IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-1736
[2017] NZHC 997

BETWEEN	MAN FUNG LAM YUET MING BETTY WONG MORAL DRAGON LIMITED Plaintiffs
AND	CHIU CHEUNG MO LILY YUET HA WONG First Defendants
	SUNLINK DEVELOPMENTS LIMITED Second Defendant
	PLIMMERTON HEIGHTS DEVELOPMENT LIMITED Third Defendant
	STEVEN WEE HONG LEE Fourth Defendant

Hearing:	29 February-9 March 2016
Counsel:	R J B Fowler QC and P W F W Cheng for Plaintiffs J R Parker and D M Consedine for First, Second and Third Defendants P Barratt and S F W Learmonth for Fourth Defendant
Judgment:	16 May 2017

JUDGMENT OF WILLIAMS J

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Background and issues

[1] The Sunlink Group comprised four companies:

(a) Sunlink (NZ) Ltd;

(b) Sunlink Developments Ltd;

(c) Sunlink Investments Ltd; and

(d) Plimmerton Heights Construction Ltd.

[2] Since 1996, the Group has operated in the Wellington commercial and residential property markets. Sunlink NZ Ltd purchased and then onsold at a substantial profit a commercial property on Dixon Street in the Wellington CBD. Sunlink Investments Ltd purchased and then onsold at a profit a property at Cuba Street in the Wellington CBD. Sunlink Developments Ltd has nearly completed a residential subdivision in Plimmerton. Plimmerton Heights Construction Ltd built homes on some of the lots at the Plimmerton site. Only Sunlink Developments Ltd remains active. The profits it has produced are the subject of dispute in this proceeding.

[3] The sole director and registered shareholder of the companies within the Group is the first defendant Mo Chiu Cheung known in this litigation by his English name, David Mo.[1] He and his wife Wong Yuet Ha (known in this litigation by her English name Lily Mo), are the first defendants.

[4] Lam Man Fung (known in this litigation by his English name, Tony Lam) and his wife Wong Yuet Ming (who uses the English name Betty Lam) are the plaintiffs, together with a company Mr Lam now owns with his son, Gary – Moral Dragon Ltd. They say the whole Sunlink Group was in fact a joint venture between the Lams, the Mos, and certain other individuals with smaller interests. They say that in return for contributions to the joint venture totalling around $760,000, they were entitled to between 35 and 50 per cent of the Group.

[5] For ease of reference I refer in this judgment to the disputing families generically as the Lams and the Mos and to the primary protagonists as David and Tony.

[6] The Mos accept that the Lams have an interest in Sunlink and that this interest is not reflected in the registered shareholdings. They agree that there was a joint venture between them. But they say the Lams only have interests in Sunlink Developments Ltd – the company that undertook the residential subdivision in Plimmerton. The Mos say the Lams' interest in Sunlink Developments Ltd was no

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[1] I have used the traditional Chinese format in which the surname is placed first when a person's full name is set out. The intitulements have used the English convention where the surname is last.

greater than their actual contribution to its capital. This, the Mos said, was not $760,000 as the Lams claimed, but around $270,500, or six per cent of the capital of the project. They are therefore entitled only to six per cent of Sunlink Developments Ltd, according to the Mos.

[7] The essential dispute between the Lams and the Mos is therefore over which of the Sunlink Group's companies the Lams have interests in, and the comparative size of that interest as against the Mos and any other interest holders. There is then a downstream issue about what obligations the Mos and any relevant Sunlink companies might owe the Lams by way of account of profits.

[8] Potentially relevant to that issue is the fact that both sides also accept that the Mos gave the Lams cash payments of approximately $276,000 in total over the course of the business relationship. The Mos say these were private family loans that had nothing to do with Sunlink. The Lams on the other hand say they were dividend payments in accordance with the joint venture and that they help to prove its existence.

[9] Although this litigation presents as a simple commercial dispute between two families over their investments (joint or otherwise), an important element in the dispute is that the Lams and Mos are related. Lily Mo and Betty Lam are sisters. The leading protagonists, their husbands David and Tony, are brothers-in-law. These family relationships help to explain the almost complete lack of formality around the business arrangements between them.

[10] The Lams also bring a further claim against the Group's solicitor, Steven Lee, the fourth defendant. They say that he was their legal advisor and that he failed to protect their interests in the joint venture because he did not ensure that their shares in the relevant companies within the Group were registered so as to reflect their 35-50 per cent stake in the Group overall, nor did he ensure that proper account was given to the Lams for their true share in the profits from the sale of Group properties.

[11] Mr Lee says he was merely solicitor for the companies in the Group and acted at the direction of Mr Mo as he was (for the most part) sole director of all of

them. He said he was never the Lams' lawyer and never owed them any direct obligation as their legal advisor. In any event, he says the proceeding has been filed out of time and cannot now be pursued (at least for the most part).

[12] The following broad issues therefore arise:

(a) In which of the Sunlink Group's companies did the Lams have an interest?

(b) What was their share of that company or companies?

(c) Whatever that share is, how should it be accounted for now?

(d) Did Steven Lee owe the Lams any direct obligation as their lawyer?

(e) Did he breach it by failing to arrange for registration of their shareholding in the Group companies and/or failing to ensure a proper account to them of Group profits?

(f) Does the Limitation Act 1950 bar the proceeding against Steven Lee?

(g) What relief if any is appropriate now?

[13] Overlaying these questions is the law in relation to joint ventures and fiduciary obligations owed between joint venture partners and by legal advisors.

[14] I will begin with a brief summary of the establishment and operation of the Sunlink Group by David. Then, after a brief comment in relation to witness credibility generally, I address and make findings on the contributions the Lams made to Sunlink and the payments the Mos to the Lams over the period 1997 to 2015.

[15] Next, I turn to assess the significance of two key documents; one written in 2003 and the other in 2007. They record the joint views of the key protagonists in relation to aspects of the structure and ownership of Sunlink. I then consider wider

contextual evidence. This relates to relevant experiences of individuals who are not directly engaged in the present dispute. I then turn to draw the factual threads together and make findings on the two key factual issues, being how large the Lams' share is and which company or companies that share relates to.

[16] Having made those findings, I then turn to the applicable law in relation to joint ventures and fiduciary obligations. I make findings in relation to the obligations that the Mos and relevant Sunlink companies owe to the Lams on the facts as I have found them.

[17] I then turn to the case against Steven Lee solicitor. I begin by summarising the factual background to the allegations the Lams make. I then turn to make the necessary factual findings on the applicable law.

[18] I finally turn to make the orders necessary as a result of the findings in this judgment.

Formation of Sunlink Group

David Mo moves to New Zealand

[19] David and Lily Mo were, until 1996, based in Hong Kong where they had (and still have) various business interests. In 1996, they decided to move to New Zealand to pursue property related business opportunities here. They moved to New Zealand in early 1997.

[20] Tony Lam said he ran into David Mo by chance while walking along the causeway in Hong Kong not long before the Mos left for New Zealand. He said David told him that he (David) needed more money to invest in New Zealand to qualify for a New Zealand resident's visa. Tony said this chance meeting was the beginning of the New Zealand joint venture as, not long thereafter, he and David agreed to share the costs of the New Zealand investments.

[21] David on the other hand said Tony's story was false. David said he was not short of cash either to qualify for a resident's visa or to take advantage of business

opportunities in New Zealand. He said that in fact Tony was the one who was short of cash at the time and was asking David for money. He said he lent Tony US$38,000 in 1998 and it wasn't paid back until 2005.

[22] David said Tony's original story was that Tony had first discussed the joint venture at the Yangtze restaurant in Wellington in April 1996. But when David said he did not come to New Zealand until the end of November 1996, leaving again on 7 December, Tony changed his story to the causeway meeting. It is unnecessary to resolve this dispute.

Sunlink NZ Ltd and Dixon Street

[23] David's first New Zealand property investment was in a lot at 79 Dixon Street on the corner of Dixon and Victoria Streets. He tendered for the site at a price of $418,000 +GST on 1 July 1996, and his tender was successful. The land at that stage was basically a vacant lot run as a small car park. He planned to build a car park building on it. The purchase settled on 2 October 1996 without the need for debt funding. David incorporated Sunlink NZ Ltd on 29 April 1996 to take title to the land. He was registered as the sole shareholder. The original directors were himself, Steven Lee and Clara Ngai. Ms Ngai had worked for David in Hong Kong. It was necessary for Steven Lee to be a director because at that stage he was the only one resident in New Zealand. He attended to opening and operating company bank accounts, executing formal documents as required and the like. By 1999 however, the other two directors had resigned and David remained as sole director and shareholder.

[24] The purchase was originally set up as a 50/50 partnership with one of David's business associates named Jim Kan although Mr Kan was never actually allocated shares. According to Steven Lee, this was because Jim never resolved who or what would hold his half of the venture. A dispute subsequently developed between David and Mr Kan over the Dixon Street "partnership". Mr Kan complained that David was using Sunlink NZ Ltd to support the other Sunlink companies. Mr Kan had no interests in those companies and considered this intermingling to be improper. David eventually bought Mr Kan out in order to resolve the dispute. I

will return to this matter below. For present purposes it is sufficient to note that the plan to build on the site did not eventuate and it was sold undeveloped 10 years later for $2.9 million.[2] The sale produced a capital gain of about $2.4 million. Sunlink NZ Ltd is no longer active.

Sunlink Developments Ltd and Plimmerton Heights Constructions Ltd

[25] On 29 November 1996, David purchased a second property. It was a 9.6 ha block of land in Plimmerton. He planned to develop and subdivide it for residential purposes. The purchase price was $770,000.

[26] Sunlink Developments Ltd was incorporated on 24 December 1996 to be the vehicle for the Plimmerton venture. As with Sunlink NZ Ltd, the original directors of Sunlink Developments Ltd were David, Steven Lee and Clara Ngai. Lily Mo joined the directorship for a year in 1997 but by early 1999 all directors other than David had resigned leaving him as sole director and shareholder.

[27] The evidence before me was that 52 lots had been sold and only four sections remained.

[28] I should note that a second company was incorporated in relation to the Plimmerton Development – Plimmerton Heights Construction Ltd. This company was incorporated much later on 6 April 2005. It was, according to David, used as a vehicle only for the construction activity on the land. Some of the lots were sold with new dwellings built by Plimmerton Heights. Since such construction as was required was, David said, completed in 2012, that company has been inactive since then.

[29] It is not yet known what profit Sunlink Developments has made or will make but an October 2006 valuation valued the subdivision, when completed, at $10.8 million.[3]

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2 The sale settled on 18 December 2006.

3 Truebridge Valuers, Sunlink Subdivision, Grays Road Camborne, 23 October 2006.

[30] Mr Don Lang, accountant, gave evidence on behalf of the Mos. He provided a consolidated statement of Sunlink Developments' financial performance from 1997 until November 2015. According to Mr Lang, sales over that period amounted to $9,343,649 producing a net operating profit of $1,451,615. David's drawings recorded as shareholder's salary were then deducted below the profit line. This amounted to $1,067,032. Once sundry income was then added back, Mr Lang's assessment was that overall profit for the development over that roughly 18 year period was $446,586.

[31] Expert evidence for the Lams suggested that profit levels for the project were likely to have been considerably higher, but it is unnecessary to address that issue at this juncture. I will come back to it later in this judgment.

Sunlink Investments Ltd and Cuba Street

[32] Finally, David purchased a third property at 106 Cuba Street on 25 February 1997. Sunlink Investments Ltd had been incorporated a week earlier to take title with the same three initial directors as the other companies in the Group, and David as the sole shareholder. The purchase price for the property was $620,000 and Sunlink Investments Ltd settled on 3 May 1997. The purchase was partly funded through a $500,000 loan secured against all three properties. A $100,000 revolving credit facility was made available to Sunlink Investments Ltd in the borrowing package.

[33] Cuba Street was sold in 2001 for $1.2 million producing a capital gain of nearly $600,000. Sunlink Investments Ltd is no longer active.

Inter-company lending

[34] The evidence at trial demonstrated that by the fiscal year ending March 1998, there were extensive inter-company loans and guarantees. I have already mentioned the fact that Sunlink Investments Ltd's fixed loan and revolving credit facility amounting together to $600,000 was secured against all three properties in the Group. Collateral guarantees were also provided by Sunlink NZ Ltd and Sunlink

Developments Ltd. In addition, Sunlink NZ Ltd had provided its own $110,000 loan to Sunlink Investments Ltd and a $861,000 loan to Sunlink Developments Ltd.

[35] David provided his own personal guarantee for bank borrowing. He is also regularly recorded in the company accounts as personally guaranteeing all inter-company loans.

[36] This pattern of loans within the Group continued throughout the period relevant to this litigation. Although Sunlink Investments sold Cuba Street in 2001, it remained as a lender to Sunlink Developments until 2008 when the advance was written off. Meanwhile, Sunlink NZ Ltd filed its last accounts in 2007 following the sale of Dixon Street. Drawings recorded in its company accounts of that year show an advance $2,923,406 to Sunlink Developments Ltd and a $532,967 advance to "general".

[37] In the explanatory notes to each set of accounts during this period, lending and borrowing is set out under the heading "Inter-company current account". This suggests that, like shareholders' current accounts, money shifted readily between the four companies within the group even though the companies had no direct shareholding in each other.

Site visits and business trip

[38] Finally by way of background I note Tony's evidence that on his first visit to New Zealand in December 1996, David showed him the Dixon Street property that he had just purchased. And on further visits, Tony said, in 1997, 1998 and 2000 David also took him to the Plimmerton subdivision and the Cuba Street property. David, Tony said, made it clear that the Lams were to be shareholders in companies owning all three properties. Tony said he, David and Steven Lee discussed David's plans with respect to the properties at length, leading Tony to believe that investing in David's Sunlink ventures would be a good investment for the Lams.

[39] David agreed that he may have shown Tony the three properties in 1998 and 2000 (not 1996 or 1997), but, he said, he was doing no more than being a good host by showing them around his investments. There was no commitment, he said, to

giving the Lams an interest in Dixon Street and Cuba Street. That was never discussed or intended, he said.

[40] In October 1997, David, Tony and Steven Lee travelled to Bangkok together. Tony said they went there to source building materials and kitchen units for the Plimmerton subdivision. David agreed that the Bangkok trip took place but he said there were others on the tour too and it was just a group of friends being tourists rather than any kind of formal Sunlink business trip. He said he encouraged Steven Lee to come because he spoke the dialect of the local Chinese community but there was no more to it than that. He said he did visit a trade centre while he was in Bangkok and Tony may have done so separately as well but that was not the point of the trip. He said there was no discussion of the Sunlink joint venture at all on the trip.

Joint venture terminated

[41] On 20 June 2013, the Lams gave notice terminating their involvement in the joint venture. They complained that they had received poor returns on their investment and that David had managed the joint venture in a manner that entirely lacked transparency. They said they had failed to protect their investment or their interests. Proceedings were issued shortly thereafter.

Witness credibility issues

[42] Before I turn to make findings of fact on the various matters in dispute between these parties, I pause to comment briefly on witness credibility issues generally in this case.

[43] Tony and David were the leading witnesses for their respective families and interests. Others such as Betty Lam and Lily Mo, Gary Lam and Ron Luey gave evidence that was very much supplementary to the primary competing narratives of Tony and David. Their stories were diametrically opposed on a number of key issues in the case, although as we shall see, there was some agreement on less important matters. The case for each side thus stood or fell on the evidence of the respective primary witnesses and therein lay its difficulty. This, it transpired, was not a case

that could be simply resolved by a finding that one of these two was an essentially untruthful witness and the other was not.

[44] There was an additional layer of complexity. The task for counsel of testing the evidence of Tony and David was made more difficult by the fact that although both were functionally proficient in English, it was plainly not their mother tongue. As a result, when under cross-examination, they frequently reverted to Cantonese. This then needed to be translated. This was understandable and necessary. Translations were handled competently and sufficiently by a qualified interpreter, but the process was inevitably slow and occasionally clunky. This in turn made it difficult for counsel to really probe the witnesses' narrative through crisp and efficient cross-examination.

[45] In any event, and in their own ways, both Tony and David occasionally proved themselves to be unsatisfactory and less than truthful witnesses. Tony for example did not, I have found, give truthful evidence about his claim that David promised to pay him and Betty salaries totalling NZ$256,000. Nor was Tony telling the truth about his debt to Betty's youngest sister, Angel Wong. On the other hand, David proved himself willing to give false statements to a banker (as we shall see), and his approach in general to engaging in business with friends and family was (I have found) to create and exploit ambiguity, to control information to his advantage, and to retrospectively repackage facts to suit his interests where necessary.

[46] I have found therefore that the best approach was to address each specific factual dispute case by case and to look for independent corroborating evidence where it exists, to assist in my assessment. Overall, this has made the fact finding process rather more laborious than it might otherwise have been.

The Lams' contributions

[47] I turn now to discuss the contributions the Lams made to Sunlink. At this point, my aim is only to assess contributions overall. I turn to the issue of which Sunlink company or companies these payments were to later in the judgment.

[48] The Lams claim to have contributed $669,856 plus a further payment of HK$450,000. They say their contributions related to all three assets and provided the foundation for a claim to 35 to 50 per cent of the Group. The Mos challenge this. Most payments were originally made in HK$ and where the payment in that currency is referred to in the evidence I have recorded both that sum and the final sum received in NZ$. The payments the Lams claimed to have made are as follows:

Date	HK$	NZ$
7 November 1996	500,000	91,438
16 December 1996	650,000	119,847
9 April 1997	400,000	74,916
18 May 1997	1,000,000	186,039
7 January 1998		82,601
13 September 1999		9,333
Unknown date, but logically prior to 18 December 2000	450,000 (on agreed 5 to 1 exchange rate)	90,000
18 December 2000		83,443
22 March 2002		22,655
Total		**$760,272**

[49] Some of these payments are accepted by the Mos, some are not. As I have said, the Mos say the Lams only paid $270,500. It is necessary therefore to assess each payment. Surprisingly David said he did not keep a ledger of the Lams' payments and what company they related to, and none was provided in evidence.

Waysome Taxi

[50] Tony said that the first payment to David in November 1996 of NZ$91,438 was initially intended to be a loan to assist with David's set up. But Tony said he visited New Zealand with David in December 1996 and after being shown the properties then in the Group, he decided to convert the loan into an investment.

[51] David said this was not true. He said the claimed deposit was actually money Tony owed him in relation to a failed taxi joint venture in Tian Jin near Shanghai, China. David said that Tony had managed it on behalf of a small group of investors including himself. He said the venture had been established in 1992 under the name Waysome Taxi. The Hunghou Welfare Association owned half of it and the other half was owned equally by four partners including Tony, David and Jim Kan. David said that a friend of his Kin We (Ron) Luey held 10 per cent of his quarter share (i.e. 2.5 per cent) through one of David's companies. Ron Luey gave evidence in this case and I will refer to that below.

[52] David said each of the four equity partners in Waysome Taxi put in HK$1.3 million setting total capital at HK$5.2 million. David said he had been led by Tony to believe that the taxi venture failed because Tony could not obtain approval for the necessary taxi licence. David said Tony then wrote out a cheque to Jim Kan for HK$3 million, and Mr Kan paid the three remaining partners HK$1 million each. He said Tony was required to repay the investors in full but in fact had short paid them about HK$300,000 each. David said Tony claimed he had suffered exchange rate losses in the reconversion from Yuan to $HK. The HK$500,000 or NZ$91,438 paid on 7 November 1996, he said, related to making up on that short payment. It was neither a loan to nor an equity investment in Sunlink.

[53] Tony responded by saying that this was not true. He said in fact it was David who ran the Waysome Taxi joint venture not him. He said David had paid a HK$3 million refund cheque to Jim Kan who had then disbursed it to the other investors.

[54] I consider that the payment related to Sunlink on the balance of probabilities and not Waysome Taxi. It should therefore be credited to the Lams. In fact, the evidence as we have it suggests that Jim Kan was the active player in Waysome Taxi rather than Tony or David. David accepted in evidence that it was Mr Kan who repaid him for his Waysome Taxi investment, not Tony. Tony's evidence was to the same effect. It is hard to fit that with Tony having control of the Waysome Taxi chequebook. Why would Tony not have simply made out three separate cheques of HK$1 million each if he had management of the company? Indeed in earlier

litigation between David and Mr Kan in relation to the Sunlink NZ Ltd 'partnership' (a dispute to which, as I have said, I will return later in more detail) David argued in a proposed settlement that credit for any payments to Sunlink by Jim Kan should be reduced by HK$500,000 because Mr Kan separately owed him that amount. In the absence of any further explanation, it seems reasonably likely that that debt was for Waysome Taxi. It was the same amount that David said Tony owed him for Waysome Taxi. According to the minutes of a settlement discussion between David and Jim Kan's representative in January 1999, Mr Kan's representative said that the debt had already been repaid so should not be deducted in the calculation of his entitlements from the 'partnership' on termination. Nothing more was heard of it.

[55] In addition, there was no documentation provided to support David's alternative version of the facts, i.e. that Tony controlled Waysome Taxi and owed David money in that role. Nor did David's co-investor, Ron Luey, corroborate that version in evidence. He was not even asked to. Further, there was no evidence that Ron Luey received any money for his 10 per cent share of David's stake when Tony made the disputed payment to David. This suggested the $91,438 was not connected to Waysome Taxi.

[56] Finally, a hand edited draft letter was produced dated October 1996 and intended, I was told, to be sent under the name of Jim Kan to Immigration NZ. In the draft (I was not provided with a final copy), Jim Kan referred to Waysome Taxi as a project in which he had worked in "close partnership" with David. It is telling, in my view, that the letter was not written by Tony even though it involves Waysome Taxi. In my view, if Tony had really been in charge of Waysome Taxi, David would have approached Tony to write to Immigration New Zealand about that business.

[57] Overall, it is my view that Tony's version in relation to this payment is the more credible. The payment is to be credited to the Lams accordingly.

The Mo Tim payments

[58] The next three payments on 16 December 1996, 9 April 1997 and 18 May 1997 totalled HK$2,050,000 or nearly NZ$381,000. Tony says these were each paid by way of cheque made out to David Mo personally and delivered to his sister Mo

Tim in Hong Kong. Mo Tim managed David's rental properties in Hong Kong. Tony said the bank no longer held records for these payments (they were too long ago) but he provided a page from an old diary that he said he used to record the payments at the time they were made. They are recorded in Hong Kong dollars with an associated HSBC bank account number and cheque numbers.

[59] Mo Tim gave evidence. She denied any such payments were made to her by Tony. She said that she had in fact had very little contact with Tony and Betty over the years when they were in Hong Kong. She said although she had a managerial role with respect to David's Hong Kong property assets, she had never received cheques intended for David in that capacity from anyone. She noted that tenants always paid rent by direct bank credit in respect of the properties she managed. David, meanwhile suggested Tony's diary entries were fakes, written long after the fact by Tony for the purpose of this litigation.

[60] In response, Tony said that Mo Tim was lying. He recalled that he had in fact given one of the cheques to Mo Tim's son, as she was not available, but otherwise he reiterated that they were given directly to her.

[61] If Tony's diary notations were all the evidence on the three payments they may have been sufficient to carry the day without further support. But here Mo Tim, the alleged recipient, denied receiving these cheques. Indeed she denied receiving any cheques at all in relation to any of the Hong Kong properties she managed for David. It was also pointed out to Tony that in December 1996, when the first payment was allegedly made, David was still living in Hong Kong. The suggestion was therefore that there could have been no particular reason to give the cheque to Mo Tim in preference to giving it to David himself. Tony offered no real response to that suggestion.

[62] While Mo Tim's evidence is significant – her firm denial effectively neutralises Tony's evidence – she is not an independent witness. I consider it necessary to look elsewhere for corroboration of the narrative provided by one side or the other. There is, in my view, other evidence that broadly corroborates Tony's story on the Mo Tim payments. The first point is a small but potentially significant

item of detail. Ron Luey (to whom I make reference below)[4] said in an email to David in 2013 that he had repaid an unrelated loan from David by giving the payment to Mo Tim. David did not demur. It may be inferred that payments to David via Mo Tim were not uncommon. The second item is more general. In a statement written by David in 2007, he accepted, without any real condition, that the Lams' share in Sunlink Developments was 35 per cent. The Lams signed this statement as correct. I consider this suggests the Mo Tim payments were in fact made. Without them, David would never have agreed in 2007 that the Lams' interest in Sunlink Developments was that large. After all they amounted to nearly half the Lams' claimed contributions. Even in 2007 (that is, well before all of the Plimmerton costs had been incurred), if the Mo Lim payments were not part of the calculation, David would not have agreed that the Lams were entitled to such a significant shareholding.

[63] I discuss the 2007 statement in more detail below.[5]

[64] For present purposes, I find the Mo Tim payments are proved accordingly.

Payments by Betty Lam to Lily Mo – accepted payments

[65] David accepts that the following payments from Betty Lam to Lily Mo were for the Sunlink joint venture:

7 January 1998:	$82,601
13 September 1999:	$ 9,333
22 March 2002:	$22,655

[66] All were made to Lily's mother for Lily. Lily later initialled the first two payments as payments to the Sunlink NZ Ltd account rather than Sunlink Developments. There is some contention around that but that is best dealt within the next phase of the analysis once total contributions are clarified.

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4 At [122]–[130].
5 See [84] to [97].

Proceeds of sale of Hong Kong apartment

[67] It is accepted that Betty Lam made a payment to David and Lily Mo from the proceeds of the sale in December 2000 of an apartment in Hong Kong that she owned jointly with David as an investment property.

[68] The net proceeds of the sale were HK$657,555. Each owner's half share was therefore HK$328,774. Betty, who received the proceeds, forwarded to David HK$557,555 (that is the net proceeds less HK$100,000). Tony's evidence was that David had instructed them to hold back HK$100,000 as that money was to be paid to one Chan Tak. Tony said that, in the end, David decided, despite his earlier indication, that he did not want Tony to pay Chan Tak and so Tony forwarded the unpaid money to him from New York. Tony said that proof in this respect was in New York and he had not realised it was required for court but he could provide it if necessary. This proof was not provided.

[69] David said he never received that extra HK$100,000 and so Betty's payment should not be half the net proceeds of the apartment sale, but half, less HK$100,000 rendered in New Zealand dollars. David said the credit should not be NZ$83,443 in accordance with the then applicable exchange rate but rather NZ$67,000.

[70] I accept David's version of the facts in this respect. Tony was given an opportunity to provide documentation to support his position during the course of the trial but did not take that opportunity up. In the absence of such proof, a choice between the two versions of what happened to the HK$100,000 would be little more than speculation. I find Tony's claim to have paid the full net proceeds to David not proved on the balance of probabilities. The credit in that regard is NZ$67,000 accordingly.

Apartment mortgage

[71] The final item in the claimed contributions related to borrowing secured against the Hong Kong apartment prior to its sale in 2000. The date for this is not known. It is accepted however that David arranged to borrow HK$900,000 against the apartment. And it is accepted that the entire sum was paid to Sunlink

Developments. HK$600,000 was invested as capital and HK$300,000 was used to retire debt. Betty's half of this HK$900,000 would have been HK$450,000. The appropriate exchange rate into New Zealand dollars is not known because the date of the payment of the HK$900,000 to David is not known. But the parties accepted that an exchange rate of HK$5 to NZ$1 was an appropriate proxy for whatever the actual rate was at the time.

[72] The parties agreed that the appropriate credit is HK$450,000 and I am content to leave it on that basis. However, in 2003 the parties agreed that Betty was responsible for only one-third of the loan. I return to this issue below.

Conclusion

[73] I find payments totalling NZ$743,829 proved.

Payments by the Mos to the Lams

[74] It is common ground that the Mos made payments of the order of NZ$276,000 to the Lams during the course of the Sunlink business relationship. Given the lack of conflict over this matter there is no need to set out the individual payments in detail although I will return to discuss some of these below.

[75] Tony says that the payments were returns on their Sunlink investments and confirmed the significant nature of their stake in the Group. The Mos said this was not the case. They were in fact personal loans made necessary because the Lams were in financial difficulty in Hong Kong. David said the payments could not have related to the Plimmerton development (the only venture in which, he said, the Lams had an interest) because by that early stage, the subdivision had not produced any income from which payments could be made. And in any event, he said, the bank's requirements were that debt had to be paid down before any profit could be allocated.

[76] In my view, there are likely to be elements of family obligation and commercial dividends in these payments by the Mos. By 2003, there was friction between the parties over the lack of dividends from the New Zealand operation and,

I infer, this is likely to have been the reason for the Lams' tardiness in contributions or perhaps even refusal to make further contributions. It is significant that a number of payments from David to either Tony or Betty were made in that crucial 2006–2008 period, when, Tony says, the Lams were becoming increasingly frustrated at the lack of a dividend despite the sale of Dixon Street at a significant capital gain.

[77] In any event, I have no doubt that the payments ought to be taken into account as a matter of equity in the final wash-up that will be required in due course.

Written 'agreements'

[78] While the Lams' contributions to one or more entities within the Sunlink Group provide one kind of indicator as to the nature and size of the Lams' stake, the parties also prepared written documents that throw light on both the size of the Lam share and the companies in the group it related to. I turn now to those documents.

The 2003 memorandum

[79] In April 2003, David and Tony executed a memorandum in Chinese relating to various matters affecting the Sunlink Group including the HK$900,000 apartment loan contribution. A translation into English was provided to me, the terms and accuracy of which are not contested. On the question of the Lams' proportion of the venture, cl 1 of that memorandum is relevant. It provides:

> Wong Yuet Ming [Betty] and Mo Chiu Cheung [David] in 2001 have used the property at Patterson St [Hong Kong] to obtain mortgage advance of HK$900,000. (From the advance, Wong Yuet Ming on her part paid the sum of HK$300,000 to Mo Chiu Cheung for investment in the New Zealand company (Sunlink Development Co Inc) for development). Responsibility for future repayment and payment of interest is one-third of the total amount.

[80] It will be remembered that the Hong Kong apartment was in fact sold and the mortgage discharged in December 2000 – nearly two and a half years before the date of this memorandum.[6] Tony arranged the payment of the net proceeds to David (while withholding HK$100,000). So both signatories knew there was no longer any mortgage at the time of the agreement. The only logical explanation for cl 1 is

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6 Note the parties refer in cl 1 to the mortgage having been obtained in 2001. This seems to be a simple error. It was obviously obtained at some time prior to 2000.

therefore that it must have been felt that the issue of responsibility for repayments would have continuing relevance to any final reckoning between the Mos and the Lams in relation to the Sunlink joint venture. That is because David had taken responsibility to meet all repayments of principal and interest during the life of the loan. Tony must have wanted to avoid David seeking to recover half of those repayments from Betty's share of the profits because the apartment was jointly owned. The point is that in cl 1 David and Tony both agreed (in effect) that the right of recovery from Betty would be no more than one-third of the advance. And that, in turn, must have been on the basis that the Lams were only benefitting from the money to the extent of a one-third share in Sunlink Developments. The clause confirms by inference that both sides agreed the Lams' share was one-third.

[81] David noted in evidence that of the HK$900,000 advance, Betty put HK$300,000 into Sunlink Developments and he did the same. The remaining HK$300,000 David used to pay down Sunlink Developments' debt. In my view, that does not detract from the rough and ready one third-two thirds calculation Betty and David plainly made, as recorded in 2003.

[82] In relation to the question of which of the Sunlink companies were to be the subject of Lam interests, cl 1 is relevant because it states that the advance was destined for Sunlink Developments Ltd. But cls 2 and 3 are also relevant. They provide as follows:

> 2. From May, every month is to send (sic) by facsimile a copy of the monthly bank statements of Sunlink (NZ) Co. Ltd. and Sunlink Development Co. Ltd., and to provide the details of all expenses (if exceeded (sic) amount of NZ$5,000).
>
> 3. To the end of April 2003 Sunlink (NZ) Co. Ltd. owed BNZ Bank NZ$200,000. Sunlink Development Co. Ltd. owed BNZ Bank approx. NZ$735,000. Among the two fixed term accounts of NZ$90,000 (the share of Wong Yuet Ming is US$10,000).

[83] These clauses may suggest that the Lams also had an interest in Sunlink NZ Ltd, though it does not necessarily follow that the interest was proprietary. It may simply have been that the Lams wanted to know what else was going on in the

Group. That would particularly be so if the Lams were aware of the Jim Kan dispute. I come back to that dispute later.[7]

The 2007 meeting

[84] On 22 September 2007, Tony, Betty, David and Lily met at David's home in Wellington. Tony and Betty's son Gary Lam was also present. The context of the meeting is of some importance. It was held during a visit by Tony, Betty and Gary to New Zealand. It followed the sale in 2006 of the Dixon Street property and resulting wind up of the activities of Sunlink NZ Ltd. Tony said the Lams had become concerned that following the realisation of a significant capital gain on the Dixon Street sale, there had been no dividend to them as interest holders. David denied there were any such concerns at the time because the Lams had no interest in Sunlink NZ Ltd. He said the proceeds of sale were all taken up in repaying debt and the cost of settling Jim Kan's claim. Any remainder went to the Plimmerton subdivision, he said.

[85] The minutes of the meeting suggest its purpose was to clarify entitlements, roles and the events that might trigger an unravelling of the joint venture. Tony also signalled at the meeting that he wished to vest his own personal Sunlink shares in a company to be owned 50 per cent by himself and 50 per cent by his son. The name of that company was Moral Dragon Ltd.

[86] Tony and Gary Lam both said this meeting had been preceded by a meeting with them, David and Steven Lee solicitor probably on 20 September. Tony and Gary said they had discussed all foregoing matters at that earlier meeting and had reached the agreements recorded in the minutes. Steven Lee and David denied any such prior meeting took place. It is unnecessary to resolve that dispute at this point as it is relevant only to the claims against Steven Lee. I will return to it in the context of my assessment of that claim.

[87] It is common ground that the minutes of the meeting on the 22nd at David's house were prepared by David in Chinese on Sunlink Developments Ltd stationery.

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7 See [112]–[121], and [152].

The choice of language of record was David's as, he said, he did not want any misunderstanding. He felt that any English language record would create problems because of his lack of fluency in that language. Two translations of the text in Chinese were provided in court. The first was from a Department of Internal Affairs Department interpreter via the Internal Affairs' translation service and seems to have been obtained by the Lams for the purposes of this litigation. The second was provided in the bundle of documents at trial but its provenance and author were unclear.

[88] There is a brief unnumbered clause in relation to the language of the minutes, suggesting that the parties expected an English language translation of the minutes to be produced. The Internal Affairs translation was as follows:

> The above meeting minutes are recorded mainly in Chinese and shall be effective immediately.

[89] The unattributed version is quite different in its terms:

> In the event of any inconsistency between the two versions, the Chinese version of the above minutes shall prevail.

[90] At clause 3 of the minutes David recorded agreed shareholdings for the first time. There is no difference between the translations of that clause. The names of the parties are recorded slightly differently but nothing turns on that. The Internal Affairs translation provided as follows:

> Mo Chiu Cheung [David] – 25 per cent
>
> Wong Yuet Ha [Lily] – 40 per cent
>
> Moral Dragon Ltd – 17.5 per cent
>
> Wong Yuet Ming [Betty] – 17.5 per cent
>
> *Remarks*
> Moral Dragon Ltd shareholders – Lam Man Fung [Tony], Gary Lam.

[91] Under the notation "Remarks" at the very end of the minutes after the signatures of the four present, the following is recorded:

> In the event that the co-operative arrangement is terminated, all matters related to the assets and liabilities of the company shall be distributed as per the current shareholding arrangement.

[92] The equivalent passage in the unattributed translation records as follows:

> In the event the Corporation relationship is terminated, all of the companies' (sic) assets and liabilities shall be allocated based on the shareholding interests at the time of the termination.

[93] The difference between these translations is potentially important. The Internal Affairs translation suggests that the final reckoning will be based on the shareholding reflected in cl 3 meaning the Lams would receive 35 per cent of any surplus on completion of the Plimmerton subdivision. The unattributed translation suggests that rights on termination to any surplus might be other than the allocation expressly provided for in the agreement, without explaining how, or by what formula.

[94] The next point is that an underlying tension between the parties is plainly reflected in cls 1 and 2 of the minutes. In cl 1 David provided that the Mos are responsible for "establish[ing]" Sunlink Developments' plan. I take establishing to mean implementing that plan. But the minutes continued:

> Such co-operative agreement on development shall terminate immediately upon such time that the interests of [the Mos] and [the Lams] are damaged.

[95] In clause 2 meanwhile David recorded the Lams' agreement that the Mos "shall have full authority to deal with financial matters". But again that authority was conditional. The minutes continued:

> Such financial authorities (sic) shall terminate immediately upon such time that the interests of [the Mos] and [the Lams] are damaged.

[96] Thus, the point seems to be that the David would run the company with all necessary authority for so long as he did so in a way that protected the interests of both sides. These clauses would only have been necessary, in the context of a seven year business relationship between family members who had never bothered to record these matters before, if trust was beginning to erode.

[97] Crucially, as part of the resolution of that tension for the time being at least, David accepted the responsibility to protect the interests of both families in undertaking Sunlink Developments' project in Plimmerton.

[98] Two matters arise that are collateral to the minutes, but relevant to the issues covered, so I will address them both here.

Payments from Sunlink Developments

[99] The first relates to payments received by Tony and Betty in relation to Sunlink Developments up to the date of the meeting. On the same day that the meeting occurred and the minutes were signed, Tony and Betty say they also signed separate acknowledgements listing the payments they each had received from Sunlink Developments. They are not counter-signed by David. The two tables below are reproductions of these documents.[8] These lists, if genuine, viewed alongside the matters addressed in the minutes, tend to confirm Tony's evidence that return on investment had become a significant issue by 2007. There was, by contrast, no similar list for the Lams' payments *into* Sunlink whether Sunlink Developments or any of the other Sunlink companies. The payments acknowledged by the Lams were as follows:

Betty Lam

Date	HK$	NZ$
June 15, 2005	40,000.00	
Feb 14, 2006		4,000.00[9]
May 16, 2006		
		3,000.00
Oct 20, 2006	40,000.00	
Dec 20, 2006		20,000.00
Feb 27, 2007		20,000.00

8 They are reproduced as set out (with one exception noted below). It is not clear how the two columns relate except that they record payments in different currencies.

9 In the original, this figure was $6,000, with a note saying "Deduct NZ$2000" and "Air Ticket".

July 8, 2007		2,000.00
Sept 14, 2007		2,000.00
Sept 22, 2007		8,000.00
Total	**$80,000.00**	**$68,200.00**

Tony Lam

Date	NZ$
Dec 20, 2006	5,000.00
Jan 23, 2007	10,000.00
Feb 5, 2007	5,000.00
March 12, 2007	5,000.00
March 19, 2007	5,000.00
April 11, 2007	5,000.00
April 24, 2007	5,000.00
July 8, 2007	2,000.00
Sept 14, 2007	2,000.00
Sept 22, 2007	8,000.00
Total	**$52,000.00**

[100] In evidence before me, David said these lists are not genuine. He said subdivided lots in Plimmerton were not put on the market until well after the meeting in 2007, so Sunlink Developments had no income from which to make any of the payments on the list.

[101] In my view, the lists are genuine. Two important clues support this conclusion. First, if the Lams were going to retrospectively concoct a list of payments to help their claim, that list would cover their payments *into* Sunlink Developments, not *from* that company to them. The lists are, in one sense, contrary to the Lams' interests in that they acknowledge the receipt of a measure of benefit from a Sunlink company. If the Lams were minded to manufacture evidence, it would not be that evidence.

[102] The second point is that the significant payments in Betty's list and all payments in Tony's list post-date the sale of Dixon Street. Indeed $25,000 in payments were made just two days after settlement of that sale. This is also broadly consistent with the transfer of $2.9 million by way of "drawings" from Sunlink NZ to Sunlink Developments. That transfer is recorded in the Sunlink NZ accounts for the 2006-2007 tax year, as I have already said. Plimmerton sales may not have started, but Sunlink Developments now had plenty of cash on hand with which to provide dividends to its shareholders if needed.

[103] I will come back to the inferences that may be drawn from these payments, and their source, in my conclusions on factual findings.[10]

Salary promise?

[104] The second matter related to Betty and Tony's salary expectations from Sunlink Developments after the meeting. It is necessary briefly to sketch the background to this.

[105] On 15 October 2007, David wrote two letters to Mr Vincent Chow, a Hong Kong banker. Tony said they were negotiating with Vincent Chow for banking finance and needed letters from Sunlink Developments confirming their income from the company. The letters confirmed to Mr Chow that Betty received an annual income of NZ$100,000 as a director of the company, and Tony's income as a director was NZ$156,000.

[106] Tony explained the new figures mentioned in the letters in this way. He said that he and Betty were originally to receive 50 per cent of Sunlink not 35 per cent. He said that he agreed only at the 2007 meeting to accept a reduction to 35 per cent in return for the promise David made to him and Betty about their future income. He says David promised them NZ$256,000 per annum total income from Sunlink Developments. Tony said he asked for this agreement to be included in the minutes already discussed, but David would not agree. Tony said David promised instead to confirm this separately later, but that was never done. Tony said that did not matter

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[10] See [136]–[158].

because the letters to Vincent Chow sent three weeks after the meeting also confirmed this agreement.

[107] David acknowledged that he wrote the letters to Mr Chow at Tony's request, but said he did this as a favour to the Lams in order to assist them to obtain finance from Vincent Chow. He said they were false and both he and the Lams knew they were false.

[108] I do not consider these letters recorded any genuine agreement between David and the Lams over the Lams' income entitlements. These are inexplicably substantial salaries, far more than the Lams acknowledged they had received in payments over the previous two years, and inconsistent with the capital gain nature of property development. There are other indicators in this direction. Neither Tony nor Betty were directors as represented in the letters and they had no hands-on executive role, as the September 2007 minutes made clear. It is also difficult to credit that Tony and Betty would have acquiesced in David's refusal to include such an important matter in the minutes of this watershed meeting in September. But if true, it is even more difficult to understand why something so important was not recorded by Tony in some way in a file note or personal memorandum given that Tony and Betty were so troubled by the lack of return on their investment.

[109] It is also clear that, if such a promise was made, David never kept it. But there is no record of written complaints by Tony after 2007 about this breach of promise. Tony said he rang David directly about it on a few occasions, but something as significant as breach of a promise to pay $256,000 per annum ought to have produced written letters demanding an explanation or a further meeting. The fact that it didn't, suggests to me that the promise was not made.

[110] I reject Tony's contention in this respect accordingly.

The wider context: Jim Kan, Ron Luey, and Angel Wong

[111] The Lams' financial contributions to the Mos for Sunlink entities and written records of relevant agreements reached in 2003 and 2007 are not the only evidence

about the Lams' rights in the Sunlink Group. Other contextual clues were suggested by one side or the other as relevant.

Jim Kan

[112] The first of these relates to the investment of Jim Kan in the purchase of Dixon Street through Sunlink NZ. Mr Kan did not himself give evidence, but the parties produced a number of documents relating to his investment and no issue of admissibility was taken in that respect. The background may be briefly set out on the basis of these documents. It is common ground that some time in 1995, David and Jim Kan agreed that the Sunlink NZ property investment would be a 50/50 "partnership" between them. Pursuant to that, Mr Kan said he contributed nearly NZ$470,000 to the investment between August 1996 and January 1997. (It is to be remembered that the purchase price for Dixon Street was NZ$418,000 +GST).

[113] By the beginning of 1999, David and Mr Kan had fallen into dispute because Mr Kan said the investment was being used by David to benefit other Sunlink companies unrelated to their Dixon Street partnership via Sunlink NZ. In addition costs were too high, he said, and profitability too low.

[114] In January 1999, David and Clara Ngai met with Mr Kan's representative, Eric Ng, and his solicitor, Paul Cheng to resolve the dispute. A document, part minute of their discussions and part written agreement (like the 2007 Lam/Mo minute), was signed by David following the meeting. But, in evidence, David denied its authenticity. He said:

> At the time my English was poor. Well, I actually, I didn't understand what was written down there.

[115] According to the minute, Eric Ng complained that Mr Kan had not agreed to David drawing $3,000 per month from Sunlink NZ. He complained that company assets had been used to obtain loans for David's other Sunlink projects when their "joint venture" related only to Dixon Street. Agreement was reached that David would provide supporting documentation with respect to past company expenditure and that any expenditure of Sunlink NZ funds on other projects would be treated as a

personal loan from the company to David. David requested 18 months to repay that personal loan while Mr Kan (through Eric Ng) offered him only six months.

[116] There was agreement that David held 50 per cent of the shares in Sunlink NZ as trustee for Mr Kan, and there was also agreement that a director should be appointed for Mr Kan's side. David said it had to be Mr Kan himself while Mr Kan, through Eric Ng, preferred a representative.

[117] As I noted earlier with respect to Waysome Taxi, David said that of the contributions Mr Kan claimed to have made to Sunlink NZ, HK$500,000 was in fact a repayment of a loan and so should not be credited as a contribution. Eric Ng for Mr Kan said this was a past debt that had since been repaid, and so rejected this allegation.

[118] Whatever agreements may have been reached at the meeting, the dispute was not resolved because Mr Kan issued proceedings in September 1999. He alleged that Dixon Street had been mortgaged without his consent; that a debenture had been granted to the BNZ without his consent; and the company had loaned significant sums to Sunlink Developments and Sunlink Investments again without his consent. The essential facts were admitted in a statement of defence filed on behalf of David. The proceeding settled in December 2001 with the payment to Mr Kan of NZ$723,402 coming not from Sunlink NZ, but from Sunlink Investments funds.

[119] For the Lams, Mr Fowler QC used this material for two purposes. First, as propensity evidence to demonstrate that Mr Kan's dissatisfaction over the loose arrangements around his investment in Sunlink NZ reflected precisely the Lams' experience with respect to their investment. The second point was that the withdrawal of Jim Kan from Sunlink NZ, increased by default, the Lams' proportion of Sunlink Group to 50 per cent. This confirmed, he submitted, Tony's contention that his share was in fact 50 per cent of Sunlink Group rather than 35 per cent.

[120] I do not see the logic in the second contention. The fact that a shareholding was freed up with the withdrawal of Mr Kan does not necessarily suggest that it was available for the Lams to take up. The Lams did not point to any contemporaneous

payment by which they took that extra 50 per cent up. The Kan withdrawal can only be seen as neutral in that respect in the absence of evidence of an agreement between Tony and David on the question.

[121] But the evidence clearly does support the proposition that David's modus operandi with respect to his investment partners was to maintain a certain fuzziness around financial arrangements and entitlements. David did not suggest that Mr Kan was an investor in the overall Sunlink Group. He cannot have expected that Mr Kan's half contribution could simply be used to benefit David's other projects without proper protection of Sunlink NZ's position. David suggested in evidence that Mr Kan agreed to Sunlink NZ banking the other companies, but that is not plausible. Why would Mr Kan agree to that? There is certainly no evidence to support such a suggestion. The evidence suggests in this case and (I infer) in the Lams' case, that David created and then exploited ambiguity in the arrangements between his equity partners where it was to his advantage to do so.

Ron Luey

[122] Ron Luey gave evidence in support of the Lams. He is also engaged in litigation in his own right with David over his shareholding in Sunlink so he has a degree of self interest and I will exercise caution over his evidence accordingly. Specifically, I will rely on it only where it is corroborated by other, independent evidence. He claimed to be a 2.5 per cent shareholder in the Sunlink Group having contributed $50,000 to the venture in November 1997 when, according to Mr Luey, David valued the overall group at $2 million. He was, he said, an old friend of David's. They had originally worked together in a dental equipment sales joint venture in Hong Kong. And, as I noted earlier, he had been a contributor to David's share in Waysome Taxis. He said he visited David in Wellington in May and August 1997 and was shown Dixon Street, Cuba Street and the Plimmerton subdivision. He said that in all, he made eight visits to New Zealand between 1997 and 2004 in relation to his investment in the Sunlink Group.

[123] Mr Luey said that David had told him that he (David) owned a third of the Sunlink Group; Tony Lam owned another third; and Jim Kan owned approximately a

quarter. The remaining eight per cent, Ron Luey said, was, on David's explanation, owned by a group of smaller shareholders including Mr Luey himself.

[124] David responded to this evidence by accepting that the original plan was that Mr Luey would take two and a half per cent of the overall group provided he contributed two and a half per cent of the costs of development but he never did. He said Ron Luey only ever put in $50,000.

[125] David said he let Ron contribute $50,000 to the project as a favour. He said Mr Luey really just wanted to be able to say that he was part of a big property investment operation in New Zealand. He thought this would make him look good.

[126] David said that not long after that (in January 1998) Mr Luey asked for $23,000 back because he was short of cash. David said he was prepared to repay to Mr Luey the remaining $26,000 of his original investment but he had no share in the company because he never paid his way.

[127] David said Mr Luey's multiple visits to New Zealand between 1997 and 2004 were just friends catching up. They were not business. Their business relationship ended when Mr Luey borrowed back half of his investment in 1998.

[128] In reply, Mr Luey accepted that he asked for a loan from David shortly after he paid $50,000 but, he said, this was a short term loan that had nothing to do with Sunlink and David knew and accepted that. Indeed David agreed in a subsequent email that this was the position. Mr Luey rejected David's characterisation of him as just a big noter. Mr Luey said he was a successful businessman in his own right, making an investment with an old and trusted friend.

[129] Mr Luey's share in the Sunlink Group is not directly in issue in this proceeding. As I have said, he has separate proceedings against David in relation to that interest. Once again however, the fact that a significant sum of money was received by David from Mr Luey without, it seems, any attempt to nail down in writing important details is contextually significant. For example, no document recorded what part or share of the Group the investment represented, whether the

contribution was to subsequent development rather than an initial purchase (as David suggested), or whether it was contingent on further payments to maintain the two and a half per cent level over time. This is consistent with the experience of Mr Kan in a claim ultimately conceded by David, and with the experience contended for by the Lams in this proceeding.

[130] In addition, Mr Luey's evidence that David told him the Lams held one-third of the Group, also confirms, broadly, the Lams' contention in this case, but I choose to treat that evidence with caution because any success on the Lams' part in this case is likely to provide support for Mr Luey's own proceeding.

Angel Wong

[131] Angel Wong (the youngest sister of Betty and Lily) gave evidence broadly in support of David's case. She suggested in evidence that Tony had reneged on payments he promised to make to her as a result of a business failure in which they were co-investors. A handwritten agreement was signed in August 2007 purporting to settle the issue. Tony signed accepting that US$150,000 would be a fair payment to Angel Wong for the loss. The note recorded that Tony agreed to pay Angel Wong "by partial payment with no interest".

[132] David said Tony had in fact asked him to pay Angel on his behalf and as a loan to him. David said he paid Angel US$30,000 as a result of Tony's request.

[133] Angel confirmed that she received payments from David totalling US$30,000. She provided details of dates on which the payments were made and amounts received.

[134] Tony said he did not read the English note referring to the $150,000 and that there was an original true agreement in Chinese but that is now lost. He accepted that the English note nonetheless had his signature on it. But he said there was no real debt. He agreed to give Angel money because she needed it and he felt sorry for her as his wife's little sister. He said the story about the failed business was false.

[135] Tony's explanation lacks credibility while Angel's detailed recall of David's payments to her very much support his story. I find the payment on Tony's behalf of US$30,000 is proved and should be included in the calculation of contributions made by the Mos to the Lams.

Drawing the threads together – factual findings

[136] David said the Lams only contributed six per cent of the capital in the Sunlink Developments project at (on his calculation) $270,500. He rejects the suggestion of any Lam interest in the other companies. Though he did not say so, this contribution would have set overall shareholder capital in Sunlink Developments at just over $4.5 million. He does not explain how that is made up, but the accounts suggest that much of this was the capital gains enjoyed by other Sunlink companies on sale of their assets and transferred to Sunlink Developments. David says these were his gains alone.

[137] The contributions that the Lams made to the Mos in relation to Sunlink (however defined) is an important indicator of the size of their stake in it, but they cannot be seen as necessarily definitive. I accept of course that the venture commenced on the basis of proportionate contributions. Tony accepted this in his own evidence in chief. But as time progressed much changed and it is necessary to take a more holistic view of the evidence in order to make sense of its internal contradictions.

[138] The payments the Mos claim they made to the Lams are accepted by the Lams (with the exception of the Angel Wong payments on which I have already made a finding). And as I have said, whether properly seen as Sunlink dividends or intra-familial loans as yet unrepaid, equity will consider them to be relevant in the final accounting analysis even if not on the question of proportion.

[139] In my view, the 2003 retrospective agreement over the apartment mortgage and the 2007 meeting minutes are also significant indicators of proportion because they are consistent in allocating around one-third of the venture to the Lams. In 2003, this arose from Betty's claim to be responsible only for one-third of the outgoings on the discharged apartment loan; and in 2007, 35 per cent is expressly

confirmed as the Lams' shareholding. Neither translation of the 2007 minutes makes that allocation conditional upon further contributions by the Lams. The Internal Affairs translation stated expressly that this would be the Lams' entitlement on winding up. The unattributed translation, as I have said, contemplated a possible shareholding adjustment at termination but gave no formula or guidance on how or why.

[140] I do not think the difference matters. I consider that if it was the clear understanding of the parties in 2007 that shareholding was entirely contingent on a final accounting of contributions at the end of the project, the 2007 minutes would not have read in the way that they do. David would undoubtedly have made it clear at the meeting, as he belatedly argues now, that the Lams' share depended on that final reckoning. And the minutes would have recorded the amount the Lams were required to pay to bring them to 35 per cent as at September 2007 or, alternatively, would not have referred to a set figure, but a formula for calculating the Lams' share. David would have insisted that this be recorded in the minutes. After all, he drafted them.

[141] On David's evidence, the Lams were already well behind by 2007 in terms of paying their proportion of overall value. Lily Mo said she heard David complaining to Tony during the Lams' New Zealand visit in 2003. And David said he was making regular phone calls to Tony about this issue. The last payment the Lams claimed to make was in March 2002 – more than five years earlier. On the other hand, the net capital transferred to Plimmerton from the sale of Dixon Street, was all David's on his story. And the Lams had no share in Dixon Street according to David. That means the shortfall in Lams' contributions to Plimmerton would already have been very obvious by 2007 assuming his calculation of the Lams' contribution to be right.

[142] If David was truly concerned in September 2007 that the Lams were not holding their end up, I have no doubt that the minutes would have said so.

[143] I do not know whether the Lams' contributions equalled 35 per cent of Sunlink Developments' capital as at September 2007. As I have already found, the

2007 minutes provide independent support for the Mo Tim payments in excess of NZ$380,000, in the sense that the minutes show no hint that David had concerns in 2007 about the size of the Lams' contribution to the venture. That is likely to mean that Tony's evidence about contributions the Lams made was broadly accurate and I have found accordingly with the single exception of the HK$100,000 Chan Tak payment held back from the apartment sale proceeds. But the important point is that on the date that the parties committed unequivocally to a 35 per cent Lam share, contribution was not a live issue. That in the end, is all that matters.

[144] I conclude therefore that the Lams' portion is 35 per cent.

[145] But 35 per cent of what? This issue is far more difficult. On this question, the evidence is a moving feast. There are two reasons for this.

[146] The first is that David intentionally maintained a certain informality and ambiguity around arrangements with his potential partners. He was able to do this because he had ties of family and/or history and (I infer) culture with them. David used these means to limit the information he made available to his potential, and later actual, partners. As Jim Kan, Ron Luey and the Lams all discovered in turn, the terms and conditions of business with David were always opaque. These were not typical arms-length commercial arrangements.

[147] The second reason is very much related to the first. It is that David's business objectives changed over time. Dixon Street was to be a major development. The purchase was effected by David and Jim Kan, but further capital would be needed, they thought. That is, no doubt, what his pitch was to Tony and Ron Luey when he showed them around Dixon Street and the other properties. In due course, David must have said to the Lams that their and Mr Luey's capital would be utilised in these developments. I infer then that Ron Luey's evidence about David saying to him that the Lams had a one-third share in the Sunlink Group was more likely a description of his ultimate intention rather than the actual position at the time. The trip to Bangkok in October 1997 which I agree was, in part at least, to look at potential building products was to my mind, consistent with that broad approach.

[148] I reject David's explanation that the trip was just a group of friends going to Thailand for a holiday. I have no doubt that the trip was multipurpose and that sourcing production for Plimmerton was one such purpose.

[149] In truth there was not one overarching Sunlink joint venture. Rather, there were three separate joint ventures – the very reason that Jim Kan (the 50 per cent owner of the Dixon Street joint venture) fell into dispute with David who tried to move funds freely between them – and each joint venture had the potential to utilise the Lams' funds if David required them. In a sense, by maintaining the opacity that I have described, David succeeded in having the Lams bank him for free until he was ready to incorporate their money into a particular venture that crystallised arrangements. That use of money will no doubt be relevant to the accounting that will ultimately be required.

[150] The Lams could point to nothing in writing that nailed down what venture they were buying into and the evidence of oral exchanges between the protagonists was consistent either with present or future commitments to a broad stake in Sunlink. Utilising that ambiguity David could keep the Lams in the game. The prospect of future riches helped to fudge with optimism the lack of a firm commitment to any particular venture.

[151] In the result, no developments took place at Dixon Street or Cuba Street and the Lam money was not needed there. But by 2000 when the Hong Kong apartment was sold, the Lams and Mos understood that the Lam money would be applied to Sunlink Developments and the Plimmerton subdivision. That was where the funds were needed and the 2003 retrospective memorandum confirmed this. The Lams' forensic accountant, Roger Taylor, also confirmed this on the basis of the financial information provided to him. He said he never found evidence of any payments from the Lams that were then on-transferred from the Mos' accounts to any Sunlink company other than Sunlink Developments.

[152] I have not overlooked the fact that the 2003 memorandum also referred to David's obligations to keep the Lams informed of transactions relating to Sunlink NZ. This was not necessarily evidence of an interest in that company. It could

simply have been a safeguard designed to avoid the problem Jim Kan found himself in: finding out too late that money from the Lams' joint venture was being siphoned off to another of David's companies.

[153] Nor do I disregard the fact that Lily Mo signed acknowledgements in 2000 on request from Betty that payments in 1998 and 1999 had been for Sunlink NZ and Dixon Street. Lily said this was merely a mistake. On reflection, I accept that explanation. Lily had no role in the administration of the Sunlink companies (she did not take over a bookkeeping role for Sunlink until 2006) and it was an easy enough mistake to make if not dealing with these companies on a daily basis. What is more, Lily's acknowledgement was inconsistent with the treatment of the apartment mortgage and with the subsequent documentation in 2003 and 2007. No other payments were tagged in this way and it is, seen overall, against the run of the evidence.

[154] Finally, it is necessary to step back and look at the funds contributed as a proportion of expenditure on each of the three projects. Even if I accepted that the Lams paid all of the $760,000 they claimed, it still falls so far short of 35 per cent of the whole group as to be completely unrealistic. The fact that the two important documents in the evidence both focused on Sunlink Developments on the other hand, makes much better sense. It will also be remembered that a third document, the Lams' record of payments from Sunlink Developments, is also supportive of the proposition that Sunlink Developments was the only company in this joint venture. Tellingly, the Lams adduced no equivalent lists for either of the other two Sunlink companies.

[155] All of that said, I accept David's counter-argument that the proved contribution is still short of 35 per cent of Plimmerton alone as matters have turned out. But the following factors provide me with confidence that this was nonetheless what the parties intended:

(a) the Lams were family;

(b) David had strung them along for a considerable period over where their interests lay; and

(c) the Lams had been long term investors for little return until they convinced David to give them drawings out of the Sunlink Developments accounts, following the transfer to that company of the Dixon Street proceeds.

[156] I am satisfied therefore, standing back and looking at the evidence as a whole, that the Lams were 35 per cent joint venturers in the Plimmerton subdivision through Sunlink Developments Ltd.

[157] It is necessary then to address the question of Plimmerton Heights Construction Ltd, the company David formed to undertake construction on some of the lots primarily, he said, for the tax advantages of separating that aspect of the business.

[158] In my view, Plimmerton Heights also formed a part of the joint venture. The Lams thought they were investing in the Plimmerton subdivision and that Sunlink Developments was the vehicle for that project. The evidence is that they only became aware of the company in September 2007 prior to the watershed meeting, but it seems clear to me that David fobbed them off when they began to ask about its role. To the extent that Plimmerton Heights produced income from the Plimmerton subdivision, David held 35 per cent of the shares in that company for the Lams also.

Joint venture and fiduciary obligations

Introduction

[159] It is common ground that the Lams and Mos were engaged in a joint venture, the terms of which were not entirely reduced to writing. I have found that the joint venture related to the Plimmerton subdivision and therefore to the two companies that undertook that venture. The joint venture sat above these companies and, to that extent was independent of them, although in large part, the work of the joint venture

was undertaken through them. The Lams were 35 per cent owners in the joint venture and therefore in the companies.

[160] Once the parameters of the joint venture are settled, it must follow that David held the Lams' shares in those joint venture companies as trustee for them. The debate, now much reduced, as a result of my rejection of the Lams' argument that the joint venture applied also to Sunlink NZ and Sunlink Investments, is what obligations if any, the Mos owe the Lams beyond the obligations to transmit to them the appropriate proportion of shares in the Plimmerton companies.

Submissions

[161] The Lams argue in that respect that the Mos were obliged to:

(a) consult with them or involve them in all decisions relating to financing and sales of sections in the Plimmerton subdivision;

(b) ensure transmission of 35 per cent of the shares in the Plimmerton companies and to register the same; and

(c) account for any resulting profits, dividends or salaries held by them in a fiduciary capacity for the Lams.

[162] The Lams say the Mos breached these obligations through the way in which David managed the subdivision. The Lams argued further that the nature of this joint venture meant that the Mos had no right to profit personally or to the exclusion of the Lams through the joint venture and that the Mos acquired a section of the Plimmerton subdivision at cost depriving the joint venture of profit of the order of $100,000.

[163] The Lams say the decision of the Supreme Court in *Chirnside v Fay* is the controlling authority in the circumstances of this case.[11] The applicable principle is that the Mos owed the Lams fiduciary obligations that precluded them from profiting

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[11] *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.

personally from the venture.[12] The Lams submit that the Mos must now account for and disgorge their share of the true profits from the joint venture.

[164] While the Mos accept trusteeship of an appropriate proportion of the joint venture company shares, they reject the far ranging consequences argued for by the Lams. They point to the Supreme Court decision in *Maruha Corporation v Amaltal Corporation Ltd* in support of the proposition that all obligations beyond transfer and register of the appropriate shareholding are a matter of contract and company law reflecting the legal vehicles the parties employed to advance the joint venture.[13] There is, they submit, no room for equitable obligations in the commercial arrangements consciously adopted by the parties.

Analysis

[165] Although the parties referred to a slew of New Zealand and Commonwealth authorities in relation to the nature of the obligations the Mos and Sunlink Developments owe the Lams, it is my view that the two leading New Zealand Supreme Court decisions noted above are all that is required to sketch out the relevant obligations owed to the Lams.

[166] The leading New Zealand decision in relation to fiduciary obligations in the context of joint ventures is *Chirnside v Fay*. That case related to a commercial retail development in Dunedin. Chirnside was the partner in charge of operations and Fay had the task of securing finance in the joint venture as originally conceived. It was common ground that the burden of bringing the project to fruition fell largely on Chirnside but Fay argued that his equal contribution and acceptance of risk to that of Chirnside formed the basis of the 50/50 split in the joint venture. At some point Chirnside identified and obtained a commitment from a major cornerstone tenant in the development. He then abandoned Fay and pursued the venture through his own family trust and with the assistance of a third party minority shareholders. Fay sued.

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12 The Plimmerton companies themselves are also sued directly in knowing receipt, but this is primarily to capture the transfer to those companies of the profits (or part of them) from Sunlink NZ and Sunlink Investments, and, as I have found, the Lams had no direct interest in those profits. I do not address this claim further.

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

The Court was unanimous that Chirnside owed Fay fiduciary obligations with the scope of the original joint venture.

[167] Blanchard and Tipping JJ suggested most joint ventures will inherently involve fiduciary obligations because of their close analogy with partnerships;[14] but in any event, they found, a close analysis of the particular circumstances of the case suggested that the relationship between Chirnside and Fay involved such strong elements of trust and confidence, one to the other, that fiduciary obligations were necessarily generated.[15] This will arise, Blanchard and Tipping JJ found, where one party has undertaken to act for the benefit of the other or to promote or protect the other's interests, yet is also in a position to take the opportunity that this role affords and choose to benefit him or herself.[16] Thus, the potential conflict of interest position the fiduciary is in, is, in a sense, generative of the obligation.

[168] The Court was also unanimous that the fiduciary may not profit in contravention of the joint venture. To profit would be to surrender to the conflict of interest that fiduciary obligations are designed to protect against. The remedy is to require the fiduciary to give an account of all profits and to disgorge them in accordance with the terms of the joint venture. In that case, Chirnside and Fay were 50/50 partners and Chirnside was required to disgorge 50 per cent of the profits accordingly.[17]

[169] By a majority (the Chief Justice dissenting on this point) the Court concluded that, despite his position as a fiduciary, Chirnside was entitled to an allowance before profit is calculated to account for his contribution of time and skill in bringing the project to fruition. The majority considered it would be inequitable for Fay to be unjustly enriched by appropriating to himself the fruits of Chirnside's time and skill without appropriate recognition of that effort.[18]

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14 *Chirnside*, above n 11, at [74].
15 At [88].
16 At [91].
17 At [16], [17], [53] and [102].
18 At [54] and [140]–[146].

[170] Before I draw any conclusion about the impact of that decision on these facts, it is necessary also to consider the Supreme Court's subsequent decision in *Maruha v Amaltal*.

[171] That case involved a joint venture fishing company between New Zealand (Amaltal) and Japanese (Maruha) interests. By agreement of the joint venturers, Amaltal prepared accounts including tax accounts for the new joint venture company called Amaltal Taiyo. In the course of undertaking this work, Amaltal fraudulently failed to advise Maruha that the joint venture fishing quota was able to be depreciated for tax purposes. This generated a significant tax advantage. Amaltal kept for itself the higher contribution Maruha paid to meeting the joint venture company's tax obligations, the latter still believing that the joint venture quota was not able to be depreciated. The relevant issue before the Supreme Court was whether the joint venture gave rise to fiduciary obligations owed by Amaltal to Maruha, quite apart from a separate uncontested finding of fraud. Amaltal argued that there was no room for equitable obligations in the joint venture because the relationship had been reduced to a joint venture company. The rights and obligations between the parties in contract and company law covered the ground.

[172] In a unanimous judgment written by Blanchard J, the Court stepped back a little from the generalisations used in the reasoning in *Chirnside v Fay*:[19]

> The characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations.[20] In our view when commercial parties elect to use an incorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature.

[173] The Court nonetheless found there was a fiduciary element to the relationship in that case. The fact that the parties had allocated accounting functions to one party within the joint venture created a principal/agent relationship between the two companies and that aspect *was* inherently fiduciary.[21]

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19 *Maruha*, above n 13, at [20].
20 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31].
21 *Maruha*, above n 13, at [21]–[24].

[174] In the case of the Lams and Mos, the fact that the operational arms of the joint venture are companies does not entirely displace the fiduciary obligation owed by the Mos to the Lams. There is no doubt that the circumstances of the joint venture meant that the Lams were entitled to repose and did repose trust in David to administer the project in accordance with their best interests. My reasons are these:

(a) David controlled the project itself as the man on the ground in New Zealand in a manner similar to Chirnside.

(b) As sole shareholder and director, he had complete control of the Plimmerton companies and could use them to further his own interests if he so chose.

(c) The Lams lived at a distance and had little understanding of New Zealand law and culture, or of progress with the project given David's control of the information flow.

(d) The parties were not commercial interests operating at arm's length as with Amaltal and Maruha (although Tony and David were both experienced businessmen). Rather, they were closely related family members. This allowed David to tap into a large reservoir of natural trust and mutual regard.

(e) The result was the Lams were almost entirely at the mercy of David in the completion of the project, and both David and the Lams were aware of that.

(f) David was, at all times, a consenting trustee for the Lams' shares in the joint venture companies.

(g) David willingly and personally (along with Betty) accepted the responsibility to protect the Lams' interests in the venture in accordance with cls 1 and 2 of the 2007 minutes.

[175] I conclude therefore that in the unique context of this particular business relationship, the use of joint venture companies did not displace a broader based set of fiduciary obligations owed by the Mos to the Lams. These obligations included, as agreed, trusteeship of the Lams' shares. But they also included the obligation to report regularly on progress with the venture and to keep accounts. Most importantly, the Mos were obliged to account to the Lams for 35 per cent of the profit of the joint venture subject only to such deductions for project/company expenses as were consistent with that fiduciary obligation, which at its heart meant David could not use his position of control over the joint venture companies to advance his own personal interests to the detriment of the Lams when faced with a conflict between those competing interests.

[176] In that regard, I note Mr Taylor, forensic accountant for the plaintiffs provided his own broad brush assessment of what reasonable profits might be in the Plimmerton subdivision. He said it was reasonable to expect a profit in excess of $100,000 per section sold. Meanwhile for the Mos, Mr Lang analysed Sunlink Developments' accounts from 1997 to 2015 and suggested that actual net profit was far less at $514,000 overall for the entire 18 years of the venture.

[177] Mr Taylor raised various issues with both above and below the line deductions and expenses suggesting that they were either inappropriate or unreasonably inflated so as to artificially reduce overall profit levels in Sunlink Developments. He identified the following matters of concern:

(a) small loans to unrelated companies outside the Sunlink Group;

(b) deduction of non-deductible legal fees since 2013 of the order of $150,000;

(c) relatively high above the line salaries to unnamed recipients combined with significant below the line shareholder salaries in excess of $1 million advanced to David without a shareholders' resolution involving the Lams;

(d) high non-deductible entertainment costs; and

(e) much lower than average gross profit figures in 2009 and 2010 suggesting, Mr Taylor surmised, perhaps that sections were being sold at an undervalue over that period.

[178] Mr Taylor accepted however that no final assessment of these matters could be made until this judgment was to hand. I would add, nor are any firm conclusions possible until a final taking of account is completed. Certainly the hearing before me was not the place to pursue this detailed accounting debate. A proper forensic inquiry is called for.

[179] As noted above, in *Chirnside* the majority found that Mr Chirnside was entitled to an allowance for his time and skill. The same applies here: David put a significant amount of time and energy into the business while the Lams were essentially passive investors. The applicable principle in *Chirnside* is that to disqualify David from proper remuneration for his skill and effort would unjustly enrich the Lams at his expense. As the Plimmerton development was substantially the result of David's effort and acumen, reasonable compensation is called for.

[180] While that is the position in principle, I heard little evidence on the time David expended over the course of the venture and the various tasks he performed. Still less, did I hear evidence of what fair remuneration might be for the time and tasks involved. I will need to return to these matters once the taking of account is complete.

Conclusion

[181] It is appropriate therefore that the Lams and the Plimmerton joint venture companies give an account in accordance with Part 16 of the High Court Rules. I will make the necessary detailed orders at the conclusion of this judgment.

[182] The claims in relation to Sunlink NZ and Sunlink Investments Ltd are dismissed.

The Steven Lee claim

Submissions and evidence

[183] The Lams (and Moral Dragon Ltd) then sue Steven Lee submitting that as solicitor for the joint venture, he was retained by the Lams who regularly instructed him in their own right.[22]

[184] The Lams claim that Mr Lee was retained to ensure that their interests in the joint venture companies were transferred to them and registered, and that appropriate account was given to them for their share of the "profits or sales". The Lams claim that these obligations were fiduciary in nature and were breached during the course of the joint venture. The Lams argue that such breaches gave rise to the following losses:

(a) 33 per cent of the profits of all Sunlink profit;

(b) 33 per cent of total shareholders' salaries from Sunlink companies; and

(c) 33 per cent of the equity in Plimmerton Heights Construction Ltd.

[185] These losses produced a final total loss of $1,366,951, the Lams claim.

[186] According to Tony's evidence he met with David and Steven Lee at an early stage in the formation of the joint venture.[23]

> Steven spoke Cantonese and we discussed what Steven Lee's role would be. He was to look after all legal matters pertaining to the joint venture investments, help with identifying potential projects, assist in the setting up of and maintaining the entities to facilitate the investments. He explained to me that there would be a different company running each of the projects. He would look after the legal side of the investments and accountants would be engaged to keep the book. Generally our interests would be taken care of by him. After the meeting with Steven I felt more confident about investment

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22 According to the amended statement of claim, such instructions were given in December 1996, April 1997, October 1997, September 2007 (in relation to Moral Dragon Ltd), and February 2012.

23 Tony Lam's evidence in chief at [16].

> in New Zealand and in the joint venture. It was reassuring to know we could rely on an experienced local lawyer who could also speak Cantonese.

[187] The Lams say that Steven Lee knew of the proposed one-third shareholding from the outset in December 1996 but in any event he could not have been left in any doubt by April 2003 when Mr Lee met at the offices of Jimmy Luey accountant (not Ron Luey) with Mr Luey, Tony and David. At that meeting it was agreed that in order to avoid unnecessary tax and financial disclosure implications triggered by Tony's foreign residency, David would hold the Lams' Sunlink shares in trust. What is more, the Lams argued, Mr Lee wrote to Tony and Betty on 29 October 2003 seeking their signature on a shareholder's resolution affirming Sunlink Developments' decision to borrow funds for the Plimmerton subdivision. This resolution was a requirement of the intended lending institution. It confirmed, the Lams submitted, that Steven Lee must have thought, without properly checking, that the Lams' shares had been transferred to them.

[188] The Lams also referred to a meeting that they say occurred between Tony and Gary Lam, David, and Steven Lee on or about 20 September 2007 and prior to the watershed 22 September meeting with the Mos.[24]

[189] All their concerns over lack of transparency and poor return were, according to Tony, covered at that meeting with Steven Lee. Tony said Steven was evasive in relation to shareholdings in Plimmerton Heights Construction Ltd, but he offered to provide more documentation around progress in the Plimmerton project overall, and, Tony said, Steven promised to provide statements about the proceeds of the Dixon Street sale. According to Tony, Steven failed to keep his promise in these respects.

[190] Tony said the original proposal was for Steven to record the result of that meeting in English, but David wanted a Chinese language record and so wrote the minutes up himself. These exchanges, Tony said, demonstrated that Steven accepted

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[24] They originally alleged the meeting took place on 22 September, the same day as the meeting held at David's home that produced the 2007 minutes. But when Steven responded in his evidence in chief that this was a Saturday and he plays golf every Saturday, rain or shine, and never came to the office, both Tony and Gary accepted that the 22nd must have been wrong. They pointed to the date on photographs they took of the outside of Steven's office on, they say, the date of the meeting. I was advised by counsel and accept that the photos are dated 20 September 2007.

the role of protecting the Lams' interests, and promised to take steps to do so. They showed he had indeed accepted a retainer to act for the Lams in the ways particularised.

[191] Finally, the Lams referred to a telephone conversation alleged to have occurred between Tony and Mr Lee in February 2012. In that conversation, Tony pressed Steven Lee for details about section sales and profits achieved by Sunlink Developments because David had refused to provide those details. Tony said that Steven advised him to obtain an independent audit of the company in order to address his concerns. This too, Tony said, was, in substance, advice.

[192] Steven generally denied these factual allegations. He said he was solicitor for the Sunlink companies and dealt exclusively with David as chief executive in terms of taking instructions. I address the detail of Mr Lee's factual rejoinder below.

[193] Steven Lee also pleaded an affirmative Limitation Act defence. Mr Lee submitted that the action was out of time insofar as it related to events that occurred before June 2007. The Lams' response was:

(a) the September 2007 and 2012 phone calls fell outside that limit; and

(b) in any event s 28 of the Limitation Act 1950 applied to delay the limitation period until the point at which the damage the Lams say they suffered was reasonably discoverable.

Analysis

[194] A contract of retainer may be formed by express agreement, or in some cases, by implication. An express contract of retainer must be proved in the same way as any other contract: offer, acceptance, intention to create legal relations, and consideration.[25]

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[25] *Caliendo v Mishcon de Reya* [2016] EWCA 150 (Ch) at [669]; *Eksteen v White* HC Auckland CP169/96, 11 June 1999 at [93].

[195] An implied retainer can arise "where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties."[26] An implied contract is to be inferred from the conduct of the parties, but it must still satisfy the other prerequisites of contract formation, including intention to create legal relations.[27]

[196] The claim against Steven Lee is fraught with both factual and legal difficulty.

[197] First, the evidence to support an express retainer by the Lams of Mr Lee is sparse at any stage either inside or outside the limitation period. Tony says he met with Steven Lee at the Yangtze restaurant and on later occasions where Mr Lee promised to take care of their interests. Presumably this meant Mr Lee promised, when required, to take care of the Lams' interests to the exclusion of or in preference to the Mos' interests in the Sunlink companies. Such a retainer would have put Mr Lee into a hopeless conflict of interest viz-a-viz his primary instructing contact – David – and the companies for which he clearly did act.

[198] Mr Lee may well have said something like "while I am solicitor for the group, you will be taken care of", but that cannot, in this context, be interpreted as an acceptance of an express retainer even if one was sought. This is far too loose to amount to a formal contract for the provision of legal services for the Lams. None of the usual indices of a retainer are present. There was no file discovered in the name of the Lams, they were not billed for any legal services while the companies were, but only for specific work done for the companies. For the most part, this was conveyancing and financing commercial property work. There were no opinions covering structuring or shareholding and the like either to the Lams or jointly to the Lams and the Mos. There is, as far as I am aware, no billing for the joint venture at all and no file in its name. These factors cannot, alone, be decisive, but in the absence of reliable evidence of a specific offer and clear acceptance, they can become so.

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26 *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249 at [22].
27 *Brown v Innovatorone Plc* [2012] EWHC 1321 (Comm) at [1012].

[199] Mr Lee said in fact that he did not know whether the Lams were investment partners in any of the Sunlink companies until the April 2003 meeting with Jimmy Luey and David. And even then, he said he was unaware of whether David's trusteeship was present or prospective and for how much. This evidence is consistent with the wider run of the evidence. As I have said elsewhere, David's modus operandi was to keep governance and business partner issues very much to himself, leaving Mr Lee's role as that of an orthodox commercial property solicitor for the Sunlink companies who paid his bills.

[200] It is true that Mr Lee originally found both the Dixon Street and the Plimmerton properties for purchase; and it is common ground that Mr Lee travelled to Bangkok with David, Tony and others. But none of that makes it more likely that Mr Lee had a broader retainer viz-a-viz the Lams. Rather, it reflected the strong relationship between Mr Lee and David and the fact that the former spoke both English and Cantonese fluently when David did not speak English at all, at least in the early years. So Mr Lee naturally came to perform a role as an informal go-between with other parties with whom David had to transact, especially when David first came to New Zealand. But, insofar as his legal services were concerned, I infer that Mr Lee was carefully contained by David, as were others with whom he did business.

[201] I find the evidence is very much against the proposition that Mr Lee was subject to a retainer either expressed or necessarily implied by the wider factual context, to take care, in broad terms, of the Lams' interests.

[202] By the time of the April 2003 meeting with Jimmy Luey, Mr Lee would have become aware that David had, or would in the future hold, shares on behalf of the Lams as their trustee. But that is not inconsistent for the proposition that governance and shareholder interests were kept under tight control by David. And it certainly did not make that issue Mr Lee's problem. The October 2003 shareholders' resolution forwarded by Mr Lee for signature by the Lams under cover of a perfunctory letter from Mr Lee confirms this. As Mr Lee argued, this was no letter of advice to a client. It indicated that the lender required a resolution. It asked that if the Lams agreed with the proposal, they should sign and return it. The tenor of the

letter was whether the Lams were now legal shareholders or merely beneficial ones (as was the position in April) was no business of Mr Lee's. His brief was to secure the paper work necessary to obtain the funding.

[203] That brings me to the September 2007 meeting alleged to have occurred at Steven Lee's offices prior to the evening meeting at David's home. Mr Lee says no such meeting took place. He said it could not have occurred on the 22nd as he would not have been available on that day and it did not occur earlier because there is no record of it and he has no recollection of it either.

[204] I have real doubts as to whether any such meeting ever took place. Tony and Gary Lam were unsure of the date. And they equivocated when pressed over whether Betty Lam had attended with them. On Tony's evidence, it was the meeting at Steven Lee's office that produced the agreement on shareholdings, division of roles, the obligation to protect the interests of the two families and so on. But the minutes actually produced by David later, following the meeting at his house, gave no impression of an earlier agreement, and certainly no indication that Steven had any role in it. The minutes were very much in lay terms with no evidence of any legal input or audit. Gary produced three photos at the hearing allegedly taken on the day of the meeting. These photos were of the outside of Steven's offices in Paraparaumu. I find these to be unsatisfactory evidence. They are, as I have said, of the outside of Steven Lee's offices. But there are none of the interior or of Mr Lee himself. If there had been a meeting, and on Tony's evidence, this was the important one, why had the parties not prevailed upon Mr Lee and David to have their picture taken too? Instead there are just three apparently random pictures of the outside of a legal office. This is strange at best.

[205] Mr Fowler QC, understandably, submitted that it cannot be expected that the Lams could have predicted in 2007, the need, six or seven years later, to provide proof of a meeting with Steven Lee in the context of a dispute with the Mos. That is a fair point, but it does not enhance the inherently unsatisfactory nature of the evidence. It is hard to see why a photo taken of the outside of someone's office should be seen as good evidence that a meeting took place inside the office when the

natural and innocent thing to do would have been to take photos of the people, not the place.

[206] Gary Lam gave some evidence about the inside of the office from his own memory, but, perhaps understandably this too was vague and unsatisfactory. It was a long time ago, and on his evidence, he had only been there this once.

[207] I think it more likely that Mr Lee had no role in what David would have considered was private family business. This is supported by the fact that the 2007 minutes are never referred to Steven Lee for his subsequent consideration and advice despite their obvious importance. Mr Lee of course could not have read them anyway as they were in Chinese script (Mr Lee can speak Cantonese but not read Chinese characters), but no translation was ever given to him either. The evidence suggests strongly that the disagreement between the Lams and the Mos was not a matter in respect of which Steven Lee's assistance was required. It was family business.

[208] The brief phone call in February 2012 in which, according to Tony, Mr Lee told him to get an audit done on Sunlink Developments makes no difference to that overall analysis, even if it is believed. It simply demonstrates that Mr Lee did not wish to give the Lams legal advice. He sent them elsewhere.

[209] As to the Limitation Act aspects, in my view even if the foregoing is wrong, the Limitation Act would bar action in respect of any alleged breaches prior to 27 June 2007.[28] This would cover all payments by the Lams to the joint venture – the events which, if there was a retainer, would provide the best basis for a breach of obligation under it, because the payments were made on an unspecified basis and without reference to shareholding entitlements. I agree with Mr Lee that it is hard to see how anything that occurred after those payments could be causative of the loss. Once they were made, it was arguably too late to do anything but attempt to retrieve the situation. In my view, all causative breaches (if they were breaches) were well outside the six year limitation period.

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[28] As the alleged breaches are said to occur prior to 1 January 2011 (if they occurred at all), for the most part the Limitation Act 1950 applies to these facts – see s 2A. 27 June 2007 is six years before the date of the first statement of claim.

[210] Nor do I accept the Lams' argument in relation to s 28 of the Act. I agree with Mr Lee that the construction of s 28 advanced by the Lams is not available on the plain wording of the section.

[211] Section 28 provides:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
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> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> (d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
>
> (e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[212] The concealment in (a) and (b) must be that of defendant pleading a limitation defence. That is, in must that of Steven Lee. The evidence must suggest that he concealed the fact that the Lams were not in fact shareholders. As I have found, these issues were kept away from Mr Lee wherever possible. There is no evidence that he knew of and concealed the facts in this regard. Nor do I accept that, in terms of (c) this can be construed as an action to correct a mistake. On the contrary, David accepts that he holds a proportion of shares in Sunlink Developments at least, for the Lams. The dispute is primarily over how much. But that is not a mistake. It is a debate. It is accepted that once that issue is resolved,

David would be required to transmit the shares. Section 28(c) therefore is not applicable on the facts.

[213] The claim against Mr Lee is dismissed accordingly.

Orders and directions

[214] I have found that the Lams hold a 35 per cent interest in the Plimmerton subdivision joint venture incorporating Sunlink Developments and Plimmerton Heights Construction Ltd.

[215] I have found that the Mos (and David in particular) owed fiduciary obligations to the Lams in relation to the Plimmerton joint venture, in addition to obligations owed by the companies and David as director and any rights of ordinary shareholders. These obligations required that deductions and expenses from revenue for the purpose of deriving profit were only such as were reasonably necessary to derive that profit, and in light of the no conflict fiduciary obligation owed to the Lams.

[216] I have held that it is in order for reasonable deductions to be made to account for the time and skill expended my David in deriving the Plimmerton joint ventures profits and that this issue must be returned to this Court for final resolution.

[217] I have held further that the Lams had no entitlement to the shareholder salaries they claimed were promised to them.

[218] And I have held that the acknowledged payments made by the Mos to the Lams of $276,000 together with the Angel Wong loan from David on Tony's behalf of US$30,000 should be taken into account in any final settling of the entitlements between them.

[219] Subject to the foregoing findings, I direct that a qualified statutory accountant (either agreed between the parties, or appointed by me within five working days hereof, in the absence of such agreement) take an account of Sunlink Developments

Ltd and Plimmerton Heights Construction Ltd pursuant to Part 16 of the High Court Rules.

[220] The costs of the account taker will be met from the funds of Sunlink Developments Ltd. The account taker will provide an estimate of his or her reasonable costs within five working days of appointment, and Sunlink Developments shall immediately pay into court by way of security, that sum or a bond in terms acceptable to the Registrar securing payment of such sum.

[221] David Mo, Sunlink Developments and Plimmerton Heights Construction Ltd will procure the provision of such accounts and all relevant supporting documents including but not limited to invoices, receipts and statements of account covering the period 1997 to the present date, and David Mo and/or a qualified accountant in that behalf will verify the same by affidavit within 10 working days of the date on which the account taker is agreed by the parties or appointed by me.

[222] The plaintiffs will then have 10 working days from that date to give notice of any challenge to the accounts provided, such notice to include sufficient particulars and grounds to inform David Mo, Sunlink Developments, Plimmerton Heights Construction Ltd, and the account taker, of the nature of the challenge.

[223] Any item unchallenged will be deemed to be accepted.

[224] Should the parties be of the view that further expert evidence is required to assist the account taker in carrying out his or her function, or should the account taker so decide, the account taker may make further directions in that regard.

[225] The matter will then be set down to be heard by the account taker by notice given to the participating parties and he or she may hear such evidence and submissions in the taking of account as may be deemed necessary.

[226] The account taker shall furnish to the Court in due course a written report recording the decision or decisions made.

[227] The account taker or any party may by notice to all other parties and the Registrar, refer any disputed item of account for the decision of this Court.

[228] The matter will thus be returned to this Court for final orders including orders in relation to appropriate deductions for the time and skill expended by David during the course of the venture.

[229] Leave is reserved to any party to apply for further directions if required.

[230] Costs are reserved until final disposition of this matter.

Williams J

cc: P Cheng, Morrison Kent, Wellington