential factors that may speak helpfully to a court on cultural and linguistic matters but on the other hand not to overdo it in such a way that the law and the entire justice system is seen as being capable of equal treatment to different creeds of people. The danger is that a culturally or linguistic diverse litigant, a CALD litigant is tasked to work twice or thrice as hard through the entire justice system just to resolve a matter simply because of the possibility that the Court sees the litigants' way of life, way of business, as something entirely foreign to them and where members of the cultural majority being a known quantity to this court is probably going to spend less time and fewer resources to resolve their matter before the Court.

So as I address this court on what relevant cultural and linguistic factors may impact Mr Deng and Mr Zheng, at the forefront of my mind and at the forefront of the appellant's case is the need to draw a sensible boundary line such that justice can be seen to have been dispensed with sufficient finality and also be applied equally. The Court of Appeal in this case took judicial notice to the possibility of cultural matters having relevance to Mr Deng and Mr Zheng's situation and the Justices in that court urged caution. My client also agrees and also submits on this appeal that this court and any other court should assist on an abundance of caution not to draw inferences on culture and on language, specially when that evidence is not led. However, this is as far as what Mr Deng agrees with the Court of Appeal on this point because beyond that the appellant expresses some concern of the possible scenario in which a court may begin speculating on features unique to culture and language and place weight on them simply because they may be cultural or linguistic features that are typically portrayed as practices of people that share maybe the culture of Mr Deng and Mr Zheng or maybe communicate in the language of Mr Deng and Mr Zheng.

**WILLIAM YOUNG J:**

But aren't you speculating either way and if you don't know you're speculating in a racist way because you're assuming that you must apply one set of cultural norms which aren't the norms practiced by the parties as if they were?

**MR HUANG:**

Yes Sir but what I mean is at trial unfortunately counsel and the Court did not have the foresight to lay the evidential foundation to ensure cultural matters were addressed at the time. So there is an element of hindsight that we unfortunately get to have at this stage of the proceeding and that unfortunately is the reason why clients such as ours are spending more time before the Court and I think this is a problem that the Court can address for future matters. But insofar as our clients are concerned the image that I want to say is that evidentially speaking the concrete has been set, there is not a lot more we can add to it and so what I ask this court to do is to basically adjudicate based on the evidence that's before it and you may see that in the written submissions of counsel already that both sides are contemplating on being able to resolve this issue irrespective of whether those culturally significant issues were brought before this court in order to help Mr Deng and Mr Zheng resolve their overall problem. So that's what we're dealing with here.

I want to remind the Court that on cultural matter the High Court did not hear much at all. The evidential high watermark is in three paragraphs of Andrew McKay's brief of evidence and the three paragraphs are basically verbatim word for word the same and I may just give that reference to you. This is document 203.0622 and it is Andrew's paragraphs at 14, 120 and 288. I'll just read that very brief paragraph, because this is the high water mark, evidentially speaking, on cultural issues covered throughout this entire proceeding. I quote: "In my recent experience of three litigation matters involving Chinese property developers, the common themes are the following. Number 1, undocumented and informal business relationships. Number 2, existing documentation, if any, is often limited to emails and WeChat conversations written in Chinese. Number 3, property sales to and from

extended family members and related parties before the final sale of the completed property to a third party. Number 4, movements of large amounts of money between extended family members and related parties.”

On linguistic matters, there were no issues flagged at trial. Seven of the nine viva voce witnesses had the assistance of the same court interpreter when they spoke in Mandarin, and through the translation of written documents from three separate translation firms, there were no particular questions raised on the slight differences in the way those documents were translated from Chinese to English. So when the High Court gave its decision in December 2019 the outcome signalled to the parties that the Court there had sufficient evidence at that stage, as presented over the 10 day trial, to apply the relevant objective test as Justice Fitzgerald did in the test of *Woodcock v Woodcock* [2018] NZHC 4707, and I'll just quickly quote from that case. “Whether a particular –

**O'REGAN J:**

We haven't got time to quote from that case.

**MR HUANG:**

All right. No problem.

**WILLIAMS J:**

Do you agree that the **guānxi**, is it?

**MR HUANG:**

Oh, **guānxi**?

**WILLIAMS J:**

No not **guānxi**, the word that was translated “company”.

**MR HUANG:**

**Gōngsī**.

**WILLIAMS J:**

**Gōngsī**? Do you agree that **gōngsī** doesn't necessarily have to mean company?

**MR HUANG:**

The appellant's answer to that is that evidence was not led so we'd be in speculation territory to run that through. So unfortunately it has its meaning, but the Court at trial did not look into that.

**WILLIAMS J:**

All right, so your answer is there's not enough evidence.

**MR HUANG:**

Not enough Sir.

**WILLIAMS J:**

And the reference to the *Collins Dictionary* isn't good enough?

**MR HUANG:**

No that's not what the appellant meant. What the appellant meant was that the Court, although can take judicial notice of it, it may not necessarily be able to measure the amount of weight to put on it, simply because there was scant evidence during trial to assist the Court on the cultural or linguistic significance of potentially that word there.

**WILLIAMS J:**

Okay.

**WILLIAM YOUNG J:**

Is there much else you want to add?

**MR HUANG:**

That is the thrust of my submissions, so if I may just retire. I think that's as much as I can assist the Court with.

**WILLIAM YOUNG J:**

Thank you very much.

**MS ANDERSON QC:**

May it please your Honours. The Law Society is grateful for the opportunity to intervene in the appeal. I am sharing the speaking slot with Ms Chen who I will split my time with. She wishes to address the Court. What I want to emphasise to your Honour is that the focus of the Law Society submissions has been to try to provide you with a framework within how to deal with what is, I emphasise, quite a complex issue. In the materials we provided you you'll see that this is very, at its base, partly a question about how you judicially reason through an issue because judges use common sense, or their own background, all the time in approaching a case, and of course what is recognised where you have a CALD litigant is that those assumptions may not apply, and so there is, in fact, your common sense doesn't actually – there needs to be a counter to that common sense approach.

But to understand the framework when this appears you've first got to work out, well, does the Evidence Act 2006 apply, because if the Evidence Act applies to the material that is an issue in the case, for example, the report that was referred to by the Court here, then you're in the Evidence Act and you've got to do what your Honours propose be done in the *Bathurst Resources Limited v L & M Coal Holdings Limited* [2021] NZSC 85 case which is to work through the tests in that Act to determine, well, this is evidence. Unless I'm taking judicial notice of it, it needs to be, come in as evidence. If it's coming in on appeal, it's fresh evidence and has to meet that test. If it's coming in, what is it relevant to. Is it relevant to a primary act or a second fact in the sense of the relevance to assessment of all the other evidence and, at that point, well, should I exclude it because if you're in the High Court you might want to exclude it because it might raise all sorts of other issues and cause undue expense or delay and on what basis is it coming in, and so it's not really for the Law Society to tell your Honours what should happen in this case in its intervention role. Well what we urge on you is to approach this issue within the framework which is first, is this evidence in this particular case and in

other cases and therefore, the first issue is, well, to decide whether it's evidence, there's two ways it might not be. One is if you regard this as the matter in issue that requires proof and the nature of a legislative fact or a social fact of which you conclude evidence is not required and we've pointed to the fact that has been determined to be outside the regime of the Evidence Act. If you were to decide well, this particular fact that's been proved is not an adjudicative fact, it's a social fact or legislative fact, then you may allow evidence in other than through the normal regime of the Evidence Act, but still you would want to create some tests around that. You would want to be sure of its reliability.

Another way evidence might not come in other than under the Evidence Act is where courts are just applying their common sense to something and we've referred you to the Evidence Law Commission report on that when the Act was being developed and the Law Commission said: "Well, we're not going to regulate common sense under the Act." So you may form the view that simply being alerted to an issue of cultural complexity, cultural context and having that raises a flag, does not require evidence. That is simply the Court saying well: "In a common sense way we need to be careful here." If that's all a Court is doing, then arguably that doesn't require evidence. It may be different –

**WILLIAM YOUNG J:**

The Court is probably in a position to be careful because there's a substantial amount of contemporaneous material in this case that was available. Translated I agree, but it does give a reasonable understanding of the approach to business I suppose you might say of the two protagonists.

**MS ANDERSON QC:**

Yeah, so if I can just actually, what I was going to go on to say, it's one thing to say well, these are culturally diverse parties, I need to be aware that I need to approach this differently. It might be another thing to say that we're aware of an approach, a cultural dimension that says that Chinese parties are less likely to write something down. Can I take that proposition and apply it to

these parties? That's not applying common sense in my submission. That's applying the judicative approach.

**WILLIAM YOUNG J:**

You may want to look at well, this is the material, this is the document trail and we can see that some things aren't recorded, so that's a finding that's specific to them.

**MS ANDERSON QC:**

Yes and that's got nothing to do with the cultural dimension really.

**WILLIAM YOUNG J:**

Based or premised on what's happened.

**MS ANDERSON QC:**

That's looking at the way these people did business. Anyway so obviously –

**WILLIAM YOUNG J:**

Would you normally need much more than that?

**MS ANDERSON QC:**

I beg your pardon?

**WILLIAM YOUNG J:**

Would the judge normally need – I mean in a case like this anyway where there is quite a document trail, would the judge need to do any more than say, well, this is how the protagonist in this case were engaging with each other. Which is pretty much what a judge would do in any case.

**MS ANDERSON QC:**

Well that is what a judge would do in any case, but what's been raised by the Court of Appeal is whether inferences should or should not be drawn from the fact that they didn't write something down, and that's really how this evidence has been used, and tendency evidence like that is a difficult area of the law, and I haven't got much time because Ms Chen wishes to address you, but I

do want to refer you to a couple of articles which I think will elicit for you, quite helpfully, what are the issues going on with the use of this type of evidence, because it is actually way more cerebral in fact than I'm giving it credit in just addressing you here, because it's actually a very wide issue which would apply to all sorts of other areas. For example, some of the material I'm providing you is about sexual offence evidence about tendencies to do X, and how you approach that type of evidence, so the particular cases that I suggest that you, not cases, articles that I suggest you have a look at is an article by Currie, it's a Canadian article. Tab 6 of volume 9. I'll just give you the references, and an article by Paciocco, I'm not sure that's how you pronounce it, but tab 10 – sorry, volume 10, tab 19, and an article by Hamer and Edmond, which is volume 10, tab 10, and an article by Burns, which is at volume 10, tab 2.

Just before I sit down, I also want to emphasise that in approaching how you apply this framework, it's important to recognise that access to justice can't be that at the expense of natural justice, and applying the framework in the Evidence Act is particularly helpful but, of course, the test in that Act requiring reliability for published sources, requiring incontrovertibility for judicial notice, are tests that have been developed in the common law to assist with that balance, and also in the Evidence Act, of course, there is section 6 and section 10, and section 10 says that you interpret the Act in accordance with the principles in section 6, and that, of course, those section 6 principles involve fairness to the parties, avoiding undue expense and delay. So the Act has helpfully provided the correct balances, and in a way it's just about applying them once you're in the Evidence Act.

**WILLIAMS J:**

With a case like this, for example, judges may naturally draw inferences from paucity of evidence. That's the less the evidence the greater the tendency to create inferences out of own experience. That's the danger, isn't it?

**MS ANDERSON QC:**

In a sense –

**WILLIAMS J:**

Because we don't have any experience of the way in which necessarily these particular litigants might do business.

**MS ANDERSON QC:**

That's true, and the issue, of course, is how these particular litigants might do business, and what the Court of Appeal has indicated is that they are Chinese litigants and they may be less likely to write things down. That is the proposition. Chinese people may be less likely to write things down. So analytically that's the proposition, and it's said to be relevant because it may be relevant as to whether these parties, having not written something down, objectively may have been regarded as being in a partnership, and therefore you have to consider the issue within that framework as to well what evidence can I have regard to on that first point, do I need evidence, can I take judicial notice of this issue. So –

**WILLIAMS J:**

And you say?

**MS ANDERSON QC:**

Well, well as intervener, your Honour, we've –

**WILLIAMS J:**

No I'm speaking in the abstract, not this particular case, but I mean it could be equally Tongan litigants or Ngā Puhī, it doesn't really matter.

**MS ANDERSON QC:**

It's going to – it really has to focus on analytically and the way I've gone through what is the issue that it is relevant to, what is the evidence, how is it being proposed to be admitted. For example, if it's an article about, and I don't actually like using this case as I feel it's a bit unfair to the parties because of being an intervener, but can I take an example in a sexual offence context, it's the same issue in a person is, I think there is now a rule of law about this, a person is less likely to report something immediately in a sexual

offence. You shouldn't infer that nothing's happened because they haven't reported it. That's an example of that and it's probably a bad example because I know there's lots of law in it that I don't know about because it's not my area. But taking that in the abstract you need to consider, well, what is the evidence put forward for that, is it so incontrovertible that proposition that I can accept it without looking at the evidence, and you have to go through the tests of judicial notice for that.

**WILLIAMS J:**

The first question is, is this the sort of case in which there is a danger that inferences will be drawn from ignorance which may not necessarily be appropriate to be drawn, we need some education one way or another?

**MS ANDERSON QC:**

Having a flag, and that's the red flag we talk about in our submissions, your Honour. We say a flag is raised, what do I do with the flag and then you have to go, in my submission, through an analytical process to work out, to be conscious that you're doing something in the first place. So you're conscious you might want to do something and then be conscious of well what framework you're in because there's only certain ways things get considered by the Court and that's in our framework and I must sit down or Ms Chen will be very cross with me.

**MS CHEN:**

Tēnā koe, your Honours. I want to start by answering your question does the judge need to do more in this case and also whether or not the paucity of evidence may result in the danger of drawing inferences? Because I only have 15 minutes I've sought to put my thoughts in writing so I can fit within the 15 minutes and in answering your question, it actually flows from paragraph 1. This case concerns Chinese tikanga and the need actually for Chinese Tohunga (learned persons) or pūkenga as that is defined in that context under the Marine and Area Coastal (Takutai Moana) Act 2011 with respect to Māori custom and values and practices where of course here we're talking about Chinese.

I note that *Sobrinho v Impresa Publishing* [2015] EWHC 3542 (QB) case which is referred to in footnote 51 of the New Zealand Law Society's submissions talks about issues of fact or opinion that the Court is not equipped to decide without help from a skilled person in translation, interpretation or in culture.

Your Honours, I want to take you to two cases to answer the question that you have asked. The first case is *Wickham Hill Investment Pty Ltd v Ding* [2019] NSWSC 631 which is a Supreme Court of New South Wales case. I'm very short of time, so if you would allow me just to go there and quote to you. This is in tab 61 of the bundles from the New Zealand Law Society. This was about a loan agreement and this is what the Supreme Court of New South Wales said: "No such assistance was provided in this case. The Court was simply presented with translated versions of the agreements without any opportunity to question the translator about the meaning and usage of Mandarin words. Two of the agreements at least are governed by Chinese law but there is no evidence of what Chinese law says about the issues. I must therefore proceed on the assumption that it is the same as Australian law. I have therefore had no alternative but to interpret the English language translations as best I can as if they had been composed in English and were governed by Australian law. I am uncomfortably aware of how artificial this is. I have already referred to the apparent deficiencies in the translations. They have made an already unsatisfactory task even less satisfying."

The second case that I would like to point your Honours to, that is paragraphs 171 and 172. I would then like to take your Honours to *Fothergill v Monarch Airlines* [1980] 2 All ER 696 and I'm sorry it isn't here but I'm just answering your question. That's in tab 63 and I'm now quoting from pages 719 and 720. This is a situation where the Court is then asked to adduce the meaning of a word which is in French and it says: "An English court will construe the word damage as it will construe any other word which it is required to interpret according to the context in which the word is used but it's likely that the Court will require extrinsic help in construing the French

word, like my noble and learned friend Lord Wilberforce I decline to lay down any precise rules whence that help should come. If the Judge concerned is possessed of some knowledge of the French language it will be pedantic and perhaps also intellectually impossible to deny him or her the right to use that which he knows perfectly well. Once both French and Latin were languages in current use in our courts, Latin phrases still make a frequent appearance in our jurors' prudence and a judge is perfectly free to use such knowledge of Latin as he may still possess in order to interpret and apply such a phrase. Why then should a different rule be applied in the case of modern as opposed to an ancient language. Of course the same problem could arise hereafter with authentic text of conventions and languages in less frequent use and therefore less well-known in Western Europe than, for example, French or German. In such a case the Judge will be likely to require more help than in the case of those two languages but a judge will usually be unlikely to be willing to rely solely on his own knowledge of the relevant language even if he be so well versed in that language as the learned trial Judge concerned in the present case. Such a judge can always have recourse to dictionaries," and that was, your Honour, Justice Williams' point, "He can have regard to the writings of learned writers on the relevant topic, he can have regard to judicial decisions of the courts of other countries, we're talking here about the House of Lords in the UK concerned with the same problem. Such sources are clearly non-exhaustive and this is the punchline, I doubt whether in a case such as the present the evidence of an ordinary interpreter would greatly assist though such evidence might be essential if the language were unknown or little known to the Judge."

Of course in this case we're talking about Chinese which is a language that most of us did not learn at high school and we are not proficient in which is why I refer to the fact that this is not just about Chinese tikanga but also about Chinese tohunga. So the question really to address is when neither counsel nor the Court have raised the cultural red flag at first instance, when cultural language issues are relevant, you've got different translations of the same word without explanation when most of the primary documents are in Chinese. Do the courts have enough tools in their judiciary reasoning tool-box

to ensure that there is a fair trial, an impartial assessment of the evidence free from pre-judgment ensuring that there's no inaccurate factual conclusions or miscarriage of justice due to ignorance of cultural factors in reaching the correct legal decision, this is Justice Kairo, a judge of Greek origin in the Supreme Court in Victoria. So of course you can appoint an intervener and that's why we're here today but ultimately the Court can decide to remit the issue of the meaning of the Chinese term "back to the High Court" so that –

**WILLIAM YOUNG J:**

I don't think we're going to do that.

**MS CHEN:**

No all right Sir. So from the lens of enhancing –

**GLAZEBROOK J:**

When you're talking about miscarriages et cetera we are talking about a civil case where what's put in front of the Courts is much more to do with the parties than it would obviously be in a criminal case, so do you have anything to say about that in terms of what the parties choose to put in front of the Court?

**MS CHEN:**

Yes I do your Honour. If you could go to paragraph 10 of my submissions, I talk there about the fact that it's all about what is in the parties' heads and so there I talk about the fact that the courts can get all maximal of the relevant context or social framework to properly assess what the parties intended and so I go straight to Lord Hoffmann and that case *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) is in our casebook, reminds us that the reasonable person test in contract is very different from that of the reasonable bystander in tort and I have bolded these wonderful words where he talks about an understated description of what the background may include when you're talking about contracts here and he says: "Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next includes

absolutely anything which may have affected the way in which the language of the document would have been understood by a reasonable man.” Now attached to the materials I have given you I have referred to Professor Stephen Hall’s writings. He talks there about two cases, they’re from Hong Kong and they are English authorities which were found to be inapplicable as local customs, language and cultures differed in the minds of the people who were affected. So the first is the *Wong Wai-chun v The China Navigation Co Ltd* [1969][ HKLR 471 (FCSC) case which is at the top of page 3 –

**GLAZEBROOK J:**

I think you may have misunderstood my question, it was really not whether that evidence would be relevant but whether if it’s not put forward by the parties what’s the role of the Court to require that evidence to be put forward, especially on appeal.

**MS CHEN:**

The danger, your Honour, is that we are, well we’re in an adversarial system, no evidence is required as such, it’s for the parties to make the case. I guess if they don’t make the case we’re back to Justice Toogood saying: “It’s not up to the Court to Google their way out of an evidential deficiency.” So in this particular case –

**WILLIAM YOUNG J:**

But they can though, the Court can, a judge is entitled to look at a dictionary or a French English dictionary or presumably any other dictionary?

**MS CHEN:**

They are your Honour and in this case that’s what happened and as you can see the New Zealand Law Society’s submissions say that there are no issues with that in terms of section 128 and 129.

**GLAZEBROOK J:**

I understand that and I wasn't, it's just I had thought that your submission was we don't have enough, it has to go back and we have to tell the parties that they have to provide that evidence and my question was really can the Court compel them to do so. Now I understand we might be able to Google or look at other things but?

**MS CHEN:**

I am concerned, your Honour, that when we are in this evidential lacuna and we have a common phrase which is interpreted or translated in different ways without explanation and there is no evidence provided to the Court it is very difficult for the Court to draw inferences because unlike French and Latin which may be more familiar to us to most judges Chinese is not familiar and I understand in this case that there has been recourse to a dictionary and maybe we are now moving, evolving in a way that means that we are going to get more and more of these terms in the dictionary and therefore judicial notice can be taken. But, you know, I do take heed of what Justice Williams says about making inferences in a vacuum.

**GLAZEBROOK J:**

But wouldn't the answer be here we don't know what that term means so we can't put any significance on it either way?

**MS CHEN:**

That is correct, that is correct your Honour and so it's an adversarial system, it was for –

**WILLIAM YOUNG J:**

Well except there was evidence, I mean there was evidence that it means company but on the material we've seen it also means the enterprise or firm?

**MS CHEN:**

Which means that – and it's unclear.

**GLAZEBROOK J:**

And was sometimes translated that way I think, in some of the documents.

**MS CHEN:**

That's right I mean and this would be the case whether it is the use of Chinese and also whether it's the use of English by culturally or linguistically diverse parties.

**WILLIAM YOUNG J:**

But anyone that could refer to a partnership in English as a company, I mean it's perfectly acceptable to refer to, use terms like firm, company, enterprise interchangeably unless you're talking about the Companies Act.

**GLAZEBROOK J:**

We're talking about the company, a partnership or whatever it is.

**MS CHEN:**

Yes except, of course, to get into the minds of the parties and what did they think and of course that's subjectively determined on the basis of what they said and did but there's a case we slipped in just on the last day and it's *Bi v Wu* [2021] VSC 447 and I thought I'd take you there simply because it's an Australian case, it's in volume 5 at tab 48 at 126 and I just wanted to take you to 126 and 133 because what this shows is it was, it relates back to a comment that Justice Williams made earlier about what was in their minds and what they thought as opposed to what the law was. I'll just grab volume 5, tab 48. If you take a look at what the Judge says there, so it's 125 and it says: "I consider it probable that neither Ms Bi nor Mr Wu turned their mind to, or were in any way troubled by, the fact that the shares would be subscribed for in the name of a special purpose corporate vehicle to be controlled by Ms Bi, rather than subscribed for by Ms Bi personally. To Ms Bi and Mr Wu, there was no material distinction between the assets they held personally and those held by companies which they controlled. This unsophisticated understanding of legal personality is at least consistent with how Mr Wu perceived such matters. In the second Wu witness statement

and in the context of his dealings with Mr Liu and Mr Qin concerning the alleged Tripartite Agreement, Mr Wu said he was.”

So there’s no expert evidence here, Mr Wu just tells it like it is, he says he was, “Not worried about contracting with Mr Liu rather than Ms Bi, stating that ‘in Chinese culture, we don’t think so much about which party should be involved. If the money is from a family, it doesn’t matter if it’s paid back in the wife’s name, husband’s name, son’s name, or company name, it’s paid back to the family.’” So if you go to 133 of the same judgment the Court concludes: “The context also extends to the fact that although the agreement has some indicia of formality, it was at its core a document written in Mandarin and between persons with no legal training and who, by virtue of their cultural background, were not likely to ascribe significance to the concept of separate legal personality. This is not an agreement between sophisticated parties and negotiated by lawyers, and its interpretation by this Court is undertaken by reference to an unauthorised English translation penned personally by Mr Wu with Mr Hu’s assistance.”

**WILLIAM YOUNG J:**

I think we’re going to have to call it quits there Ms Chen.

**MS CHEN:**

Sorry Sir?

**WILLIAM YOUNG J:**

I think we’re going to have to call it quits there, we have got to get on to the respondent. Thank you for your submissions.

**MR ZHANG:**

Your Honours, perhaps it’s a more productive use of my time if I can ask have your Honours read our submissions?

**WILLIAM YOUNG J:**

Could you just come across to the microphone.

**MR ZHANG:**

I think it's a more productive use of my time if I can start by asking if your Honours have read our submissions?

**WILLIAM YOUNG J:**

Yes.

**MR ZHANG:**

And then let's move on to which topic do your Honours disagree with me or agree with Justice Downs because it's no good I just ran through my third pages, tell you things you already know.

**WILLIAM YOUNG J:**

Put your case, that's what we want to hear.

**MR ZHANG:**

In that case what I'll do is I'll address some of the issues that were raised by my learned friend first –

**WILLIAM YOUNG J:**

Just pause there, I wouldn't worry too much about the law, it is very much a case on the facts.

**GLAZEBROOK J:**

Can I just get you to clarify when you say the partnership started because the submissions still say 2004?

**MR ZHANG:**

Yes.

**GLAZEBROOK J:**

And is that still the position?

**MR ZHANG:**

Yes Ma'am, I'll explain this.

**GLAZEBROOK J:**

It's just a yes or not that's fine, at some stage I'd be really interested in the same question that I asked your friend and that was what's still to be done in respect of the separation agreement?

**MR ZHANG:**

Sure.

**GLAZEBROOK J:**

But I'm not trying to get you to do that now.

**MR ZHANG:**

Yes so what I'll do is I'll tell you the story and it would help if your Honours can look at the chronology that's prepared by us.

**GLAZEBROOK J:**

Is that the chronology that has the –

**WILLIAM YOUNG J:**

You've got helpfully two, what's undoubtedly the case and issues of dispute, is it that chronology?

**MR ZHANG:**

Yes, that's the one, yes.

**GLAZEBROOK J:**

Yes, that one.

**MR ZHANG:**

Yes, that's the one we had done. Right, so Tony says the relationship started in 1996. He was engaged as the employee. We don't quite dispute that. It doesn't have much of relevance. What began in 2004 is that Tony and Luke together with a wider group of businessmen, they started doing business together and they called themselves the Orient Group. They conducted business through a number of different companies. Members of this group we

say are all partners. They are free to engage any projects with anybody else within the group. Not necessarily everybody was engaged in every project. Different projects had different people involved, and thus, they had a different percentage of what they would own out of that group. This group operated for about six years from 2004 to 2010, however, from 2008 they started to disband.

In 2007, that's where the Bella Vista sections came onto the market. There were a total of 14 of them. Within the chronology, on the first page we explain when they started. They started from 30 July 2007. Gradually the Orient Group purchased 14 and they straight up on-sold three. So we have three sold at this stage.

Now, in 2008 there were saying the group started to disband. Partners left and they would sort out what they would each get out of the group. They have various agreements that don't concern this case, that's why not much of that aspect has been adduced by way of evidence.

What is important is that from fairly early on it was decided that Luke and Tony would part ways together as partners and they would takeover Bella Vista projects. This would be their parting asset from the old group and there we have Mr Jiang come into the picture. He and Luke and Tony agreed that they will do this Bella Vista thing together, that they would together develop the 11 pieces of land that's left. So, Luke and Mr Jiang signed this April 2008 written agreement. They discussed that what they would call the Orient Group would take 60%, would own 60% of this project, Mr Jiang himself would own 40% of that project. So what we say is that is also a partnership, a three-way partnership except it's not equal. It's 40 –

**WILLIAM YOUNG J:**

Yes, it's the partnership plus the third party.

**MR ZHANG:**

That's the one, Sir, and moving forward –

**GLAZEBROOK J:**

Can you, the percentages were actually the same percentages that were in those companies, is that right, at that stage? So the 50/50 was the same percentage as in the company? It's not a trick question, I'm just asking the question.

**MR ZHANG:**

Sure, sure, I don't know the answer to that. I don't think it is because I think in Luke and Tony's mind, it didn't really matter. The two companies that's listed under that agreement is OCG, or Orient Construction Group Ltd, and AAL, Albany Apartments Ltd. It didn't really matter to them which one of these two companies held how many because the point is these two men, Tony and Luke, were entering this agreement with Mr Jiang. Mr Jiang is the one that doesn't yet have, haven't yet acquired an interest in this land. He was going to bring in money. He was going to bring enough money that justifies his 40% and the reason that the Orient Group was done, entered into this group that way is because Orient Group was going to do the construction. So they were partners and getting a profit out at the end of the day, but they were also the ones that would provide construction work and they will build as they normally would and Mr Jiang was happy with that.

There's a reference about reporting to Mr Jiang and his wife Liu Hong. The reason for this is Mr Jiang wasn't always going to be in New Zealand so he had to leave the operation of this project to Mr Zheng and Mr Deng, but his wife, Ms Liu. would be in New Zealand, so that's why the reference is made that reporting will be made to Mr Jiang and Ms Liu. This is Mr Jiang's way of keeping tabs on the way this project would progress.

Then fast forward to 2010, other partners out of old group, they dropped out and we have a situation in early 2010 that Deng and Zheng say, Tony and Luke say: "Well, from now on we are the only ones left, we're going to be one to one partners from now." And obviously because the old group had a large number of people, had a large number of projects, it takes time for them to work out exactly what's left from old group for us and where are these assets,

and that's the document my learned friend referred to earlier, the 31<sup>st</sup> March 2010 document, I think it's 0966. The last four digits I think is 0966.

Now, the expert in this case for Luke, Ms Payne, she gone through all the discovery documents and she used translation software to translate various documents, so she explains what this means. This is in her evidence. Her evidence is 201.0088.

**WILLIAM YOUNG J:**

Sorry, 201.0088?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

Which paragraph?

**MR ZHANG:**

Let me just take your Honours there. This is paragraph 107. Now, she refers to a bundle that she's compiled. I will just give your Honour the code for that document. It's been put into a separate file. So her bundle is 320.4751. Your Honour will see that she refers to in her paragraph 107, she refers to a document at bundle page 41.

**O'REGAN J:**

Sorry, can you just give me that number again, 320?

**MR ZHANG:**

751, that's the one. This is the email Luke sent to Tony plus this other exiting partner Mr Zhu, and this email had this document, this spreadsheet and then Ms Payne goes on to explain what that spreadsheet meant.

**WILLIAM YOUNG J:**

So, is this the one that's got –

**GLAZEBROOK J:**

I think I've got the wrong number. I think I'm on something else, sorry.

**O'REGAN J:**

320.4951?

**MR ZHANG:**

So 4751. That's Ms Payne's bundle. So 320.7451. In fact, your Honours can just search by the last four digits. The last four digit is always unique. You don't have to type in all seven numbers. It makes it a lot easier.

**WILLIAMS J:**

Now you tell me.

**MR ZHANG:**

I should have start first shouldn't I and they go by sequential. So you can either drag it down or control F. It works both ways.

**O'REGAN J:**

So, you're taking us to page 41 of that document?

**MR ZHANG:**

Yes, 41 is the email where Luke sent this to Tony and by "this" I mean the spreadsheet that's in question, and then Ms Payne goes on explaining what the spreadsheet actually meant. This is evidence from accounting expert explaining what an accounting document means. Essentially what it is, is that Luke says: "We had various assets we had from the group. This is how we accumulated them." That's the theoretical part and that gives us a number and then we look at it, what are we actually, what assets we actually have in our hands now and these are these other assets and they more or less match up, at least it's close enough and because in the old group they weren't equal

partners, people were free to engage in any particular transactions they like with other partners, so it didn't result in the same amount of asset they had. For example, as I was saying, there were 14 pieces of land with Bella Vista, but they sold three at first start and then by 2010 they sold another piece, so in total we have four.

The way these four were split is that Luke gets 26 out of 49 and Tony gets 23 out of 49 and that's why you have a part of this is something about that's not quite equal. My learned friend says: "See, they're not equal." What I'm saying is it is not equal what they had inherited from the old group, but it also says, elsewhere within the same document that moving forward in the Bella Vista project they are 50/50.

**O'REGAN J:**

Is that consistent with the partnership having existed since 2004?

**MR ZHANG:**

Well, I would say they were in a partnership but they were in a slightly different partnership. It was not an equal partnership in it was partnership with other people.

**WILLIAMS J:**

Yes, it was a more organic partnership, you say?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

Now it's a crystallised exclusive one?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

What led to the, when you got to equalisation, you say in 2010, was there cash contribution to bring it to equality or was there just an agreement that from now on it would be equal?

**MR ZHANG:**

Right, so what they inherited is obviously not the same. Luke has about 900,000 and Tony is about 780 and they said: "We're going to treat it as we are both putting 800 in." So what that means is you now owe the partnership roughly 20,000 and the partnership owes me roughly 120,000 and moving forward we'll take our profits and we are putting more money into this, we will adjust along the way and we will reach equal sharing.

**WILLIAMS J:**

Right, so it just gets recorded as credits in the shareholders' current account?

**MR ZHANG:**

Yes, yes.

**WILLIAM YOUNG J:**

Is that a suitable point to stop because we will start again at two?

**MR ZHANG:**

It's a good point to stop, Sir.

**WILLIAMS J:**

Okay, thank you.

**COURT ADJOURNS: 1.03 PM**

**COURT RESUMES: 2.02 PM**

**MR ZHANG:**

Your Honours, I resume where we left off. Where we left off was Ms Payne's analysis of these mid to early 2010s internal accounts. Now, at this point I

address something that Deng is attacking. He is saying his signature on this document purportedly is a forgery. He has given no explanation of why somebody would bother to forge his signature.

Clearly that document was sent to him with the intention of setting out a way moving forward. He doesn't explain why Zheng would bother to do this if they weren't going to do business together with common view of profit. It does not explain what may be the effect of Zheng trying to forge his signature. He didn't even explain this in his brief of evidence despite Zheng explains in his brief of evidence first. Mr Deng only brought up the forgery allegation under cross-examination when he was being asked to explain this. Now, his way of explaining this is: "It's a forgery, I know nothing about it."

Now, let's go back to Ms Payne's discussion of these papers. She keeps explaining what they all mean and then at her paragraph 129, she discusses another worksheet which is substantially similar to the ones we looked at earlier. This is her page 54 to 56 and if I can ask your Honours to go to page 54 of her bundle, your Honours will see –

**WILLIAM YOUNG J:**

Sorry, whereabouts, sorry?

**WILLIAMS J:**

320.4804.

**WILLIAM YOUNG J:**

So, 304.

**O'REGAN J:**

It's the one we had open.

**WILLIAM YOUNG J:**

Right, okay.

**GLAZEBROOK J:**

Can you give it to me again because my computer had been doing some unbelievably odd things so my associate had shut down everything that I had and hopefully it stopped it doing unbelievably ridiculous things?

**MR ZHANG:**

Sure. That's all right, Ma'am. So what Ms Payne's brief of evidence where these discussions take place –

**GLAZEBROOK J:**

So just the brief of evidence you're referring to?

**MR ZHANG:**

All right, I'm referring to her bundle. Her bundle, the last four digits –

**GLAZEBROOK J:**

Bundle doesn't help me, I'm sorry.

**O'REGAN J:**

The bundle is at 320.4751.

**MR ZHANG:**

Yes, that's the one.

**WILLIAM YOUNG J:**

Yes, so what page?

**MR ZHANG:**

54.

**O'REGAN J:**

54?

**MR ZHANG:**

Yes.

**O'REGAN J:**

What's the green ink on this page?

**WILLIAMS J:**

Her writing.

**MR ZHANG:**

It's Ms Payne's own notes. She used the software to translate and to help her understand the Chinese characters.

**WILLIAMS J:**

The software translated –

**O'REGAN J:**

It translated "company".

**MR ZHANG:**

Yes, yes and there is some significance to this because at the time there was no particular company. Throughout this case, what Mr Deng is saying is I'm only in one company with you. That's Orient Construction Ltd. Everything we have is with that company. I can't explain what it is between us with OCL and OHL, but I'm driving this idea that when we part ways I sold you my share of OCL. Everything that this company refers to OCL. That must be false because back at this time 2010, there was no OCL. OCL did not come into the picture until I think either 2012 or 2014. So clearly, right from the start they used the word "company" in Chinese gōngsī to refer to a fairly uncertain idea. It's really just two laypeople doing things together and try to record their fears.

**WILLIAMS J:**

It would be a little strange to expect the word "company" to exist standalone in Mandarin since it's a French word originally and used for a specifically English legal entity whatever, unless it was the straight transliteration of company.

I don't know how you would do that in Mandarin. It would have to be an adaptive word.

**MR ZHANG:**

It is, it is. As is the case with many imported concepts, Chinese don't really, did not really have these words and what happened is actually Chinese people import a lot of concepts from the Japanese. The Japanese used a lot of trans characters to create words to modernise themselves to I guess connect with the rest of the world. This happened sometime around Ming restoration. So modern Chinese have a lot of words like this such as society, such as education, such as physics, chemistry. These are all imported words from Japanese. But people, modern Chinese people must conduct business some way, so they feel if we go to a particular office, we operate from there, we pay people payroll, we sent out emails to our Excel spreadsheet, pay invoices, smoothly run bank accounts, we operate that out of a company. That is how these people saw it and it is pretty clear from the actual content of these spreadsheets they encapsulate the projects of several companies at the time. For example, it has business dealings of the Bella Vista project. It refers both to the four sold sections and their ongoing co-operation with Mr Jiang on the other ones that they intend to develop.

So we have this line of plot that the two men now in 2010 engaged in this working relationship, we call it partnership and Mr Deng doesn't explain what it is. The next event that happened is another thread of plot. That is they with another, Mr Jiang, created this new company called RAL, Rosedale Apartments Ltd. This is a company where Mr Zheng would have majority shareholding, Mr Jiang and Mr Deng would have smaller shares. They would put money in and build up apartments on this particular lot of land in Rosedale. In this proceeding Mr Zheng says: "Our respective shares in RAL is not part of the partnership that I claim." Mr Deng makes a big fuss about this, he's saying, oh, why isn't it, it's bad if you don't say so, and Justice Downs certainly made some fuss about this as well. We're saying it's not part of partnership because other than putting money in, acting merely as shareholders you don't have to do anything else with RAL. RAL simply a

holdings company holding this piece of land and getting contributions from shareholders and eventually if there's any profit they would have split it in accordance with their shareholding percentage. There is nothing about this company that takes them out from the normal company regime into a partnership relationship. But even if this company is supposed to be part of the partnership it still doesn't really change anything. The accounts are pretty clear on that one. All we would be doing is saying well that's part of the partnership, let's account for these assets, and who should get what. It wouldn't have made a difference at the end of the day.

Then the next event that happened we go back to the thread of story about the Orient partnership between our two protagonists. That is in March 2011 ECL was incorporated. ECL's named director and shareholder is Mr Zhu, Mr Zhu is Mr Deng's friend, but Mr Zhu didn't really want to get involved in this business so he just set this up and left it to Mr Zheng and Mr Deng to run ECL. So over the course of the next four years ECL took on various projects and ECL's bank accounts was used by both Mr Zheng and Mr Deng for their, what we call partnership, moving money in and out. Mr Deng does not advance a coherent story, what is the nature of the two men's involvement in their business, He does acknowledge well this company exists but he doesn't explain if they are neither shareholders nor directors what are they? Are they partners or are they under some other sort of contract?

Moving on, the next event happened in the chronology is the lots of the, two lots of the Bella Vista land was sold to third parties. This happened in June 2012. Then in 2013 OCL was incorporated. Then in October 2013 for the first time Mr Deng starts to making his share of contribution towards RAL where he holds 5% of the shares. He should have contributed his 5% in the past but he didn't. Up to this point it was always Zheng fuelling it for him. This creates a bit of set-off which we'll address later.

One event I didn't explain really is the first wave of transfers of Bella Vista sections. Now what it is, is this. The Bella Vista sections at the very start were settled under companies they controlled and pursuant to the April 2008 Bella Vista agreement it was agreed that they will get related parties to hold

the sections, and it turns out the reason for doing that is so that these people can help get loans, they can keep holding the land with minimum amount of capital advanced up front. So we have the first wave of transfers.

**O'REGAN J:**

When you say "to hold them" do you mean actually own them?

**MR ZHANG:**

Yes Sir. Actually own them. So, for example –

**O'REGAN J:**

Did they have an obligation to sell them back if called upon?

**MR ZHANG:**

Yes they would. For example one of the people that held the section was Mr Deng's mother, Ms Ni. Ms Ni had to pay a deposit, so that morning Mr Zheng took some money out, handed to Mr Deng, Mr Deng puts this money into his mother's bank account, his mother then transfer this to a lawyer, lawyer transfers to the vendor's lawyer, which is themselves, vendor's lawyer transfers this back and Mr Zheng pockets the money. That's your deposit going around, and amazingly Mr Deng says these were transfers bona fide purchase for value which can't be true because if that's the case, these sections would have sold to other parties, unrelated parties, as of 2008, 2009, then why did they still discuss their ownership over these eight, remaining eight lots, as of 2015?

**O'REGAN J:**

But you just said that they were transferred.

**MR ZHANG:**

We said –

**O'REGAN J:**

I said did the buyer own them?

**MR ZHANG:**

Yes.

**O'REGAN J:**

And you said: "Yes."

**MR ZHANG:**

The buyers own them in name legally, trustees.

**O'REGAN J:**

Well that was exactly what I was asking. So you're saying they held them as nominees, they were just (inaudible 14:15:35)

**MR ZHANG:**

Yes. Let me be clear. Maybe there's some miscommunications here. We are saying these people are essentially trustees. They held these sections on their trust. But they're going to say you've now got to transfer this land to somebody else and they will do it. These were not people who are bona fide for value.

**O'REGAN J:**

Why did they pay a deposit if they were only holding it as trustee?

**MR ZHANG:**

They didn't pay deposit, Sir, that's what I'm saying.

**O'REGAN J:**

Well, you just said they did. You said the money was advanced, it was paid across and then it came back again.

**MR ZHANG:**

Yes, let's be clear what are we saying. The "they" here is Mr Zheng and Mr Deng themselves. So Mr Zheng, one of our plaintiffs here, he says, this transfer was among our own people and how I prove that, I transferred the

deposit to Deng, then Deng transferred deposit to his mother, mother pays lawyer, lawyer pays vendor's lawyer, then vendor's lawyer pays Ms Jiang.

**O'REGAN J:**

But if she held it as trustee, none of that needed to happen. All it had to be was a declaration of trust?

**MR ZHANG:**

Right, there needs to be a sale in order for her to get a bank loan. So the bank would have demanded to see –

**O'REGAN J:**

So, do you represent to the bank that it had been sold when it hadn't, is that what you're saying?

**MR ZHANG:**

Essentially. Essentially. That's how they were able to get the loan from the bank with minimum amount of capital.

**WILLIAM YOUNG J:**

Pre-sales that are represented to the bank as sales that show the development is well underway.

**MR ZHANG:**

That I don't know, Sir. I don't know how it was presented to the bank, but essentially the transfers were made so they can obtain loans from the bank and so that was done.

So this started in November 2008 and took a while to get transferred and then fast forward to October 2013 we have the second wave of transfer. So we have related people transferring to other related people. For example, Ms Ni, Mr Deng's mother now transfers two lots to D&R, which is Mr Jiang's company, and again it was just money passing from right hand to left hand and again, for this wave of transfers, Mr Deng amazingly again says these are

arm's length transactions and the people who held these, the purchasers of these sections have no obligation to do anything.

**O'REGAN J:**

Is there evidence that the transferees did eventually transfer them back to the appellant or the respondent, or their company?

**MR ZHANG:**

Right. What happened at the very end is that Mr Deng potentially purchased by himself. His wife probably got another one. Then they sold one to Mr Zhu and there was some debt set out because they owe Mr Zhu half a million dollars and the rest were, I think, sold on open market. So, by the time this case reached trial –

**WILLIAMS J:**

By these bare trustees on paper?

**MR ZHANG:**

Yes. So they transferred, but it's Mr Zheng, sorry, it's Mr Deng and Mr Zheng who pocketed the money.

**WILLIAMS J:**

There's no transmission back to the company?

**MR ZHANG:**

No.

**WILLIAMS J:**

They're sold by the bare trustees?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

To the open market?

**MR ZHANG:**

Yes, yes.

**WILLIAMS J:**

So presumably the deposit that was paid to each of these related parties was the same deposit each time, the same money being recycled, was it?

**MR ZHANG:**

Sorry your Honour, you have to probably run that –

**WILLIAMS J:**

Did Zheng, the money from Zheng that ended up in Ms Ni's pocket so it could be handed back, I'm just asking is that the same money that keeps getting recycled to each related party?

**MR ZHANG:**

You mean for the first wave of transfer for all the lots?

**WILLIAMS J:**

Correct.

**MR ZHANG:**

That I don't know, Sir. Potentially, because it didn't all get transferred at the same day. So potentially on day number 2 they transfer another lot, they will do this again. On day 3, they do that again.

The next important event happens under the thread of a plot that involves RAL. Basically, between November 2013 to December 2014, Tony now, for this duration, transferred quite a bit of money to RAL. He transferred more money than his 25% would have demanded.

Over the same period, we are now onto page 10 of our chronology, the second row on page 10, for that same period, December 2013 to roughly September 2014, Tony also made additional transfers to RAL which he claims

to be his contribution which we say these weren't his contribution. These were reversals of certain transfers that needed to be reversed. So Tony didn't actually pay this money out of his own pocket.

Why is this fact important? This fact is important because Tony, in this case, has been advancing inconsistent proposition as how much he has contributed to RAL. He always goes with a high figure when it suits him. However, his own expert, our expert and Ms Jin disagree with him. They have shown in the bank accounts that these transfers, that's on the second row of page 10, were not contributions he made out of his own pocket. It were money he received earlier and simply reversed them.

At the bottom of page 10 we have the remaining part, remaining lots of the second wave transfers. We had Zheng himself transferring. Sorry, we had D&R Homes transferring lot 14 to Fiona, who is Mr Jiang's wife. So that little table there explains how the deposit in relation to that transfer went around in circles. So again, left hand hand's money to the right hand, pays lawyer, then receive that back. The same thing happened with lot 21 to Mr Chen who was a defendant and then also in July 2014, D&R transferred lot 23 to Tony, same thing. Then in August 2014 we had OCL making a mistake relating to concrete work and this subsequently created a bit of division between the protagonists. So, basically, there was a concrete problem. It cost a lot of money to fix. RAL had a cash flow issue, couldn't pay OCL. So, when money is tight, parties argue.

Let's fast forward a little bit to 7<sup>th</sup> April 2015. My friend has discussed this particular email sent by May, who is Zheng's sister, to Luke, Tony and Judy. What happened there is the parties have made contributions to RAL over the last several years and, as I was explaining, Zheng, for the first few years, made a contribution for himself and Deng. Then since 2013, Zheng made a lot of contributions. So at this point of time, the parties say: "Look, we need to sit down and do a bit of accounting, sort out who contributed how much and what's the position between the two of us." So, May and Judy undertook this exercise. They calculated what had transpired.

In a nutshell, from the start I think it's about 2010 to 2013, Zheng's contribution helping Deng would have accrued interest of roughly \$90,000. So on top of what Deng has put in, sorry, on top of what Zheng's put in, Deng would owe him \$90,000 because he didn't put in any cash of himself. Then between late 2013 to really 2015, that's a year and a bit of time, Deng's put in roughly \$600,000. Now, out of that, about 400 is his, is the contribution that he himself should have put in, so he basically over-contributed by about 200,000 and because of this 200,000 is counted as if it's Zheng's contribution. Now, Zheng owes him a little bit of interest. So the net position between the interest that's set-off, and how much Deng's put in for on Zheng's behalf, comes to a net difference of \$120,000. This is recorded in a very comprehensive spreadsheet May sent to our protagonists, including Judy. Everybody was happy with that.

Under that thread of plot, the next thing is Judy then compiles the March 2015 internal accounts. Now, the internal accounts records these things. It records what projects are outstanding, how much they got from the projects, how much money has sunk into the projects and, very importantly, the two men's contribution towards the partnership, and this part gets updated every two months, the two men's contribution to the partnership. Now, as we know, right at the start, Zheng's contribution is roughly \$900,000, this was back in 2010, and Deng's contribution is roughly \$700,000, and over time they both have drawn money out of the partnership. So by this stage, five years later, the position is roughly \$680,000 negative for each.

**WILLIAM YOUNG J:**

I'm finding it a bit difficult to find my way around all the documents. Is there an email between the two protagonists to which is attached a set of the internal accounts?

**MR ZHANG:**

There are many such emails. They usually are not sent by Luke nor Tony. They usually are sent by Judy. So Judy would have, Tony's wife, she would compile these and she would send these to both of them, to both men.

**WILLIAM YOUNG J:**

Okay, so can you just show me one?

**MR ZHANG:**

Sure. Let's look at the most important one, the March 2015 one.

**WILLIAM YOUNG J:**

Okay. Well, I'd prefer one earlier than that because her account is that it's only around then or a little bit earlier that she discovers the internal accounts.

**MR ZHANG:**

She started compiling them some time in 2012, 2013. So before she started, it was Jenny, Luke's other sister, that did it.

**WILLIAM YOUNG J:**

Okay, have we got any document where the internal accounts are shared between the two protagonists say in 2011 or 2012?

**MR ZHANG:**

Yes, let me see.

**WILLIAMS J:**

I had the impression that Mr Deng's case was that Judy doesn't find out about these internal accounting matters until 2014.

**MR ZHANG:**

That's wrong. She definitely started compiling them as soon as Jenny left some time in 2013. So she not only knows what's in there, she's literally the author of them.

**WILLIAM YOUNG J:**

There is a reference to this in Ms Payne's evidence. I couldn't actually track the email to which she referred into the document because –

**MR ZHANG:**

Now, Sir, before I find you the email, let me address the point that your Honour was talking about. So, what Judy actually says in her brief of evidence is that in 2014 she discovers, she alleges she's discovered contribution disparities to RAL. She doesn't, in her brief of evidence, say there's anything wrong with the internal accounts. She never said so in her brief of evidence. During cross-examination I pressed her on this: "Tell me what is the problem with the internal accounts." She couldn't point them out. I know she still maintains there were problems. They found a lot of them earlier. There is no evidence in her brief of evidence that actually explains this.

**WILLIAMS J:**

Is it the case that the payment to RAL out of OCL were made in 2014 or were they earlier that she's worried about, becomes worried about?

**MR ZHANG:**

Well, Sir, you see, our case is she never actually raised these issues. She's only raised these issues in this proceeding and she doesn't explain, so we don't know what she's on about. She's the one that always compiled these internal accounts. She never raised any issue. There's not a single email you can find before 22<sup>nd</sup> May 2015 where she says: "That account is wrong. Let me explain to why this is wrong and I'm not going to have this." You can't find one because it doesn't exist.

**WILLIAM YOUNG J:**

Right, well, can we just find an email where the document is shared.

**MR ZHANG:**

So if your Honours can go to the document with last four digits being 1212.

**WILLIAM YOUNG J:**

Sorry, what tab, sorry?

**MR ZHANG:**

The document last four digits being 1212.

**GLAZEBROOK J:**

That doesn't help us.

**O'REGAN J:**

What are the first three digits?

**MR ZHANG:**

305. You don't actually have to worry about the first three. The last four are unique.

**WILLIAM YOUNG J:**

Okay, all right, so, sorry, what's the...

**GLAZEBROOK J:**

305.1212.

**MR ZHANG:**

That's the one.

**GLAZEBROOK J:**

It has to be said, this numbering system is unbelievably difficult when you're just working off electronic copies.

**WILLIAM YOUNG J:**

This is an email from whom, from Luke?

**O'REGAN J:**

Just from Jenny not Judy.

**MR ZHANG:**

Yes, it's from Jenny.

**WILLIAM YOUNG J:**

And it's to Luke and Judy?

**MR ZHANG:**

Yes. Let me just have a look at this, Sir.

**WILLIAM YOUNG J:**

So the attachment is not that easy to read, but it's towards the top of the page isn't it, 31.

**MR ZHANG:**

Your Honours, let's try 305.1299.

**WILLIAM YOUNG J:**

1299. Okay, right, I see it's a bit easier to find.

**GLAZEBROOK J:**

305.1299?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

Are we seeing here the forwarding of accounts?

**ELLEN FRANCE J:**

I haven't got that.

**GLAZEBROOK J:**

I don't have it, so I don't know.

**WILLIAM YOUNG J:**

It's at the top. Is this a forwarding a set of accounts of 31 January 2014?

**MR ZHANG:**

Yes.

**WILLIAMS J:**

That seems to be from Zheng though.

**MR ZHANG:**

That's Zheng in 2018 forwarding this email to our firm.

**WILLIAMS J:**

Oh, I see.

**MR ZHANG:**

It's an email below it came from Judy on the 24<sup>th</sup> March 2014 to Luke.

**GLAZEBROOK J:**

I've no idea, sorry.

**WILLIAMS J:**

To Zheng.

**GLAZEBROOK J:**

I'm afraid you've totally lost us because we have absolutely no idea where anybody is.

**WILLIAM YOUNG J:**

We're on page, sorry, 1299, aren't we?

**O'REGAN J:**

306.1299.

**GLAZEBROOK J:**

Oh, 306.

**O'REGAN J:**

306.1299.

**MR ZHANG:**

Yes, that's the one, Sir. My apologies, I always search them by control F. I think your Honour is going by sliding the bar, so you probably needed the first three code.

**GLAZEBROOK J:**

It's all we can do.

**O'REGAN J:**

So this is Judy sending them to your client?

**MR ZHANG:**

Yes. She has taken over this role when Jenny left in November 2013, so from there she's been doing this.

**ELLEN FRANCE J:**

So, is she sending it to the appellant as well?

**MR ZHANG:**

Sometimes she does, but not in this one. In this one she's only sent this to my client.

**ELLEN FRANCE J:**

Well, where do we see one where in any earlier point in time she's sending it to the appellant?

**MR ZHANG:**

This is March 2014. She took over this role in November 2013. I don't think in this proceeding we've produced very single historical email, so I'm not

100% sure if we have one before this one because before this one we would have potentially only had one. Maybe the –

**ELLEN FRANCE J:**

But this one is not going to the appellant, is it?

**WILLIAM YOUNG J:**

It's from his wife.

**ELLEN FRANCE J:**

It's from his wife, but it's not being sent to him.

**WILLIAM YOUNG J:**

It's from the appellant's wife. Judy is the appellant's wife.

**ELLEN FRANCE J:**

Yes.

**GLAZEBROOK J:**

But it's very near into – if she only took over in 2013, it's not very helpful to have as evidence of a partnership in 2010, is it?

**WILLIAM YOUNG J:**

Well, what about, you said Ms Payne refers to some emails in 2010. Do we know where they are?

**MR ZHANG:**

So in 2010, at the very start of what we say is the Zheng and Deng partnership, they were initially compiled by a different guy Mr Yu. Mr Yu left sometime in late 2010 and Jenny took over. Then Jenny left at the end of 2013, then Judy took over.

**WILLIAM YOUNG J:**

Okay, there was a reference to it in the evidence of Ms Payne. I will just see if I can find it. All right paragraph 92 of her evidence, it's 0972010097.

On 10 August Tony Deng, Zheng, Deng sent an email to Luke with the subject "BV". It appears to be a draft email that Tony is sending to Luke for review so where would we find that?

**MR ZHANG:**

If you were to toggle to Ms Payne's bundle, that document is 320.4751. It's at page 39 of her bundle.

**WILLIAM YOUNG J:**

All right.

**GLAZEBROOK J:**

Is the translation on the next page is it?

**MR ZHANG:**

Yes. That I assume is translated by Ms Payne's software. It is plainly obvious that as of 2010, Mr Deng's under no illusion or mistake that he's involved in the BV project and he has a 30% stake, yet he says he didn't know anything about this. It was a (inaudible 14:39:54) in 2014 and it can't be true.

**GLAZEBROOK J:**

So what's this supposed to show?

**MR ZHANG:**

Well, within this document there was another budget table. This is to do with the BV project's budget I guess. Mr Deng would have compiled that.

**ELLEN FRANCE J:**

The document that's attached to this email, where do we see the attachment?

**MR ZHANG:**

Ms Payne didn't include that document into her bundle, but let me see if I can find this in the –

**WILLIAM YOUNG J:**

So then I see bundle page 41 Luke writes to, amongst others, Tony and there's an attachment which I take it is what's set out over the page?

**MR ZHANG:**

Yes, although this one deals with a slightly different topic. Well, an entirely different topic to the previous page. The previous email from Deng to Zheng and Zheng deals with the Bella Vista project only and this one from Mr Zheng to Deng deals with the partnership, or the position between the two men.

**WILLIAM YOUNG J:**

So there's no translation of this document?

**MR ZHANG:**

The document at 42?

**WILLIAMS J:**

Handwritten notes. It's just Ms Payne's notes?

**MR ZHANG:**

Yes. There may actually be a translation for this because many documents were translated many times in this case.

**WILLIAM YOUNG J:**

Okay, so what did the appellant say about this email?

**MR ZHANG:**

He doesn't. He ignores every evidence that's against him. He pretends they don't exist. Now he tells your Honours various pieces of evidence from different place and then he says: "They don't make any sense, they are confusing, I'm confused. I hope you're confused." That's the stance he's taken in every three hearings in this case.

**WILLIAMS J:**

The page 40 translation of 39, I just want to find out what the mechanics of this is. So, Deng writes to Zheng. Is this a draft note that Deng is giving to Zheng to pass onto Jiang?

**MR ZHANG:**

That appears to be what it is.

**WILLIAM YOUNG J:**

Yes.

**MR ZHANG:**

Because you see in the 2008 agreement, they said they would report to Jiang what's going on with the project because Jiang's overseas.

**WILLIAMS J:**

Right and of course Deng is the project manager?

**MR ZHANG:**

Yes.

**GLAZEBROOK J:**

I'm still a bit lost as to what this is supposed to show, what you say it shows, and I'm probably more lost because we don't actually have the table that's attached.

**WILLIAM YOUNG J:**

I think it's the next document, isn't it?

**GLAZEBROOK J:**

No.

**ELLEN FRANCE J:**

No, not to bundle, not to page 40.

**WILLIAM YOUNG J:**

Oh, I see. Okay, sorry.

**GLAZEBROOK J:**

No, that shows something different the next document.

**WILLIAM YOUNG J:**

Okay. The guts of it on your case is that there are exchanges of documents that are referable generally to the internal accounts, is that right?

**MR ZHANG:**

Yes, Sir.

**GLAZEBROOK J:**

But this is just relating to the Bella Vista project, isn't it, which is always said to be a 50/50 share on the basis of the shareholding anyway, isn't it?

**MR ZHANG:**

Well, that's what we say.

**GLAZEBROOK J:**

Leaving aside the other partner.

**MR ZHANG:**

Yes, yes, well, that's what we say. I know that's what Mr Deng denies.

**GLAZEBROOK J:**

So, I don't know what it shows about it being a general partnership of everything.

**MR ZHANG:**

This document doesn't go as far as showing the two men were in otherwise a bigger partnership. It only shows these two men's involvement in the Bella Vista partnership.

**WILLIAM YOUNG J:**

Is there one that deals with the internal accounts that have this sort of total, the running total contributions et cetera? You've got one from 2014 I think?

**MR ZHANG:**

Yes.

**WILLIAM YOUNG J:**

Is there an earlier one?

**MR ZHANG:**

Yes, Sir, we have one every two months running from March 2010 to –

**WILLIAM YOUNG J:**

Yes, and is there always an email? So are there emails that attach them passing?

**MR ZHANG:**

Right.

**WILLIAM YOUNG J:**

Because as I understand the appellant's case is he says: "I never knew anything about this until 2014 or 2015 perhaps."

**GLAZEBROOK J:**

2014 I think when his wife took over the accounts, although I think he still says he didn't understand them.

**MR ZHANG:**

Your Honours, do you have the Word document which is the table which gives you links to all the actual documents?

**WILLIAM YOUNG J:**

We've got a table of contents.

**MR ZHANG:**

Yes, the Word document?

**WILLIAM YOUNG J:**

I'm looking at the PDF document actually, but it's hyperlinked.

**MR ZHANG:**

Right, okay, well that's good. That will make everybody's lives really easy. Easier, I should say. So if you look at 305, so don't click anything, just go to the table, go to 305.1137.

**WILLIAM YOUNG J:**

Yes.

**MR ZHANG:**

You will see from there onwards roughly well, a number of documents. These are the emails and their attachments. So let's go with the first one 305.1137. That's an email Jenny Zheng sent to Luke Zheng and Tony Deng 9<sup>th</sup> January 2012 and the next document, if luck would have it –

**ELLEN FRANCE J:**

Sorry, what date? Which one are we one, 305.1137?

**MR ZHANG:**

That's the one. So the top email is where Luke forwarded this email to our firm. You'll see there it's a guy called Simon Zhao. He was our lawyer and the email below, the forwarded message is from Jenny Zheng to Lu Zheng and D Deng on 9<sup>th</sup> January 2012.

**WILLIAM YOUNG J:**

So there's an internal account spreadsheet of the 30<sup>th</sup> of November 2011?

**MR ZHANG:**

Yes and the next document, if we're lucky, will be the actual document.

**WILLIAMS J:**

1139 are we going to now?

**MR ZHANG:**

That's the one and then the next one after that is the translation of 1139.

**WILLIAMS J:**

It's actually the reconciliation as at November, isn't it, 2011?

**MR ZHANG:**

Yes. So I think they have about two months delay give or take. They have to get all the invoices, all the bank statements of that period then do the compilation and calculation.

**WILLIAMS J:**

I see. So, it's as at that date rather than the date of the reconciliation itself?

**MR ZHANG:**

Yes. Basically, a number of items from that point onwards below are other emails of the same nature across the four, five years' time span.

**O'REGAN J:**

And these were produced monthly these reconciliations?

**MR ZHANG:**

Every two months, Sir.

**O'REGAN J:**

Two months.

**MR ZHANG:**

Every two months. So they do it in, so it's end of January, end of March, end of May, July, September, November.

**WILLIAM YOUNG J:**

And so was the appellant taken to these in evidence?

**MR ZHANG:**

Sorry, Sir?

**WILLIAM YOUNG J:**

Was the appellant shown these in evidence?

**MR ZHANG:**

Yes, these were explained in my guy's brief of evidence because he's a plaintiff. He explains this first. The defendant doesn't explain what they mean.

**WILLIAM YOUNG J:**

Does he just say: "I don't understand what they mean"?

**MR ZHANG:**

He doesn't really say that either in his brief of evidence. At trial, he says: "I don't know anything." And Justice Downs said: "Mr Zheng, I know how this works. Lawyers, usually draft this so let's not press Mr Deng," and to that extent he says "his wife knows about this, let's ask her". So, by the time it's Judy's turn, she can't really explain this either. Well, she can't explain what's wrong with them.

**WILLIAM YOUNG J:**

Okay, so where are we now?

**MR ZHANG:**

Right, the next event important to this thread of partnership story, on the 19<sup>th</sup> of April 2015, that's page 17 of my chronology, second box, Luke began a discussion with Tony and Judy about accounting, about the internal accounts for period ending 31<sup>st</sup> March 2015. He kind of points out a couple of things that needs to be corrected.

**WILLIAM YOUNG J:**

Sorry, what date should I be looking at?

**MR ZHANG:**

The date is 19<sup>th</sup> April 2015.

**WILLIAM YOUNG J:**

19 April 2015, right thank you for your help.

**WILLIAMS J:**

Page 17 of the chronology.

**WILLIAM YOUNG J:**

Okay, yes.

**MR ZHANG:**

This email resulted in Judy on the 29<sup>th</sup> of April sent out updated internal accounts for period ending 31<sup>st</sup> March 2015. This is the very last one they had.

**GLAZEBROOK J:**

So, where are you taking us?

**MR ZHANG:**

So this is page 18 of the chronology. This event happened on –

**GLAZEBROOK J:**

Sorry, you're not taking us to a document?

**MR ZHANG:**

I will do that, Ma'am. I will do that right now. I should do that.

**GLAZEBROOK J:**

If you weren't going to take us to a document, that's fine. I just thought you were taking us to a document.

**MR ZHANG:**

I should, I should. This is important, Ma'am. Let's start with 316.3883.

**GLAZEBROOK J:**

Sorry, 3883?

**MR ZHANG:**

That's the one, Ma'am. That's the 19<sup>th</sup> of April email. Let's start from the beginning. That's the 17<sup>th</sup> April email from Judy with a draft version of the March 2015 accounts, internal accounts, and then Luke two days later on the 19<sup>th</sup> of April replies, points out various things he says needs to be corrected.

**WILLIAMS J:**

You said 316.3833. That's a share transfer.

**O'REGAN J:**

3883.

**WILLIAMS J:**

Sorry.

**ELLEN FRANCE J:**

What's the significance of that?

**MR ZHANG:**

This is how we ended up with the final version of this, the internal accounts.

**ELLEN FRANCE J:**

But why does that matter?

**MR ZHANG:**

I'm just trying to tell a story, Ma'am. I'm just trying to tell a story. This is how this email chain started and then on the 29<sup>th</sup> of April, Judy incorporated these corrections or suggestions into the final version of the March 2015 accounts. So, I will take your Honours to that email. Now, the document should be

320.4974 but it seems that on my computer this link doesn't open, so let me just go to the actual bundle itself and see if it opens for me there.

**O'REGAN J:**

320.4974?

**MR ZHANG:**

Yes. The link doesn't work but the file is in the folder, if you just scroll down to the very bottom of the folder you will find it and its attachment, the very final version of the March 15<sup>th</sup> internal accounts is 319.4669. That's 319.4669. Your Honours, if you have now open 4669, can you please scroll down to page 4729.

**WILLIAM YOUNG J:**

4729.

**GLAZEBROOK J:**

Sorry, what's the, 4729, what's the first number?

**WILLIAM YOUNG J:**

Don't we need 4729. It's in the same document.

**GLAZEBROOK J:**

Oh, okay.

**MR ZHANG:**

It's a page number, Ma'am.

**WILLIAM YOUNG J:**

It's the last page of the spreadsheet, isn't it?

**MR ZHANG:**

Not quite the last page.

**WILLIAM YOUNG J:**

Not quite, oh no, sorry.

**MR ZHANG:**

4729 is the third to last page. This page is Deng's partnership contribution or drawings account and you can see it gets updated up to 31<sup>st</sup> March 2015 and you will see there is a highlighted section towards the end. The first line of the highlighted section reads: "RAL Zheng Lu owed \$120,000." Let me know if you have trouble finding this line. So, there is a highlighted section.

**WILLIAM YOUNG J:**

Yes, 120,313.60 is that right?

**MR ZHANG:**

That's the one Sir. What that means is this. Judy by this stage incorporated the RAL contribution difference into this, and they are agreed. There is no more RAL contribution difference past this date. It's been subsumed into this internal account. This proposition has been explained in Zheng Lu's brief of evidence. Tony does not address this in his brief of evidence. Judy does not address it in her brief of evidence, they just pretend this didn't happen. What they rely on is an email on the 22<sup>nd</sup> of May which Judy out of the blue just saying you owe me 20 grand over the RAL thing, pay up.

**O'REGAN J:**

If RAL was a separate business you're saying that this shouldn't have been in there, or are you saying this shows RAL is part of the partnership?

**MR ZHANG:**

This doesn't show RAL is part of the partnership because this doesn't actually deal with the respective entitlements under RAL. What this shows is these two people treating each other as very close partners, so any transaction between them is reported here. This is essentially what are they doing. They say, we have a bit of debt in terms of how we're handling our RAL contributions. Let's just put them all in one place. This way we don't have to

have three parallel debts when you can imagine over the course of five years dealing they could have many other things. I lend you \$40 there, you help me pay him there. They put everything in this account.

**O'REGAN J:**

Except RAL.

**MR ZHANG:**

Well, they don't put in the interest as shareholders under RAL here but they're putting in, in terms of who owes who when you're putting money on my behalf into RAL.

**WILLIAMS J:**

Your point is this is evidence of a 50/50 partnership because there's a debit there against Mr Deng for \$120,000 to even up RAL's holdings.

**MR ZHANG:**

Yes, yes. In fact, not just this line. Every line in this document proves that these two men recorded the dealings in these internal accounts, and Mr McKay agrees this, agrees with us on this point. I cross-examined him about this point in cross-examination and he concedes that these documents show these two men more or less share everything equally. I can give you the reference to that.

**WILLIAMS J:**

This is the paragraph 99 of the Court of Appeal's decision?

**MR ZHANG:**

Yes, that's the one, I think, really about it, your Honours ask about this point. Also his cross-examination is 204.0751.

**WILLIAMS J:**

0751?

**MR ZHANG:**

Yes. This line of questioning began around page 0782, line 10. Your Honours can read from there and this rounds out toward the end of the page where he essentially agrees these spreadsheets show two men equally share everything. At this juncture, shall we say a bit more about Mr McKay's evidence.

**WILLIAMS J:**

Just before you do, can you give me that page number in the cross-examination please?

**MR ZHANG:**

Sure, Sir.

**WILLIAMS J:**

I've got the document 0751. Give me the specific page.

**MR ZHANG:**

Yes, it's 0782 and it's from line 10.

**GLAZEBROOK J:**

Sorry, I didn't catch that page number?

**MR ZHANG:**

It's 782, 0782. Mr McKay was engaged as Mr Deng's expert because Mr Zheng hired his expert. Mr Zheng was the plaintiff, so his brief of evidence came in first. Mr Zheng's expert Ms Payne was saying: "I'm being asked to look for things that show these two people may be in a partnership. So I look at what the legal test is. Two men in business together making profit. Here's a bunch of documents that's been discovered, I look at them." So, she looks at these various spreadsheets. She concludes these two men were in business together and the records show that they did this to be of making profit. Mr McKay comes in, he doesn't disagree with this analysis by Ms Payne, but what he says is, one, the bulk of his evidence goes towards

explaining this thing lacks various formalities of a formal partnership like GST, joint account, et cetera, et cetera. Was none of that. If we had all of these present, we wouldn't have this lawsuit. Mr Deng would have no room to debate there's no partnership.

But more interestingly, his analysis on the numbers disagree with these that Mr Deng asserts. He largely disagrees with Mr Deng. He disagrees with his own client's assertion about various contributions. He made various tables setting out what he thinks are contributions. He was able to recognise various transactions which Deng says these are my contributions and we say, no, these are not your contributions, these are in effect circular transactions. I paid you, then you paid around and Mr McKay was in agreement with that in his brief of evidence.

It was then Mr Zheng's turn to file a reply evidence and in the reply evidence, Mr Zheng comprehensively went through all these transactions he says are circular transactions, and Ms Payne then give supplementary evidence basically analysing what Mr Zheng just said about these circular transactions. Then Mr McKay was given a change to address these. Under cross-examination he substantially agreed Ms Payne's analysis that even more transactions that Mr Deng had claimed to be his contribution, he now accepts, Mr McKay now accepts were not really contributions from him. I won't spend time going over the lengthy transcript, but that essentially is what happened on that front.

Now let's go back to the story. Sometime in early 2015 Deng says: "Money is tight, we're losing money in this project, I need some money, can I borrow some from you?" My guy then sold his own house and he put money in. He put \$120,000 into the business accounts to keep the business afloat. He then put in \$200,000 for Mr Deng to take, as part of the, what he agreed he would, then Mr Deng, and Mr Deng took the \$200,000, as they had agreed, and took additional \$90,000 which at the time Mr Zheng did not realise.

I won't go through the intricate calculations. They are fairly apparent from both the chronology and our submissions and then where we get to is that at around mid-May Zheng, sorry, Mr Deng says: "I think we should separate, we should part our ways," and Mr Zheng says: "Well that's okay then, let's do that." There began our discussion of separation and that takes us to the principles in separation which my friend earlier taking your Honours to, I think it's document 316.3873. That was 316.3873. What your Honours are seeing, this is the translation of the very last iteration of this document. How it started was it started with just black text from Zheng to Deng saying this is how I propose we would move on and then Deng replies to Zheng in the first lot of red text. Zheng says, Deng says: "This is what I think." Then Zheng replies in the green text saying: "Well, this is what I think." Then finally you have Deng replying in the red text.

After that round, the conversations still kept going but it didn't take place in this document because by then they had some specific points left not agreed upon. I will get into that a bit later, but let's look at this document first.

Now, it is my guy's contention that these two men were in partnership. They saw every asset under every company as something that they had a direct interest with. They didn't see it as, well, if we're shareholders of something we can only have the shareholder's interest at the end of the day. They didn't see it that way. The way they saw it is each project belonged to both of them, all the tools, everything. So this document shows they intended to divide every asset between themselves as if they owned it and these clauses will tell us exactly that.

So let's see, the first clause says when they would have formally separated. That's simple enough. The second clause deals with their interest in the Bella Vista project as well as Tong Zhu's \$500,000. They both borrowed this from Tong Zhu. That was cash flow. So what Zheng is saying is: "You can take my 30% of Bella Vista and you also take Tong Zhu's loan of 500." Under this proposal my client loses out a little bit because by this stage Bella Vista was worth more than half a million dollars, so he's giving out about

\$270,000 and in return Deng takes over the loan. But Deng disagrees with that. Deng says, look, the Bella Vista project now has an on the books loss of \$90,000. So what he's saying is, he's saying of which you should cover about \$30,000. This is where the Court of Appeal picked it up saying, well, you see Deng is fully cogent that this is a partnership proposition, they share profit and loss. He's saying look, Deng is saying you've got to take roughly your one-third loss of this and Deng proposes this should be evened out by, in the form of invoice, and then we get the green text. Zheng disagrees with that proposition. Zheng says, look, these sections, you can't just look at what we put into these sections, it's been years since we got the sections, the sections have appreciated in value and he further talks about waiving management fees of Orient, which is themselves, their partnership, and he's saying that's also, can also be counted him contributing more. Essentially he's saying you get a pretty good deal out of this.

**GLAZEBROOK J:**

What was agreed at the end of this, or was nothing agreed, and is it only 30,000 at issue, or what's at issue?

**MR ZHANG:**

Let's be clear about two things Ma'am. One thing is what they did agree. There were a few things they did agree on, for example, this one and for example how did they treat other debts.

**GLAZEBROOK J:**

I can't quite understand.

**MR ZHANG:**

There are two different concepts here. One is what are the things they didn't quite agree on, and the other thing is what are the things they did agree on but they didn't do. The things they did agree on –

**GLAZEBROOK J:**

Okay well, that's good, is there anything they didn't do there?

**MR ZHANG:**

Accounting. They agreed to do a final accounting here, and they refused, hence the lawsuit.

**GLAZEBROOK J:**

What was the final accounting supposed to do. Where did they agree to the final accounting?

**MR ZHANG:**

I think it's clause 9.

**GLAZEBROOK J:**

So that's a final accounting in relation to Bella Vista or is that everything?

**MR ZHANG:**

Everything.

**GLAZEBROOK J:**

Well I'm not very interested in that. I just want to know what the Bella Vista stuff is at the moment. So what's the difference between the parties in terms of Bella Vista? I'm interested in anything else whatsoever because we haven't got to it.

**MR ZHANG:**

Okay, so just Bella Vista. Well that's the bit they didn't quite agree. Zheng is saying, you take my 30% that's worth more than \$200,000, and you take my share of the half million dollar debt, you get a better deal out of it, we can just settle like that, and Deng says, no, I think you should take on the losses that we suffered, and Zheng says –

**GLAZEBROOK J:**

So is the difference 30,000 is what I'm actually just asking you, between the parties on this.

**MR ZHANG:**

Possibly Ma'am. Possibly. So what my client has proposed would be, it's an even set-off and Zheng is saying, on top of that you should pay your one-third of the 90,000 loss. So essentially probably 30,000 part.

**GLAZEBROOK J:**

But if the difference is 30,000 between the parties, your client says nothing more on Bella Vista, and everything's been done here apart from that 30,000?

**MR ZHANG:**

Well, the position we took in this lawsuit is that because we didn't reach a final agreement, we can't just say we have agreed on Bella Vista, even –

**GLAZEBROOK J:**

But if it's 50/50 you have, really, haven't you?

**MR ZHANG:**

Yes, except Bella Vista, by the time this lawsuit came to court, was worth far more than half a million. This is 2015 and by 2019 this would've been worth a lot more, hence the need of accounting. Had Mr Deng just –

**GLAZEBROOK J:**

Well you either split in 2015 and do this or you don't. You don't redo accounts later, do you?

**MR ZHANG:**

Well, if –

**GLAZEBROOK J:**

Or do you say you do?

**MR ZHANG:**

If a partner under a fiduciary duty refuses to carry out his duty and he gets equitable relief against him, then I don't see why –

**GLAZEBROOK J:**

That would only be the final accounting, wouldn't it? You don't say you get the whole lot on something that you've agreed to split from 2015, do you?

**MR ZHANG:**

I don't know the answer to that, Ma'am.

**GLAZEBROOK J:**

Well, don't you do the accounts as at 2015 when you agree to split? It might be if you've got a net amount at the end of it there might be interest going from one to another, but you don't say: "Oh, well that means we carried on in partnership with all of the accretions in value from then on, do you"?

**MR ZHANG:**

That probably is right and as I say, as we've seen before.

**GLAZEBROOK J:**

Okay, I'm sorry, I'm just trying to get – perhaps if I explain what I actually want because I'm having real difficulty with this whole case is it would be really helpful to know what the party, what the actual difference between the parties is in terms of what they say should've come as against what actually came.

**MR ZHANG:**

I will summarise that point.

**GLAZEBROOK J:**

So, in fact, this seemed to me to be a useful thing to say on the whole they've agreed on the principles and as at 2015, what would this have meant for both of the parties and I'm not asking you to do it now obviously, but I just have some difficulty, I must say, just working out what assets are where and what was supposed to be split.

**MR ZHANG:**

Yes.

**GLAZEBROOK J:**

On whatever basis, whether there's a partnership, whether there's a joint venture, or frankly, even whether you're just looking at the shareholding in the companies underneath, but I'm not entirely sure what's held where and what the parties actually say about what should have happened. I mean they sensibly came to arrangements in terms of splitting off their interests so they didn't remain entwined, as I understand it.

**MR ZHANG:**

Yes, yes. I explain that at the end of this document. We now move on to clause 3. Clause 3 deals with debts, debts other than the 500. So there are two debts. One is 140,000.

**GLAZEBROOK J:**

These are outside debts are we talking about at the moment or internal debt?

**MR ZHANG:**

Internal. Sorry, what I have said is debts –

**GLAZEBROOK J:**

The 500 is an external debt, isn't it?

**MR ZHANG:**

This is also external debt I should say. You have \$140,000 owed to May Zheng, Luke's sister, and \$300,00 owed to one staff Xu and another \$300,000 owed to another staff Ma and Luke is saying: "We should just pay everybody off using the money that we have." And, Deng, in red text disagrees. He says: "Zheng should take over Xu and Ma's debt because they will be working for Xu and Ma," sorry, because Xu and Ma will be working for OCL and Zheng will take over OCL. You have then in the green text Zheng disagrees with that and then you have the red text Deng disagrees again. So they didn't reach agreement whether the other debts should be split evenly.

**O'REGAN J:**

But none of this matters. The legal structure doesn't matter in relation to that, does it? That's just a matter of repaying debts.

**MR ZHANG:**

Well, it matters in the sense these were borrowed by them as partners.

**O'REGAN J:**

Well, they were borrowed by relations but not by them, weren't they?

**MR ZHANG:**

Sorry, Sir, I don't think I understand the question.

**O'REGAN J:**

So, the two of them together borrowed this money whether they were partners or anything else.

**MR ZHANG:**

That's right.

**O'REGAN J:**

Is there any dispute that the money is owed? It's just about how it gets repaid is the dispute, isn't it?

**MR ZHANG:**

Yes, yes.

**O'REGAN J:**

So it doesn't matter whether it's a partnership or not.

**MR ZHANG:**

No, it doesn't. So I think what your Honour is saying if we look at these debts in isolation, it's entirely possible two people together owe a third party some money.

**O'REGAN J:**

Correct.

**MR ZHANG:**

And they say how shall we pay that. That wouldn't necessarily show partnership or not.

**O'REGAN J:**

All I'm saying is it doesn't matter whether it's a partnership or not.

**MR ZHANG:**

That's also right. If they need to do accounting of Bella Vista, yes, they've got to do it, whether they're in partnership or some other form of joint liability. That is right, there is no dispute about these debts, were owed to these parties. Then we move on to clause 4.

**GLAZEBROOK J:**

What is that page. Can you just give me the number? What do the differences between the parties mean?

**MR ZHANG:**

About \$60,000 I think.

**GLAZEBROOK J:**

All right, thank you. Now 4, can you just help me, what does that mean "the project"? Does that mean the construction project or does that mean the construction project and the land?

**MR ZHANG:**

Shares for the construction project. So how it is, is they have a company called RAL, owns the land.

**GLAZEBROOK J:**

So the land isn't dealt with at all in here?

**MR ZHANG:**

This doesn't deal with RAL's land because RAL, as I was saying, sits outside of this partnership. It's a three-way –

**GLAZEBROOK J:**

No, I'm just asking. So Rosedale means the construction project?

**MR ZHANG:**

Yes.

**GLAZEBROOK J:**

Thank you.

**MR ZHANG:**

I should explain this a bit better. Rosedale the company, Rosedale, RAL, the company engages this other company called NCCL. Then NCCL engages OCL to do the construction work and this, of course –

**GLAZEBROOK J:**

Yes, I realise that. That's just what I was asking.

**MR ZHANG:**

Yes, so they in agreement on that, they have a bit of discussion about how they should deal with P&G issues, which I think deals with the invoicing, and I think what they're saying is they would both be responsible for profit and losses up to end of May, as far as this project goes.

**O'REGAN J:**

And was that implemented?

**MR ZHANG:**

No, this is part of the claim. My guy says, turns out they lost about \$570,000 up to that point. He says, Dong needs to share half that loss. My guy paid all that debt himself. He says, as my partner you've got to pay me half of this.

So there is roughly \$270,000 of claim against Mr Deng. He doesn't want to pay, that's why he fights this lawsuit.

**GLAZEBROOK J:**

A loss on the construction contract?

**O'REGAN J:**

So after the 31<sup>st</sup> of May 2015, but isn't that when the separation happened?

**MR ZHANG:**

So the loss is up to 31<sup>st</sup> of May 2015.

**O'REGAN J:**

So did he take over the sole responsibility from the 31<sup>st</sup> of May?

**MR ZHANG:**

My guy did.

**O'REGAN J:**

So he bears the loss, doesn't he?

**MR ZHANG:**

So past 31<sup>st</sup> of May he bears the loss. He's saying before 31<sup>st</sup> of May we have this loss.

**O'REGAN J:**

I see, okay.

**GLAZEBROOK J:**

Is he suggesting you actually work the – I'm not quite sure what the – so the project shall belong after 31<sup>st</sup> and jointly owned before then. Accounting until the end of June is agreed to.

**MR ZHANG:**

There's a, I should correct myself –

**GLAZEBROOK J:**

So what is the agreement or not agreement on this?

**MR ZHANG:**

So rather the email from 18 June, I should correct that. So what they agreed is any profit or losses up to 30<sup>th</sup> of June will be borne by both of them. Any profit or loss past 30<sup>th</sup> of June will be borne by my client alone. That's what they agreed on.

**O'REGAN J:**

So that's agreed. So that's no longer in dispute. So again that doesn't matter if it's –

**WILLIAM YOUNG J:**

Sorry, this is what I don't quite understand. I mean bits and pieces of this agreed, but not all of it.

**MR ZHANG:**

Yes.

**WILLIAM YOUNG J:**

So what are we, are we saying it's a deal that's complete in relation to the issues that were agreed, or because not everything was agreed it's just written in water?

**MR ZHANG:**

Okay, so there are several reasons why we're talking about this piece of document. See, in the High Court my guy didn't think this document was all that important. He's saying, look, because we didn't overall reach agreement there is no need for me to talk about this document. I'm showing you the High Court trial judge we are in partnership, we had all these accounts running up, and these are all the things that I suffered a loss and he should bear half of it. In the Court of Appeal – sorry. In the High Court I should say Mr Deng says, this is our separation agreement. We have a done deal. I did

my part, end of it, I don't know, what are you talking about, why are we still talking. In the Court of Appeal, the Court of Appeal took the emphasis off this document and they determined this document is conclusive proof there's partnership because both men saw through company structure and dealt with all the assets directly and now in this court, Deng says, I don't know what his position is about this actually.

**GLAZEBROOK J:**

He says everything that's in here has been implemented apart from – when I asked, he said everything has been implemented apart from payment of the shares of the 300,000.

**MR ZHANG:**

No.

**GLAZEBROOK J:**

Which wasn't dealt with in this agreement.

**MR ZHANG:**

Yes, because there is no \$300,000 for the shares. It's not there. They never discussed –

**GLAZEBROOK J:**

I'm just telling you what he said and I'm just asking you what you say.

**MR ZHANG:**

Yes, yes. So we are saying this document is important because it shows this is how they wanted to conclude the partnership, proof for partnership, and insofar as whether they agreed on, there are some things they did agree on and there are other things they didn't quite agree on.

**GLAZEBROOK J:**

Well, whether you agreed or not, can you tell me what your client says is wrong with what he was proposing in the first place and what is the difference

under this agreement between what your client – at the moment I have toted up 60,000 plus 30,000.

**MR ZHANG:**

Yes, right, okay.

**GLAZEBROOK J:**

And there it says they share it up to a point and then afterwards they don't.

**MR ZHANG:**

Yes.

**GLAZEBROOK J:**

So that's agreed as well and you don't say there's anything further or different in that?

**MR ZHANG:**

No.

**GLAZEBROOK J:**

And the next one just seems to be something that doesn't have anything to with the partnership anyway because it's payment post-partnership in terms of the \$60 an hour.

**MR ZHANG:**

Yes. So why my guy says that out of the partnership what he's owed are, so he says out of the OCL concrete construction, we covered that. Basically, he's owed half of roughly 55, sorry, 540 to \$560,000, he's owed half that. He's also owed the \$290,000 which Zheng took.

**GLAZEBROOK J:**

Sorry, the 200, tell me, I'm working through this at the moment and I'm not sure where the 280 comes from.

**MR ZHANG:**

290.

**GLAZEBROOK J:**

Well, 290 I understand you say it's a totally separate loan outside of all of this and the other side says: "No, it was payment in respect of this agreement."

**MR ZHANG:**

So 290 is part of this. They don't have to explain the 290 within this document because that's part of their partnership accounting. That's a positive you may take.

**GLAZEBROOK J:**

So where is your 290,000 then. I'm sorry, I'm probably being very slow.

**MR ZHANG:**

No, Ma'am, that's perfectly understandable this line of question. So you see before this, in April, they came to agreement as of March 2015 this is our position right. That position subsumed the \$120,000 difference for RAL but it hasn't yet taken into account the \$200,000 my guy lent to Mr Deng and the other \$90,000 that Mr Deng had taken. So had they proceeded with accounting, they would have done other accounting at the end of May which is the accounting that my guy has been chasing. That accounting would have taken into account the \$200,000 and the \$90,000 and in fact, my guy did make a draft to this effect and this was sent to Mr Deng and Mr Deng refused to engage.

This email is referred to in our chronology. This is at page 23 at the bottom 28<sup>th</sup> of June email from May to Tony. So she's drafted, she sent an email to Judy and Tony his drafted accounts ending 31<sup>st</sup> May 2015 and that account shows how a far bigger disparity between the two men's contribution and to that the initial, Judy and Tony initially did not engage and later Judy replied back saying: "We are still half owners, you're just an employee, you can't get into our business." That email from Judy was on 12<sup>th</sup> of July 2015.

What's more that's owed to my client is that they agreed to split certain projects, but these projects were nearly done by mid-2015, but what happened is Mr Zheng went to the clients, got paid and took the money away. So Mr Deng, Mr Deng, went to the clients, got paid, took the money away. Never came back shared these payments with my client. That's also explained in my client's brief of evidence. It's part of what he claims in this lawsuit.

**O'REGAN J:**

So broadly, how much do you say?

**MR ZHANG:**

Roughly \$700,000 I think.

**O'REGAN J:**

How much has the litigation cost so far?

**MR ZHANG:**

Good question. Together probably a million dollars. Justice Asher wrote extrajudicially that anything under \$500,000 should be done by way of (inaudible 15:36:36) system. I concur with his Honour's opinion.

After the separation in principle document the parties had a few more exchanges. What Deng says is that: "I never heard back from Zheng so I thought we were just happy to proceed." That's obviously wrong because subsequent emails, as we record in the chronology, shows Mr Deng always came back, sorry, Mr Zheng, Mr Zheng always came back asked for accounting and Mr Deng just refused. Eventually, he just wrapped by the Bella Vista project and that was the end of that. So that's basically the story.

**O'REGAN J:**

I think the 700,000 includes the 290?

**MR ZHANG:**

Yes.

**WILLIAM YOUNG J:**

Are those your submissions?

**MR ZHANG:**

These are all the facts, Sir, and also we explained a whole bunch about the law.

**O'REGAN J:**

I think we know the law.

**WILLIAM YOUNG J:**

In this respect it is a pretty factual case.

**MR ZHANG:**

It is. It is. Except that the defendant and the appellant initially run this case as section 4(2) excludes finding of partnership if you have a company. He succeeded on this point in the High Court overturned on the Court of Appeal. Every single authority we looked at that's got a company as part of the partnership structure, none of the these authorities said that there is anything wrong with this. In fact, curiously, almost nobody even talked about this point. It's as if it's automatic that you definitely can have company and partnership running concurrently.

**WILLIAM YOUNG J:**

Well, I don't think there's any dispute about that.

**MR ZHANG:**

And now they say oh, it creates a presumption and to which we say it doesn't and then they say if it doesn't create a presumption, it creates a burden of proof that you have to overcome. You have to take yourself out of the –

**WILLIAM YOUNG J:**

There aren't many cases where the evidence is in a state of such complete balance that it comes down to the burden of proof. I'm not sure that this is one.

**MR ZHANG:**

I agree, Sir. I use my final five minutes briefly address the cultural aspect of this case. Your Honours, would have read our submission. We don't think the cultural aspect made any difference. We don't think any of Deng's complaint gets him anywhere because he doesn't advance a coherent story. This is the problem with the way he runs this case. He does say if the company, sorry, if the word Gōngsī means company, which company is it and how does this fit in his story, how does this undermine our story, how do we understand the internal accounts differently? It does. His silence also defeats his complaint about he wasn't given an opportunity to be heard about this, on this point. Had he been given this opportunity he would have just said, it doesn't mean anything because the internal accounts, they are byzantine, they're enigmatic, rubbish in, rubbish out, don't take interest in. That's what he would have said, it wouldn't have mattered, and in this case I think the Court of Appeal was very careful, they're not saying because the cultural contacts, we're going to read in the evidence in this way or that way, they're saying because the cultural contact we're going to be careful not to read the evidence, not to –

**WILLIAM YOUNG J:**

Not to use a European New Zealand rule of thumb to measure the evidence.

**MR ZHANG:**

Yes Sir and if I would go bit further than that because I would say if we had have told Kiwi farmers, somewhere down in Invercargill, something similar to this they probably would have written "company" on their little sheet as well. They probably wouldn't have turned their mind to, oh, is this a firm, or is this enterprise, should we call it partnership. Me, as a lawyer, I didn't understand the distinction until probably 30 year studying company law. This isn't

something that lay people would necessarily understand, and understand what implication they may carry. Also the other aspect of what the Court of Appeal thought about cultural context is the whole idea of **guānxi (15:41:08)** that is people do things based on trust and relationship. I say it's not necessarily something unique to the Chinese people. You basically have half the world try to write everything down, and half of the world don't always write everything down, it just so happens your central view would be let's write everything down, whereas a more Eastern Asian view would be let's not write necessarily everything down. But in this case a lot of stuff were written down so I don't think that even played a big part in the Court of Appeal's decision making.

**WILLIAM YOUNG J:**

What's distinctive about this litigation is that the writing is, to use a rugby analogy, a rolling maul. We're not talking about a single piece of writing, we're talking about a developing piece of writing over a number of years and that seems to me, anyway, to reflect a developing business relationship whether you call it a corporate one, a partnership one or a joint venture, isn't that right? And while westerners, shall we say Pākehā New Zealanders, might have crystallised these things in developing contracts, that might not be the way Chinese people do it, is that such a startling proposition?

**MR ZHANG:**

Sir I'm not sure if I would entirely agree that it's not something that Kiwis do because a lot of the cases we look at, *Clark v Libra Developments Limited* [2007] 2 NZLR 709 for example, these are a Kiwi man, right, they did some partnership together, they did other things that weren't partnership and they had to go to the Court, ask the Court to decide were we a partnership or not.

**WILLIAMS J:**

Yes, most fights, commercial and contracts fights in this country are over what the words mean rather than the lack of words.

**MR ZHANG:**

Yes. Finally, I use my last two minutes, your Honour. As your Honours have pointed out this litigation has cost a lot more money than it should have. The Court of Appeal thought it's good idea to send this back down to the High Court for accounting. We think this court is actually capable of ruling of how much somebody should pay somebody.

**GLAZEBROOK J:**

Only if you actually give us what you actually say between the two of you is actually the difference between the two of you, and then we might be able to, and explain why. Frankly at the moment I wouldn't be able to do anything with what's in front of me.

**MR ZHANG:**

My guy does in his brief of evidence explain very precisely what he seeks. Mr Deng, on the other hand, doesn't quite address these things my client explains and in our submissions we do rebut what Mr Deng advances as a front of defences. If your Honours would come down on a number that would save us, everybody, a lot of headache of having to go down to High Court and when we come back yet again in two years.

**WILLIAM YOUNG J:**

Thank you.

**MR ZHANG:**

As the Court pleases.

**MR TURNER:**

Thank you your Honours. Your Honour, Justice Glazebrook, there is evidence as to the comparative who owes what, or credits and debits, as far as that can be attributed and that's in –

**GLAZEBROOK J:**

So it'd be pretty nice to have had that pointed out at the beginning so that we could have worked through it that way rather than with very disparate...

**MR TURNER:**

It's very difficult to discern for very, very different reasons because there are so many individuals in the companies. But Andrew McKay attempts in his conclusions to look at this with a series of tables and so that is there.

**GLAZEBROOK J:**

I saw that.

**MR TURNER:**

And so that is there.

**GLAZEBROOK J:**

I did see that but it would have been nice to know why or what the other side is and why.

**MR TURNER:**

Yes, yes. He clearly does try to attempt all these company attributions and personal and everything else.

**WILLIAMS J:**

As Justice Downs set out in chapter and verse in his decision.

**MR TURNER:**

Yes, yes.

**WILLIAMS J:**

Mr McKay, in the end says, look, I (shrugs)...

**MR TURNER:**

He can't have confidence that the figures are reliable or not, or there's no double entry cover test.

**WILLIAMS J:**

That was the caveat on whatever conclusions he reached.

**MR TURNER:**

Yes and that's what he says. My friend took you to an excerpt we cross-examined Andrew McKay and Andrew McKay says: "Look, I don't call these accounts. I can't have confidence in them as being an equalisation or anything. It's a running log."

**WILLIAMS J:**

That counts against you suggesting there is a precise figure on your side.

**MR TURNER:**

There is some uncertainty and Mr McKay does caveat that as well, but what we say and to take your point further, your Honour, it is a bit of a running maul. I mean we say there's –

**ELLEN FRANCE J:**

Just keep in front of the mic.

**GLAZEBROOK J:**

We can actually hear you but sometimes the transcript won't pick it up, so it is important.

**MR TURNER:**

It is a running maul from 2004. I mean we're told when Mr Deng is told now in 2017 that he's a partner in a partnership, but back when the maul starts, he's playing on the wing as a director shareholder.

**WILLIAMS J:**

It's good for wings to get in the maul occasionally.

**WILLIAM YOUNG J:**

We might block the metaphor. Can you just tell me this, what does your client say about the emails that he appears to have got that have got the internal accounts attached?

**MR TURNER:**

These accounts, the explanation given at trial was very unsatisfactory. It relates apparently to contributions to Bella Vista. Now, when you look at these emails, they say the contributions are held by Jiang, Bin Jiang and his company D&R Homes and Albany Apartments Ltd.

**WILLIAM YOUNG J:**

Aren't they, I understood that emails to which your client received or was otherwise a party had attached to them the internal accounts that are at the respondent's case.

**MR TURNER:**

So, yes, that's correct and I will address it. The first point is that these accounts are incomprehensible to our clients. They don't understand them.

**WILLIAM YOUNG J:**

Did he ever write back and say in 2012, say: "What's all this stuff about?"

**MR TURNER:**

Well the evidence and fairly Mr Deng gave evidence to say: "Look, I was told by Mr Zheng that I had an interest in the companies of \$800,00." That's the extent of it. So that is far lesser than what's being attributed now to the significance of these accounts that you're an equal partner with equal profit share, an equal burden on losses to this whole arrangement. That's not what he's told back in the day. Back in the day says, you've got an interest in these companies with an investment in land, and he goes, sweet, well I'll just continue working on the projects and earn money from time to time, and it's only when his wife is asked to do the mindless data entry into the MYOB in 2014 that she gets an understanding of what these accounts are attempting to

signify, a working log of who's paying what to whom which gives her real cause for concern. They have no faith in these accounts and even in these principles in separation, they're not looking to equalise matters at all. Tony Deng is looking to get something out of the relationship, perhaps a return of all the monies that he's invested and to step away and that's why we say well, it's wrong to elevate that principles in separation up to the starting, the genesis, the conclusive evidence of an equal sharing, equal loss sharing tax partnership. It's simply not. It's just a negotiation document to step out.

On top of that, Mr Zheng doesn't prove or say he has any loss from this. I mean he's saying now through his counsel that: "Oh, I have about a \$500,000 loss for projects that Orient Construction has, which we have to share in up to 31 May." That's totally wrong. Orient Construction brought claims against Mr Deng as well as a second plaintiff. All those claims were dismissed at trial. There's been no appeal by Orient Construction on those claims.

The second point is that Mr Zheng was the director of Orient Construction. He has it completely. He is the directing mind. He has all the shares. All of the benefit of that company is left with him. I mean that's what you do when you run a company.

Thirdly, this company still has this lucrative \$6.8 million contract with Rosedale to build the apartments. It had on spent –

**GLAZEBROOK J:**

Can I just check, are you saying there's no such thing as a concept of a loss up to a particular point when you're actually waiting to be paid after that point for the construction, because I'm having a bit of difficulty seeing how when you've got an ongoing construction you can have a loss at any particular point? But I can understand how you could have a loss if you have a project that's gone down the gurgler before you start on a new project, but if it's the same project and you're just waiting for some money, I would've thought you apportion back the money you get later to cover whatever expenses you had

to put out earlier. But I don't understand, I must say I didn't understand that in the separation agreement.

**MR TURNER;**

It's incomprehensible. We don't understand that either. This company Orient Construction no doubt had some – there was some submissions apparently where concrete was poured wrongly on a particular job.

**GLAZEBROOK J:**

That was minor.

**MR TURNER:**

It was absolutely minor, so we don't understand how this loss has come about or how Mr Deng should somehow be held to account for them. You know, the company trades, still trades, it was still trading in the litigation. I'm not sure if it still is. It has this contract \$6.8 million. The evidence led was that it had spent about \$1 million performing that contract, so it was still a valuable proposition. I mean to say now that somehow that Mr Deng has to account for some sort of company expenditure to 31 May, just wasn't proven. It didn't make sense and Justice Downs heard all of the competing evidence and said: "Well, I don't consider that there is a liability there." And there's been no appeal from any of these claims from Orient Construction against Mr Deng that monies are owing to that company. I can't say more than that.

Really, you know, again, Mr McKay looked at all the documents with the benefit of his Mandarin speaking Chinese reading staff. You know, he wasn't using Google software for interpretation. He tries to reconcile everything as much as he can. They're irreconcilable.

Ms Payne doesn't really address all of the initial documents. She goes on to address these further documents from June 2010. There's no evidence that Deng's involved with the figures that Ms Payne analyses and what I'm saying is when we get to what is alleged, the attribution of these accounts is it's just unilateral. It's simply Mr Zheng, Mr Zheng's hope, or subsequent claim of

partnership. It's not what Mr Deng knows or understands. So, in our submission, there can't be what the parties did and said were attributed the mutual intention to partnership from the relationship and we say this litigation is really more about sour grapes.

**GLAZEBROOK J:**

Can I just ask, my impression is that it's more an issue of quantum rather than type, isn't it? Haven't we got down a sort of partnership, no partnership whereas actually there are disputes over particular amounts of money that might or might not be owing which again is why I'm having difficulty really understanding this because in order to make sense – it might be there's something overriding, but my feeling is that it was that alone or was it actually part of the accounting in terms of the 290 and that doesn't seem to be anything to do with whether there's a partnership.

**MR TURNER:**

No. I think that's a fair point and when it comes to it, when Mr McKay who attempts to analyse Tina, Ms Payne's evidence and the plaintiff's evidence of all these competing interests, the difference between them is negligible save for Mr Deng never got value for the shares in Orient Construction and when that's taken into account, Mr Zheng owes Mr Deng around about \$300,000 or \$400,000. He disputes that. Mr Zheng disputes that any value was to be given for Orient Construction. In the end, Mr Deng couldn't understand the accounts with Judy. They couldn't – there were then different iterations of these accounts to get through. Justice Downs says: "There was no way these accounts would ever be reconciled," and I have to say to go back to the High Court to have an account taking on all historic accounts of all these matters will be an extremely difficult if not an impossible task to get any proper evidential reconciliation. So Mr Deng said: "Well, I will just walk away from this relationship. Zheng, you have the company, all the projects, we'll shut down Eversolid Construction and I will just go on, on my merry way and work further with Mr Jiang," and that's what happened and, of course. Mr Zheng had the right to transfer whatever interest he has. There's no trust documents that have been produced. Weren't no finding of any trust or beneficial

interest, but if he thought he had this interest, he gifted it to Mr Zheng. Mr Zheng takes care of the loan from Tong Zhu. It was the loan that was used by the group of companies and really, there's nothing between them.

Of course, it's incongruous of course that Mr Zheng in one breath says: "We can disregard company structures and contracts, but actually, when it comes to Rosedale Apartments, we must now look at contributions proportionate to shareholding. That's how we work that company, but we didn't work that with everything else and so that's all partnership."

I mean one of the other things that I'm asking your Honours to be careful on is if this isn't a clear company contract split, is it a clear partnership? I mean, this is the problem that we had in the Court of Appeal. The Court of Appeal didn't analyse what the parties, in my submission, by reference to the evidence what they agreed on, when they agreed on, at date and by what event and they didn't, in my submission, look at this co-operation agreement in terms of the evidence of that and how it is attributed now to partnership. And when one looks at that with Mr Deng walking away from the relationship with some sort of indeterminant interest, there is really nothing left to squabble over, in my submission and having an account will just go down to a further road of litigation is all I can see.

I mean, again, there's all this evidence. My friend took you to emails about whether Zheng owes Deng simply \$120,000 for contributions to Rosedale and whether he was entitled to subtract an interest component. Judy Lin didn't agree. There's no doubt she that a sum of 220,000 was owed. If that was the case, why does in WeChat on 29 May Mr Lu Zheng acquiesce to this transfer of money? I mean, it would only make sense because he's providing this money to equalise or contributions and the disparity of contributions to this company.

We have of course Ray Yu who starts these accounts, the company accounts, contributions when all the other old group are involved in these companies in 2008 and the main point that I wish to make about them is that they're wrongly

elevated or attributed to this mutual intent for partnership which is simply not the case. When the content is known and when the attribution of relevance is understood, Tony and Judy say: "Well, we do not agree. We don't agree with how you're treating they money from these, the profits from these companies and you're paying to your own benefit, we wish to leave," and that's essentially what happens.

In terms of there is some emails that my friend took you to with the Bella Vista project. It shows that there is – I think one of the emails said, look, why doesn't this balance, or what's the problem, and it's simply, if one looks at the evidence of Ms Payne, it's simply saying, well, this project has got \$1.8-odd million involved with the AAL investment. That's the investment of the company. It doesn't say anywhere, Deng, this is your personal investment, and it has the reference then to, D&R has the sum of \$741,000-odd. That's, D&R is the company of Bin Jiang. Nothing to do with those two. Nowhere in these different accounts did you see any involvement from Mr Deng, or any communication saying, yes, thanks very much, please pay my half share of the profit to anywhere or allocate it this way. There's nothing like that. I mean really, as far as those accounts go, it's simply a running log of transactions and that's the best that can be ascribed to them.

So we get to the point really where you were asked to look at further evidence, as we did at trial, from Ms Payne who led supplementary evidence-in-chief about some sort of monetary transfers and Mr McKay disagreed with them, or with the significance of them and we had to do a lot of extra work in detail with him behind the scenes. All of this money appeared to be circular money transfer from Orient Construction through Eversolid Construction which might have had an overseas bank paying money and then it flowed back through another company and back to Orient Construction. It just couldn't be shown. There was no probative value from any of those transactions and so there couldn't be any reliance that any money was owed by any and no company has brought any claim against Mr Deng.

When it comes, now, to Mr Deng saying well – sorry Mr Zheng saying: “Actually, we still need to resolve matters by accounting for company losses.” This isn’t a personal loss for him, it’s a company loss, and all these matters were dealt with at trial and there’s been no appeals on those matters. There’s no clear reference to a loan in his communications of \$290,000. It was dealt with at trial. The evidence was between alleged documents of monies from 140 to 200. Of course, the example for the 200 is because of the demand made by Judy Lin for equalisation to Rosedale Apartments. That principles in separation document doesn’t refer to the 61,000 that Mr Zheng admits is owing to Mr Deng. My learned friend actually just made that concession as well on the stand. I mean, that’s money that Mr Deng has walked away from.

So, unless I can help you, your Honours, any further, those are the submissions. We say that there is no proven partnership under the western concept of the Partnership Act 1908 in this matter. Certainly an unorthodox way of doing business, but that was not, in my submission, proven at trial and the Court of Appeal were wrong to elevate the principles in separation to attribute a partnership.

**WILLIAM YOUNG J:**

Thank you. We’ll take time to consider our judgment and deliver it in writing in due course.

**COURT ADJOURNS: 4.03 PM**