

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2017-404-002730
[2019] NZHC 3236**

BETWEEN

LU ZHENG
First Plaintiff

ORIENT CONSTRUCTION LIMITED
Second Plaintiff

AND

DONGLIN DENG
First Defendant

BIN JIANG
Second Defendant

ORIENT HOMES LIMITED
Third Defendant

.../intituling cont over

Hearing: 18 – 29 November and 3 December 2019

Counsel: D Zhang and E Tie for Plaintiffs
JD Turner and L Huang for First and Third Defendants

Judgment: 10 December 2019

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Tuesday, 10 December 2019 at 2.30 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors/Counsel:
Amicus Law, Auckland.
McVeagh Fleming Lawyers, Auckland.

EVERSOLID CONSTRUCTION
LIMITED
Fourth Defendant

HONGLAN LIU
Fifth Defendant

D & R HOMES LIMITED
Sixth Defendant

YAN JIN
Seventh Defendant

TONG ZHU
Eighth Defendant

YAOKUN CHEN
Ninth Defendant

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What the case is and is not about

[1] Lu Zheng is a businessman. He is the sole director and shareholder of Orient Construction Ltd.¹ Mr Zheng and Orient Construction sue Donglin Deng and two other defendants.² No fewer than eight causes of action are pursued, in an inadequate statement of claim. The primary actions allege the existence of partnerships; alternatively, joint ventures attracting fiduciary duties. A final account is sought as the foremost remedy.

[2] Given these features, the case might have been approached by focussing on the alleged relationships, and features said to make these fiduciary. Instead, Mr Zheng adduced much evidence about what Mr Deng owed him, and why. Mr Deng responded in kind. This dynamic established an irreversible life of its own, compounded by an array of factual disputes, including a set of impenetrable, internal business accounts.³ In turn, much time was spent on what these meant, how the figures were calculated, and who the accounts reveal as debtor: Mr Zheng or Mr Deng?

¹ Orient Construction.

² Orient Homes Ltd and Eversolid Construction Ltd. Mr Zheng settled his claims against the second, fifth and sixth defendants on day five of the trial. He abandoned his claims against the seventh, eighth and ninth defendants on the last day of trial.

³ The internal accounts.

[3] None of the causes of action poses this question. None requires it be answered. Indeed, the foremost remedy sought by Mr Zheng presupposes this question should not be answered. In any event, it could not be—at least reliably. An experienced forensic accountant said the internal accounts were “bizarre”, “enigmatic”, and a “moving feast of numbers”, analysis of which would involve “throwing good money after bad”.

[4] Which brings me to the point of this introduction and unifying feature of this judgment: despite the extensive invitation, I decide only the critical issues, factual and legal.

Background

[5] As observed, Mr Zheng is a businessman; more specifically, a property developer. Mr Deng is a project manager. The pair met in 1998. Mr Deng was initially Mr Zheng’s employee (with several others). In 2004, Mr Zheng, Mr Deng and another incorporated Orient Homes Ltd.⁴ Orient Homes developed property and built houses. Business grew. Mr Zheng, Mr Deng and others later incorporated more companies under the banner, the Orient Group:

(a) In 2006, Orient Construction Group Ltd.⁵

(b) Later the same year, Albany Apartments Ltd.⁶

(c) In 2010, Rosedale Apartments Ltd.⁷

(d) In 2013, Orient Construction.

[6] Shareholdings and directorships for each changed over time. For example, Mr Zheng, Mr Deng and Mr Zheng’s brother-in-law were directors and shareholders of Orient Homes at its incorporation. The company restructured its shareholding in 2007, 2008 (twice) and 2009. Mr Zheng and Mr Deng both held shares between 2004

⁴ Orient Homes.

⁵ Orient Construction Group.

⁶ Albany Apartments.

⁷ Rosedale Apartments.

and 2008. The company was removed from the register in 2017. Mr Deng was then the sole director and shareholder. Schedule A is a table of all companies, their directors and shareholders.

[7] The Orient Group's business was something of a family affair. As observed, Mr Zheng's brother-in-law was a director and shareholder of Orient Homes. Mr Zheng's two sisters helped with the accounts. So too Mr Deng's wife, Judy Lin. The companies shared tools, equipment and an office. They sometimes worked together. For example, Rosedale Apartments built apartments at 40 Rosedale Road. Orient Construction was the main subcontractor for this project.

[8] In 2007, the Orient Group decided to buy and develop 11 lots of land in Bella Vista Drive, Gulf Harbour.⁸ Albany Apartments bought four lots from an unrelated vendor, Bella Vista Developments Ltd. Orient Construction Group bought the remaining seven from the same vendor. The Orient Group suffered during the 2008 global financial crisis. Most of its other shareholders and directors—called the “old group”—left between 2008 and 2010. So, Mr Zheng and Mr Deng became the group's primary shareholders and directors.

[9] The Orient Group needed capital to complete the Bella Vista project. Bin Jiang was introduced. I use the passive voice because Mr Zheng and Mr Deng disagree who introduced him. Mr Jiang agreed to contribute capital. An agreement was recorded 27 April 2008. It was expressed as between Mr Jiang, Orient Homes and Albany Apartments. Mr Zheng and Mr Jiang both signed the agreement. Mr Deng did not. He says he did not know about it, at least at the time. Mr Zheng says he signed the agreement on behalf of Mr Deng. The agreement said Mr Jiang was to “own 40 percent” of the project; the two companies, “60 percent”. Relatedly, D & R Homes Ltd was incorporated 13 May 2008.⁹ Mr Jiang was its sole shareholder and director.

[10] In 2011, Mr Deng introduced Tong Zhu to Mr Zheng. Mr Deng and Mr Zhu knew each other from university. Mr Zhu injected \$500,000 to the Orient Group, in

⁸ The Bella Vista project.

⁹ D & R Homes.

part to a newly formed company, Eversolid Construction Ltd.¹⁰ In return, Mr Zheng and Mr Deng supported Mr Zhu's immigration application.

[11] The Bella Vista project was later completed. And, ultimately, the lots sold or transferred. Then, on 31 May 2015, Mr Zheng and Mr Deng parted ways.

[12] Accounts differ as to what went wrong. The project at 40 Rosedale Road did not go well. Orient Construction poured the concrete without adequate reinforcing. The mistake was not found for some time. It cost more than \$100,000 to fix. Mr Zheng says the mistake was Mr Deng's as he did not put the steel in. Mr Deng says it was Mr Zheng's because Mr Zheng did not order the steel. There were related cashflow problems. Ms Lin thought Mr Zheng was exposing the group to undue risk. And, there were disagreements about other matters too. Though ventilated, these need not be recorded. It is enough to observe Mr Deng decided, with his wife's encouragement, he and Mr Zheng should separate their Orient Group interests. Mr Deng told Mr Zheng so in May 2015. It is common ground separation occurred 31 May 2015.

[13] Negotiations followed. In June 2015, Mr Zheng distributed a document called, "Principles in Separation". Mr Jiang later did likewise in relation to a share transfer agreement for the Bella Vista project. Neither was signed. Mr Deng contends both were largely implemented. Mr Zheng disagrees.

[14] Mr Zheng says Mr Deng still owes him a lot of money. Mr Deng says the opposite.

A precis (only) of the competing cases

[15] Despite the Orient Group's clear corporate structure, Mr Zheng alleges his business dealings with Mr Deng reflect a partnership between them, or if not that, a joint venture attracting fiduciary duties. The statement of claim alleges this partnership or joint venture began as early as 2004. Mr Zheng says the business of Rosedale Apartments lay outside the partnership or joint venture.

¹⁰ Eversolid Construction.

[16] Mr Zheng contends he and Mr Deng (with Mr Jiang) formed a second partnership from 2008 in relation to the Bella Vista project. Mr Zheng says he and Mr Deng maintained partnership accounts, which they discussed every second month. Mr Zheng says Mr Deng signed these.

[17] Mr Zheng says Mr Deng has failed to honour his obligations as his partner or joint venturer, including by failing to account for profits, and excluding him from partnership assets—three of the Bella Vista lots. Mr Zheng says Mr Deng withdrew approximately \$57,000 from the partnership and borrowed or took another \$290,000. Mr Zheng says Mr Deng has not repaid either amount.

[18] Mr Zheng says he and Mr Deng were equals, and this was reflected in their business relationship.

[19] Mr Zheng argues the remaining defendants must account for the Bella Vista lots or their value, as they have or had title to property that was not theirs.

The defendants' cases

[20] Mr Deng denies ever being in partnership with Mr Zheng (or Mr Jiang). Mr Deng says he and Mr Zheng regulated their dealings through a series of companies, and their relationship was purely commercial, not fiduciary. So, there is nothing to account for, land or otherwise.

[21] Mr Deng acknowledges the Orient Group kept internal accounts. However, Mr Deng says he still does not understand these. Mr Deng says his alleged signature is a forgery. Mr Deng says he signed invoices only in Chinese; for everything else, he signed in English. The accounts are signed in Chinese.

[22] Mr Deng denies taking or borrowing money from Mr Zheng. He says Mr Zheng owed him money when they separated their business interests, and the money that came to him reflects this—with Mr Zheng's agreement. So too other things, such as two cars.

[23] Mr Deng says Mr Zheng was the businessman and dominant personality; he did what Mr Zheng said.

[24] Mr Deng and Orient Homes offer affirmative defences by way of set off. They contend they never received full payment or consideration for the transfer of Orient Construction's shareholder current account in 2015; Mr Zheng has not repaid \$480,000 which he owes Mr Deng, and Mr Zheng owes Mr Deng \$20,840 in relation to shareholding in Rosedale Apartments.

[25] Eversolid Construction was not represented. It took no part in the trial.

Partnerships? Or joint ventures attracting fiduciary obligations?

[26] The most important question is whether partnerships existed between Mr Zheng and Mr Deng; then Mr Zheng, Mr Deng and Mr Jiang in relation to the Bella Vista project. An equally important—and closely related question—is whether an analogous fiduciary relationship existed between Mr Zheng and Mr Deng; then Mr Zheng, Mr Deng and Mr Jiang, again in relation to the Bella Vista project.

Principle

[27] Section 4(1) of the Partnership Act 1908 defines a partnership very broadly:

Partnership is the relation which subsists between persons carrying on business in common with a view to profit.

[28] Section 4(2) of the same Act provides “the relation between members of any company ... under ... [the Companies Act 1993] ... is not a partnership within the meaning of this Act”. There is little case law on the subsection. Fitzgerald J has said it means two shareholders of the same company do not comprise a partnership in relation to the affairs of that company.¹¹

[29] Section 5 of the Act identifies non-exhaustive rules for the identification of a partnership. For example, s 5(c) provides receipt of a share in the profits of a business is prima facie evidence of a partnership, but not determinative.

¹¹ *Woodcock v Woodcock* [2018] NZHC 470 at [77].

[30] Case law emphasises the signal importance of inquiry into the nature of the relationship, and mixed nature of the question. It is one of fact and law. Hence Cooper J has warned of the dangers of looking at other cases for an answer:¹²

Very little assistance can be obtained from the numerous cases reported in which the question of partnership or no partnership has been decided. In all such cases the particular facts—what were in effect the respective contracts—were intimately connected with the questions of law.

[31] The Court of Appeal has made the same point a different way: the question must be “determined by the Court on the basis of what *the parties* said and did”.¹³ That a witness asserts a partnership is not determinative.¹⁴ Indeed, both parties could believe they were in a partnership when in law, they were not.¹⁵

[32] Stephen Graw captures these points well:¹⁶

[W]hether a particular relationship is a partnership is a mixed question of fact and law that can only be determined by looking at the parties’ objectively determined intention, as it appears from all the surrounding facts and circumstances, and *then* deciding whether that relationship is one which the law regards as a “partnership”.

[33] As will be apparent, a written agreement is not required; a partnership can be implied from circumstance. Or, as Fitzgerald J has explained:¹⁷

There are no determinative features giving rise to or excluding a partnership relationship. Equally, there are no formal requirements for the creation of a partnership, and arrangements can vary from a formal, documented partnership agreement, to informal and undocumented arrangements. In fact, many partnership arrangements are oral.

[34] A partnership attracts heightened obligations (beyond contractual ones). Our Supreme Court has said the relationship between partners “is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith”.¹⁸

¹² *Aldridge v Paterson* (1914) 33 NZLR 997 at 1006.

¹³ *Clark v Libra Developments Ltd* [2007] 2 NZLR 709 at [51] (emphasis added).

¹⁴ At [51].

¹⁵ *Inland Revenue Commissioners v Williamson* (1928) 14 TC 335 (IH (1 Div)).

¹⁶ Stephen Graw *An Outline of the Law of Partnership* (4th ed, Thomson Reuters, Pyrmont, NSW, 2011) at [1.30].

¹⁷ *Woodcock v Woodcock*, above n 11, at [80].

¹⁸ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [74].

[35] What then of a joint venture attracting fiduciary obligations? Geoff McLay says no other broad category of contract “has generated more argument, both judicial and academic, about the existence of a good faith obligation than that broadly known as joint ventures”.¹⁹ Writing extra-judicially, Blanchard J describes these concepts as “rather slippery”.²⁰

[36] However, it is now clear a joint venture—by which I mean no more than the term implies—can attract fiduciary obligations when X is entitled to place trust and confidence in Y, and X is entitled to rely on Y not to act contrary to X’s interests. This, I think, captures the critical reasoning of Blanchard and Tipping JJ in *Chirnside v Fay*.²¹

[37] All this suggests a partnership and a joint venture attracting fiduciary obligations may not be much different, at least on some facts. Indeed, in *Chirnside v Fay*, Mr Fay objected Mr Chirnside had “sold our project ... we are partners in this project and you should have first got my authority to sell out”. The trial Judge (William Young J) and Court of Appeal placed weight on this piece of evidence.²²

[38] Finally, some aspects of a (single) joint venture can attract fiduciary obligations, even when other aspects do not. The Supreme Court has said:²³

It is well-settled that, even in a commercial relationship of a generally non-fiduciary kind, there may be aspects which engage fiduciary obligations of loyalty. That is because in the nature of that particular aspect of the relationship one party is entitled to rely upon the other, not just for adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has either agreed to perform for the other or for both or has, perhaps less formally, even by conduct, assumed.

[39] From here, I use the term joint venture to mean a joint venture attracting fiduciary obligations.

¹⁹ Geoff McLay, “Equity and Joint Ventures” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [40.1].

²⁰ Peter Blanchard “Fiduciary Obligations Between Parties to Unincorporated Joint Ventures” in Maree Chetwin & Philip Joseph (eds) *Joint Ventures Law* (Centre for Commercial and Corporate Law, Christchurch, 2008) at 1.

²¹ *Chirnside v Fay*, above n 18, at [80].

²² *Chirnside v Fay* [2004] 3 NZLR 637 at [27].

²³ *Maruha Corporation v Amaltal Corporation Ltd* [2007] NZSC 40, [2007] 3 NZLR 192 at [21].

An overview of the evidence in relation to the alleged partnerships and joint ventures

[40] Mr Zheng testified. He called five other witnesses. I begin with his two sisters, Jenny and May Zheng. I use Christian names.

[41] Jenny worked for the Orient Group from 2008 as an accounting assistant. Jenny said she “understood” her brother and Mr Deng “entered into a partnership exclusively between themselves” on 1 April 2010. Jenny said the internal accounts reflected this. Jenny left in 2013.

[42] Jenny was a difficult witness. She appeared anxious to convey her belief in the existence of a partnership between her brother and Mr Deng, and offered this opinion to questions that had little, if anything, to do with this subject. In cross-examination, Jenny said the accounts were intended to reflect the relationships between the various companies in the Orient Group. This answer sat awkwardly with Jenny’s insistence of a partnership, and of accounts prepared to reflect that.

[43] In re-examination, Jenny said she was “very confused” when she gave this evidence, and had, when she gave it, asked the interpreter to clarify. In fact, Jenny did not ask for clarification during this sequence (as she did for others). And, her answer was given without hesitation or apparent confusion. Jenny presented as intelligent and not unsophisticated. She has a degree in commerce.

[44] May helped with the Orient Group’s accounts from 2007. May also said she “understood” her brother and Mr Deng began a partnership from 1 April 2010. Unlike Jenny, May elaborated. May said she believed this because Mr Zheng or Mr Deng would authorise payment of bills; a record was kept for the expenses for each project; PAYE deductions were made for all employees; and Mr Zheng and Mr Deng had different but complementary roles. Mr Zheng focussed on the financial side of the business; Mr Deng, management of projects.

[45] May had revolving employers for reasons that went unexplored. May said her wages were paid by Albany Apartments; then Rosedale Apartments; then Rosedale Apartments and Eversolid Construction; then Eversolid Construction alone; and finally, Orient Construction.

[46] Bin Ma and Wei Hua are construction workers. Both said they treated Mr Zheng and Mr Deng as their bosses. Mr Ma said he called them “Director Zheng” and “Director Deng”. Which brings me to Mr Zheng.

[47] Mr Zheng said little to support the existence of a partnership beginning 2004. Indeed, despite the pleading, Mr Zheng did not really assert the existence of a partnership from this period. Mr Zheng said this in evidence-in-chief:

9. I first began to have business dealings with Mr Deng in 2004. At the time, myself, Mr Deng, and more than 10 other businesspeople were involved with a group of companies conducting mostly real property development work. I was the de facto organiser of this group. This group was established because individually we all lacked the funds and brand name to take on projects and compete in the market. This group represented itself as “Orient Construction Group” as a brand name. I will refer to this group as the “old group”. The old group used these companies to conduct its business:
 - a. Orient Homes Limited (“OHL”). This company was incorporated on 11 June 2004 and removed from the companies register on 15 December 2017. Throughout this time OHL had various shareholders and directors, including Mr Deng and myself. However, at the date of being removed from the register Mr Deng was the sole shareholder and sole director.
 - b. Orient Construction Group Limited (“OCGL”). This company was incorporated on 29 June 2006 and removed from the companies register on 18 August 2014. Throughout this time OCGL had various shareholders, including Mr Deng and myself. However, at the date of being removed from the register Mr Deng and Shouju Zheng were the only shareholders and Mr Deng was the sole director.
 - c. Albany Apartment Limited (“AAL”). This company was incorporated on 22 September 2006 and removed from the companies register on 8 July 2016. Throughout this time AAL had various shareholders, including Mr Deng and myself. However, at the date of being removed from the register I was the sole shareholder and sole director.

As can be seen from the Companies Register, we all had roles of directors and/or shareholders in these companies. It was a somewhat complex system, and not every person was necessarily involved in every project. Each member was free to engage in development projects with any of the other members as he saw fit. We kept accurate and up-to-date business records, and we never had any issues of tracking capital, expenses, loans, and profit sharing.

10. Between 2004 and 2009, using these companies the old group completed a number of development projects around Auckland. This old group eventually broke up, the breaking up occasion took about two years

starting from 2008 and finishing in 2010, although I do still collaborate with some of them on other development projects.

[48] This account implies casual corporate collaboration, not more. Again, I did not understand Mr Zheng to say otherwise despite pleading a partnership traceable to 2004. I assume Mr Zheng really alleges a partnership with Mr Deng beginning 2010.²⁴ Mr Zheng's later evidence in chief confirms this.²⁵

29. This means by March 2010 Mr Deng and I were basically partnering exclusively. We agreed that from now we would be 50/50 partners. For the purpose of this proceeding I call it the Orient Partnership. Between ourselves we in fact never used a proper name for this partnership, but to the world we continued to use the brand name of Orient Construction Group.
30. The old group maintained partnership accounts, its tenth partnership account dated 31 March 2010 reflects the above assets position. This document was made by Mr Deng and myself. We both signed this document. This document can also be taken as the starting partnership accounts for the partnership between Mr Deng and me.

[49] Mr Zheng's core evidence about this alleged partnership was confined. He said:²⁶

31. During the course of the Orient Partnership, besides OHL and AAL, we also formed a few other companies that served as vehicles to advance the Orient Partnership's purposes:
 - a. OCL, which was incorporated on 23 July 2013;
 - b. ECL. Mr Zhu was the sole shareholder and director for ECL, but Mr Zhu was never formally part of the partnership. Instead, Mr Deng and I was the true owner of this company's various development projects. Through ECL, the Orient Partnership completed the following projects:
 - i. 68 Fonteyn Avenue, Avondale;
 - ii. 146 Neilson Street, Onehunga;
 - iii. 112 Paratai Road, Orakei;
 - iv. 54 Ormiston Road, East Tamaki;
 - v. 103 Kerrs Road, Wiri; and
 - vi. 50 Omahu Road, Epsom.

²⁴ And, a separate, three-party partnership involving Mr Jiang from 2008.

²⁵ Brief of evidence.

²⁶ Brief of evidence.

Mr Deng and I oversaw each of those projects and were intimately involved in their completion.

32. The same people would work together on all of the Orient Partnership's development projects. For each development project, our roles were as such:
 - a. Mr Deng and I were the project managers;
 - b. Ms Yi Zhang ("Lina") was the project designer; and
 - c. Ms Ying Zheng (my second sister, also known as Jenny) initially, and Ms Xiao Feng Lin and May Zheng after 2013, did the accounting for the projects.
33. We would transfer funds between OHL, OCL, AAL, and ECL as needed for the various development projects. These funds were not transferred pursuant to services that the companies rendered to each other. Therefore, no invoices were ever issued, nor GST paid for the transfer of the funds between these companies. Mr Deng, Ms Lin and I had authorisation to operate OHL, AAL and ECL's bank accounts at all material times.
34. In addition to this, the various companies under the Orient Partnership would also share other resources such as tools, vehicles and storage.

[50] So too Mr Zheng's evidence about the alleged partnership with Mr Deng and Mr Jiang:²⁷

19. The three of us entered into a written agreement around 27 April 2008, setting out the arrangement for the development of Bella Vista sections, thus becoming a new partnership. I will refer to this partnership as the Bella Vista Partnership and the development project as the Bella Vista project. The actual written agreement did not have my name or Mr Deng's name printed, instead it used the moniker Orient Construction Group. The document only has my signature and Mr Jiang's signature on it, as I signed on behalf of Mr Deng and myself.
20. It needs to be noted that for the 60% share that belonged to Mr Deng and myself, we called ourselves the "Orient Construction Group" in Chinese. And we listed OHL and AAL as the companies under the Orient Construction Group. As I explained earlier, at this point of time, the 11 sections were held by OCGL and AAL. OHL did not yet hold any sections. Our intention was to close down OCGL and have OHL take over because we did not want to have to deal with OCGL's complicated history. We were both shareholders and directors at various points of these companies' incorporation, and both companies had their registered address at 18 Gills Avenue, Albany.

²⁷ Brief of evidence.

[51] Mr Zheng said nothing about the characteristics of his relationships with Mr Deng and Mr Jiang that might support the existence of partnerships or joint ventures, most obviously, mutual loyalty, reliance and trust. Instead, Mr Zheng relied heavily on the internal accounts prepared by his sisters—about whom I have already spoken—and Judy Lin, Mr Deng’s wife. Mr Zheng said these demonstrated the existence of partnerships with Mr Deng. Mr Zheng says he and Mr Deng discussed the internal accounts every second month.

[52] Tina Payne is a forensic accountant and former employee of the Serious Fraud Office. Ms Payne was asked to provide “an expert opinion to demonstrate, if possible, that a partnership existed between Mr Zheng and Mr Deng”. Ms Payne adopted the statutory definition of a partnership (see [27]) and examined documents in the common bundle, including correspondence. Ms Payne concluded the totality of evidence demonstrated “an equal partnership between Mr Zheng and Mr Deng, with the pooling of their company assets”.

[53] There are obvious problems with the admissibility of this evidence; problems I voiced at trial. Expert evidence is admissible only if the expert is suitably qualified in relation to the subject, and the evidence is substantially helpful in ascertaining any fact in a case or understanding other evidence in the case.²⁸ Moreover, while an expert may comment on the ultimate issue in a case, this is so only when the expert is expert on that issue, and her or his evidence substantially helpful. For these reasons, Courts have long warned of the dangers of expert transgression into areas reserved exclusively for the finder of fact. The Privy Council’s decision in *Pora v R* is a reasonably recent reminder of just this.²⁹

[54] Ms Payne is a forensic accountant with considerable experience. However, Ms Payne has no expertise in *identifying* a partnership. Doubt attaches to whether a body of experts exists in relation to this specific subject. As discussed earlier, the existence of a partnership is a legal conclusion, and one reserved for me. Ms Payne’s testimony is really a submission—on oath. This because on this subject, Ms Payne

²⁸ Evidence Act 2006, s 25.

²⁹ *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

here did no more than anyone could do by analysing the record and drawing conclusions from it.

[55] To be clear, Ms Payne could have given admissible evidence on this subject, albeit in a different way. For example, Ms Payne could have said the internal accounts contain information beyond that necessary for the maintenance of interrelated companies, but of relevance to the existence of a partnership. An opinion like this would be within Ms Payne's expertise, and substantially helpful in terms of the Evidence Act 2006.³⁰ And, Ms Payne could obviously examine the accounts and explain what they meant, for, that is (well) within her expertise. This would be substantially helpful too.

[56] Some of Ms Payne's testimony can be reconceived these ways. Ms Payne did examine the accounts. She said these, from 14 June 2010, showed Mr Zheng and Mr Deng made equal contributions to the Orient Group, and revealed evidence of intent to maintain symmetry of profit. In relation to the latter, Ms Payne said the accounts contained narrations "to the effect that at the end of each financial year, the profits will be either 'split' or reinvested".

[57] Ms Payne said some entries are consistent with the maintenance of a shareholder's current account; an account between the shareholder and company. Ms Payne said others could reflect the percentage of shares held by each in the companies comprising the Orient Group, while others may reflect Mr Zheng's and Mr Deng's more general investments to the group. Ms Payne said the accounts appear to comprise "an amalgamation of the companies held by Luke Zheng and Tony Deng".

[58] In cross-examination, Ms Payne acknowledged she did not consider the Orient Group's external accounts in determining whether a partnership existed. So, Ms Payne had no regard to published financial information about the companies, how the rest of the world would view them given this information, or whether the internal and external accounts betrayed inconsistency about the nature of the enterprise.

³⁰ Ms Payne did not say this.

[59] Ms Payne acknowledged it was possible Mr Zheng and Mr Deng were doing no more than what they appeared to be doing: transacting business as shareholders and directors of a series of companies. Ms Payne accepted the internal accounts could be conceived as showing the relationships between the companies, which is how Jenny described them before retracting the observation.

[60] As will be apparent, the internal accounts occupied much trial time. These are not in a standard accounting format. They capture information beyond a typical balance sheet or other financial statement. The internal accounts do not exhibit double entries. Therein lies part of the problem.

[61] I give an example, a document dated 31 March 2010. It is headed, “Orient Construction Group 10th Reconciliation (Zheng Deng ...)”. The document identifies “theoretically available capital”, under which it records “Zheng and Deng’s investment in the group’s shares”; tax credits; “Zheng’s personal investment and loss; and then “fixed interest loans ... to the company by shareholders and employees”. The next section captures “Actually owned funds”. These include “Funds occupied by the group properties Zheng and Deng got at the separation” (from the old group); temporary loans; assets and inventory; “arrears outside the group”, bank balances across company accounts and “other cash accounts”. The ultimate figure is “Actual owned capital” of almost \$2.6 million. The translated document comprises Schedule B.

[62] Mr Deng gave extensive evidence. I record material aspects only. Mr Deng denied the existence of partnerships. He said Mr Zheng was responsible for all financial arrangements; Mr Deng managed projects only. Mr Deng said he took directions from Mr Zheng in relation to the Orient Group (even though Mr Deng was a director of some of the companies). Mr Deng said he had little understanding of the internal accounts; he relied on his wife to explain these. As observed, Mr Deng denied signing the accounts. Mr Deng called his wife and an expert, Andrew McKay.

[63] Ms Lin helped with the internal accounts after Jenny left (when Ms Lin began was a source of contention, but this need not be resolved). Ms Lin was troubled by Mr Zheng’s management of the companies. She persuaded her husband to separate

his business interests from Mr Zheng “due to the financial risks” she thought Mr Zheng was taking with the Orient Group. Ms Lin played a role in post-separation negotiations.

[64] Mr McKay is an experienced chartered and forensic accountant. Mr McKay gave evidence about “the nature of the arrangements” between Mr Zheng, Mr Deng and the Orient Group companies. Mr McKay said while “it will be a question of legal interpretation as to the type of arrangement that actually existed ... it is my opinion that there are some characteristics of a partnership ... and some characteristics of an unincorporated or informal joint venture”. Mr McKay said he considered the “more likely” business arrangement was an informal joint venture because:

- 119.1 The lack of a GST number and registration with the IRD as a Partnership does not help/support the argument that a business partnership existed;
- 119.2 The lack of a separate bank account in the partnership name does not help/support the argument that a business partnership existed;
- 119.3 Some of the companies within the Orient Group were set up specifically for a particular property development and some intercompany agreements exist;
- 119.4 The nature of some of the agreements in evidence, Bella Vista development and 40 Rosedale Road development (i.e. a project) suggests the business arrangements were a series of JV’s; and
- 119.5 Mr Deng did not appear to have an active role in the main decision making of the business (Orient Group), rather he acted on instruction from Mr Zheng. ...

[65] Mr McKay was more mindful of the distinction between his role and mine than Ms Payne. However, Mr McKay’s evidence on this topic is not substantially helpful either. As with Ms Payne, Mr McKay identified features apparent on the face of the record and expressed an opinion on the ultimate issue absent requisite qualification. However, Mr McKay’s evidence in relation to the internal accounts was—like Ms Payne’s—well within his expertise, and substantially helpful.

[66] I foreshadowed this evidence at the beginning of the judgment. It is best captured by my questions of Mr McKay:

- Q. Again, I just want to pick-up some sentiments that you've expressed, and I assure you there are no trick questions on my part. You don't see how you could run a business like this on these accounts?
- A. I don't, not the volumes and values that they're, that are flowing, the contributions that you see; 50s, hundred thousands, 30 thousands and then the size of the contracts that need to be run....
- Q. And you said that you "didn't like them"? The accounts and you thought that they were "unreliable"?
- A. I – yes, because you don't have the full double-entry system. You can't see – there's a reason that double-entry bookkeeping exists.
- Q. Yes and when we talk about the accounts we're talking about the internal reconciliations?
- A. Yes, Your Honour.
- Q. Yes. You said that these contained a "running tally of something" and you emphasised the word, "something"?
- A. Yes.
- Q. It's not clear to what that something actually is?
- A. Only it's trying to run something as Mr Zheng suggested a contribution and that sort of thing but it's – you try and then say well that should – because you don't – we won't, we don't have their indi – like their individual, you need their individual personal balance sheets as well and personal bank statements and personal tax returns to tie this whole thing together.
- Q. Yes?
- A. And it's not that – we don't have it. Neither I nor Ms Payne had all of that.
- Q. Yes. You also said that the numbers are "a moving feast"?
- A. They are a moving feast, particularly that table 10 when we spent more time looking at it after Ms Payne's evidence last week when we suddenly went hold on, these are all –
- Q. Circular?
- A. Very circular.
- Q. Yes. You said that this is a bizarre way of accounting?
- A. It is a bizarre way, Your Honour.
- Q. Yes. The internal accounts contain no obvious linkage to figures in the external published financial statements?

- A. I couldn't see it. I mean I only – and to qualify that I only looked at two years, two year end ones mostly and I can't follow this so I'm not putting...
- Q. Yes?
- A. The time we'd spent on this file is a lot already and then trying to follow that through and that was through one of my team who can read Mandarin.
- Q. Yes?
- A. I cannot.
- Q. Yes. So forgive me for being blunt. You thought you'd be throwing good money after bad by trying to make sense of these internal accounts?
- A. I did.
- Q. Tell me whether you disagree with these expressions in relation to the internal accounts, idiosyncratic at best?
- A. At best.
- Q. Enigmatic?
- A. Definitely enigmatic.
- Q. Unreliable?
- A. I would say they're probably unreliable. ...
- Q. Forgive me for being so direct. Can I have any confidence in these numbers?
- A. I don't have confidence in the numbers and I am sorry, I don't want to say that but I don't have confidence that all the evidence is here and I'll refer it to myself or Ms Payne to make the correct assessments, especially when we both sort of went oh, there's a whole pile of circular transactions here so that means let alone the tax consequences.
- Q. One final question. Imagine you're asked to make an important decision based on these numbers. Would you feel comfortable doing that?
- A. I don't think you're able. I can't, I don't think you're able, will be able to Your Honour.

[67] Ironically, the internal accounts acknowledge shortcomings. Many have a section called, "Financial error". This contains a figure by which the accounts cannot be reconciled. By 31 May 2015, financial error had swollen beyond \$40,000.

Analysis

[68] The existence of partnerships relies on the evidence of Mr Zheng and the internal accounts. Jenny had no first-hand knowledge of arrangements and, as observed, was a difficult witness. The features May identified are equally consistent with the operation of companies. Much of Ms Payne's evidence is inadmissible. The balance of her evidence does not appreciably advance Mr Zheng's case.

[69] As to Mr Zheng's evidence, I do not accept it for five reasons. First, it strikes me as revisionist history—nothing quite fits. Contemporaneous records do not refer to partnerships, use that term or any like it.³¹ The agreement with Mr Jiang in relation to the Bella Vista project expressly refers to two companies, Orient Homes and Albany Apartments. Mr Zheng drafted this document. It does not include his name, or Mr Deng's. Mr Zheng's and Mr Deng's post-separation correspondence is strangely silent on the topic of partnerships. Even Mr Zheng's letter of demand does not fit his evidence. The letter (correctly) refers to an agreement between Orient Homes, Albany Apartments and Mr Jiang, whereas Mr Zheng said the agreement was a personal one between three men.

[70] Mr Zheng said the Orient Group referred to the partnerships. Most would think it referred to the Orient Group of companies. In 2016, May sent an email to Mr Deng in which she complained about Mr Deng's use of *company* property. Mr Zheng (and Mr Deng) typically signed correspondence as "Director".

[71] Second, Mr Zheng signed many of the external accounts as true. Whatever the internal accounts reveal, the two sets cannot be reconciled. For example, some of the internal accounts identify off-book assets, by which I mean company assets under personal names. The internal accounts appear to reveal different holdings to those in the external accounts. Current account contributions in the external accounts do not appear to correspond with those in the internal accounts.

³¹ The single possible exception is an email Mr Zheng sent to Mr Deng on 9 July 2015, so, after the alleged partnerships ended. The English translation contains this sentence: "Partnering in doing business is nothing but sharing profits together and taking risks together". I was not told how the original, Chinese version reads.

[72] Mr Zheng volunteered Orient Construction's external accounts for the year ended 31 March 2016 were "false" in relation to shareholders' current accounts. I asked Mr Zheng when he knew this. He said he did not know this until "we started proceedings". However, in cross-examination, Mr Zheng acknowledged reproducing the same information for the following year's external accounts. Mr Zheng signed these 7 July 2017. The claim was filed only four months later.

[73] Central to Mr Zheng's case is the proposition the world was told one thing by the external accounts, when the correct position was another. This is unattractive.

[74] Third, Mr Zheng freely testified of probable illegality as if this were unremarkable:

- (a) Mr Zheng said the group's accountant forewarned of several "problematic tax implications". To address this, "we moved the money around to make it look like it was paid out from Mr Deng's account".
- (b) When incorporated, Orient Construction did not have accounts with building suppliers, but Eversolid Construction did. Mr Zheng said Eversolid Construction bought materials used by Orient Construction. This would be unremarkable if Eversolid Construction invoiced Orient Construction for the materials. It did not.
- (c) Mr Zheng said the companies transferred and used funds between themselves as needed. These were not treated as loans. Or, recorded in the external accounts.
- (d) Mr Zheng said to reduce the liabilities of Orient Homes and Eversolid Construction to zero, each company created "a number of invoices purporting to bill Orient Construction for services in relation to the Lincoln Garden project. Neither Orient Homes nor Eversolid Construction provided any actual services to Orient Construction". Mr Zheng described these invoices as "fictitious".

[75] Mr Zheng implicated Mr Deng in these (and other) things. I do not overlook this. However, the important point—given the burden of proof—is Mr Zheng’s acknowledgement of likely impropriety in connection with a claim that has at its heart dissonance between external and internal accounting. It bears repeating Mr Zheng is an experienced businessman, and the person responsible for the financial affairs of the Orient Group.

[76] Fourth, Mr Zheng said Rosedale Apartments was not within either alleged partnership. He did not explain why. The statement of claim provides no explanation either. Nothing about Rosedale Apartments’ business or operation stands out as different. Distinguishing this company from others in the alleged partnerships appears capricious.

[77] Fifth, Mr Zheng failed to discover the principles in separation document even though he created it, then relied heavily on it during post-separation negotiations. Mr Zheng said nothing about the document in his brief of evidence. Mr Zheng did not acknowledge the document’s existence until Mr Deng raised it in his evidence.

[78] This leaves the internal accounts. Some contain entries for Rosedale Apartments. This is significant because Rosedale Apartments was not within the alleged partnerships, in turn wounding the proposition the internal accounts disclose them.

[79] However, even if Ms Payne is correct the accounts do reveal intent to split profits and maintain equal investments, it does not necessarily follow partnerships existed.³² This introduces a series of concerns I raised at the end of trial, for, Mr Zheng and his lawyer, Mr Zhang, appeared to have assumed otherwise. Neither seemed to have given obvious thought to the countervailing corporate structure, absent fiduciary elements or statutory landscape. Both seemed to have been blinded by the internal accounts. And, mistaken possible evidence of partnership as conclusive.

[80] I begin with the obvious. Mr Zheng conducted his business through a series of companies. He relied—as he was entitled—on the limitation of liability and corporate

³² Partnership Act 1908, s 5(c).

veil. If the companies had become insolvent, it is difficult to imagine Mr Zheng would have accepted creditors' contentions of personal liability. Mr Zheng now wants to have it every which way. As observed, Mr Zheng contends the world was told one thing by the external accounts, when the true position was another. Public policy tells against this argument. Company accounts must be published for good reason. People are entitled to rely on them. Similarly, people are entitled to know whether they are dealing with a company or a partnership. The distinctions between the two are not subtle. Mr Zheng told the world he was in business through a group of companies. Absent cogent evidence of partnership or an analogous fiduciary relationship, he should be held to that.³³

[81] No such evidence exists. As foreshadowed at the beginning of this judgment, there is a paucity of evidence about features typically associated with fiduciary relationships: mutual loyalty, reliance and trust. Mr Zheng said nothing about these. Unsurprisingly, Mr Deng said nothing either. I do not overlook the cooperation between Mr Zheng and Mr Deng across the group, or within a company forming part of the group. Nor do I overlook the cooperation between the companies. Each, however, is explicable by the men's roles as directors and shareholders, and the companies' common projects.

[82] Nothing tangible emerges to imply the existence of relationships beyond those required by the corporate structure, still less relationships attracting heightened, fiduciary obligations. Indeed, Mr Zheng's and Mr Deng's dealings appear arms-length. Again, even if one assumes an agreement existed between the men to split profits and invest equally—aspects the internal accounts arguably reveal³⁴—the preponderance of evidence discloses a purely contractual arrangement between an experienced businessman and project manager.

[83] Moreover, as directors, Mr Zheng and Mr Deng owed duties to their companies. Putting each other first as partners sits awkwardly with the men's corporate responsibilities.

³³ *Maruha Corporation v Amaltal Corporation Ltd*, above n 23, at 201–202.

³⁴ Post-separation correspondence provides some support for this too; Mr Zheng and Mr Deng appear to assume they may bargain irrespective of their corporate holdings or company ownership of assets.

[84] I mentioned statutory landscape. Mr Zheng and Mr Deng cannot have been partners while each was a shareholder in the same company because s 4(2) of the Partnership Act precludes this; see [28]. No partnership could encompass Orient Construction between 23 July 2013 and 2 April 2016; Orient Construction Group for a nine-day period in October 2008; Albany Apartments for the same period; and Rosedale Apartments between 14 January 2014 and 8 September 2015 (albeit, as observed, Mr Zheng said Rosedale Apartments was not within any partnership). In each period, Mr Zheng and Mr Deng were members of the same company.

[85] This is no mere technicality because Orient Construction conducted much of the group's business, and it must be removed from the calculus for the 22-month period immediately preceding the separation. Moreover, by the end of December 2013, Orient Homes and Albany Apartments were inactive, and Orient Construction Group had been deregistered. This combination leaves a sizable hole in the alleged five-year partnership between Mr Zheng and Mr Deng.

[86] For completeness, I accept the key aspects of Mr Deng's evidence at [62]. Unlike Mr Zheng, Mr Deng appeared unsophisticated, even a little immature despite his tertiary education. Mr Deng impressed as sincere when he said Mr Zheng took charge of the Orient Group. This is consistent with Mr Zheng's own evidence about his relationship with the old group as "the de facto organiser" (see [47]), and how the Orient Group functioned after the old group's departure. It is also consistent with an email Mr Deng sent Mr Zheng on 7 July 2015, in which he said Mr Zheng controlled the group.³⁵ I find Mr Zheng was in charge. This conclusion also tells against the existence of partnerships.

[87] I do not overlook Mr Deng's cross-examination in which he said he understood the Bella Vista project "was between three men", or this later exchange:

Q. Earlier, you accept that the Bella Vista project was a project between three men, you, Luke and Jiang?

A. Yes.

Q. That is a partnership isn't it?

³⁵ Mr Deng's evidence he did not understand the internal accounts is supported by the same email.

A. I don't understand what this partnership refers to, what sort of partnership this is.

Q. A partnership of three men undertaking a business venture together developing sections in Bella Vista Drive?

A. If that is the definition, then yes I agree, I believe it is.

[88] As observed earlier, what a witness believes is not determinative. And, Mr Deng did not sign the Bella Vista agreement. It is expressed as between Orient Homes, Albany Apartments and Mr Jiang. As observed, the agreement does not mention Mr Zheng or Mr Deng. The statement of claim contains the full text of the agreement under the heading "Particulars", while alleging the agreement comprised a partnership between Mr Zheng, Mr Deng and Mr Jiang.

[89] These reasons, aside from the Partnership Act point, also exclude the prospect of joint ventures. No additional analysis is required. This conclusion also makes it unnecessary to determine whether Mr Deng breached the alleged partnerships or joint ventures, and what, if anything, follows. The third, fourth, sixth and seventh causes of action fail.

Other causes of action in relation to the Bella Vista project

[90] The fifth cause of action alleges the defendants hold Bella Vista lots on constructive trust for Mr Zheng. The eighth cause of action alleges Mr Deng breached contract in relation to the Bella Vista project. This is pleaded as an alternative to the fifth cause of action. Each is pleaded as an alternative to the partnership and joint venture causes of action. Both arise from this evidence from Mr Zheng.³⁶

23. After the formation of the Bella Vista Partnership, and in accordance with the Bella Vista Partnership agreement, we transferred Bella Vista sections from OCGL and AAL to various three related persons. These persons were able to borrow from the bank using the sections themselves as security. This process began from 2008 and was completed in 2011. This was the first wave of transfers to related persons.

a. Lots 18 and 20 to Ms Ruiming Ni, who is Mr Deng's mother, for \$220,000 each. On 10 November 2008, I took out \$150,000 cash from AAL's bank account, deposited it into Mr Deng's personal bank account. Mr Deng then transferred \$146,000 to Ms Ni's account on 10 November 2008. Ms Ni then on 17 November 2008 transferred

³⁶ Brief of evidence.

\$134,267.34 to the lawyers to settle the purchase. I think \$264,000 was borrowed from the bank.

...

- b. Lots 14,21,23, 25, 26, 2, 28j, 29, 30 to D&R. As far as I can remember Orient Partnership paid for the deposit for lot 14. Mr Jiang paid the deposit for the other seven lots as his injection of capital into the Bella Vista Partnership.

...

- 24. Mr Deng and I jointly made all the important business decisions in relation to the Bella Vista Project. From 2009 to 2013, we designed and constructed houses for lot 27, lot 28 and lot 29. These three lots have all since been sold. Unfortunately, the housing market was very poor at the time, so we did not make much profit of the sale of those houses. We even lost money on the sale of lot 27.
- 25. Nonetheless, we decided to press on with developing the remaining eight sections of land. From 2013 to 2015, we started working on the house design for the remaining eight sections.
- 26. In the course of development, we transferred the remaining sections to further related persons. This was the second wave of transfers to related persons:
 - a. Lot 14, also known as 27 Bella Vista Drive, from D&R Homes to Ms Liu. The flow of funds is evidenced in D&R project financial accounting records dated 31 July 2014:
 - i. The list price was \$330,000, with a loan of \$224,000.
 - ii. On 10 July 2014, Mr Jiang transferred \$30,000 to D&R Homes, this probably was meant to be the down payment;
 - iii. On 11 July 2014, Mr Jiang transferred \$77,757.22 to Liu Lawyers for settlement of lot 14.
 - iv. 14 July 2014 was settlement date.
 - v. On 18 July 2014, D&R Homes transferred Mr Jiang \$30,000
 - vi. On 21 July 2014, D&R Homes transferred Mr Jiang \$47,757.22.
 - vii. On 28 July 2014, D&R Homes transferred Mr Jiang \$30,000.
 - b. Lots 18, 20 from Ruiming Ni to D&R Homes. The listed price for both lots was \$370,000.

...

I cannot remember how deposit was funded. Settlement date was 8 October 2013. The combined loan under Ms Ni's name was \$264,000, the combined sale price was \$740,000. It means after paying off Ni's loan, there was \$476,000 left over. On 21 October 2013 Ms Ni transferred to Mr Deng \$498,613. This money was then used up by the Orient Partnership:

- i. On 22 October 2013, \$110,000 was paid out to a creditor of Orient Partnership, Mr Yu Fang Han.
- ii. On 12 November 2013, \$55,000 was transferred to RAL (I will explain RAL's role below).
- iii. On 19 November 2013, \$60,000 was transferred to OCL.
- iv. On 27 November 2013, \$20,000 was transferred to RAL.
- v. On 4 December 2013, \$50,000 was transferred to OCL.
- vi. On 11 December 2013, \$100,000 was transferred to OCL.
- vii. On 16 December 2013, \$58,500 was transferred to RAL.

...

- c. Lots 21 D&R Homes to Mr Yaokun Chen. List price was \$330,000 with \$224,000 borrowed from the bank.
 - i. On 3 July 2014, D&R Homes transferred OHL \$50,000.
 - ii. On 7 July 2014, D&R Homes transferred OHL \$30,000.
 - iii. As far as I remember, we then paid money to Yaokun Chen to settle the property.
 - iv. settlement date was 11 July 2014.
- d. Lots 23 D&R Homes to Mr Donglin Deng. The flow of funds is evidenced in Orient Partnership's partnership accounting record dated 31 July 2014 and D&R project financial accounting records dated 31 July 2014:
 - i. On 22 July 2014, Mr Jiang transferred \$100,000 to Mr Deng.
 - ii. On 24 July 2014, the transfer was settled, Mr Deng would have paid D&R Homes that \$100,000/
 - iii. On 28 July 2014, D&R Homes paid Mr Jiang \$100,000.
- e. Lot 25, 26 and 30 remained with D&R Homes.

...

27. I stress that none of the transactions in the first and second wave of transfers to related persons were arm's length transactions. Rather, all of

the recipients were related persons. All the deposits required in these transactions were paid for by the Bella Vista Partnership. The land was transferred to these related persons so that they could take out loans in their names, and the loan funds could then be applied to the development of the Bella Vista land.

[91] These somewhat Byzantine dealings are summarised in Schedule C.³⁷ They include transfers to Mr Jiang's wife, Mr Deng, Mr Deng's mother; and transfers from Mr Deng's mother to D & R Homes.

[92] As Mr Zheng's evidence makes clear, both causes of action are mere variants—or extensions—of the Bella Vista partnership and joint venture causes of action. Both presuppose Mr Zheng had an interest in Bella Vista land arising from an agreement with Mr Deng and Mr Jiang. My earlier conclusions preclude this finding.

[93] Mr Zheng contends post-separation correspondence reveals evidence of his personal interest in the land. For example, Mr Zheng suggested this to Mr Deng in his principles in separation document:

Zheng shall give the 30% shares of the eight pieces of land of Bella Vista to Deng according to the actual amount of investment. Tong Zhu's loan of 500,000 and the interests occurred in future shall be the responsibility of Deng personally. ... However, the eight pieces of land left still has appreciation and should be left uncounted for the moment. Only our three people's investment plus the bank loan should be counted, which, divided by eight pieces of land, is converted into around 330,000 per piece of land. This figure is equivalent to the result of counting the losses of the previous 3 properties. Furthermore, the management fees of the 3 properties of Orient are also waived, equivalent in to giving to Deng and Jiang the part that is due to Zheng.

[94] This document reveals evidence of Mr Zheng's *belief* in a personal interest in the land. So too, I accept, other post-separation correspondence. However, none of this constitutes evidence Mr Zheng had such an interest. The key points remain:

- (a) Mr Zheng did not buy any of the lots. Companies did. Albany Apartments bought four. Orient Construction Group bought seven.

³⁷ The schedule was prepared by the defendants.

- (b) Mr Zheng adduced no evidence he funded or partially funded any of the purchases independently of the group's companies and independently of the alleged Bella Vista partnership, the existence of which I rejected.
- (c) Mr Zheng adduced no tracing evidence in relation to the purchases.
- (d) Mr Zheng was a director of both Albany Apartments and Orient Construction Group when these companies transferred the land.

[95] Two other significant problems exist for these causes of action. The statement of claim does not identify how the alleged constructive trust arose, or what contract was breached. In each respect, the statement of claim is seriously deficient. A defendant should not be left to guess what a plaintiff's case is. Nor should a Court.

[96] The statement of claim alleges each transfer of land to an individual "constitutes termination of the Bella Vista Project Partnership". The first occurred 14 July 2008, when D & R Homes transferred one of the lots to Mr Jiang's wife. So, Mr Zheng's statement of claim alleges a partnership from 27 April 2008 until only 14 July 2008, and one repeatedly terminated thereafter with each transfer of land.

[97] On behalf of Mr Deng, Mr Turner described these aspects of the statement of claim as "nonsense". I would not use this term but do not disagree.

[98] These causes of action fail.

A loan? Something else?

[99] The first cause of action is framed this way:

The first plaintiff repeats paragraphs 1 to 35 and says that the first defendant's failure to repay the money owed to him in the amount of \$290,000 is a breach of contract, or in the alternative that the first defendant owes him a debt of \$290,000, or in the alternative that the first defendant has unjustly enriched himself at the first plaintiff's expense in the amount of \$290,000.

WHEREFORE the first plaintiff seeks:

- i. Judgment for \$290,000.00;

...

[100] This cause of action alleges Mr Zheng loaned Mr Deng \$290,000, which Mr Deng has failed to repay, or Mr Deng has wrongly taken \$290,000 from Mr Zheng.

[101] The pleading does not correspond with the earlier, factual recital in the statement of claim. This alleges:

- (a) Mr Zheng agreed to lend Mr Deng \$140,000.
- (b) Mr Deng (through Ms Lin) took this sum.
- (c) Mr Deng then “advanced to himself further no less than \$150,000”; meaning up to another \$150,000.

[102] Neither corresponds with Mr Zheng’s evidence. He said:

47. ... around late March to early April 2015, Mr Deng told me that Ms Lin had been complaining about the financial difficulties that Orient Partnership was facing had also impacting their family life. He said they needed some extra money for their domestic use and asked if he could borrow money from me. I agreed to his request.

...

49. The Orient Partnership had no cash at the time, but because I only just sold my house, I had cash. So, on 26 May 2015, I deposited \$200,000 into OCL’s ASB account from my ANZ Zheng Wang Family Trust. This was one of the bank accounts under the partnership.

50. We had agreed that Mr Deng could draw the \$200,000 from the ASB account. The \$200,000 lending was to be set off against the \$60,000 that I owed him at the time. The net position was to be that he would owe me \$140,000.

51. I further deposited \$120,000 into other bank accounts of the Partnership, as I intended to pay further expenses of the Partnership since many projects were still ongoing. The transfers were a little complicated and I explain them below:

- a. 17 April 2015, I deposited \$40,000 to ECL’s account from my BNZ family trust account.
- b. 4 May 2015, I took \$60,000 from ECL’s account and transferred it into my joint ASB account.
- c. 5 May 2015, I took \$40,000 from ECL’s account and transferred it into my joint ASB account.

- d. 6 May 2015, I deposited \$100,000 to OCL's account from my joint ASB account.
- e. 19 May 2015, my ANZ Zheng Wang Family Trust deposited \$50,000 to OCL's account.
- f. 28 May 2015, my ANZ Zheng Wang Family Trust deposited \$30,000 to OCL's account.

In other words, over this period of time I deposited \$220,000 into the Orient Partnership accounts and received \$100,000, resulting in a net contribution of \$120,000.

- 52. However, instead of only drawing \$200,000 as was previously agreed, Ms Lin transferred a net total of \$290,000 from the ASB account to Mr Deng's own bank account. I believe this was on Mr Deng's instructions. This was \$90,000 more than Mr Deng was supposed to take, but he never told me about it.
- 53. Mr Deng did not take the \$290,000 in one single transaction. Instead, the money was taken in a series of transactions between 8 April 2015 and 29 May 2015:
 - a. Mr Deng transferred \$390,000 into OCL's bank account, and took out \$10,000;
 - b. Mr Deng took out \$530,000 from OHL's bank account; and
 - c. Mr Deng transferred \$90,000 into ECL's bank account and took out \$230,000.

In total, Mr Deng withdrew \$680,000 from the Orient Partnership's bank accounts, while contributing \$390,000, with a net effect of a withdrawal of \$290,000.

[103] On Mr Zheng's account, he agreed to lend Mr Deng \$200,000. So, the alleged loan ranges between \$140,000 and \$290,000, with Mr Zheng's testimony advancing a figure something in the middle. Mr Zheng's letter of demand deftly avoids the issue. It says Mr Zheng loaned Mr Deng "some money" in April 2015.³⁸

[104] Surrounding transactions are difficult to follow. Mr Zheng and Mr Deng each contributed large amounts to Orient Group company bank accounts. Each also withdrew large amounts from these accounts. But, Mr Zheng did not directly transfer any money to Mr Deng. I return to this later.

³⁸ However, the letter does say Mr Deng wrongly took \$290,000.

[105] It is also difficult to know who made the transfers. Mr Zheng said Ms Lin did, using Mr Deng's login details and password. Ms Lin denied this. She said May made at least some, but Mr Zheng authorised everything. Mr Zheng denied this. It is unlikely Ms Lin transferred funds totalling \$200,000, because she sent WeChat messages to Mr Zheng confirming their receipt. Ultimately, who made the transfers matters not; the questions are whether Mr Zheng loaned Mr Deng money, and Mr Deng took additional funds belonging to Mr Zheng.

[106] Mr McKay examined the transfers. He said Mr Deng "transferred a net amount of \$290,000 from the Orient Group to [his own] personal ASB account between 8 April and 29 May 2015". Mr McKay said Mr Deng later transferred \$100,000 to the Orient Group between 22 and 27 June 2015 (through two transactions of \$50,000).

[107] Ms Payne examined the transfers too. She said Mr Deng's apparent June transfers involved a series of circular transactions. Ms Payne said the correct position, overall, was that Mr Deng withdrew \$290,000 from the group in April and May 2015. Mr McKay agreed with Ms Payne's analysis.

[108] This brings me back to Mr Zheng's evidence. Mr Zheng said he owed Mr Deng \$60,000 in relation to the break-up of the Orient Group and he agreed to Mr Deng taking \$200,000. But, Mr Zheng said Mr Deng (through Ms Lin) withdrew \$290,000; meaning, Mr Zheng repaid Mr Deng \$60,000; Mr Deng borrowed \$140,000; and Mr Deng unilaterally took another \$90,000.

[109] Mr Deng said he borrowed nothing; he and Mr Zheng were separating their business interests. Mr Deng said Mr Zheng agreed to him taking \$290,000 as Mr Zheng owed him a lot more than this (Mr Deng says Mr Zheng owed him at least \$500,000).

[110] As I said at the outset, determining who owes what to whom cannot be reliably determined because the external and internal accounts differ, and the latter are opaque. However, Mr Zheng's testimony has little support in contemporaneous evidence; Mr Deng's testimony has more.³⁹

³⁹ The correspondence described from here omits unimportant messages.

[111] On 7 April 2015, May sent an email to Mr Deng and Ms Lin saying Mr Zheng owed Mr Deng \$120,313.60. On 29 April, Ms Lin replied. She said Mr Zheng had received \$748,751.68 from the Orient Group; Mr Deng had received \$626,458.35 from the group; and Mr Zheng owed Mr Deng about \$122,000. Mr Zheng replied the same day. He agreed he owed Mr Deng \$122,000.

[112] On 19 May, apparent consensus ended. Ms Lin sent Mr Zheng an email saying he owed Mr Deng \$220,840. This figure reflected overpayments relative to shareholding in Rosedale Apartments, and was additional to the \$122,000 figure. In other words, Ms Lin now contended Mr Zheng owed Mr Deng more than \$300,000.

[113] On 29 May, Ms Lin and Mr Zheng exchanged WeChat messages. Ms Lin told Mr Zheng \$200,000 had been received: \$160,000 from Orient Homes; and \$40,000 from Orient Construction.

[114] On 1 June, Mr Deng transferred his 50 percent shareholding in Orient Construction to Mr Zheng. Mr Deng says this was worth approximately \$300,000.

[115] On 8 June, Mr Zheng sent Mr Deng the principles in separation document. The men corresponded for a week about terms. Each amended the document accordingly, using different coloured text. The final iteration is quite detailed. It and related communications are silent on the topic of a loan from Mr Zheng to Mr Deng, and silent on the removal of an additional sum by Mr Deng.

[116] On 22 June, Mr Deng sent Mr Zheng another email about the principles in separation document. Mr Zheng replied the same day. His message addressed Mr Deng's but again, said nothing about a loan or removal of an additional sum.

[117] On 7 July, Mr Deng sent an email to Mr Zheng. Mr Deng said he did not understand the internal accounts. He accused Mr Zheng of "fraudulent accounting"; of "taking advantage of the group and the company"; and of "exploiting" him. Mr Deng said Mr Zheng "controlled the finance" and still owed him a lot of money.

[118] Mr Zheng responded 9 July (at 12.14 am). He said he “gave” Mr Deng \$200,000 in June because Ms Lin had been unwell. Mr Zheng then said Mr Deng took the money “from my own hands”. The email makes no reference to the sum being repayable. Nor does it imply this. The email also says nothing about the taking of an additional sum.

[119] On 12 July May again emailed everyone. She said: “Director Deng owed the company about \$925,000, and Director Zheng owed the company \$412,000”. May invited Ms Lin to assess the position. Ms Lin replied that day, saying May was only “a staff member”, and, “None of the accounts [are] recognised by us”. Mr Deng did not respond. He said he had enough of “lies”.

[120] On 7 October 2015, Mr Zheng left voice messages for Mr Deng saying he would not sign a proposal from Mr Jiang in relation to their differences. There was then a long silence.

[121] On 22 September 2016—hence 11 and a half months later—Mr Zheng sent Mr Deng an email.⁴⁰ This email contains the first reference to a loan to Mr Deng, and the first reference to Mr Deng taking additional money. So, the allegation came out of the blue.⁴¹

[122] I recapitulate. The figure for the alleged loan has changed repeatedly. Mr Zheng did not refer to the existence of a loan or complain about the additional taking of funds in contemporaneous correspondence. The men were actively negotiating terms of their disengagement, and Mr Deng accused Mr Zheng of impropriety in July 2015. If Mr Deng had wrongly taken money, one might have thought Mr Zheng would respond then.

[123] He did not. Indeed, Mr Zheng did not ventilate the allegation of a loan until September 2016. By then, Mr Zheng had obtained Mr Deng’s shareholding in Orient Construction. Whether this was worth \$300,000 is beyond this judgment, but it was presumably worth something. Moreover, it is not clear why Mr Deng would

⁴⁰ Mr Zheng signed as (sole) director of Orient Construction.

⁴¹ In this email, Mr Zheng said he had twice earlier raised this topic with Mr Deng. No record exists of either occasion.

want to borrow a lot of money from someone he no longer wished to do business with. It seems unlikely. Ms Lin told Mr Zheng he owed her husband large amounts of money. This appears to be the real reason Mr Deng was provided funds. Ms Lin's 29 May WeChat message she had received these (through Orient Homes and Orient Construction) is consistent with this analysis too.

[124] I summarise. I do not accept Mr Zheng's evidence he loaned money to Mr Deng, or his related evidence Mr Deng took an additional sum (through Ms Lin or otherwise). I find Mr Zheng authorised the transfers in recognition of Mr Deng's interests as expressed by Ms Lin in her 19 May email. Two final points cement my view.

[125] First, surrounding transactions show no direct transfer of funds from Mr Zheng to Mr Deng. Had this been a loan from Mr Zheng to Mr Deng, one would expect Mr Zheng to have put funds into Mr Deng's personal bank account. This was the obvious way to achieve that objective. It was also the easiest. Mr Zheng did not do so. Instead, he and Mr Deng engaged in a series of bank transfers involving Orient Group companies. This is consistent with the men disentangling their business interests and making related payments.

[126] Second, this cause of action is brought by Mr Zheng, not Orient Construction. As observed, Mr Zheng did not make any transfer direct to Mr Deng. Those that did occur involved companies in the group, of which Orient Construction was one. However, Orient Construction has no complaint about what occurred. Again, the cause of action is Mr Zheng's, not Orient Construction's.

[127] This leaves the alternative pleading of unjust enrichment. It is not clear this comprises an independent cause of action. Courts have typically viewed unjust enrichment as a unifying principle, not more.⁴² I need not decide if unjust enrichment can exist independently because my factual determinations preclude such a finding even if it could.

⁴² *Ellice v Stallard* [2019] NZHC 1739 at [62]; *Fuati v Peng* [2019] NZHC 1859 at [34]–[38]; and *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 at [95]–[100].

[128] This cause of action fails.

A debt? Unjust enrichment?

[129] The second cause of action concerns \$57,483.29. Orient Construction alleges Mr Deng owes this as “a debt”, or Mr Deng has unjustly enriched himself at Orient Construction’s expense. Related factual recital in the statement of claim is terse:

26. On 20 June and 20 July 2015, the first defendant, using his own name and the Xiaofeng Lin, received payments from the second plaintiff, the total amount comes to \$9,581.36.
27. From 12 June 2015 to 11 January 2016, the second plaintiff paid the loan repayments for two cars that belonged to second plaintiff and was under the control of the first defendant. The total amount paid by the second plaintiff for the car with registration HSS450 was \$20,474.03. The total amount paid by the second plaintiff for the car with registration HUB850 was \$10,255.28.
28. From 04 July 2015 to 03 January 2016, the second plaintiff paid for various expenses incurred by the first defendant but were invoices to the second plaintiff, including mobile phone, fuel, and building materials. The total amount paid by the second plaintiff for these expenses comes to \$17,172.62.

[130] In relation to this cause of action, Mr Zheng said:

70. In June 2015, despite that he had already announced that the Orient Partnership had come to an end, Mr Deng continued to take funds from OCL’s bank accounts directly:
 - a. On 20 June and 20 July 2015, Mr Deng and Ms Lin took \$9,581.36 from OCL’s account. ...
 - b. From 12 June 2015 to 11 January 2016, funds from OCL were used to make loan repayments for two cars that were registered under its name, but were under the control of Mr Deng, being:
 - i. A total of \$20,474.03 for the car with registration HSS450; and
 - ii. A total of \$10,255.28 for the car with registration HUB850.... HSS450 remains in the control of Mr Deng, but it appears that Mr Deng has transferred HUB850 himself, before on selling it to D&R. ... In any case, the cars are no longer available for OCL’s use.
 - c. From 4 July 2015 to 3 January 2016, OCL paid for various expenses that were incurred by Mr Deng, albeit under OCL’s name. These included expenses such as mobile phone, fuel and the costs of

building materials. The total amount paid by OCL for these expenses were \$17,172.62.

[131] This evidence does not reveal “a debt”; it discloses no agreement Mr Deng would pay or repay money. I raised this with Mr Zhang during his closing address on behalf of Mr Zheng. Mr Zhang acknowledged the pleading was problematical. He relied on the alternative contention of unjust enrichment. Mr Zhang also suggested this could be an instance of money had and received. The latter forms no part of the statement of claim. And, the statement of claim does not identify how Mr Deng unjustly enriched himself at Orient Construction’s expense. This is another example of inadequate pleading. Despite these shortcomings, I assume the cause of action properly alleges unjust enrichment, and this is available notwithstanding the common law’s reservations (see [127]).

[132] I have already captured Mr Zheng’s evidence-in-chief. In cross-examination, Mr Zheng accepted he and Mr Deng agreed the latter should continue to help with ongoing projects after the separation, at the rate of \$60 per hour. Whether Mr Deng was an employee or independent contractor is unclear.⁴³ Mr Zheng also accepted Mr Deng continued to use a mobile telephone and fuel card belonging to and paid for by Orient Construction, and Mr Deng bought materials for the projects he was helping with. These too Orient Construction paid.

[133] Mr Zheng accepted Mr Deng provided services to Orient Construction “on smaller projects”. However, he said Mr Deng did not provide the services he anticipated, or, at least all services for which Mr Deng was paid. Mr Zheng said Mr Deng should repay Orient Construction for his use of the cars and telephone.

[134] Mr Deng says he did work for Orient Construction, but Mr Zheng did not pay him the full amount. So, Mr Deng stopped work 5 September 2015. In relation to the cars, Mr Deng said Orient Construction asked him which ones he wanted, and he assumed responsibility for paying for two, a Lexus and Toyota, from the beginning of 2016 (the cars were leased). Mr Deng said he believed this was agreed. Mr Deng said

⁴³ Orient Construction’s bank records show transactions on 20 June and 20 July for “wages” in relation to Mr Deng. But, Mr Zheng alleged Ms Lin completed both using Mr Deng’s login details and password. Ms Lin denied this. It is likely Mr Zheng authorised both payments because he controlled Orient Construction from 1 June, and for the other reasons beginning [138].

he understood he could use the fuel card and telephone, especially as he was performing work for Orient Construction, and needed both to do so.

[135] Other witnesses touched on these topics. Their evidence does not help, save for May's. I return to it soon.

[136] I prefer Mr Deng's evidence (again). First, Mr Zheng's evidence-in-chief was materially incomplete. It conveyed a different—and somewhat sinister—picture. Mr Zheng said nothing about his agreement for Mr Deng to work for Orient Construction, and nothing about related arrangements. Mr Deng raised these points in his brief of evidence. Only then did Mr Zheng address them (in a reply brief), but with the qualification Mr Deng did not do the work. This is unsatisfactory; witnesses swear or affirm to tell the “whole truth”. And as observed, in cross-examination, Mr Zheng accepted Mr Deng did work on smaller projects after 31 May 2015.

[137] Second, Mr Zheng did not complain about any of this in post-separation correspondence until 22 September 2016 (when he also alleged the loan to Mr Deng).

[138] Third, Mr Zheng was the sole director and shareholder of Orient Construction from 1 June 2015. All usages and payments occurred thereafter. If Mr Zheng was unhappy with what was happening, he could have easily acted. He did not. Mr Zheng said he did not because Mr Deng had promised “a reconciliation” in relation to their business affairs, extending to possible involvement of a third party. By this, Mr Zheng meant a final assessment about who owed whom, what. However, the men's efforts to do so had been unsuccessful to this point; indeed, these had caused only more acrimony. Consequently, is not clear why Mr Zheng would see “a reconciliation” as pivotal.

[139] Fourth, it is not obvious why Mr Deng would be responsible for paying for materials for Orient Construction's projects as either an employee or independent contractor.⁴⁴

⁴⁴ Mr Zhang did not cross-examine Mr Deng he had used the building materials for his own purposes. If this remained part of Mr Zheng's case, Mr Zhang had a duty to put this to Mr Deng (given s 92 of the Evidence Act 2006).

[140] Fifth, Mr Deng's evidence about the telephone and cars is supported by contemporaneous correspondence.

[141] On 15 July 2015, May sent an email to Mr Deng, Ms Lin and Mr Zheng. She asked, "which vehicles Director Deng would like to keep". May offered to "transfer the ownerships of the vehicles that Director Deng does not want to [Orient Construction]". May followed up 15 December 2015. By that time, Mr Deng had chosen the Lexus and Toyota. May said:

We have discussed the issues regarding the cars and mobile phones on WeChat on September 15. Please send me your personal account by this Sunday, December 20, 2015. I will transfer it to Toyota Finance and Vodafone. From January 1, 2016, Orient Construction Limited will no longer make above payments.

If we do not receive your reply by December 20th, we will dispose the properties under the OCL company. In addition, we have requested Vodafone to stop the service of the 4 new mobile phones you have changed.

You and Judy have officially left OCL on 31/05/15, and you said that the separation account will be done at the end of 2015. If OCL continues to pay for your personal payments, the accounts are going on and on and we will never be able to reconcile clearly. We can only separate all the current payment, which will also benefit Xiaofeng for doing the accounts.

[142] May accepted she sent both email. May acknowledged the second suggested Mr Deng would become responsible for payments from 2016. However, May said it was clear Mr Deng was responsible for all expenses beyond 31 May 2015. I disagree. The sequence implies Orient Construction was content for things to continue as they had because Mr Deng had been providing it services as an employee or independent contractor. And, because Orient Construction saw all this as an adjunct to the process of separation. May's December email betrays frustration but is otherwise consistent with both. The same email also implies the arrangement was not dependent on what May called a "separation account" or what Mr Zheng termed "a reconciliation", albeit this was clearly hoped for.

[143] This leaves one piece of evidence. On 21 June 2016, May sent an email to Mr Deng inviting payment for the cars and telephone for the balance of 2015, complaining he had used company property. I consider this email inconsistent with Orient Construction's earlier position and May's December 2015 email.

[144] These conclusions exclude unjust enrichment. The cause of action fails.

Set off defences

[145] Mr Turner confirmed the three set off defences need be explored only if a cause of action succeeded. These are better left unaddressed. Analysis would be artificial given my suite of factual determinations, all contrary to Mr Zheng.

Results and costs

[146] I dismiss all causes of action.

[147] I can think of no reason why Mr Deng should not have costs. If the parties disagree, they may submit memoranda of not more than five pages:

(a) Mr Deng by **28 January 2020**.

(b) Mr Zheng by **4 February 2020**.

Addendum: admissibility of evidence

[148] Mr Deng sought to adduce evidence from two witnesses in China, Mr Zhu (the director and shareholder of Eversolid Construction); and Chenggang Zhang. To avoid confusion, I use Mr Zhang's Christian name. Mr Zhu lives in China; Chenggang is visiting there.

[149] I said I would receive their evidence and determine admissibility later.

[150] Each witness offers evidence consistent with aspects of Mr Deng's beyond the mere formal. For example, Mr Zhu says he invested \$500,000 with the Orient Group, and Mr Deng assumed responsibility to repay this when he and Mr Zheng separated their business interests. Chenggang is a director and shareholder of Rosedale Apartments. He says Mr Zheng never told him about a partnership with Mr Deng.

[151] Mr Turner contended the evidence of each was admissible because both had sworn affidavits, and both were overseas. Mr Zhang questioned whether either affidavit complies with the Oaths and Declarations Act 1957. No one addressed the pre-eminent concern, s 18 of the Evidence Act 2006. It provides:

18 General admissibility of hearsay

- (1) A hearsay statement is admissible in any proceeding if—
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) either—
 - (i) the maker of the statement is unavailable as a witness; or
 - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[152] Section 16(2) of the same Act provides:

- (2) For the purposes of this subpart, a person is unavailable as a witness in a proceeding if the person—
 - (a) is dead; or
 - (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
 - (c) is unfit to be a witness because of age or physical or mental condition; or
 - (d) cannot with reasonable diligence be identified or found; or
 - (e) is not compellable to give evidence.

[153] There is no real doubt the circumstances relating to the making of each statement provide reasonable assurance each is reliable. Each witness made an affidavit specifically for the trial; and each largely offers evidence within his knowledge (“I understand” or some variant appears, but infrequently).

[154] However, while each witness is outside New Zealand, I heard no submission or evidence about the practicality of each returning, or more obviously, giving evidence by video link from China. Overseas video links are now used frequently in the High Court in both civil and criminal trials. Normally, they work well.

[155] In *Solicitor General v X*,⁴⁵ the Court of Appeal held a Chinese national was not unavailable to give evidence merely because he was in China and did not wish to come here. The Court said assessment of reasonable practicality required it to know “what steps had been taken to secure [the witness’s] attendance at trial, whether in person, or by some technological means, such as video link”.⁴⁶ The learned authors of *Mahoney on Evidence* observe *Solicitor General v X* “seems to suggest that the difficulty involved in organising the technological means for an overseas witness ... will not, without more, be enough to render a person unavailable under s 16(2)(b)”.⁴⁷ I agree.

[156] For the same reasons, I was not satisfied there would be undue expense or delay if either had to testify in person. The evidence of both is inadmissible.

.....

Downs J

⁴⁵ *Solicitor General v X* [2009] NZCA 476.

⁴⁶ At [36].

⁴⁷ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence* (4th ed, Thomson Reuters, Wellington, 2018) at 108.

Schedule A

INFORMATION ON RELEVANT COMPANIES

ORIENT CONSTRUCTION LIMITED – current

Incorporation date	23/07/2013	
Current director	Lu Zheng	Since 2/04/2016
Former director	Donglin Deng	Between 23/07/2013 and 27/11/2013
Current shareholder	Lu Zheng (100%)	Since 2/04/2016
Former shareholders	Donglin Deng (50%)	Between 23/07/2013 and 2/04/2016
	Lu Zheng (50%)	Between 23/07/2013 and 2/04/2016

ORIENT HOMES LIMITED – removed

Incorporation date	11/06/2004				
Removed	15/12/2017				
Director history					
Lu Zheng	11/06/2004 appointed		30/09/2008 removed		
Donglin Deng	11/06/2004 appointed		20/09/2008 removed	1/04/2009 appointed	15/12/2017 removed
Jingli Zhu	11/06/2004 appointed		30/09/2008 removed		
Zuoqi Li		30/09/2004 appointed		1/04/2009 removed	
Shareholder history					
	11/06/2004	24/10/2007	1/10/2008	10/10/2008	12/08/2009
Donglin Deng	40%	23%	30.6%	0%	100%
Lu Zheng	40%	26%	34.6%	0%	-
Jingli Zhu	20%	21%	28%	0%	-
Hong Lin	-	12%	0%	-	-
Yaping Yao	-	10%	0%	-	-
Zuoqi Li	-	5%	6.6%	100%	0%
Lei Yu	-	3%	0%	-	-

EVERSOLID CONSTRUCTION LIMITED – removed

Incorporation date	21/03/2011	
Removed	15/12/2017	
Former director	Tong Zhu	Between 21/03/2011 and 15/12/2017
Former shareholder(s)	Tong Zhu (100%)	Between 21/03/2011 and 15/12/2017

ORIENT CONSTRUCTION GROUP LIMITED (OCGL) – removed

Incorporation date	29/06/2006					
Removed	18/08/2014					
Former director	Donglin Deng			Between 29/06/2006 and 18/08/2014		
Former director	Jingli Zhu			Between 29/06/2006 and 10/10/2008		
Shareholder history						
	29/06/06	10/04/07	13/06/07	25/06/07	1/10/08	10/10/08
Meng Zhao & Feng Lu	9% jointly	0%	-	-	-	-
Donglin Deng	20.6%	23%	23%	23%	30.6%	74%
Ying Zheng	18.4%	21%	0%	-	-	-
Shouju Zheng	23%	26%	26%	26%	26%	26%
Lei Yu	3%	3%	3%	3%	0%	-
Zuoqi Li	4%	5%	5%	5%	6.7%	0%
Hong Lin & Xinchun Lin & Xincheng Lin	12% jointly	12% jointly	12% jointly	12% jointly	0%	-
Yaping Yao & Yang Wang & Xiaomei Liu	10% jointly	10% jointly	10% Yang Wang	10% Yang Wang & Yaping Yao	0%	-
Jingli Zhu	-	-	21%	21%	28%	0%
Lu Zheng	-	-	-	-	8.7%	0%

ALBANY APARTMENTS LIMITED (AAL) – removed

Incorporation date	22/09/2006					
Removed	8/07/2016					
Former director	Lu Zheng			Between 22/09/2006 and 8/07/2016		
Shareholder history						
	22/09/06	10/04/07	13/06/07	18/07/07	1/10/08	10/10/08
Wen Lu & Lu Zheng & Yang Wang	23% jointly	26% jointly	26% jointly	26% jointly	0%	-
Lu Zheng	-	-	-	-	34.6%	100%
Yaping Yao & Xiaomei Liu & Yang Wang	10% jointly	10% jointly	10% Yang Wang alone	10% Yaping Yao alone	0%	0%
Donglin Deng	20.6%	23%	23%	23%	30.7%	0%
Ying Zheng	18.4%	21%	0%	-	-	0%
Jingli Zhu	-	-	21%	21%	28%	0%
Xincheng Lin & Xinchun Lin & Hong Lin	12% jointly	12% jointly	12% Hong Lin alone	12% Hong Lin alone	0%	0%
Lei Yu	3%	3%	3%	3%	0%	0%
Zuoqi Li	4%	5%	5%	5%	6.7%	0%
Meng Zhao & Feng Lu	9%	0%	-	-	-	0%

ROSEDALE APARTMENTS LIMITED – current

Incorporation date	10/03/2010				
Current directors	Lu Zheng	Since 19/12/2013			
	Chenggang Zhang	Since 12/04/2010			
Former director(s)					
Donglin Deng		6/07/2011 appointed			8/09/2015 removed
Lu Zheng	10/03/2010 appointed		11/07/2011 removed	19/12/2013 appointed	
Chenggang Zhang	12/04/2010 appointed				
Shareholder history					
	10/03/10	10/04/10	11/07/11	14/01/14	8/09/15
Lu Zheng	100%	60%	0%	35%	35%
Chenggang Zhang	-	40%	70%	60%	65%
Donglin Deng	-	-	30%	5%	0%

D & R HOMES LIMITED (DRH) - current

Incorporation date	13/05/2008	
Current director	Bin Jiang	Since 13/05/2008
Current shareholder	Bin Jiang (100%)	Since 13/05/2008

Schedule B

Orient Construction Group 10th Reconciliation (Zheng Deng 31/03/10)				
Chapter 1 Fixed Ratio Balance Sheet				
1	Theoretically available capital		Zheng individual	Company
1.1	Zheng and Deng's investment in the group's shares			
	1.1.1 Residual value after separation 31.03.09	Refer to Zhu and Li's separation ledger for details		
	Zheng's residual value 31/03/09			797,089.90
	Deng's residual value 31/03/09			705,117.99
	1.1.2 Subtracted 50,000 virtual value from old ORH (Zheng 50/135)	Refer to Zhu and Li's separation ledger for details		
	Zheng 50/135			-18,518.52
	Deng 45/135			-16,666.67
	1.1.3 Dividend of West team	Refer to the form from email Zheng Ying sent		
	Third dividend of West team (Zheng)			11,852.00
	Third dividend of West team (Deng)			10,667.00
	1.1.4 Apartment project deposit refund 240000 deducted lawyer fees 16868 = 223132	50% each (111566)		
	Zheng's share of the company (26%)			29,007.16
	Deng's share of the company (23%)			25,660.18
	1.1.5 Kitchen rebate before separation (\$141520 for ISL and FINGAL WAY project, less \$10395 for Xiao Cui plumbing and electrician)		\$131,125	
	Zheng's due share (26%)			34,092.50
	Deng's due share (23%)			30,158.75
	1.1.6 Modern Kitchen receivables		\$228650+\$6080=234730	
	Zheng's due share (26%)			61,029.80

	Deng's due share (23%)			53,987.90
	1.1.7 ISL project profit (excluding the interest of Zheng Lu, Li Xiaohui, Li Yong and Wangt Hui, \$106,755)	Equally shared by Zheng and the company (377925-106755)/2=135585		
	Zheng's due share (26/49)			71,943.06
	Deng's due share (23/49)			63,641.94
	1.1.8 FG project profit	Equally shared by Zheng and the company (26369.25)		
	Zheng's due share (26/75)			9,141.34
	Deng's due share (23/75)			8,086.57
	1.1.9 Profit for four lots of land BV sold	Equally shared by Zheng and the company (36146.18)		
	Zheng's due share (25/49)			19,179.61
	Deng's due share (23/49)			16,966.57
	1.1.10 Warehouse reported loss	Refer to Zheng Mei MAR2010 inventory		-13,292.14
	1.1.11 75% of the loss in the financial year 2009-10	\$399673.3-\$14559.56 newly purchased fixed assets – 106755 Zheng, Li Yong, Xiaohui, Wang Hui interest = \$278358.74		-208,769.06
	Subtotal			1,706,576.44
	Original investment of Zheng and Deng to the group (2007, including virtual value)		2391200	
	Zheng's original investment was 4.88 million x 26%		1268800	
	Deng's original investment was 4.88 million x 23%		1122400	
	Zheng and Deng's residual value (31/03/10)		1,706,576.44	
	Thereinto, Zheng's residual value is 26/49		905530.3559	
	Thereinto, Deng's residual value is 23/49		801046.0841	
	Loss of Zheng and Deng's investment in new ORH (31/03/10)		684,623.56	
	(public expenses after 01/04/2009 have been included)			
	Difference between Zheng and Deng investment		104484.2718	
1.2	Tax credit			

	1.2.1 GST refund of all existing company's properties			
	Two lots of developed land under AAL in LG phase 1	\$184286/9x2		40952.44
	Lot 14 in BV project under AAL	\$240000/9		26666.67
	KTW118 Under ORH (Deng family)	\$343000/9		38111.11
	Reserved funds for Lin Feng brother DB project unpaid tax			61413.17
	Historically GST return minus project team tax reserve			-25195.37
	Subtotal			141,948.02
1.3	Zheng's personal investment and loss (excluding group shares)			
	1.3.1 Personal investment by Zheng Lu (before establishment of new AAL)	See individual and company reconciliation 2007 for details	421,100.00	
	1.3.2 Zheng Lu's investment in new AAL	Zheng Lu's first investment in new AAL	437,868.37	
	1.3.3 Zheng Lu's investment in new AAL	Zheng Lu's second investment in new AAL 01/02/08	400,000.00	
	1.3.4 Zheng Lu's investment in new AAL	Zheng Lu's third investment in new AAL 31/07/08	800,000.00	
	1.3.5 Refund of apartment project deposit (deducting lawyer fee)	Equally shared by Zheng and the company (each 111566)	111,566.00	
	1.3.6 ISL project profit (after deducting four people's interests)	Equally shared by Zheng and the company (377925-106755)/2=135585	135,585.00	
	1.3.7 Moving losses caused by separation among Lin, Wang and Yu			
	Half of the public expenses of AAL	See the financial situation of the group at the time of separation on 30/09/08 for details	-228,247.00	
	Half of the loss of the apartment project	See the financial situation of the group at the time of separation on 30/09/08 for details	-366,024.00	
	25% of overtime pay wages between 01/04/08 to 30/09/08	See the financial situation of the group at the time of separation on 30/09/08 for details	-8,851.25	
	25% of overtime pay wages between 01/04/07 to 31/03/08	See the financial situation of the group at the time of separation on 30/09/08 for details	-15,690.10	

	The group owes OSR 25% of the shared public expenses	See the financial situation of the group at the time of separation on 30/09/08 for details	-788.33	
	1.3.8 Moving losses caused by separation between Zhu and Li			
	25% of the public expenses (after adjustment) between 30/09/08 to 31/03/09	140400-46083 (deducting OSR apportion) x 25%	-23,579.25	
	Plus half of FG profit		26,369.25	
	1.3.9 Half of BV's profit from selling four lots of land		36,146.18	
	1.3.10 Zheng Lu shall share 25% of expenses for the financial year 2009-10	\$378073.3-\$14559.56 newly purchased fixed assets-106755 Zheng, Liyong, Xiaohui Wanghui interest=\$256758	-64,189.50	
	Zheng Lu's total investment in new AAL		2,058,968.37	
	Zheng Lu's loss on his investment in new AAL (public expenses after 01/04/2009 are not included)		397,703.00	
	Subtotal		1,661,265.37	
1.4	Fixed-interest loans lent to the company by shareholders and employees			
	1.4.1 Zheng Lu (personal investment loss up to 31/03/10 has been deducted		0.00	333865.56
	1.4.2 Deng Donglin		0.00	287,948.99
	1.4.3 Zheng Mei	11/11/09 after 70000 being transferred	0	76,437.00
	1.4.5 Li Xiaohui			100,000.00
	Subtotal		0.00	798,251.55
				2,630,575.50

2	Actually owned funds			
2.1	2.1 Funds occupied by the group properties Zheng and Deng got at the separation			
	2.1.1 Two old houses at Don Buck (980,000x65/173)	The tentative cash investment to DB project with Zhu totals 980,000 yuan		
	203DB 310,000 – 75*31/1.73 million loan	Pricing is separation price, the loan is shared on a pro rata basis		175,607.00
	201DB 340,000 – 75*34/1.73 million loan	Pricing is separation price, the loan is shared on a pro rata basis		192,601.16
	65/173 DB project cost after Zhu and Li separation			15,499.46
	65/173 DB bank insurance premium and land tax expenses minus rental income after Zhu and Li separation	54123.07 x 65/173		20,335.26
	203 the total cost of redecorating			33,072.80
	2.1.2 KTW project			
	Total capital occupation of the project (always deducted loan 222950)	To 31/03/10		263,380.23
	2.1.3 Lincoln Garden Phase I			
	Two lots of land in Lincoln Garden phase I	Developed section average costs 184285.87 total land 211009 (details please refer to forms made by Zheng Mei on 14/12/2009)		157,562.74
	Interest on two lots of land in LG phase I (30/09/08-31/03/10)	\$4093 (01/10/08-31/03/09) \$15669.33 (01/04/09-28/03/10)		19,673.08
	LG Phase I new house 6#	The separation price is 400,000 yuan and the loan is 365,728 yuan		34,272.00
	LG6 bank insurance fee land tax fee minus rental income after Zhu and Li's separation 30/09/2008-31/03/10	See Lin Xiaofeng five building property investment table		16,536.58
	LG phase 1 new house 64#	The separation price is 400,000 yuan and the loan is 337,000 yuan		63,000.00
	LG64 bank insurance fee minus rental income after Zhu and Li's separation 30/09/2008-31/03/10	See Lin Xiaofeng five building property investment table		13,823.45
	LG phase I project cost (three houses)	01/04/09-01/03/10		4,241.90

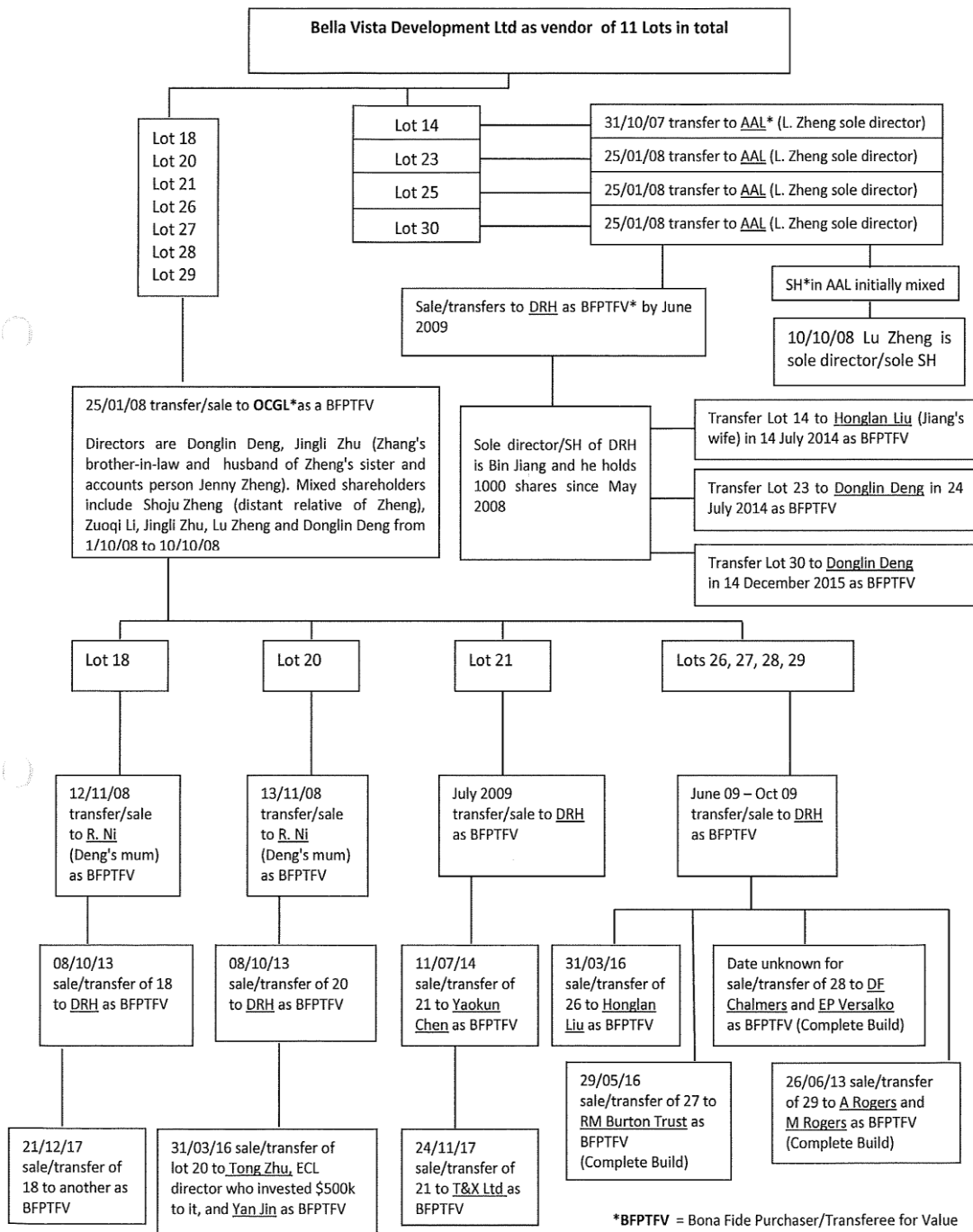
	LG phase I project cost (land)	01/04/09-01/03/10		5,195.24
	2.1.4 LG phase II old house plus large section	Old house 400000, undeveloped section each lot 7500x4=300000, loan 595656.32		104,343.68
	Chen Shuzhu bank insurance fee and land tax expenses	See Lin Xiaofeng five building property investment table		44,275.20
	LG phase II project cost (section)			690.50
	2.1.5 New AAL, BV input in D & R	BV 11 plots (in co-operation with Jiang Bin, 60% shares, 03/03/10 calculation results)	0.00	1111974.76
	Subtotal		0.00	2,276,175.04
2.2	Temporary loans from internal project teams or former shareholders	Positive numbers mean that individuals owe to the company		
	(1) Wang Hui	Deng, Zheng, Zhu and Li	0	1,021.90
	(2) DC refund for KTW three houses	108/173 of DB expense		-7,153.16
	(3) Zhu Jingli	Workers' wages (01/06/09-31/03/10)		33,787.81
		After personal reconciliation, the company owe3s Zhu (including ACC \$1688.4)		50,400.00
		PAYE, ACC already deducted		-16,787.77
	(4) Xiao carpenter parents			-2,624.00
	(5) Lin Xinchun			-1,304.85
	(6) Money collected from Modern Kitchen before separation (the five shareholders divided, tax not deducted)			-72,175.20
	(7) GREENHITHE refund from DC	Lu Feng, Wang Hui x 2 not received		-20,332.43
	(8) LG interest refunded by BNZ			-5,532.09
	(9) OSR	See OSR and company 18/11/09 reconciliation for details		10,160.65
	(10) West team	The actual expenses		23,182.85
	(11) Guang Yang			132.52
	Subtotal		0.00	-7,223.77

2.3	Fixed assets and inventory	Loss of the warehouse reported by Zheng Mei will be dealt with in the next financial year		
	2.3.1 Occupied funds by the warehouse up to 30/04/09	Zheng Lu 3Kerema did not count all the things he used		49,117.00
	2.3.2 Production equipment and tools and vehicles (31/03/09)	See the results after separation after pricing		36,900.00
	2.3.3 Residual value after depreciation of office equipment (30/06/09)			3,043.00
	2.3.4 Warehouse sales revenue (30/04/09-30/11/09)	Zheng Lu used items for 3Kerema		-5,392.14
	2.3.5 Warehouse reporting loss	Zheng Mei MAR2010 inventory		-13,292.14
	2.3.6 Newly added fixed assets in the financial year 2009-10			14,559.56
	Subtotal			84,935.28
2.4	Arrears outside the group (receivables)			
	2.5.1 Modern Kitchen	Modern Kitchen owes a total of 234,730 to seven people		
	Owes Zheng and Deng 49%			115017.7
	Subtotal		0.00	115,017.70
2.6	Group bank account			
	3.1.1 Orh-ASB 00 account			6798
	ORH – ASB 50 account			10776
	ORH – asbnzmay			1500
	3.1.2 AAL-ASB 00 account			10957
	The list – ASB 50 account			749
	3.1.3 OCG – ASB00 accounts			738.63
	OCG – ASB50 accounts			47.76
	OCG – NAT			130.22

	3.1.4 Isl-asb 00 account			43242
	ISL – ASB 50 account			3
	Subtotal		0.00	74941.41
2.7	Other cash accounts			
	3.3.1 Lin Bin 6 lg	Has been calculated in the project expenditure, will calculate the balance after sell		4373.1
	3.3.2 Wilson 64LG (separated from Li Zuoqi)	Has been calculated in the project expenditure, will calculate the balance after sell		5853.48
	3.3.3 Lin Fengdi	Has been calculated in the project expenditure, will calculate the balance after sell		11227.76
	3.3.5 Liu Jianwen			3879.98
	3.3.8 Chen Shuzhu			689.98
	Subtotal			26024.3
2.8	Group subsidiaries and other current account interests			
	4.3.1 The money from Lv qingang is not counted as cash of the group or expenses			0
	Actual owned capital (cash plus equity)			2,569,870.00
3	There is actually more cash (Positive for more)			60,705.50

Schedule C

FLOW CHART OF TRANSACTIONS INVOLVING LOTS OF LAND INITIALLY FROM BELLA VISTA DEVELOPMENT LTD (UNRELATED) AS VENDOR



*BFPTFV = Bona Fide Purchaser/Transferee for Value
 *SH = Shareholder
 *OCGL = Orient Construction Group Ltd
 *AAL = Albany Apartments Ltd