

AUSTRALIA / JUDGMENT

Liu v Lam [2024] NSWSC 1306

COURT

Supreme Court

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record**Supreme Court****New South Wales****Medium Neutral Citation:** Liu v Lam [2024] NSWSC 1306**Hearing dates:** 14, 15, 16, 19, 20, 23, 27 February, 13 March 2024. Further written submissions received on 27 March and 4 April 2024**Date of orders:** 18 October 2024**Decision date:** 18 October 2024**Jurisdiction:** Common Law**Before:** Walton J**Decision:** The Court orders and directs:

- (1) The plaintiff shall file and serve Short Minutes of Order reflecting this judgment within 28 days of the publishing of the judgment.
- (2) If there is any dispute as to the form of the Short Minutes of Order filed and served by the plaintiff in accordance with Order (1), then the defendant shall file and serve an alternative form of Short Minutes of Order within 35 days of the publishing of this judgment.
- (3) The Short Minutes of Order shall make provision for the receipt by the Court of submissions as to any adjustment to the judgment sum for any monies paid into a Chinese Court by the defendant, interest and costs (not exceeding five pages) in the event of any dispute as to those matters. The Short Minutes of Order shall also make provision for the filing and service of evidence in the case of a dispute as to costs.
- (4) In the event any one or more of the issues concerning monies paid into a Chinese Court by the defendant, interest and costs are resolved, the parties shall provide a note accompanying the Short Minutes of Order to that effect in which case the Court may deal with the consent orders administratively in Chambers.

Catchwords: CONTRACTS – Formation – Agreement – Acceptance of offer – communication of acceptance – whether agreement executed by both parties

CONTRACTS – Formation – Intention to create legal relations – whether agreement indemnified plaintiff for loss occasioned by prior judgment debt

EVIDENCE – Credibility of evidence

EVIDENCE - s 191 Evidence Act - status of agreed facts – whether agreed facts and issues in dispute constituted an "agreement" – whether evidence before the court warrants displacement or modification of agreed facts – use to which agreed facts may be put

PARTNERSHIPS AND JOINT VENTURES – Whether contract of partnership – Interpretation – presumptions – evidence of Chinese law – absence of common law in China – contribution towards losses – no partnership found

PROCEDURE – equitable set-off – no basis for set-off or repayment

CONTRACTS – penalties – whether interest claimed under agreement is penal – whether different interest rate should apply – interest under contract unenforceable

CONTRACTS – Mitigation

Legislation Cited: Civil Procedure Act 2005 (NSW) s 100

Evidence Act 1995

Partnership Act 1892 (NSW) ss 1, 9, 24(1)

Cases Cited: *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30

Arab Bank Australia Ltd v Sayde Developments Pty Ltd (2016) 93 NSWLR 231; [2016] NSWCA 328

Australian Securities and Investments Commission BHF Solutions Pty Ltd (2022) 293 FCR 330; [2022] FCAFC 108

Bonython v The Commonwealth [1951] AC 201; (1950) 81 CLR 486

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61

Briginshaw v Briginshaw (1938) 60 CLR 336

Burke v LFOT Pty Ltd (2002) 209 CLR 282; [2002] HCA 17

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256

Chan v Zacharia (1984) 154 CLR 178

Cubillo v Commonwealth (No 2) (2000) 103 FCR 1; [2000] FCA 1084

Damberg v Damberg (2001) 52 NSWLR 492; [2001] NSWCA 87

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79

Edwards v Skyways Ltd (Edwards) [1964] 1 WLR 349

Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95; [2002] HCA 8

Farmers' Mercantile Union and Chaff Mills Ltd v Coade (1921) 30 CLR 113

Fazio v Fazio [2012] WASCA 72

Forsyth v Gibbs [2009] 1 Qd R 403; [2008] QCA 103

Friend v Brooker (2009) 239 CLR 129; [2009] HCA 21

Galati v Deans (No 2) (2018) 133 ACSR 516; [2018] NSWSC 1813

Gibson Motor Sport Merchandise Pty Ltd v Forbes [2005] FCA 749

Goldsbrough Mort & Co Ltd v Quinn (1910) 10 CLR 674

Hawes v Dean [2014] NSWCA 380

Helmos Enterprises Pty Ltd v Jaylor Pty Ltd [2005] NSWCA 235; (2005) 12 BPR 23,021

Hope v Bathurst City Council (1980) 144 CLR 1; 29 ALR 577; 54 ALJR 345

HP Mercantile Pty Ltd v Dierickx (2013) 306 ALR 53; [2013] NSWCA 479

James v Commonwealth Bank of Australia (1992) 37 FCR 445

Lym International Pty Ltd v Marcolongo [2011] NSWCA 303

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305

Mao v Bao [2023] NSWCA 278

Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6) (2015) 329 ALR 1; [2015] FCA 825

Minter v Minter (2000) 10 BPR 18,133; [2000] NSWSC 100
Miwa Pty Ltd v Siantan Properties Pte Ltd (2011) 15 BPR 29,545; [2011] NSWCA 297
Nadinic v Drinkwater [2017] NSWCA 114
Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331; [2005] HCA 54
Norman v FEA Plantation Ltd (2011) 195 FCR 97; [2011] FCAFC 99
Nunn Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994] 1 VR 74
OLI 1 Pty Ltd (In Liquidation) v OLG 1 Pty Ltd (No 2) [2022] NSWSC 1199
Orion Insurance Co plc v Sphere Drake Insurance plc [1992] 1 Lloyd's Rep 239
Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525; [2016] HCA 28
Quadling v Robinson (1976) 137 CLR 192
Redowood Pty Ltd v Mongoose Pty Ltd (2004) 49 ACSR 172; [2004] NSWSC 101
Roadshow Entertainment v ACN 053 006 269 Pty Ltd (1997) 42 NSWLR 462
Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd) [2008] NSWCA 149
Sangha v Baxter [2009] NSWCA 78
Shahid v Australasian College of Dermatologists [2008] FCAFC 72; (2008) 168 FCR 46
Steinberg v Commissioner of Taxation (Cth) (1975) 134 CLR 640; [1975] HCA 63
The Crown v Clarke (1927) 40 CLR 227
United Dominions Corp Ltd v Brian Pty Ltd (1985) 157 CLR 1; 60 ALR 741; 59 ALJR 676
Warner v Hung, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2) [2011] FCA 1123; (2011) 297 ALR 56
Woods & White v Hopkins [2016] WASC 16
Yacoub v Commissioner of Taxation (2012) 292 ALR 128; [2012] FCA 678
Texts Cited: Anson's Law of Contract, 27th Edition
Heydon on Contract (Thomson Reuters, 1st edition, 2019)
On Equity (Thomson Reuters, 2009)
Category: Principal judgment
Parties: Tuo Liu (Plaintiff)
Kin Lam (Defendant)
Representation: Counsel:
J R Willis (Plaintiff)
D Robinson SC and Bradley Smith (Defendant)

Solicitors:
Piper Alderman (Plaintiff)
Baker McKenzie (Defendant)
File Number(s): 2020/117870
Publication restriction: Nil

JUDGMENT

1. By a Statement of Claim ("SOC") filed on 20 April 2020 Tuo Liu ("plaintiff") brought a claim in contract pursuant to an agreement alleged to have been entered into between the plaintiff and Kin Lam ("defendant") on 14 May 2018. On the plaintiff's case, the agreement sued upon is constituted by three pages of Chinese script. For ease of reference, I shall refer to the three-page document in Chinese Script and the English Translation of the same length, which contains the terms of the agreement, as "the Agreement". There was attached to the Agreement five additional pages. These pages did not contain operative terms, as such, and were not referred to in the text of the Agreement.
2. The Agreement in Chinese Script appeared at 465 to 467 of Exhibit 5 (a two volume set originally described as Volume D of the Court Book). The English translation appeared at 468 to 470 of Exhibit 5. That document contained three signatures at the bottom of the first two pages and five signatures at the bottom of the third page, which also included those same three signatures. It was common ground that the signature appearing between the other two signatures was the defendant's English signature. It was also common ground that the signature appearing to the left of that signature was the plaintiff's Chinese signature. The plaintiff contended that the signature sitting to the right of the defendant's English signature was the defendant's signature written in Simplified Chinese. The contention was disputed by the defendant.
3. The five additional pages consisted of a letter from Advocatus Law dated 30 April 2018 and post-dated cheques from a corporation known as BS Tech Pte Ltd ("BS Tech") to Ignatius J & Associates ("Ignatius") which appeared at 467A to 467E of Exhibit 5 ("the Advocatus Law Document"). The defendant had been successful in obtaining judgment against BS Tech in a prior proceeding. The letter from Advocatus Law attached cheques forwarded by BS Tech as payments which were post-dated and ultimately not entirely honoured.
4. In a copy of the Agreement before the Court there was an additional page at 471 that provided a notation ("the notation") typed in English. In its original form it was handwritten by the plaintiff.
5. There is a further document in the record before the Court which was not relied upon by the plaintiff as forming part of the Agreement or constituting an attachment to the Agreement. That document consisted of a 2-page letter from Ignatius responding to the Advocatus Law Document and challenging parts of it ("the Ignatius Document"). That document is found at 463A and 463B of Exhibit 5 and has affixed to it the English signature of the defendant. It does not contain the Chinese signatures of either the plaintiff or the defendant.

6. On or around 3 June 2014, the defendant entered into an antecedent loan agreement with a company incorporated in Hong Kong, by the name of Hong Kong Jiayi International Trade Co Ltd ("Jiayi"), pursuant to which he personally borrowed RMB 5 million ("Jiayi Loan Agreement"). Clause 4.2 of the Jiayi Loan Agreement specified that the plaintiff was a guarantor and stated the obligations of the plaintiff under that agreement.
7. The defendant defaulted under the Jiayi Loan Agreement and Jiayi commenced proceedings against the plaintiff, as the guarantor, who was ordinarily a resident of the People's Republic of China ("China"), rather than against the borrower, the defendant, who was ordinarily a resident of New South Wales. Those proceedings were heard in the People's Court of Tianjin Binhai New Area ("the Lower Court Proceedings"). A judgment was delivered in favour of Jiayi against the plaintiff on 27 September 2017. The judgment was for the sum of RMB 5,000,000 plus interest and damages of a further RMB 1,483,333.31. There was an additional charge for interest on overdue payments from 5 July 2016 bringing the total judgment sum to RMB 6,635,516.64 ("the Lower Court Judgment").
8. The plaintiff then brought Appeal Proceedings in the Secondary Intermediate People's Court of Tianjin ("the Appeal Proceedings"). Collectively I shall refer to the Lower Court Proceedings and the Appeal Proceedings as "the Chinese Court Proceedings".
9. The appeal from the Lower Court Judgment was determined on 19 March 2018 ("the Appeal Judgment"). The orders made in the Appeal Judgment were for the plaintiff to pay an additional appeal filing fee, bringing the total amount payable under the judgment sum to RMB 6,692,699.64. Accrued post judgment interest, including interest accrued during the Appeal Proceedings, resulted in the plaintiff having to pay an amount of RMB 9,469,485.52 ("Judgment Debt").
10. The Court enforced the Judgment Debt. As part of the enforcement proceeding, the plaintiff's home was seized by the Court and funds were deducted from his bank account. The plaintiff was anxious to avoid being placed on a list of people with "bad credit" (which had a severe consequence in China) and sought to delay the Court's enforcement measures. The plaintiff paid the Judgment Debt over time, paying a total of RMB 9,469,485.52 by 23 January 2019 (the plaintiff earlier paid RMB 1 million to Jiayi under the Jiayi Loan Agreement).
11. A short history of events prior to the Jiayi Loan Agreement having been entered into may be usefully given at this juncture ahead of the detailed findings of fact later in this judgment. Having met in 2011, from 2013, the plaintiff and the defendant discussed potential future collaboration for business opportunities. In about 2012, the plaintiff introduced the defendant to a corporation known as Tianhe Chemicals Group Limited ("Tianhe"), a manufacturer and seller of chemicals in China.

12. In around 2014, the defendant became interested in and studied the business plan of a Hong Kong based company known as CAN (HK) Co Ltd ("CAN"), a developer of piping technology. CAN wished to establish a factory which could produce pipe fittings and other material.
13. The defendant was advised that CAN required EUR 10 million to buy land for the factory and a further EUR 40 million to build a production factory.
14. The defendant established that BS Tech, a Singaporean company, would be able to source funds (by an introduction to bank lenders) for a fee of 4% of the face value of an instrument (EUR 400,000) with a further 1.9% (or the instrument needed for security) which was to be obtained for a Malaysian company, Jiaso (the full name was not in evidence) (for a fee of EUR 190,000).
15. On 13 June 2014, Millennium Commodity Trading Limited ("Millennium"), a company under the control of the defendant, entered into an agreement with BS Tech for the provision of a EUR 10 million financial instrument for a fee of 4% of the face value of that instrument. Millennium was a company incorporated and registered in Hong Kong of which the defendant is a shareholder and sole director.
16. On 30 September 2014, Millennium entered into an agreement with Much Rise Investment Limited ("Much Rise"), the parent of CAN, whereby Millennium would obtain an effective 10% equity stake in the relevant CAN subsidiary.
17. The funds borrowed under the Jiayi Loan Agreement were to pay for the fees of BS Tech and Jiaso. That money (RMB 5 million or about EUR 585,000) was advanced 2 days after the Jiayi Loan Agreement was entered on 3 June 2014 (there was an earlier version of this agreement to which I shall later refer).
18. The money was paid by Jiayi to the defendant who, in turn, transferred that sum to his company, Millennium, which then paid BS Tech and Jiaso. BS Tech ultimately failed to provide the agreed finance.
19. The defendant's case was that he and the plaintiff were equal partners in respect to profits and liabilities resulting from the Jiayi Loan Agreement, which was in furtherance of, or continuous with, a partnership emerging from the CAN deal. It was contended the Jiayi Loan Agreement was a partnership debt. The plaintiff contested all of those propositions (I note that there is some evidence of an unrelated attempted transaction by which Jiayi, as a borrower, sought to obtain funds facilitated by Millennium. However, the plaintiff's role, in that respect, was limited).
20. Later in early 2015, the Tianhe was suspended from the Hong Kong stock exchange. The plaintiff worked to have the suspension lifted by finding a new auditor as Tianhe's current auditor, Deloitte, would not sign off on its accounts. The defendant knew professional people in Hong Kong and could introduce them to Tianhe to help it recover trading. He introduced, in that respect, Bowie Cheng ("Mr Cheng").

21. An agreement was reached between Tianhe, the plaintiff, the defendant and Mr Cheng by which they would be paid an amount of money for the provision of services to enable Tianhe to re-list on the Hong Kong stock exchange ("the Tianhe Venture").
22. The defendant contended that the Tianhe Venture was entered within the scope of a partnership with the plaintiff and was a transaction of that partnership. That contention was contested by the plaintiff. Further, there was a dispute between the parties as to how much was agreed to be paid under the Tianhe Venture. Payments were received from Tianhe.
23. There was no dispute two payments of RMB 5 million and RMB 1.5 million were received by the plaintiff in 2016 (although the defendant correctly contended that the sum of these amounts was inconsistent with the amount the plaintiff said he would be paid under the Tianhe deal).
24. There was a dispute regarding whether RMB 7 million (or a substantial sum) was received by the plaintiff in late 2015. This contention was contested by the plaintiff. The defendant contended that there was a substantial "balance" of the Tianhe funds which were not distributed to the defendant.
25. In the instant proceedings, the plaintiff claimed that, under the Agreement, the defendant had agreed to pay the plaintiff what the plaintiff was required to pay under the Lower Court Judgment and the Appeal Judgment. In substance, the plaintiff claimed that, under the Agreement, the defendant agreed to indemnify the plaintiff for his loss occasioned by the Judgment Debt in consideration for the plaintiff proffering a period of forbearance.
26. Accordingly, the present proceedings are brought for breach of the Agreement. It is claimed that the defendant had wrongfully failed and refused to pay the plaintiff any amount in relation to the amount owing or interest thereon which remained due and owing to the plaintiff under the Agreement. It was claimed that, by January 2019, the plaintiff had paid the Judgment Debt (equivalent to \$1,890,531.96). There was also a claim in interest, costs and expenses in the claim for damages by the plaintiff. The plaintiff contended that there was no set off or repayment available to the defendant arising out of the Tianhe Venture or payments received by the plaintiff from Tianhe.

THE AGREEMENT

1. The Agreement was drafted by the plaintiff's lawyers on instructions from the plaintiff.
2. The preamble to the Agreement stipulated the parties to be the plaintiff (Party B) and the defendant (Party A).
3. What follows is a reference to the three pages of the Agreement in English text.
4. There is a recital to the Agreement:

"1. On 3 June 2014, Party A signed a Loan Agreement with Hong Kong Jiayi International Trade Co., Ltd. (hereinafter referred to as 'Hong Kong Jiayi'). Party A borrowed RMB 5 million yuan from Hong Kong Jiayi and Party B was the guarantor.

2. Because Party A failed to make repayments on time, on 13 July 2016, Hong Kong Jiayi sued Party B at The People's Court of Tianjin Binhai New Area ('Binhai Court') and requested Party B to assume the liabilities as a guarantor. It asked the court to order Party B to pay the principal of the loan, being RMB 5 million yuan, interests for overdue payment, being RMB 2.73 million yuan (as of 4 July 2016), interests payable at the actual date of paying off the debts, liquidated damages, and other fees. It also asked the court to order Party B to pay its legal service fee, being RMB 331200 yuan, and all litigation costs. Binhai Court accepted this case and the case ID was (2016) JIN 0116 MIN CHU NO. 2011.
3. After hearing, Binhai Court made the decision and ordered Party B to pay Hong Kong Jiayi the principal of the loan, being RMB 5 million yuan and the interests for overdue payment and liquidated damages incurred between 20 June 2014 and 4 July 2016, being RMB 1483333.31 yuan (the 1 million repayment made during that period has already been deducted from the amount). The court ordered Party B to pay Hong Kong Jiayi the interests for overdue payment, liquidated damages and other fees incurred between 5 July 2017 and the actual date of paying off the debts. This amount will be calculated on the basis of RMB 5 million yuan with an annual interest rate of 24%. Other claims raised by Hong Kong Jiayi were dismissed. Party B paid 62183.33 yuan for the filing fee of the case and the 9000 yuan authentication fee was borne by Party B ('first instance Judgment').
4. After the first instance judgment was made, Party B appealed within the term for appeal. The appellate court made the judgment on 19 March 2018. Party B's appeal was dismissed and the first instance judgment was upheld.
5. Party A voluntarily becomes liable for the repayment of all and final liabilities assumed by Party B in the above-mentioned cases."

1. The terms of the Agreement then appeared as follows:

"As a result, through friendly negotiations, Party A and B formed the following agreements.

I. Party A promises to Party B that it will borne all the debts assumed by Party B due to the above-mentioned cases, and all liabilities, fees and loss incurred by Party B, including but not limited to all and any liabilities, legal service fees, litigation costs, translation fees, authentication fees, potential costs for court enforcement, penalty interests, and all the legal service fees paid by Party B ('all debts'). Besides, Party A should pay Party B interest from 13 July 2016 until the day that all debts are paid off. The principal shall be the amount of all debts and the interest rate is 0.02% per day.

II. Party A promises that before 31 December 2018, it will pay all debts and interests agreed in Clause I to the following account designated by Party B:

Account Name:

Bank:

Account Number:

III. If Party A fails to perform the obligation to pay Party B within the period agreed in Clause II, Party B has the right to commence legal proceedings to request Party A to pay all debts mentioned above and interests for overdue payments (0.05% per day). All resulting costs, including but not limited to litigation costs, legal service fee, translation fee and authentication fee, shall be borne by Party A.

IV. Party A voluntarily offers a piece of land owned by him in Australia as the security for all debts mentioned above. Party A should assist Party B to process the mortgage of the land in Australia according to Australian law. Within () days after this contract takes effect, Party A and Party B should proceed with the procedures of registering the mortgage of the property. Party A should not delay this process without reason.

Below is the information of the land:

Location: 32°48'46.4"S, 150°41'30.6"E

Size:

Owner:

Term of Ownership:

Certificate ID:

V. If Party A fails to perform the obligation to pay Party B within the period agreed in Clause II, Party B can choose to exercise the rights of mortgagee against the mortgaged land. However, all other rights of Party B will not be affected by the rights in relation to mortgage.

VI. Without Party B's consent, Party A should not sell, transfer, gift, or mortgage the property. Party A should keep the property properly according to Party B's request. If the property is subject to government requisition, Party B has the rights to place the compensation in escrow or request Party A to perform the obligation to pay all debts at an earlier time.

VII. If Party A breached the contract and disposed the property by himself, such disposal would be invalid. Party B can request Party A to return the property to its original state and pay a sum that equals to 10% of the amount of all debts as liquidated damage.

VIII. If Party A concealed the facts that the mortgaged property is co-owned, or is subject to disputes, or had been seized or retained, or is subject to other mortgages, Party A shall compensate Party B for any economic loss caused by such concealment, and pay a sum that equals to 10% of the amount of all debts as liquidated damage."

1. As to the terms of the Agreement and the process for dealing with copies of the Agreement and disputes, these appeared at the end of the terms following:

"IX. This contract will take effect after being signed by both parties. This contract is in quadruplicates. Party A and Party B hold two copies respectively. The contract is made in English and Chinese. If there are inconsistencies between the two versions, the English version shall prevail.

X. Any disputes in relation to this agreement shall be resolved through negotiation. If negotiation is unsuccessful, the matter shall be administered exclusively by the courts of the State where Party A's land locates."

PRIMARY ISSUES

1. As I will note below, the parties reached, prior to the commencement of the proceedings, an agreed statement of issues. I will expand upon those issues below. However, it is convenient to mention three principal issues on appeal at this juncture.
2. First, on the first day of the hearing, Mr D Robinson SC with whom Mr B Smith appeared for the defendant, articulated a defence that there was no binding agreement as there had not been an exchange of offer and acceptance.
3. It was the defendant's case that he signed the three pages on 9 May 2018 (by his English signature) and that:
 1. there was an offer made by the defendant which was not accepted by the plaintiff; and
 2. if it was accepted by the plaintiff, that acceptance was never communicated to the defendant.
1. The plaintiff's case was that there was an offer and acceptance in a hotel room occupied by the defendant on 14 May 2018 by the execution of the Agreement by the plaintiff and the defendant using their Chinese signatures. Alternatively, the defendant contended that there was an offer when the plaintiff asked the defendant to sign the collateral agreement on 8 May 2018 and an acceptance by the defendant by the signing of the Agreement on 9 May 2018 and returning the document to the plaintiff on that day (the respective statements of issue in this respect shall be referred to as "the offer and acceptance issue").
2. Secondly, there was a further related issue which was expressed by the parties as follows:

"Whether the document titled Agreement executed by the parties in May 2018 ostensibly for the repayment by Lam to Liu of any amounts paid by Liu to satisfy a judgment debt to Jiayi was intended to give rise to enforceable legal obligations or was the Agreement entered into as an artifice for Liu to provide to the People's Court of Tianjin Binhai New Area to delay enforcement of the Jiayi Judgment against Liu?"

1. The defendant relied upon a number of factors in that respect including a feature of the Agreement itself to which I will revisit. The defendant submitted:

"A further indication that the Agreement Sued Upon was not intended to be binding is that the land of Mr Lam said to be "pledged" as security is almost entirely left blank, other than latitude and longitude co-ordinates which are meaningless to support any attempt at identification and enforcement.³⁰⁴ While there was provision for the parties to attend to the mortgage of the land, no steps were taken to mortgage the land, with no follow up or complaint by Mr Liu. Further the Agreement Sued Upon declared that it "is written in Chinese and English" with the English version to prevail in event of inconsistency.³⁰⁵ There is no suggestion in any evidence that there was ever an English version."

1. Thirdly, the defendant also contended that he and the plaintiff were partners in respect of the profits and liabilities resulting from the Jiayi Loan Agreement. This issue was as follows:

"Whether the Loan Agreement entered into with Jiayi, by Lam (described as borrower) and Liu (described as guarantor) in June 2014 was entered into as a partnership."

1. I have earlier mentioned the various forms of, or aspects of, a partnership the defendant contended arose between the plaintiff and the defendant.
2. There were further agreed issues which I will discuss under the next heading. However, I observe at this juncture I will make findings in this judgment contrary to the defendant as to each primary issue. Namely, there was offer and acceptance forming a contract in terms of the Agreement; in forming the Agreement the parties intended to create legal relations and there was not the partnership or partnerships contended for by the defendant.

THE EVIDENCE BEFORE THE COURT AND FURTHER AGREED ISSUES

1. There was a significant volume of evidence produced in each party's case in the form of affidavits produced by the plaintiff and the defendant (contained within Exhibit 3 in the proceedings).
2. The plaintiff filed affidavits dated 29 March 2021 ("the first plaintiff affidavit"), 7 April 2022 ("the second plaintiff affidavit"), 26 July 2022 ("the third plaintiff affidavit") and 13 February 2024 ("the fourth plaintiff affidavit").
3. The plaintiff gave his evidence with the assistance of an interpreter. He does not speak English. He stated the conversations he had referred to in his affidavits were conversations which occurred in Mandarin. There was an English translation of his affidavits.
4. The defendant adduced evidence by way of affidavits dated 26 July 2021 ("the first defendant affidavit"), 1 October 2021 ("the second defendant affidavit"), 26 July 2022 ("the third defendant affidavit") and 3 November 2023 ("the fourth defendant affidavit"). Save for the third plaintiff affidavit, these affidavits are to be found in Exhibit 3 in the proceedings (Volume B of the Court Book).

5. The plaintiff also relied upon the report of Stephen Dubedat, forensic document examiner, dated 19 November 2021 ("the Dubedat Report").
6. The defendant relied upon the report of Ana Zhao who had professional experience in translation and interpreting, including translating the legal document dated 1 June 2021 ("the Zhao Report").
7. Neither Mr Dubedat or Ms Zhao were required for cross-examination.
8. There was documentary evidence exhibited before the Court consisting of the following:
 1. subpoenaed material from the Department of Home Affairs, Department of Foreign Affairs and Trade, and Roads and Maritime Services, although only a very small portion of this material came into evidence (two pages from the Court Book C became Exhibits marked 8 and 9 respectively); and
 2. documents comprising exhibits and annexures to the lay evidence (Exhibit 5 which consists of two volumes) and other exhibits. Much of the material in Exhibit 5 consisted of the Chinese language version of the document plus an English translation.
1. The parties produced a document which was described during the proceedings as a Statement of Agreed Facts and Issues in dispute ("SOAF"). This document was filed on 13 October 2023. I have earlier set out Items 1 and 2 under Part B of the SOAF at [37] (Item 2) and [39] (Item 1). The remaining issues were:

"3. What amounts were:

 - (a) Received by Liu from Tianhe Chemical Group Limited (Tianhe) in 2015 and 2016;
 - (b) received by Liu from Tianhe for Liu and Lam;
 - (c) (out of the amounts referred to at (a) and (b)) paid or transferred by Liu to others, to whom, when and in what amounts?
4. Did Liu hold monies received from Tianhe for the partnership or, alternatively, on trust for Lam?
5. If the answer to (4) Is yes, were partnership funds used to repay Jiayi.
6. If the answer to (5) is yes:
 - 6.1 was such repayment a partial payment in satisfaction of the Agreement if the Agreement was intended to give rise to enforceable legal obligations; or alternatively
 - 6.2 is Lam entitled to set off any such monies paid against any debt otherwise found to be owing under the Agreement.
7. If Liu is otherwise successful:
 - (a) did he mitigate his loss to Jiayi; and

- (b) is his claim for interest at 18.25% per annum in clause III of the Agreement unenforceable as a penalty and if so, whether any (and if so, what) other interest rate should apply;
 - (c) did Lam pay amounts towards the Jiayi Judgment or to others at Liu's request, which amounts Lam is entitled to set off against any monies otherwise payable to Liu?.
8. Whether Lam owes:
- (a) the amount of \$1,890,351.96, or some other amount; and
 - (b) interest calculated at 18.25% per annum from 31 December 2018, or at some other rate,
 - (c) other costs and expenses to Liu pursuant to the terms of the Agreement, and if so, in what amount."
1. The SOAF also contained a statement of agreed facts. There was subsequently a dispute as to two aspects of the SOAF in that respect. This resulted in the tendering of a document entitled "Communications leading to Agreed Statement Of Facts And Issues: 26 July to 13 October 2023" ("SOAF related documents") and the plaintiff and the defendant making supplementary submissions as to that issue. I will resolve the questions arising in that respect later in this judgment.
 2. The parties produced a joint chronology which was filed on 2 February 2024 ("the Joint Chronology").
 3. On 13 March 2024, during oral submissions in reply, senior counsel for the defendant provided a document to the Court, although apparently not to his opponent, which was described in oral submissions as "the facts that are established objectively" (the document actually bore the title "Facts established in [the defendant's] case"). Senior counsel for the defendant, Mr D Robinson explained that, by the use of the word "objectively", he was referring to facts that were either established by documentary evidence, accepted by the plaintiff or corroborated wholly or partially by other evidence, including admissions. Senior counsel stated that he had produced the document because of "discussions between the Bench and the Bar" by which he was presumably referring to issues raised by the Court as to the credibility of the defendant's evidence.
 4. Mr J Willis of counsel who appeared for the plaintiff accepted, in substance, that any prejudice experienced by his client may be remedied by being given an opportunity to respond to the document produced by the defendant. The plaintiff did so by producing a document bearing the same title on 4 April 2024 identifying the points of dispute with the document produced by the defendant in red mark-up. The document in reply was introduced by the following statement on behalf of the plaintiff:

"This document has been prepared by the solicitors for the Defendant, and amended in mark-up by the solicitors for the Plaintiff in accordance with the direction of Walton J on the final day of the hearing (13 March 2024). The document is not intended to, and does not, enlarge or narrow the facts that have been established or the issues in dispute but instead seeks to provide a convenient summary of those facts the Defendant asserts were established on his case.

For the avoidance of doubt, consistent with the Plaintiff's position in relation to the Agreed Statement of Facts and Issues in Dispute filed in the proceedings, this document is not considered to be an agreement for the purposes of section 191 of the Evidence Act 1995 (NSW).

For the avoidance of doubt, the Plaintiff does not agree that the facts below are the only facts relevant to the disposal of the proceedings and in that respect relies on his closing submissions dated 26 February 2024."

1. I shall refer to the respective documents produced by the parties, in this respect, as the "Objective Facts Documents" and will refer, to the extent necessary, to each party's version of the document by reference to the Objective Facts Document produced by the plaintiff or defendant.
2. There was a significant controversy during the proceeding as to the authenticity of an email dated 26 September 2015 which, on its face, was sent from the defendant to the plaintiff ("the 26 September 2015 email"). I will return to the parties' submissions in this respect later in this judgment, however, I note for present purposes that the parties, at the Court's request, produced a note showing transcript references to the cross-examination of the parties as to the alleged email. The defendant produced such a document on 27 March 2024 which was confirmed with minor variations by the plaintiff on 4 April 2024.
3. Lastly, the parties both filed substantial written closing submissions, both on 26 February 2024. The plaintiff's closing submissions shall bear the short form "PWS". The defendant's closing submissions shall be referred to as "DWS".

FINDINGS OF FACT

Credibility Issues

1. At the opening of these findings, it is appropriate to deal with some issues of credibility of the witnesses but not exhaustively as the topic will be revisited at the end of the general narrative of facts and in light of further findings made therein. Some issues of principle might be firstly mentioned.
2. The assessment of credibility of a witness may be based upon whether the accounts of a witness is inherently probable or given against interest. It does not follow that a witness who has been found not to be honest or unreliable about one matter should necessarily be disbelieved about everything else: *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1; [2000] FCA 1084 at [118] (O'Loughlin J). Nor does the disbelieving of a witness as to a particular proposition necessarily mean that the proposition has been proven: *Steinberg v*

Commissioner of Taxation (Cth) (1975) 134 CLR 640; [1975] HCA 63 at 694.

3. Further, as Basten JA observed in *Sangha v Baxter* [2009] NSWCA 78 (with whom Handley AJA agreed), considerable caution should be exercised in making global credibility findings. His Honour observed:

"[155] There are risks in making global findings about credibility of any particular witness. Because a witness has not told the truth with respect to a particular matter does not mean that other parts of his or her evidence are untruthful. Where possible, an assessment should be made of the reasons for the untruthfulness in order to see if other aspects of the evidence are likely to be infected by the same concern. Further, evidence may be rejected because it is apparently unreliable, possibly mistaken or deliberately untruthful or capable of being categorised in a variety of ways which are unlikely to be capable of clear delineation in some cases.

[156] Further, findings of credibility are not usually findings with respect to factual issues in the case, but are rather subsidiary findings on the way to determination of issues. Like many aspects of the evidence in a trial, the evidence of a witness who is believed to have lied in a particular respect, will nevertheless be able to bear some weight and should be placed into a balance, with other material evidence, before a conclusion is reached in relation to a critical fact. The rejection of a witness in total, absent corroboration is likely to mean that, even where corroborated, little attention will be paid to the evidence of the witness and less to the possible consequences which might flow from the fact that particular evidence is shown to be truthful: see generally, *King v Collins* [2007] NSWCA 122 at [44]."

1. That said, there are aspects of the defendant's evidence which, in a more general sense, reflect poorly on his credit as a witness and relate directly to key events in issue in these proceedings. To illustrate this proposition, I will refer to some of the defendant's evidence in the Appeal Proceedings (which will be discussed more fully below) and his evidence in this proceeding.
2. In the Chinese Court Proceedings, the defendant signed an affidavit dated 6 April 2017 for use in those proceedings ("the Chinese Court Proceedings Affidavit"). I will set out the content of this affidavit in greater detail later in this judgment, but for present purposes it may be noted that in the affidavit the defendant attested:
 1. Jiayi needed a local person as guarantor when signing the Jiayi Loan Agreement with a foreign national.
 2. As security was offered and "priority of the [plaintiff's] guarantee was placed after the security", the defendant "agreed to let [the plaintiff] sign his name".
 3. It was only because the guarantee given by the plaintiff was after security given by the defendant, the defendant agreed to let him sign.
 4. The plaintiff was a witness not a guarantor. The defendant would not have asked him to provide a guarantee as such unless that was the case.

5. In October 2015, the defendant arranged for the plaintiff to pay 1 million yuan for the principal of the loan.
1. That evidence was substantially consistent with the defendant's concessions extracted under cross-examination in these proceedings.
2. When cross-examined on such matters in the Appeal Proceedings, the defendant did not suggest his evidence was untrue. Indeed, the defendant stated that the plaintiff was a witness, not a guarantor, and, if there was any real need to ask him to provide a guarantee, he would not have done so.
3. Later, the defendant signed the Agreement knowing that it would be provided by the plaintiff and his lawyers to the Chinese Court, or a Chinese Official associated with the Court to show the plaintiff would imminently receive funds sufficient to discharge the Judgment Debt with a view to delaying the enforcement of the judgment out of the Appeal Proceedings pending receipt of those funds.
4. In these proceedings, as earlier mentioned, the defendant's case was that he entered the Jiayi Loan Agreement with the plaintiff as a partner such that the shared liabilities and revenue are equally shared between them. Any suggestion that the plaintiff only signed the Jiayi Loan Agreement because the defendant requested him to and did not take up obligations under that Agreement because he was not a guarantor or because the defendant had given a security in land ahead of any guarantee should be rejected. The Agreement was not intended, it was suggested, to create legal relations but to buy time for repayment of the Judgment Debt. To find otherwise it was argued, would be to radically reconstitute the Jiayi Partnership.
5. The defendant's affidavit evidence in these proceedings reflected those tenets, although he did, as I have mentioned, make a number of admissions or gave concession under cross-examination to the contrary.
6. Ultimately, there was an irreconcilable conflict in the evidence given by the defendant in the Chinese Court Proceedings in this respect and his evidence to the contrary in these proceedings.
7. In cross-examination in these proceedings, the defendant stated that his evidence in the Chinese Court Proceedings was in all material respects a lie. Senior counsel sought to meet this difficulty in written submissions as follows:

"Mr Lam has explained that he gave false evidence in the Chinese Proceedings to help Mr Liu, his friend, and the content of his evidence in the Chinese Proceedings was completely consistent with that purpose. It is telling that Mr Liu did not give evidence in the First Instance Court or the Appeal Court in China, despite being the defendant, and instead offered up Mr Lam and Ms Meng as his witnesses. That is consistent with Mr Liu attempting to resist Jiayi's claim in those proceedings by advancing false evidence, without exposing himself to cross-examination on issues of which he had knowledge, namely, the circumstances surrounding the payment of the

RMB 1 million on 8 October 2015 and whether or not the Jiayi Agreement contained a clause detailing security in the form of real estate."

1. What is inherent in that submission, and more broadly the defendant's case in these proceedings, is that the defendant is willing to lie in Court proceedings where he assessed there is a proper basis to do so. I note that, in the defendant's case, it is not suggested he acted under any form of duress.
2. The gravamen of the defendant's case in these proceedings including his affidavit evidence was that he was willing to tell lies to a Chinese Court to assist his friend, yet he asks this Court to accept he is a witness of truth in these proceedings when he gives evidence to assist himself.
3. These considerations must result in an acceptance of the plaintiff's submission that the inevitable consequence of the defendant's evidence is that either the defendant's evidence is accepted, wholly or in part, with the necessary corollary that he knowingly gave false evidence in China, or his evidence is not accepted, wholly or in part with the necessary corollary that he is knowingly giving false evidence in these proceedings. I have reached the latter conclusion.
4. Ultimately, I will find that the defendant's evidence in these proceedings was false and that he did not give false evidence in the Chinese courts as reflected above.
5. This conclusion is predicated upon the evidence in these proceedings supporting that conclusion including admissions made by the defendant together with my overall conclusions as to the defendant's credibility (which I will partly find in this section of my judgment and further during the course of my findings of fact).
6. The particular factual considerations bearing upon my conclusion as to the true nature of the plaintiff's obligations under the Jiayi Loan Agreement (when viewed in the light of my findings as to those matters) and the truth of his evidence in the Chinese Court Proceedings include: the email sent by the defendant to the plaintiff on 29 November 2016; the email sent by the defendant to the plaintiff dated 6 December 2016; the affidavit executed by the defendant on 6 April 2017 to be used in the Lower Court Proceedings; the viva voce evidence given by the defendant in the Appeal Proceedings and his evidence in these proceedings as to the correctness or otherwise of his evidence, in that respect and the Agreement itself being signed by the defendant with his English and Chinese signature knowing that it would be provided by the plaintiff and his lawyers to a Chinese Court or Official to demonstrate that the plaintiff would imminently receive funds sufficient to discharge the Judgment Debt and to obviate the need for enforcement of the judgment pending the receipt of those funds. I do not find that either party intended to defraud the Chinese Courts.

7. Apart from those considerations and the later elaboration upon particular aspects of the defendant's evidence which strain credulity or which were dishonest or unreliable as discussed in the fact-finding section of this judgment, particular attention needs to be focused upon two matters.
8. The first is the defendant gave a false declaration in a passport application. In his evidence in these proceedings, he accepted not only that he had lied in that document but that he was willing to lie in documents such as a declaration if it will assist him. He ultimately conceded that he was willing to lie in affidavits if that would assist him. Those are matters of general concern as to the credibility of the defendant's evidence, noting additionally, that the giving of the passport declaration was not remote from the facts and circumstances leading to the formation of the Agreement.
9. Secondly, I give one particular illustration for present purposes which has a bearing upon my later assessment of whether the defendant signed the Agreement with his Simplified Chinese signature.
10. In cross-examination, the defendant was asked about the circumstances in which his signature, which is in simplified Chinese, came to be applied to the transcript of the Appeal Proceedings ("the Appeal Proceedings transcript"). The defendant's response was, in essence, that he could not remember whether he signed it or not because there were "too many people in the Court".
11. As the plaintiff submitted, whilst the defendant could not explain how the number of people in a court room had any correlation to his ability to recall whether or not he signed the transcript of the Appeal Proceedings, he was also unwilling to accept that he must have signed it (notwithstanding his supposed lack of recollection). However, the defendant went further in his evidence. He suggested that it could have been any one of the other people in the court room that applied his signature that day to the Appeal Proceedings transcript.
12. That proposition is incredible. It would require the Court to accept that an unidentified individual would, in a courtroom, replicate the defendant's signature on the Appeal Proceedings transcript, presumably without anyone else including the defendant and the Court taking notice of what was occurring.
13. The evidence was evasive, manufactured and I do not accept it. It has a relationship to a later issue as to whether the defendant affixed his Chinese signature to the Agreement.
14. A further consideration is that it was clear from the defendant's responses to certain questions during cross-examination that he was not being entirely truthful, was evasive and was not willing to make reasonable concessions where such concessions ought to have been given in the circumstances. I do not accept the submission by senior counsel for the defendant that his evidence was "consistent and accurate and truthful".

15. Based upon my overall assessment of the defendant's evidence, which derived, in part, from my close observations of him as a witness, when combined with the further adverse credit findings regarding the defendant's evidence in the fact finding section of this judgment, I have such concerns about both the honesty and reliability of the defendant's evidence that, mindful of the aforementioned principles, his entire evidence must nonetheless be approached with great caution.
16. Overall, I have found that he is not a truthful and reliable witness and that his evidence should only be accepted to the extent that it is against his interests, is consistent with the plaintiff's evidence (which for the most part was honest and reliable) or is corroborated by contemporaneous documentary evidence.
17. The defendant made the submission as to the credit.
18. It was submitted that the plaintiff was not a reliable or credible witness and that parts of his evidence were demonstrably false or unable to be explained. Expressed with that level of generality, I do not accept the defendant's submissions, even though I have made some adverse credit findings as to the plaintiff's evidence in the course of my judgment. Further, I consider that some criticisms of his evidence to be unreasonable, because of problems as to the plaintiff's understanding of questions, the intersection with an interpreter and or ways in which questions were formulated in cross-examination.
19. It was also submitted that, to the extent there was a conflict between the evidence of the plaintiff and the defendant which is not resolved by contemporaneous documents, the defendant's evidence should be preferred. I reject that submission based upon my assessment of the defendant's evidence above and my observations as to the plaintiff's evidence below. I am also of the view that the plaintiff's case is consistent with the objective facts.
20. The attack on the plaintiff's credibility as a witness by the defendant in written submissions was as follows:

"52. First, Mr Liu's contradictory and incomprehensible accounts of the circumstances in which the Agreement Sued Upon was signed on 14 May 2018, which must be false. In Mr Liu's first affidavit, he deposed that Mr Lam met him in the lobby of the Grand Hyatt hotel in Shenzhen on 14 May 2018 at approximately 10:00am.⁴¹ They went to Mr Lam's hotel room, where Mr Liu handed a printed copy of the agreement to Mr Lam, to which Mr Liu had attached a letter from Advocatus, the Singapore solicitors, which Mr Lam had apparently emailed to him on 3 May 2018.⁴² Mr Lam then signed the agreement with his English signature. Mr Liu then photocopied the version of the agreement with Mr Lam's English signature on it, following which Mr Lam signed both copies with his Chinese signature. Mr Liu says he gave the version with three original signatures on it to Mr Lam, and he kept the version with the copy of Mr Lam's English signature. The version of the Agreement Sued Upon which Mr Liu propounds contains a handwritten annotation on page 2 of the Advocatus letter that "This loan agreement and its attachments are signed by the parties face to face at 11:18 AM on 14 May 2018 at MR LAM Kin's hotel room, which

was Room 3115 of Grand Hyatt Shenzhen in China". Mr Liu gave very specific evidence in his affidavit that "Mr Mr Lam and I left the Hotel at approximately 11:20am."

53. This version of events was undermined by two critical objective facts in Mr Lam's evidence: first, a WeChat on 9 May 2018 in which Mr Lam sent Mr Liu the agreement signed with his English signature, indicating that Mr Liu already had this document before attending the hotel; second, Mr Lam's travel itinerary for 14 May 2018 which shows that his flight from Beijing to Shenzhen arrived at 12:25pm, more than an hour after the very specific at which Mr Liu said the agreement was signed.
54. Mr Liu sought to deal with this by giving a completely different account of how the agreement was signed. He said that he had forgotten that he received the agreement signed by Mr Liu on 9 May 2018 because he had replaced his mobile phone so did not have a copy of the WeChat message.⁴⁶ That is despite Mr Liu having exhibited WeChat messages between 13 April 2018 and 8 May 2018 to his first affidavit.⁴⁷ In this new version of events, he deposed that the reason the two men met in Shenzhen was because Mr Liu was uncertain as to whether the agreement would have legal effect under Australian law.⁴⁸ Mr Liu then deposes that the version Mr Lam sent on 9 May 2018 signed with his English signature might in fact be what he (Mr Liu) took to the hotel. Although Mr Liu cannot remember what version of the agreement he took to the hotel, or whether he made photocopies of it at the hotel, Mr Liu remains "certain" that Mr Lam signed his Chinese signature at the hotel.⁴⁹ Mr Liu does seek to reconcile the handwritten annotation that the agreement was signed at 11:18am with Mr Lam's travel itinerary.
55. The detailed conversation set out in paragraph 42 of Mr Liu's first affidavit is also nonsensical once it is understood that Mr Lam had already executed the agreement, in particular the words "Are you happy with it or do you think it needs to be amended?" and "Let me take a look" which Mr Liu attributes to himself and Mr Lam respectively.
56. Mr Lam invites the Court to read the whole of Mr Liu's first account of the circumstances in which the Agreement Sued Upon was executed.⁵⁰ The fact that Mr Liu's first account was so demonstrably wrong, and that he was willing to re-construct his version of events in his second affidavit in an attempt to salvage it, reflects very poorly on his credit. The problems with Mr Liu's evidence, and their significance for the resolution of the issues, are addressed further in Section F2.3 below.
57. Secondly, Mr Liu's evidence that he did not write the email contained in Exhibit 13 (previously MFI 9). The email contains draft terms of a "Supplementary Agreement" in relation to Jiayi, BS Tech and Millennium. When asked whether he sent the document, Mr Liu's evidence was that the email was sent from Mr Lam to him, and he forwarded it by email due to many people not having WeChat accounts. That is despite Mr Lam being a recipient of the email, and with no explanation of why Mr Lam, who apparently drafted the text, could not simply have sent it from his own email account. This evidence should be understood as an attempt by Mr Liu to distance himself from any involvement in the Jiayi

transaction.

58. Thirdly, Mr Liu's insistence that the document at CB-D Tab 17 p 164 was not the agreement he signed on 3 June 2014, despite deposing in his first affidavit that that document (which he exhibited to his affidavit) was a copy of the loan agreement. He stated that "this is a distorted version of the contract" and "I think Jiayi may have made some special arrangements to this documents because this two pages do not bear my signature." After a number of further similar assertions, Mr Liu ultimately accepted that all of the signatures on the document were genuine, and that the document at CB-D Tab 17 p 164 was the document that was signed in June 2014.⁵⁶ This evidence should be understood as an attempt by Mr Liu to ensure his evidence in this Court conformed with the evidence advanced in his case in the Chinese courts.
59. Fourthly, Mr Liu's evidence in relation to the 26 September 2015 Email, which was wholly unsatisfactory. Mr Liu deposed, without any qualification, that "On 26 September 2015, I received an email from Mr Lam", referring to the document at CB-D Tab 24 p 199.⁵⁷ That was clear evidence that he (allegedly) received that email on that day. When first asked about the email, his evidence was that it was possible that he may not have received it, and possible that he did receive it. He then suggested, for the first time, that Mr Lam also asked him to pay money to Jiayi by telephone and in other emails. There was no reference to those phone calls in his affidavit and he was not able to identify any other email. He then gave oral evidence completely contrary to his affidavit that he did not pay RMB 1 million to Jiayi because of the email at all, but rather because of a phone request.⁶⁰ His evidence about the creation of the document at CB-D Tab 24 p 199 was equally incredible. He initially said that Mr Lam approached him with the printed screenshot, already signed by Mr Lam.⁶¹ He then said that he and Mr Lam applied their signatures to the email together in a hotel or a restaurant.⁶² When asked about the email account "SJTMr LiuTuo@163.com" and why he no longer has the email file he received, Mr Liu said that he normally has two email addresses, but "163.com combined the two of them into one" and "I stopped using this email address, and my company needed this email address, so all the emails were deleted".⁶³ Ultimately, Mr Liu's evidence on these matters was internally contradictory and incomprehensible, strongly supporting the inference that the 26 September 2015 Email was fabricated, as addressed further below.
60. Fifthly, Mr Liu's evidence that he was not trusted by Ms Meng to make contracts on behalf of Huge Fairway, and that Ms Meng never gave him a power of attorney to act on behalf of Huge Fairway.⁶⁴ This was demonstrated to be a lie by the photograph of Ms Meng that was shown to the witness and which became Exhibit 6, in which Ms Meng was holding a document headed "Power of Attorney for Execution of Contract" which specifically authorised Mr Liu to execute a contract on behalf of Huge Fairway.

61. Sixthly, Mr Liu's tendency to volunteer irrelevant and unresponsive information in an attempt to slight Mr Lam. In the course of being asked about his knowledge of the "something unethical" referred to in the 26 September 2015 Email, Mr Liu gave this answer:

INTERPRETER: I asked Mr Lam why he travelled so frequently in between the two countries. And I think there might be some fraudulent behaviours of Mr Lam when he applied for his passport. So, he's required to go back to Australia to report.

62. This was completely irrelevant to the question and was an unashamed attempt by Mr Liu to impugn Mr Lam's credit and elevate his own. An honest, credible and reliable witness would not engage in this conduct. Again, when being asked about his dealings with Huge Fairway, Mr Liu volunteered the irrelevant response "I'd like to repeat that Ms Meng is also a good friend of Mr Lam."
63. Seventhly, when confronted with documents which posed difficulties for his case, Mr Liu would pretend not to understand the document, provide a new explanation, or suggest that the document was fake, rather than accept the obvious propositions being put to him about it. Mr Liu was shown the WeChat messages from Ms Meng ("Rummy") at CB-D Tab 55 pp 354-5, which, fairly obviously, are Ms Meng conveying instructions about the evidence to be given in the Chinese appeal proceedings based on her involvement with Mr Liu's lawyers, and which Mr Liu forwarded to Mr Lam. When asked about this, Mr Liu gave answers such as "I'm not too sure what she was referring to" and "I had this document before, but I don't understand what she meant by that". When shown Mr Lam's travel itinerary which undermined Mr Liu's version of events about the execution of the Agreement Sued Upon, rather than acknowledge that, Mr Liu suggested the document had been "amended", by which he clearly meant fabricated.
64. Eighthly, Mr Liu's persistent evidence that he paid 1.2 million HKD out of his own money to Mr Lam in October 2015 as part of Mr Lam's share of the funds to be received from Tianhe, despite, on his own evidence, not receiving any payment from Tianhe until five months later in March 2016.⁷¹ His explanation for this was that "as agreed with Tianhe we have to invest something first before we can get profits"⁷² and "there was a responsibility of making advance payments".⁷³ In Mr Lam's submission, this explanation was invented on the run. It is unsupported in any of the documentary evidence and does not make sense on its own terms. Mr Liu, of course, also paid RMB 1 million to Jiayi at the same time, which he contended was also out of his own money. The obvious inference is that Mr Liu had received funds from Tianhe at this time, which he was seeking to explain away by this evidence. Mr Liu repeatedly gave contradictory and incoherent evidence about the dates on which he received RMB 5 million and RMB 1.5 million from Tianhe, a central issue in the proceedings. In Mr Lam's submission, this raises significant doubt about his reliability as a witness.

65. Ninthly, Mr Liu's blunt refusal to explain the source of the RMB 4.5 million he had in his bank account in May 2018,⁷⁴ combined with this vague responses that the RMB 4.2 million he paid to the Chinese court in May 2018 came from "many different businesses" in China.⁷⁵ Again, this was not a witness endeavouring to assist the Court by seeking to provide complete and direct answers to questions asked, but rather a witness who was guarded and calculated in the information he chose to divulge."
1. As mentioned, I have found during my findings of fact parts of the plaintiff's evidence to be unsatisfactory including occasionally being inconsistent, evasive or straining credulity in the sense that he occasionally maintained unexplained positions. However, in other respects, I found the plaintiff's evidence to be credible and given in a frank forthright manner allowing for some difficulties in translation and a lack of clarity in some questions asked of him.
 2. My observations of the plaintiff were that he was more often studious and attentive in addressing questions under strenuous cross-examination. His answers were frank and concise. He was unshakable in his evidence as to the central tenets of his case and, in particular, that his case put to the Chinese Courts as to the Jiayi Loan Agreement was honest and correct which in some respects corresponded to the defendant's concessions under cross-examination. However, I will deal briefly with the particular issues raised by the defendant in the aforementioned extract from his written submissions.
 3. As to the first contention, I will find parts of the plaintiff's evidence, in that respect, very unsatisfactory, lacking in candour and as being unreliable, but otherwise consider the defendant's criticism to be either unavailable or exaggerated.
 4. I have rejected the attack of the plaintiff's credit based on the second contention.
 5. I have dealt with the third contention in considering submissions by the defendant as to the intention to create legal relations and the absence of security for land being shown in the Jiayi Loan Agreement. The plaintiff's answers as to the Jiayi Loan Agreement were frank, particularly given that the defendant, Ms Meng and he had all expressed an understanding that security had been offered by the defendant in the Jiayi Loan Agreement.
 6. I have rejected the defendant's critique of the plaintiff's evidence regarding the 26 September 2015 email in the particular section of my fact finding dealing with that topic, although I have accepted the position of the plaintiff as to the receipt of a telephone request from the defendant represented a shift from his affidavit evidence (in a similar fashion to his evidence concerning the receipt of a payment from Tianhe of RMB 1.5 million).
 7. There is substance in the defendant's answer that the plaintiff was not being honest in his answer regarding a Power of Attorney by giving to him to execute a contract on behalf of Huge Fairway Trading Limited ("Huge Fairway"), most likely to downplay his association with Ms Meng, a factor present in one of the defendants examples in the sixth contention.

8. I do not, however, accept the plaintiff had a general tendency to volunteer irrelevant and unresponsive information in an attempt to slight the defendant. The illustration given by the defendant is an example of an unresponsive answer, as the Court ruled during the course of the evidence (see T101) but, in my view, it was, when allowing for some translation difficulties, isolated (and there remained the prospect for some confusion in the questions and answers which was never fully explored) (T101).
9. As to the seventh contention, and assuming Ms Meng's communication was "an instruction" as opposed to an advice, I will later find that neither the plaintiff or defendant relied upon it. Further, I do not accept that the plaintiff's responses as to his understanding of Ms Meng's message to indicate he was pretending not to understand "the document" or provide another explanation. It represented the plaintiff's uncertainty, not so much about Ms Meng's intent, but as to what idea she was trying to communicate.
10. Thus, I consider the plaintiff intended to convey that parts of Ms Meng's message were difficult to comprehend such as stating that the plaintiff and the defendant had never been involved until 2016 or the defendant did not know Tian, a position which was never adopted by the plaintiff or the defendant. The failure to act on her advice would confirm that it was either unclear or rejected.
11. I agree that the plaintiff's evidence with respect to the defendant's travel itinerary, namely, that it had been amended was disingenuous even though the plaintiff had been surprised by a document which sat contrary to his views of the time of the execution of the Agreement on 14 May 2018.
12. However, as I will find a meeting did occur and the Agreement was signed by the defendant at a time during that day consistent with the plaintiff's version, even though parts of his evidence were confused or inconsistent in that respect. Ultimately, the plaintiff's recording of the time of the meeting was simply erroneous.
13. As to the eighth contention, I will find that the plaintiff did not receive RMB 7 million or a substantial payment from Tianhe (less the RMB 7 million) in the immediate aftermath of the change of the appointment of new auditors by Tianhe. Nor do I consider the plaintiff's evidence, in this respect, when properly understood to be dishonest, contradictory or incoherent. My reasons for these views are discussed later in this judgment.
14. As to the ninth contention, I will find part of the plaintiff's evidence to be unsatisfactory, including incorporating evasion.
15. Overall, I do not consider that some general caution needs to be expressed with respect to the plaintiff's evidence, as I have found with respect to the defendant. My assessments as to his credit goes to particular findings of fact addressed below.

Chronological Findings Of Fact (Save For Some Particular Later Findings):

Background as to the Parties

1. The plaintiff is a Chinese citizen who lives in Beijing. As earlier mentioned, he speaks Mandarin but not English. The defendant is an Australian citizen who primarily lives in Sydney. However, it is appropriate to mention additional parts of his background.
2. The defendant was born in Hainan, which is an island in the south of China, on 26 June 1970. His native language was Hainanese, which is spoken in the Hainan province of China.
3. In 1979, the defendant's family left Hainan for Macau. While in Macau the defendant learned and started to speak Cantonese. He also learned to speak Mandarin at that time. Cantonese became his primary language.
4. He finished High School in Macau. However, in 1991 the defendant came to Australia to complete the Higher School Certificate. He then studied at Macquarie University from 1993.
5. In 1997, the defendant travelled to Hong Kong to pursue work in the financial services area. While in Hong Kong the defendant was employed as a financial advisor which also dealt with share broking.
6. In 2001, the defendant returned to Australia and ultimately became engaged in a cleaning business.
7. In 2008, the defendant returned to Hong Kong to set up a share broking firm. He kept that share broking business until 2011.
8. Between 2008 and August 2020, the defendant travelled for substantial periods of the year overseas on business to various countries including Hong Kong, Macau, China and Singapore.
9. The plaintiff and the defendant first met by no later than October 2011.
10. From time-to-time, between when they met until at least August 2015, the plaintiff and the defendant discussed and introduced each other to business opportunities, primarily related to the buying and selling of commodities.
11. In or about 2012, the plaintiff introduced the defendant to Zhang Xi Long ("Mr Zhang") of, or who had a relationship with, Tianhe.
12. Throughout 2013, the plaintiff and the defendant discussed potential future collaboration by which they would introduce business opportunities to each other under which they could each earn commission. The evidence does not suggest at this juncture that they had agreed to equally share all profits and liabilities.
13. In May 2013, the plaintiff and the defendant travelled together to Hong Kong and met with several parties interested in acquiring natural gas, oil and coal and investing in waste disposal, but none of these projects eventuated.

14. In 2014, Tianhe was listed on the Hong Kong Stock Exchange with a market capitalisation of HK 30 billion.

The CAN deal and the Jiayi Loan Agreement

1. As earlier mentioned, from March 2014, the defendant became involved in possible funding for CAN.
2. The defendant's evidence as to the background to these transactions was in, summary, as follows:
 1. in the beginning of 2014, the defendant met Mr Lai from CAN having been introduced by two of his business associates, Albert Wong ("Albert") and Gami Chiu ("Gami");
 2. the defendant visited CAN's offices in Hong Kong and was impressed with their 'One-Plug technology', being a technology relating to industrial pipes;
 3. CAN told the defendant that it needed EUR 10 million to buy land for a larger factory and as, a second stage, EUR 40 million to build a production facility; and
 4. in exchange for the defendant assisting with obtaining finance, Mr Lai would give the defendant a 10% share in the business. This involved the entry into a joint venture agreement ("JVA"), under which Millennium (being a company incorporated and registered in Hong Kong of which the defendant was a shareholder and sole director), being given 10% of the shares in a CAN entity. The plaintiff was not a party to the JVA and it did not confer any benefit on him. Nor did the plaintiff hold any shares in Millennium.
1. Accordingly, the defendant needed to raise money in relation to the CAN deal (being EUR 10 million). Albert and Gami suggested the defendant contact BS Tech. The defendant was told by Albert and Gami that:
 1. BS Tech may be able to source funds for a fee of 4% of the face value of the instrument to introduce a bank lender to provide a facility in the amount of EUR 10 million (being a fee of EUR 400,000); and
 2. "Jiaso", a Malaysian industrial company, would provide assets as security to BS Tech, although it is unclear why BS Tech would need security given its role was to introduce a lender which would advance the funds, and would charge EUR 190,000 or 1.9% of face value.
1. Ultimately, the funds required by BS Tech and Jiaso were borrowed from Jiayi.
2. In April 2014, the defendant told the plaintiff about the potential CAN deal in Beijing. It was the defendant's evidence that during their conversation it was agreed there would be a sharing of profits and losses between the plaintiff and the defendant which was denied by the plaintiff and remains a considerable controversy in the proceeding.

3. In his first affidavit, the defendant gave his account of the conversations that occurred between himself and the plaintiff in Beijing in this respect, which incorporated the following:
 1. the plaintiff offered to assist with finding a lender for the CAN deal (being Jiayi) and allegedly stated "let's work together and share equally on this deal"; and
 2. the defendant said, "The way to share the 10% is for you to become a half owner of Millennium" to which the plaintiff allegedly replied "[m]y 50% share in Millennium should be held by Huge Fairway Trading Ltd", (Huge Fairway Trading Ltd was a company owned by a third party to the proceedings), Ms Linjiao Meng ("Ms Meng").
1. The plaintiff denied that a conversation in these terms occurred. I will deal later with the question of partnership but, at this juncture, I note that I prefer his evidence in these respects. In addition to my earlier observations as to the defendant's credit, which I will return to below, the objective evidence is consistent with the plaintiff's denial as follows:
 1. The first is that the proposition advanced by the defendant sits contrary to the fact that the defendant did not transfer any of the shares (let alone 50%) in Millennium to Huge Fairway, the plaintiff or any company associated with the plaintiff and the defendant accepted this in his evidence. The defendant submitted that the shares were not transferred because "there was nothing there to share" because the fundraising failed. But at the time that the arrangement was said to be made the defendant did not know the fundraising would not be successful. Further, no communication was ever sent by the plaintiff raising the failure to transfer the shares, despite the agreement being important to the defendant he never committed it to writing.
 2. The defendant continued to use Millennium as his own private corporate vehicle and did not regard it as being a company owned jointly by him and the plaintiff. The defendant gave evidence that, on 6 and 8 October 2015, "I received two payments from Huge Fairway" being money received in relation to the Tianhe Venture. In fact, his share of the Tianhe monies were paid into an account belonging to Millennium. This is inconsistent with the notion that the plaintiff held an interest in that company.
 3. There is no mention of a profit and loss sharing arrangement between the plaintiff and the defendant in any other documentary evidence before the Court, which pre-dates the commencement of these proceedings.
 4. As discussed below, the circumstances in which the Agreement was entered into was inconsistent with the there being an arrangement to share profits and losses in relation to the Jiayi Loan Agreement (or for that matter, the CAN deal).
1. The defendant deposed that Mr Zhuang mentioned Tian Hao of Jiayi (referred to as Mr Tian) and Jiayi to him at a dinner at which the defendant, the plaintiff and Mr Zhuang were present to consider funding for the CAN deal.

2. There was, in fact, an earlier version of the Jiayi Loan Agreement ("the First Jiayi Loan Agreement").
3. As to the First Jiayi Loan Agreement, on 29 May 2014, the plaintiff, the defendant and others attended the offices of Minter Ellison in Hong Kong. Millennium executed an agreement with Jiayi (with no guarantor) and took a photograph of those in attendance. The plaintiff was not a party to that contract.
4. In his first affidavit, the defendant stated that the plaintiff offered to and did draft the 'first' Jiayi Loan Agreement. A document was attached to the affidavit which was said to be evidence of what the plaintiff had proposed.
5. I do not accept the defendant's evidence in this respect. It is, as the plaintiff put it, a self-serving reconstruction. If necessary to do so, I would infer that the defendant had access to the email account he used to communicate with the plaintiff at this time, but it is not necessary to do so. I reach my conclusion on the following bases which have contributed to my earlier findings as to the defendant's credibility as a witness.
6. In his third affidavit, the defendant accepted that the document attached to his first affidavit was, in fact, a different transaction. Further, the defendant accepted, in cross-examination, that it is possible Jiayi drafted the First Jiayi Loan Agreement.
7. It may also be noted that the defendant did not produce in evidence in these proceedings the First Jiayi Loan Agreement. Nor did the defendant explain why that the document was no longer in his possession.
8. I accept the plaintiff's submission that the plaintiff's attendance at the signing is not indicative of him being in partnership with the defendant for the following reasons.
9. Firstly, the plaintiff's evidence was that:
 1. he was in Hong Kong at the time and the defendant invited him to attend; and
 2. he was hopeful that he would receive a financial reward for being a "part of the introduction between Mr Lam and Mr Tian, because they had been introduced by Mr Zhuang who was [his] friend" (but ultimately, he did not receive a reward).
1. This evidence was consistent with Chinese custom under which people who assist in a deal will often be given an ex-gratia financial benefit. The expectation of a financial reward is also consistent with the plaintiff's evidence that he and the defendant would, from time to time, refer opportunities to each other for financial reward, rather than constituting an indicia of partnership.
2. Secondly, the surrounding facts and circumstances do not support an inference of partnership. If the plaintiff was truly jointly liable for the debt, it would be expected he would have been a joint owner of Millennium (at the latest) by the date the first version of the Jiayi Loan Agreement was signed which was not the case.

3. Between 29 May 2014 and 3 June 2014, the plaintiff and the defendant had a number of conversations about a proposed borrowing from Jiayi.
4. However, the content of at least one of those discussions was in dispute. In the first defendant affidavit, the defendant stated the following conversation occurred during that period:
 1. the plaintiff told the defendant that Jiayi wanted a new agreement in which the plaintiff was a "local guarantor" and the defendant and the plaintiff "put up security";
 2. the defendant would offer his land in Australia as security and asked the plaintiff if he would be the guarantor, to which he agreed; and
 3. the defendant said to the plaintiff, "We are liable 50/50 for the total loss. If Jiayi do go after the land you will have to pay me half of the land value", to which the plaintiff agreed.
1. The plaintiff denied this conversation. He stated that his involvement was because of his personal connection with his friend Mr Zhuang and the defendant. In particular, the plaintiff stated that he did not understand that he would also be guarantor for the Jiayi Loan Agreement until he attended a dinner on 3 June 2014. He stated that the first time he was asked to be a guarantor was at a dinner on 3 June 2014.
2. I am inclined to accept the plaintiff's account in this respect because, in addition to my earlier findings as to his credit:
 1. The plaintiff's account is consistent with the evidence given by the defendant's viva voce in the Appeal Proceedings (which I have earlier referred to and will set out later in this judgment) which tended to suggest that the defendant found out about the need for a local guarantor while at the dinner where the Jiayi Loan Agreement was signed, and upon finding out it was necessary, he called the plaintiff over who was "[a]t the time...not dining with us... [but was] in another conversation in another place" (although the defendant denied this part of the Appeal Proceedings evidence during cross-examination). The defendant stated in his evidence in the Appeal Proceedings, the plaintiff became a party to the Jiayi Loan Agreement as a matter of formality because he was a local and was, in reality, a witness to the transaction. The guarantee, such as it was, was secondary to the security the defendant had provided to support the loan.
 2. I agree with counsel for the plaintiff that the expression "We are liable 50/50 for the total loss" is an odd expression. A more common expression that may be expected to be used in that conversation is 'sharing the risk' although I have taken into account the prospect of translation difficulties.
1. It follows that I do not accept the proposition advanced by the defendant that the defendant and the plaintiff had discussed the prospect of the plaintiff becoming a guarantor prior to the 3 June 2014 which I discuss next.

2. On 3 June 2014, the plaintiff and the defendant entered into the Jiayi Loan Agreement at a dinner with Mr Tian and other representatives of Jiayi pursuant to which:
 1. the defendant was described as the borrower;
 2. the plaintiff was described as the guarantor;
 3. the plaintiff was to be jointly liable as guarantor for the debts owed by the defendant under the Jiayi Loan Agreement (cl 4.2.1);
 4. the amount of the loan (the "Loan") was EUR 600,000 (RMB 5,000,000) ("Loan Amount"); and
 5. the term of the Loan was 15 days (cl 2).
1. The Jiayi Loan Agreement did not contain any mortgage of land as security. However, it contained clause 4.1.1 which made provision for such mortgage, but it was not filled in by the parties with the details of the property.
2. Clause 4 of the Jiayi Loan Agreement was in the following terms:

"Clause 4 Clause for guarantee:

4.1 Guarantee secured by mortgage

4.1.1 Party B promises to mortgage the land owned by him in Australia (land certificate No.: __, size of the land: __, boundary of the land: __) to Party A as the guarantee for performing the obligations in relation to the principal debt. The minimum market value of the land is EUR _____.

4.1.2 Party B promises that he has full ownership of the land and full right to use the land. Party B promises that the land is not subject to restrictions such as claims from others, leases, or seizure.

4.1.3 The scope of the guarantee secured by mortgage includes the principal of the principal debt, interests, liquidated damages, damages, fees for preservation measures in litigation, legal costs, costs for recovering the debts and all other fees.

4.1.4 Party B should register a mortgage in which Party A is the mortgagee with relevant authority within _____ days after signing this agreement. The fees incurred due to the registration shall be borne by Party B.

4.1.5 The term of the guarantee secured by mortgage is 2 years after the maturity of the principal debt.

4.2 Guarantee secured by a guarantor

4.2.1 Party C agrees to be jointly liable as a guarantor for the debts owed by Party B to Party A under this agreement.

4.2.2 The scope of the guarantee secured by a guarantor includes the principal of the principal debt, interests, liquidated damages, damages, fees for preservation measures in litigation, legal costs, costs for recovering the debts and all other fees.

4.2.3 The term of the guarantee secured by a guarantor is 2 years after the maturity of the principal debt.

4.2.4 Meanwhile, party C promises that when Party B fails to perform the obligations of repayment in accordance with this agreement, regardless of whether Party A has other guarantees for the principal debt, Party A has the right to request Party C to assume joint liabilities as a guarantor within the scope agreed in the agreement, without first requesting other guarantors to perform their guarantee obligations

Party C expressly abandons the counterplea rights of requesting the prioritisation of the enforcement of the guarantee against the real securities provided by Party B."

1. I accept the submission of the plaintiff that he had credible reasons for executing the Jiayi Loan Agreement which were unconnected with the partnership contended for by the defendant. These explanations were as follows:
 1. he understood that the defendant had already reached a deal with Mr Tian and that the whole deal was dependent on him being a guarantor;
 2. he felt that if he disagreed, he would 'lose face' because he would not be helping the defendant and Mr Tian do a deal;
 3. he wished for the defendant and Mr Tian to strike a deal which was successful because he considered this to be a good way of getting finance and possibly something he could use in future business transactions; and
 4. on the plaintiff's account, the defendant told him that he would use his land as security and reassured him multiple times that it would be safe and that there would be no risk.
1. I note, in that later respect, that the position of the defendant in this respect was that there was no security in the Jiayi Loan Agreement and the proposition there was security available was a mere concoction to defeat the creditor. I do not accept that submission but my reasons, in that respect, can await discussion of the events leading to the Lower Court and Appeal Proceedings and the evidence given in the Appeal Proceedings.
2. On or about 5 June 2014, the defendant received the Loan Amount (RMB 5 million) from Jiayi. As earlier mentioned, those monies were transferred to Millennium.
3. On 11 June 2014, the plaintiff sent an email to, amongst others, Mr Tian and the defendant which set out terms of a "Supplementary Agreement" relating to Millennium and Jiayi.

4. The defendant identified a number of events after the signing of the Jiayi Loan Agreement which were said to contribute to a proposition that there was a partnership associated with the Jiayi Loan Agreement and the CAN deal. Those contentions were as follows:
 1. The evidence of the defendant was that on his second trip to Singapore, at the Marriott Hotel, there were negotiations as to how Millennium would cover its risk in the event of a failure by BS Tech to perform its part of the bargain.
 2. The defendant's evidence was that he provided the plaintiff with telephone updates on the progress of the meetings with BS Tech and that the plaintiff sent emails concerning Jiayi's requirements.
 3. The first of the emails referred to by the defendant was from the plaintiff to the defendant dated 11 June 2014, copied to others including Mr Tian.
 4. The 11 June 2014 email dealt with the mechanics and the subject of how Jiayi and Millennium would deal with a cash promissory note provided by BS Tech to secure its obligation to Millennium. The promissory note (also described as a cheque) was for an amount which ultimately turned out to be SGD 678,016.94, although it was unclear from the 11 June 2014 email whether that amount had already been determined at the time the plaintiff sent the 11 June 2014 email.
 5. The plaintiff's involvement was an intermediary, at least, as between Jiayi and Millennium and that showed more than an incidental involvement as a witness in the transaction. However, I infer that, in sending the 11 June 2014 email, the plaintiff was doing no more than communicating the position of Jiayi.
 6. Of greater significance to illuminating the plaintiff's quite central role in the Jiayi transaction was the exchange of emails between the defendant and the plaintiff on 13 June 2014 ("the 13 June 2014 email"), apparently immediately prior to the execution of the "Financial Joint Venture Agreement" between Millennium and BS Tech.
 7. The 13 June 2014 email sets out the defendant's views on how the BS Tech transaction should be structured so as to limit the risk to the defendant and the plaintiff from the structure of the transaction whereby BS Tech was to be paid EUR 400,000 for its role. The significant aspects of the 13 June 2014 email concerned the consideration set out by the defendant for the plaintiff as to how their risk would be managed:

"The above three points posed no risk to us and are 100 times better than the due diligence of a lawyer. We have both provided sufficient securities and guarantees for Mr. Tian's money before it is lent to us for the transaction, and now the promissory note is taken back. I want to make it clear that if the transaction fails because of them, the two of us will take the responsibility; if they're going to hold me liable for breach of contract, I will put the blame on Mr. Tian; everyone will be upset and this will affect future cooperation with Mr. Tian and will waste a lot of energy on the law.

...

If the transaction fails because of this, the two of us definitely will not take the responsibility (for 190,000 euros).

...

Mr. Mr Liu, please discuss the situation with Mr. Tian and make sure he understands it."

The response from the plaintiff to the defendant was:

"Let's have further talk after it is received and understood."

1. It was submitted by the defendant that the 13 June 2014 email illustrated that:
 1. it was plainly not a communication from the defendant to the plaintiff in a capacity as a witness, or as a witness for the sake of form only;
 2. the entire discussion is about the sharing of risk and responsibility between the two of them; with the defendant seeking the plaintiff's involvement to minimise the risk to "the two of us"; and
 3. the defendant was entrusting the plaintiff to discuss the situation with Mr Tian to make sure he understood the responsibilities and sharing of risks as set out in the email.
1. The defendant also submitted that the email was, in fact, strong evidence of a joint undertaking between the plaintiff and the defendant and consultation between the partners in the Jiayi project, as such.
2. Finally, the defendant submitted that the plaintiff's involvement in the CAN deal included the defendant, the plaintiff and Ms Meng travelling together to Singapore in July or August 2014 to introduce the plaintiff to BS Tech. While on the trip, the defendant and the plaintiff discussed, it was contended, the CAN deal with representatives of BS Tech, which involved the utilisation of the funds borrowed from Jiayi. It was accepted that the plaintiff did not deny that he travelled to Singapore with the defendant and Ms Meng, but denied being introduced to BS Tech, or that the CAN deal formed any part of the reason for the trip to Singapore. However, it was submitted the plaintiff did not provide any alternative explanation for his presence on the trip.
3. The relevant aspects of the 13 June 2014 email are at [149(7)].
4. The plaintiff's evidence as to this was as follows:

"Q. He went to see a company called BS Tech, that's B S T E C H. That's the name of the company, BS Tech?

A. INTERPRETER: I'm not too sure.

Q. You had some dealings with BS Tech yourself, didn't you?

A. INTERPRETER: No.

Q. You were aware, were you not, that Millennium signed a contract with BS Tech for Millennium to obtain a bank instrument for \$10,000,000?

A. INTERPRETER: I'm aware of that.

Q. You can look at it if you wish to, but it occurred on the 13 June 2014 was the contract. Do you accept that?

A. INTERPRETER: Where is the contract?

Q. 118 in the Court bundle, volume D. It should be in front of you because I think we were looking at that same volume. Behind tab 9.

A. INTERPRETER: I've never seen this document before.

Q. You can see it's a contract between Millennium for the party 1, and party 2 is BS Tech Pty Ltd.

A. INTERPRETER: Now I can see. Yes.

Q. And you recognise the company, BS Tech?

A. INTERPRETER: I do.

Q. Have you had dealings with BS Tech?

A. INTERPRETER: Through the introduction of Mr Lam, I also made a trip to Singapore, and I made a payment of 2,500,000 RMB to BS Tech in a deal.

Q. You are aware that the 5,000,000 RMB, which was given to Lam as the borrower in relation to the Jiayi loan?

A. INTERPRETER: Correct.

Q. And you know that Lam applied that money to the account of Millennium?

A. INTERPRETER: Yes.

Q. There was a concern raised, was there not, that if BS Tech did not perform their requirement of obtaining the finance, that there would be a financial risk for the \$5,000,000?

A. INTERPRETER: Because I wasn't involved, so I was not aware of the structure and the risks involved.

Q. Are you sure of that?

A. INTERPRETER: Yes. Because of my English limitation, I can't read, I can't speak English. So, I did not get involved in any overseas matters.

Q. I want to suggest to you that you were very much involved in handling that risk.

A. INTERPRETER: No.

Q. Could you turn to p 110 of the Court bundle which is in front of you? 110 would be the Mandarin version.

A. INTERPRETER: Yes.

Q. Can you read that to yourself?

A. INTERPRETER: Yes, I have.

Q. You see the email address 13901, et cetera. That is the address you told me of yesterday, isn't it? And that's your address?

A. INTERPRETER: Yes, it's mine

Q. Is this not you participating in the managing of a financial risk?

A. INTERPRETER: No, I was just passing on the information because this email was sent to me from Mr Lam. And I was just forwarding it to Zhuang Tao and Lin Hao.

Q. It appears to be written by you, does it not? Sent by you?

A. INTERPRETER: It is.

Q. But you had nothing to do with it except pass it on?

A. INTERPRETER: Correct.

Q. Do you remember that I took you to a passage this morning where I asked you about a risk arising from the handling of the \$5,000,000, and you said you had nothing to do with it?

A. INTERPRETER: Had nothing to do with me.

Q. This is a risk in the 5,000,000 RMB which you are at least a guarantor for, is that not right?

A. INTERPRETER: When the events occurred, at a later stage, yes, had something to do with me. But at this time, it did not.

Q. Were you a guarantor of this 5,000,000 RMB at this time? That is, the 11 June 2014?

A. INTERPRETER: Because my understanding back then was I was a witness only. So, the risks associated with it had nothing with me. It is something to be dealt with between them.

Q. Could you go to 115 in that same volume? Could you direct yourself to page 113 in Mandarin, which equates to 115 in the translation?

A. INTERPRETER: Yes.

Q. Is Mr Lam asking you to take steps in the minimisation of the risk in the 5,000,000 RMB?

A. INTERPRETER: That's what he meant.

Q. Is he asking you to take steps to involve yourself in minimising the risk in this transaction?

A. INTERPRETER: Correct.

Q. He was doing that because you were jointly interested in the 5 million RMB.

A. INTERPRETER: No. Because my signature was present in the contract with Xiae, so he states the two of us were absolutely not bear any responsibilities.

Q. That was conditional on the happening of events, wasn't it?

A. INTERPRETER: Correct.

Q. He's talking there about the two of you bearing responsibility, isn't he?

A. INTERPRETER: That's his expression."

1. In my view, the plaintiff's evidence about the 11 June 2014 email and the 13 June 2014 email was entirely credible when seen in the light of his understanding of the limits of his obligations as a guarantor of the Jiayi Loan Agreement. In my view, his answers were candid and frank. Furthermore, the communication was written by the defendant and was expressing a view about risks that were commensurate with the defendant having invited the plaintiff to engage with the Jiayi Loan Agreement where he was offering a security backing.
2. When converted to the essential ingredients of these transactions they are not demonstrative of activities engaged in a partnership because:
 1. The RMB 5 million was paid into the defendant's account, not any separate partnership account;
 2. the defendant, and not the plaintiff, travelled to Singapore with Mr Lai (from CAN), Shi Shan Xin (from Jiayi), and Albert and Gami to meet with BS Tech;
 3. the defendant, and not the plaintiff, negotiated terms with BS Tech;
 4. the defendant, and not the plaintiff, travelled to Singapore about 20 times between June 2014 and early 2015 to meet with BS Tech about the CAN deal; and
 5. there was implicit in the defendant's submissions that, whilst the date at which a partnership was formed is unclear, the partnership had arisen by the time of the CAN transaction. I have earlier rejected the evidence of the defendant that the defendant had said to the plaintiff there would be a sharing of profit and losses. In that light, and in substance, there is little more that commends the formation of conclusion as to the existence of a partnership over the CAN transaction. The preceding relationship was not, as suggested by the defendant, an intimate commercial relationship which blossomed into a partnership. There was no reference to the sharing of profits or losses. There was no evidence as to the sharing of burdens or expenses to be incurred in relation to any prospective deal. There were, in fact, limited emails or WeChat communications. The relationship was as described by the plaintiff in the nature of a referral relationship that the defendant had with other

persons such as Gami and Albert. I accept that evidence.

1. On 20 June 2014, the defendant transferred EUR 400,000 to BS Tech, being its 4% fee to procure a loan of EUR 10,000,000 to CAN. A transfer was also made to Jahir Nadeem, the Managing Director of BS Tech. The monies were transferred from the bank account of Millennium. BS Tech ultimately failed to provide the agreed finance.
2. On 30 September 2014, Millennium entered into an agreement with Much Rise, the parent of CAN, whereby Millennium would obtain an effective 10% equity stake in the relevant CAN subsidiary.

Tianhe

1. The plaintiff and the defendant visited the offices of Tianhe in March or April 2015, although there was a dispute as to the purpose of the visit, namely, whether, on the plaintiff's account, it was to "market the CAN pipeline technology and other projects to Tianhe" or on the defendant's account to discuss a possibility of a relationship between Tianhe and BNP Paribas. In any event, on the defendant's account no such relationship eventuated.
2. Between March and June 2015, the plaintiff said to the defendant in Beijing that:
 1. Tianhe had been suspended from the Hong Kong Stock Exchange (Tianhe was suspended on 16 March 2015 because its auditors refused to sign off on its accounts);
 2. he was working on the removal of that suspension;
 3. Tianhe needed to find a new auditor because its current auditor, Deloitte, would not sign off on its accounts; and
 4. the defendant knew a lot of professional people in Hong Kong and could introduce them to Tianhe to help Tianhe resume trading.
1. In about June 2015, the plaintiff said to the defendant, in Beijing, words to the following effect (translated into English):

"We have an opportunity in Hong Kong to do some work together. Mr Zhang is now the Vice General Manager of Tianhe. As you know, I know Mr Zhang very well. The Tianhe company, HK1619, has been suspended from the Hong Kong stock exchange. I am working on the removal of that suspension. Tianhe has a problem because its auditor, Deloitte will not sign Tianhe's audit certificate and will not resign.

We need to find professions, lawyers, forensic accountants, auditors to help Tianhe and to resume trading. You know a lot of professional people in Hong Kong and we need you to introduce these people to Tianhe.

Can you help find a new auditor so that we can move to the next step."

1. In about June 2015, the defendant introduced the plaintiff to Mr Cheng, an accountant, with a view to Mr Cheng assisting Tianhe. In July to August 2015, Mr Zhang (on behalf of Tianhe) agreed with the plaintiff, the defendant, and Mr Cheng to pay them an amount to provide services to Tianhe to enable it to re-list on the Hong Kong Stock Exchange by the appointment of an auditor. The agreed amount is disputed.

What was agreed to be paid by Tianhe

1. It was common ground that the Tianhe monies would be channelled through the plaintiff. He had bank account in China and agreed to receive the payment from Tianhe and distribute the defendant's and Mr Cheng's respective shares to them in Hong Kong dollars.
2. The plaintiff stated that the amount agreed to be paid was RMB 5,000,000 in total. The defendant stated the amount is RMB 5,000,000 for "each" of the three. The plaintiff's account of the exchange with Mr Zhang was as follows:

"I refer to the conversation which is alleged at paragraph 114 of the First Lam Affidavit. During the meeting, I recall Mr Zhang saying words to the following effect:

"I will pay you 5 million for your work in progressing the reorganisation of arrangements to allow Tianhe to be relisted. That will be paid once Deloitte has resigned and Zhonghui has taken over as auditor." (RMB 15 million)"

1. The defendant's evidence was that Mr Zhang offered to pay the plaintiff, the defendant and Mr Cheng, RMB 5 million each which would be paid "once Deloitte has resigned and Zhonghui has taken over as auditor" and give them (collectively) 1% of the shares issued in Tianhe once it is relisted.
2. On 11 September 2015, the defendant received, and forwarded to the plaintiff, a draft agreement from Zenith Group Holdings Limited ("Zenith"), Mr Cheng's accountant firm, which referred to Zenith's fee being equivalent to RMB 15,000,000. The agreement was not entered. The contemplated payment terms were staggered as follows:
 1. HKD 9,150,000 to be paid at the time of signing the agreement/ commencement of the work; and
 2. HKD 9,150,000 to be paid on the date of resumption of trading in Tianhe shares (which never occurred).
1. In those circumstances, it would appear Mr Cheng's understanding was inconsistent with both the plaintiff and the defendant's understanding, given he seems to have prepared a draft engagement letter (which was not entered into) which refers to a payment to him of the equivalent of RMB 15 million. The draft agreement also referred to the payment they made in two tranches, the second upon Tianhe's resumption of trading on the Hong Kong stock exchange. That never occurred and as such there must be real doubt, even if a payment of RMB 15 million had been contemplated (which the plaintiff denied), that such a payment

would have been made by Tianhe.

2. It is clear that the arrangement struck between the plaintiff, the defendant and Mr Cheng was that they would share the amount actually paid. There is no evidence that the plaintiff (or, for that matter, Mr Cheng) would have to make good any shortfall in the defendant's share of what Tianhe proposed to pay but did not pay.
3. There is a consideration weighing against the defendant's account. One significant difficulty with the defendant's account is that it was reported in 'Finance Asia' on 1 November 2014 that Tianhe had raised \$654 million in the initial public offering in June 2014. The payment of 1% of shares would be extraordinary amount to pay for the services rendered. On 25 September 2015, Tianhe released an announcement to the Hong Kong Stock Exchange that it had appointed Zhonghui Anda as the auditors of the company. I will also reject the defendant's contention that the plaintiff received from Tianhe RMB 7 million by 8 October 2015.
4. On the other hand, I have rejected the plaintiff's evidence that the RMB 1.5 million, that was received from Tianhe in August 2016, was anything other than a payment by Tianhe under the Tianhe deal. It follows that the Tianhe deal must have been more than RMB 5 million referred to in the plaintiff's evidence.
5. Ultimately, the central question remains as to what Tianhe actually paid (which in the case of the earlier party differed from their understanding of the amount agreed to be paid).
6. On 6 October 2015, the defendant received HKD 780,000 from Huge Fairway, a company associated with the plaintiff.
7. On 8 October 2015, the defendant received HKD 420,000 from Huge Fairway.
8. Various issues were raised about the source of these and other funds which I will deal with discretely at the end of the discussion of general findings of fact.
9. In the SOAF both of these payments are described as "being part-payment of the amount paid by Tianhe". The same entry appears in the joint chronology. In the plaintiff's closing written submissions, and again in the Objective Facts Document produced by the plaintiff, the transactions were described as being part-payment of the amount "payable" by Tianhe. This was disputed by the defendant who contended that the plaintiff was bound to the SOAF. Again, this issued received significant attention and accordingly, I will return to it discretely at the close of these factual findings.
10. The total amount paid to the defendant by Huge Fairway between 6 and 8 October 2015 was HKD 1.2 million. The plaintiff submitted that these monies were paid by the plaintiff in advance of receiving funds from Tianhe but related to the plaintiff's obligation to pay to the defendant amounts which were paid by Tianhe to the plaintiff. This is a matter of dispute and will be discussed later in the judgment.

11. The defendant contended that the plaintiff received a large payment, being an amount of or up to RMB 7 million around but prior to 8 October 2015 and in particular prior to the payments made by the plaintiff via Huge Fairway to the defendant. This issue attracted significant attention in the proceedings and was combined by the defendant with a contention that the payment by the plaintiff of RMB 1 million to Jiayi, as next discussed, derived from the earlier Tianhe payment. It was also submitted by the defendant that the payments received in HKD in October 2015 by the defendant from the plaintiff were derived from the payment received by Tianhe and not, as the plaintiff suggested, from his own funds. That latter consideration also connects to the issue regarding the SOAF.
12. The plaintiff paid RMB 1 million to Jiayi in late 2015. The SOAF stated that the date range for the making of the payment was around September to December 2015. The defendant contended that the Court should adopt the date of 8 October 2015 being the date stipulated in the SOC. The defendant submitted this was a more precise chronology. In fact, the Joint Chronology stated the payment was made on or around 8 October 2015.
13. To complicate the matter the plaintiff stated in the first plaintiff affidavit that he paid "1 million yuan" to Liu Xiuying (the payee appointed by Jiayi) on behalf of the defendant as requested in the 26 September 2015 email. In the first defendant affidavit, the defendant stated that the plaintiff did make the payment to Jiayi at his request but stated that it was not correct to suggest that the payment was "only made" because of that request as the plaintiff and him were jointly involved in the borrowing and project for which the money was taken.
14. There is no reference to the date of the payment in that affidavit or the defendant's other two affidavits. In addition, in the amended defence the defendant says that the time for the making of the RMB 1 million payment was between September and December 2015.
15. The defendant's preference to align this payment precisely at 8 October 2015 no doubt connects to parts of the defendant's case to which I will later refer.
16. I shall adhere to the SOAF which the defendant had contended (and I will later accept) constituted an agreement as to facts for the purposes of s 191 of the Evidence Act 1995 (NSW). It is likely that the date of the payment does occur sometime around 8 October 2015 but it in my view the uncertainty surrounding this date should result in the Court adhering to the SOAF. The repayment by the plaintiff shall be referred to as the RMB 1 million payment.
17. It was during this period that the 26 September 2015 email was said to have been sent. I note that the email stated in the second paragraph:

"Also, for the matters relating to TIAN Hao, he did something unethical to me and I do not want to deal with him. I have to trouble you to pay 1 million yuan on my behalf first as the repayment for 1 million yuan in the principal. The money you paid for me can be deducted from the profits of our cooperation or transferred to your Juhang account when you come to Hong Kong."

(Emphasis added.)

1. The exhibited copy of the 26 September 2015 email has, appearing below the words "China Unacom 4G", the words and numbers "sjt_liutuo 10:47". Immediately under this reference is the entry "Sent to me Details". Despite initially denying that this configuration demonstrated that the document exhibited in the proceedings was a screenshot taken from a phone, the defendant subsequently accepted that was the case and, further, the reference to "sjt" and "Sent to me" demonstrated that it was the defendant who took the screenshot on the phone.
2. There is also evidence from the plaintiff of a telephone call from the defendant to the plaintiff asking the plaintiff to repay the 1 million yuan.
3. As mentioned, this document was very controversial in the proceedings and attracted a great deal of attention. I will, therefore, deal with that issue discretely at the close of these factual findings. However, I note the defendant's submissions as to the email at this juncture so as to draw out the issue for these proceedings.
4. The defendant contended that the 26 September 2015 email was a fabrication by the plaintiff which falsely sought to create an appearance that the Jiayi Loan Agreement was productive of a loan owed by the defendant in his personal capacity and was unconnected to "their partnership", which:
 1. the plaintiff deployed in the proceedings which led to the Chinese Court Proceedings to resist Jiayi's contention that the payment defeated the plaintiff's defence that the guarantee had expired prior to the claim by Jiayi; and
 2. the plaintiff deployed in these proceedings for the purpose of showing the RMB 1 million was made by him only as a conduit for the defendant, who, personally, was the real payer, and to create an appearance that the loan was owed by the defendant in his personal capacity and was unconnected to their partnership.
1. On 23 February 2016, the defendant caused Millennium to commence proceedings in Singapore against BS Tech to recover SGD 678,016.94 because of its failure to provide the finance for which it was paid EUR 400,000.
2. On 22 March 2016, the plaintiff received RMB 5,000,000 from Tianhe.
3. In April 2016, the plaintiff transferred HKD 702,987 (equivalent to RMB 587,135) to the defendant, being part-payment of the amount paid by Tianhe.
4. On 2 August 2016, the plaintiff received RMB 1.5 million from Tianhe.
5. The defendant contended that the Court's finding as to (Tianhe) partnership, the 26 September 2015 email and the above payment of RMB 1 million were "critical to the determination of the issue concerning intention to enter a binding agreement constituted by the Agreement".

Events leading to the Lower Court Proceedings

1. From around May 2015, Jiayi began to make demands that the defendant repay the Loan Amount under the Jiayi Loan Agreement. In the first defendant's affidavit, he claimed that two representatives of Jiayi had locked him in a hotel room for a day, demanded repayment of the monies owed and upon him leaving the hotel room, around midnight, a number of "Jiayi enforcers" had seized his possessions including his passports. The defendant claimed that he told the plaintiff of these circumstances and asked him to pick him up at the hotel.

2. The plaintiff's account of the circumstances was as follows:

"63. I refer to paragraph 131 of the First Lam Affidavit. I recall receiving a telephone call from Mr Lam on 20 May 2015 at approximately 10:00pm. Mr Lam and I had a conversation in words to the following effect:

Mr Lam said: I lost [sic] my passport in Tianjin and it's too late to get a replacement from the embassy. Can you book me a hotel room at the King ParkView Hotel using your ID card?

I said: OK, I will meet you there.

64. Following the telephone conversation with Mr Lam I travelled to the King ParkView Hotel and met Mr Lam in the lobby. When I arrived, Mr Lam said:

"I lost my passport but the embassy will issue me with a new one tomorrow."

1. It is ultimately unnecessary to resolve whether the defendant's account of "Jiayi enforcers" notwithstanding its rather unusual aspects. It is sufficient to note at this junction that, consistent with the plaintiff's account, the defendant did make an application to the Australian embassy to have a 'lost' passport replaced. The circumstances of that application, when taken with the defendant's account of "Jiayi enforcers", adversely reflects on the defendant's credibility (which I will discuss below).
2. In the General Declaration by Passport Applicant ("the Declaration") given to the Department of Foreign Affairs and Trade ("the Department") signed by the defendant on 21 May 2015 in support of an application for an emergency passport ("the Passport Application") the defendant declared that he had "a very drunk night" in Beijing and that he "probably left [his document] bag somewhere". At the time he provided that declaration, the defendant must have known it to be false.
3. Again, senior counsel made a submission seeking to explain the defendant's actions in this respect to meet challenges as to the defendant's credibility as a witness. That submission was as follows:

"As for the declarations Mr Lam signed in connection with applying for a new passport in China, Mr Lam's evidence that he did not reveal the true position because he did not want the Chinese police investigating Jiayi for detaining him, thereby jeopardising Mr Liu's relationship with Jiayi, is cogent, makes sense in its context, and is consistent with the other evidence of Mr Lam taking

steps to help Mr Liu or preserve his interests. Mr Lam had no reason, other than to protect Mr Liu's relationship with Jiayi for avoiding the disclosure that his passport had been forcibly taken from him by Jiayi enforcers, as opposed to simply lost. Accordingly, the fact these declarations were filled out does not infect Mr Lam's general credibility so as to cast doubt on all of his evidence, as Mr Lam anticipates Mr Liu will submit."

1. I will return to the question of whether this consideration and other adverse credit findings I have made with respect to the defendant may cast doubt on all of the defendant's evidence, but it must be observed at this juncture that the defendant's evidence during cross-examination as to the Passport Application (and the making of a false declaration in that respect) compounds issues as to the honesty of the defendant's evidence vis-à-vis the Chinese Court Proceedings for the following reasons:

1. At the time that the defendant signed the Declaration, he accepted he knew it was a legal document to be submitted to the Department, and that it was very important to tell the truth in the document, and that there would be legal consequences if he didn't.
 2. He lied in the document.
 3. As earlier mentioned, the defendant is willing to lie in documents such as a declaration if it will assist him. That much is evidenced in the submission extracted above (see [197]) from counsel for the defendant in which it is suggested the defendant made a false declaration in order to avoid any jeopardy to the plaintiff's relationship with Jiayi (if he reported to police "enforcers" taking his passport) and that his evidence to that effect was consistent with the defendant taking steps "to help [the plaintiff] or preserve his interests".
1. The evidence given by the defendant in the context of his cross-examination in this proceeding as to the Passport Application makes an even more compelling basis to doubt his honesty as a witness.
 2. In this respect, the defendant gave evidence that he is willing to lie generally in affidavits if it will assist him.
 3. That evidence was as follows:

"Q. It is the case, then, that you were willing to lie on documents such as a declaration if it will assist you, that's correct, isn't it?

A. Yes.

Q. It's the case, also, that you are willing to lie in affidavits if it will assist you, isn't it?

A. Which affidavit you are referring to?

Q. Any affidavit. It is the case you are willing to lie in affidavits if it will assist you, that's correct, isn't it?

A. Yes."

1. It needs to be steadily borne in mind that the credibility issues concerning the defendant in relation to the Passport Application and the earlier example of his evidence in the Chinese Appeal Court (which was contradicted by his evidence in these proceedings) directly concerns the factual substratum of events relevant to the determination of some of the issues in dispute in this matter.
2. There is one further consideration in this immediate respect. When asked about another declaration signed by him approximately 2 weeks later, which was also in relation to an application for a passport, the defendant sought to advance a position, no doubt to reduce the adverse impact of his earlier evidence, that his passport had been "lost" could mean that it was taken by "Jiayi enforcers". This evidence strained credulity. Plainly the evidence he gave to this Court in that regard was false, and only given to seek to avoid having to admit what he clearly knew was the truth – that he also lied to the Australian government in this further declaration. That must be so because, prior to being asked about this document, he gave evidence to this Court that he agreed there is a big difference between losing your passport and having it taken by enforcers forcibly from you, and that his evidence to this Court is that he did not lose his passport.
3. Again, these considerations point to the dishonesty of the defendant as a witness.
4. I turn then to the Chinese Court Proceedings.

Immediate Steps leading to the Lower Court Proceedings

1. On 13 July 2016, Jiayi commenced proceedings against the plaintiff in the Lower Court Proceedings.
2. The plaintiff had identified four bases for defending the Lower Court Proceedings in his first affidavit as follows:

"I believed that Hong Kong Jiayi could not sue me as guarantor before first enforcing its security over the defendant's property in Australia.

I believed that liability under the guarantee could not exceed the amount of the principal owed by the defendant under the Loan Agreement.

I believed that the term of the guarantee had expired prior to the claim made against me by Hong Kong Jiayi.

I believed that the amount claimed by Hong Kong Jiayi was too large and that it exceeded the prescribed standard annual interest rate of 24%."

1. The plaintiff engaged the law firm, AMO Law Office and was represented by a partner of that firm Mr Weining Yuan. Mr Yuan was assisted by Mr Yang Wang. The plaintiff told his lawyers all of the circumstances about the case.

2. As mentioned, the defendant affirmed an affidavit dated 6 April 2017 in the plaintiff's case in the Lower Court Proceedings in China. The plaintiff's lawyers were involved in amending the defendant's initial statement and evidence. Drafts or amendments were prepared on 29 November 2016, 6 December 2016 and 12 February 2016.
3. The defendant's initial statement was written in Traditional Chinese, amended versions included both traditional and simplified Chinese, and the final version was written in simplified Chinese. This will be explored later in this judgment.
4. In her report of 1 June 2021, Ms Zhao explains and describes the use of simplified and traditional characters. She stated in her report:

"In Mainland China

The government of the People's Republic of China in Mainland China has promoted simplified Chinese for use in printing and writing since the 1950s and 1960s to encourage literacy. The Law of the People's Republic of China on the National Common Language and Characters implies simplified Chinese as the standard script, which are now generally and commonly used in Mainland China, Malaysia, and Singapore, while traditional Chinese characters are used in Hong Kong, Macau, the Republic of China (Taiwan). Schools in Mainland China use simplified characters exclusively, while schools in Hong Kong, Macao, and Taiwan use traditional characters exclusively.

Generally speaking, people from Mainland China usually use simplified Chinese for written. However, it is legal and permitted to use traditional Chinese if people choose to in some special circumstances such as ceremonies or for cultural purpose. Dictionaries published in Mainland China generally show both simplified and their Traditional counterparts, therefore, it is still the case people from Mainland China can read and use traditional Chinese. However, people in Mainland China use simplified Chinese for most of time as it is the written language people learn from primary and commonly used in community.

In Hong Kong

People from Hong Kong generally use traditional Chinese and data and media show no signs of moving to use simplified Chinese characters even it is legal to use in Hong Kong.

...

Conclusion

Even though there is always an argument that whether people from different places should use different written Chinese, people from Mainland China still use simplified Chinese in daily life. However, there are some exceptional cases when people would like to choose traditional Chinese characters for specific purpose. On the contrary, people from Hong Kong and Taiwan use traditional Chinese and rarely to see them use simplified Chinese instead."

1. I will continue then to consider the preparatory steps leading to the Chinese Court Proceedings Affidavit but note, in passing, that on 20 October 2016, the Singapore High Court ordered BS Tech to pay Millennium SGD 678,016.94.

26 November 2016

1. The defendant attended a meeting on 26 November 2016 with the plaintiff and his lawyers. The plaintiff denied the defendant attended this meeting in his affidavit evidence, but in cross-examination he agreed that this meeting occurred and that, at the meeting, the plaintiff's lawyers asked the defendant to prepare a statement and discussed how the case would be defended.
2. The plaintiff denied in cross-examination that his lawyers and himself told the defendant what to put in his statement. He also stated the lawyers advanced that the statement should be the truth. That is hardly surprising, but it does seem to be suggested by the defendant (on a number of occasions in this matter) that the Chinese lawyers advised the defendant to include matters which were, on the defendant's case, known to be untrue. In the absence of cogent evidence that the Chinese lawyers would behave in such a fashion (and I do not find that to be the case), I do not consider that a finding should be made in those terms. As I have found, the defendant's evidence alone does not establish the truth of such a proposition when taken with my other findings as to his credibility. I accept the plaintiff's evidence.

The 29 November 2016 Email

1. The defendant sent an email to the plaintiff on 29 November 2016 which described the circumstances in which the Jiayi Loan Agreement was entered into which stated that, if he did not have sufficient collateral, he would not have involved the plaintiff as the guarantor ("the 29 November 2016 email").
2. In the email the defendant stated:

"...Between June 1st and 3rd of the same year, the two parties signed a personal loan agreement in Beijing with Liu Tuo as the guarantor. However, I provided Australian land that was without caveat as a collateral. The value of the collateral was much higher than the amount of personal loan. They also knew this, but they said that they need a local guarantor to complete the project. Liu Tuo and I didn't think there was nothing wrong. In the worst case, if the payment were to be overdue, the collateral provided by me would be transferred to the name of the creditor. They also know this, but they said that they need a local guarantee to complete the project. Liu Tuo and I also think there is nothing wrong. In the worst case, if the payment is overdue, my collateral will be transferred to the name of the creditor. That's all.

I was willing to take initiative to provide the collateral because of our confidence and sincerity in this transaction. If I didn't have sufficient collateral, I wouldn't ask Liu Tuo to do so, and he wouldn't have signed the guarantee agreement. Legal representative Liu Weizhu was not present that night, so he did not sign it..."

(Emphasis added.)

1. The defendant stated that this statement was incorrect and was only included at the behest of the plaintiff. This was denied by the plaintiff.
2. Notwithstanding the defendant said he discussed the content of the email with the plaintiff and his lawyers, the defendant confirmed in cross-examination that the contents of this email were true as he understood it to be at the date that he sent the email. This admission is inconsistent to the position adopted by the defendant in these proceedings where he asserted the Jiayi Loan Agreement was entered into by himself and the plaintiff as a partnership or that there was security provided by the defendant in support of the plaintiff becoming a guarantor.
3. The statement that the defendant only included the content of the 29 November 2016 email at the behest of the plaintiff sits ill with the fact that he forwarded an almost identical WeChat message to the plaintiff on 9 March 2018 as a draft of the evidence he is willing to give (which was signed with his English signature).
4. As earlier mentioned, this email was written in Traditional Chinese which the defendant said he was fluent in writing.

30 November 2016

1. The plaintiff sent a WeChat to the defendant on 30 November 2016 containing a modified version of the defendant's 29 November 2016 email ("the 30 November 2016 WeChat message"). The modifications included the addition of the words "general guarantor" which the defendant stated was not a term that the defendant understood at the time.
2. The plaintiff's evidence was that, upon the receipt of the draft statement from the defendant, his lawyer, Mr Yuan, amended the draft "so that the issues were clear and so the statement was in a proper form to be evidence in Court...". The plaintiff sent the amended document to the defendant by WeChat but did not know if his lawyer spoke to the defendant in relation to those amendments.
3. That message was in the following form:

"I found a good lawyer in Beijing. Let's talk on the phone if convenient

1. Hong Kong Jiayi reached a financing agreement on 29 May 2014 in Hong Kong. Liu Weizhu and Lam Kin, the juridical person directors of the two parties respectively, attended the signing ceremony in a law firm;
2. Between 1 and 3 June of the same year, I signed a private lending agreement in Beijing, adding Liu Tuo as the general guarantor. The collateral I put up was a fully paid up land in Australia that I personally owned, of which the value far exceeded the borrowed amount. They were aware of this, but said there must be a local guarantor. Liu Tuo and I did not see that as a problem, because in the worst-case scenario, if I was unable to pay the debt, the

collateral could be transferred to the creditor. I offered the collateral out of my sincerity and confidence about the deal. If I did not have a collateral valuable enough, I would not have asked Liu Tuo to be the general guarantor. If he was a guarantor with joint liability, he would not have signed the guarantee agreement. The legal person of the other party Liu Weizhu was not present and did not sign the lending agreement at that night.

3. Which one among the two signed agreements would be executed was up to them, and they were supposed to notify us of their decision. However, we never received any notification in regard to that, so we did not know which agreement went into effect.
4. Two payments, one of 1 million and the other 4 million, were transferred to my personal account with the Industrial and Commercial Bank of China on 4 June. Later, Mr. Liu Tuo repaid them RMB 1 million at my request.
5. Things did not go well after that. When the two sides were negotiating debt repayment, I suggested that we go by the agreement and I transfer the title of the land I owned to a person nominated by them so that the agreement could be terminated. However, they changed their mind and demanded cash repayment instead of collateral. I told them I did not have enough cash and I needed time to get it. During that period, they pushed me into signing several Promise to Pay Letters without providing me any copy. They also repeatedly made physical threats against me, restricted my personal freedom and illegally held my passport. We kept in touch with them the whole time and never tried to avoid them.
6. Now, what is supposed to be the agreement we signed [sic] back then, obtained from the Court and sent to us by our lawyer, is completely different from the one I signed. There are two crucial pages in the agreement that do not bear my and Liu Tuo's signatures, nor do they contain terms and conditions related to the land collateral, Liu Tuo's joint liability or abandonment of collateral to the creditor.

There are two crucial pages in the agreement that do not bear my and Liu Tuo's signatures, nor do they contain terms and conditions related to the land collateral, Liu Tuo's joint liability or abandonment of collateral to the creditor.

7. Further, the agreement was signed in a private club in Beijing Qianmen, not Tianjin as shown in the alleged agreement, so there are grounds for us to question the authenticity of the alleged agreement. On the day of signing, a business partner of ours, Ms. Meng Jiaolin, was also present. She read the agreement and witnessed our signatures.

Party to lawsuit:

Attachment: land documents"

1. In the report prepared by Ms Zhao dated 20 February 2024 ("the Zhao Supplementary Report"), Ms Zhao stated that the whole of the November 2016 WeChat message was written in Traditional Chinese. In her further report of 29 February 2024 ("the Zhao Second Supplementary Report"), Ms Zhao stated that paragraphs 1-5 of this document are in

Traditional Chinese and paragraphs 6-7 are written in Simplified Chinese, with the exception of one Traditional character. The one appearance of Traditional Chinese was in paragraph 6 at the 16th Chinese character.

The 6 December 2016 Email

1. Emerging from this process, on 6 December 2016, the defendant signed an email bearing that date ("the 6 December 2016 email") which contained the following entries:

"2. Between 1st and 3rd of June of the same year, a personal loan agreement was signed in Beijing. LIU Tuo provided general guarantee as the guarantor in this agreement. However, I provided my unencumbered land in Australia as security, and the value of the security far exceeded the amount of the personal loan. They knew that. But they said that the procedures could only be completed if a local resident could act as a guarantor. LIU Tuo and I did not consider this as inappropriate. In worst case scenario, if the money could not be repaid, my security would be transferred to the creditor. I proactively offered my security because we had faith in this transaction and we wished to show sincerity. If I did not have sufficient security, I would not ask LIU Tuo to act as a general guarantor. If it was jointly liability, he would not consent to sign the guarantee agreement. The company representative, LIU Weizhu, was not there that night and therefore did not sign on the agreement.
3. There were two signed agreements. They would decide which one would be executed and then inform us. However, we were never informed. Therefore, we did not know which version of the agreement was executed.
4. Two sums of money, being 1 million and 4 million respectively, were paid into my personal account with Industrial and Commercial Bank of China on 4 June. Later, under my arrangements, Mr. LIU Tuo paid 1 million CNY on my behalf as the repayment for the principal.
5. Things did not go well later. When the other party requested a negotiation for repayment, I said we should proceed in accordance with the agreement. I would transfer my land to a person appointed by them, and the agreement could then be formally discharged. However, the other party suddenly changed its idea and requested cash, not the security. I said I did not have so much cash so I needed time. During that period, they forced me to sign multiple letters of assurance but did not give a single copy to me. They also made multiple physical threats against me personally, restricted my personal freedom and detained my passport. During this period, the parties maintained communication and meetings with each other. There was no avoidance.
6. The current agreement obtained by the lawyer from the court was absolutely not the one I signed. The key issue is that there were two pages without the signatures of me and LIU Tuo. It did not contain the contents of the using the land as security but contained clauses such as requesting LIU Tuo to be jointly responsible and abandoning the security.

7. Also, the location for signing the agreement was a private club in Qianmen, Beijing, not Tianjing, which was added after the signing of the agreement. We have reasons to doubt the genuineness and validity of this agreement. On the date of signing, Ms. MENG Linjiao, who was a business friend of us, also presented and witnessed the agreement and the signing."

(Emphasis added.)

1. In signing the email, the defendant understood that this email was to be used as the foundation for his evidence in the Lower Court Proceedings.
2. Paragraphs 1-5 of this document are in Traditional Chinese and paragraphs 6-7 are written in Simplified Chinese, with the exception of one Traditional character. The signature on this document is in Traditional Chinese.
3. As mentioned, the defendant contended that he had given false evidence to the Chinese Courts to assist his friend. However, during cross-examination in these proceedings, the defendant confirmed the italicised text of the December 2016 email as being correct, with the exception that the words "general guarantor" should be replaced with the word "guarantor".
4. The evidence of the defendant in that respect was as follows:

"Q. Can you identify which parts of that you say are false?

A. General general guarantor.

Q. Let me just find this word, or words, and make sure you identify with precision which part is incorrect. Where does the word, just using the English language version, if you can

A. "general guarantor", in paragraph 2.

Q. Which line does that appear on?

A. It's the English not one..(not transcribable)..right?

Q. On the English one. The paragraph is comprised of 11 lines. Which line are the words that you say are not true contained in?

A. "will not ask Liu Tuo to..(not transcribable)..as the general guarantor".

Q. Which line are we talking about, sir?

A. Nine.

Q. Are you saying it's just the words, "general guarantor", or is more than that?

A. Yeah, just yeah.

Q. Just to be clear, the only thing that's incorrect about that paragraph, 2, is the use of the words "general guarantor"?

A. Yeah.

...

Q. If the words "general guarantor" were replaced with the word "guarantor", would the sentence be correct?

A. Yes."

1. The plaintiff is correct to submit that the defendant's evidence under cross-examination as extracted above constitutes a concession by the defendant that:
 1. if he did not have sufficient security, he would not have asked the plaintiff to act as a guarantor; and
 2. based on his understanding, if the Jiayi debt was a joint liability, the plaintiff would not have consented to sign the guarantee agreement.
1. The 6 December 2016 email is also inconsistent with the notion of there being a partnership between the plaintiff and the defendant arising out of or relating to the Jiayi Loan Agreement.

The Chinese Court Proceedings Affidavit

1. The defendant met with the plaintiff and his lawyer, Mr Yuan and Mr Yuan's assistant in Beijing on 7 April 2017.
2. The defendant stated in his first affidavit that the following conversation occurred after he was provided with a hard copy of the Chinese Court Proceedings Affidavit. That conversation was recorded in his affidavit as follows:

"Mr Yuan said:

This is according to what we have received from you before (in relation to the affidavit). We have prepared an affidavit for you to sign."

Mr Yuan or Tuo Liu said to me:

"This is to show you are fulfilling your obligations as a borrower and the loan repayment was not from Tuo Liu if this payment was from Tuo Liu, it would show that his obligation was as a guarantor..."

"...I said: "The payment was from our joint money:"

Mr Yuan or Tuo Liu said:

"We are trying to avoid the position that both of you will be liable. Tuo Liu was a guarantor in form only, really just a witness."

1. In the second plaintiff affidavit, the plaintiff denied the content of the above conversation recorded in first defendant affidavit except for the second entry attributed to either himself or Mr Wang.
2. It appears that this affidavit was prepared because the plaintiff's lawyers told him that the 6 December 2016 email which the defendant signed could not be used as evidence.
3. At the meeting, the defendant signed the Chinese Court Proceedings Affidavit. He also signed the 26 September 2015 email which accompanied it.
4. The 26 September 2015 email was signed by the defendant with a Traditional Chinese signature. The Chinese Court Proceedings Affidavit and 26 September 2015 email were both written in Simplified Chinese.
5. As earlier mentioned, the defendant denied that he sent the 26 September 2015 email. He contended that it was not written by him and did not recall seeing it prior to 7 April 2017 although he stated he was given the 26 September 2015 email at the meeting of that date. He also contended that the email was written in a script that he does not and cannot use to write. Again, I will return to that question, but will find that I do not accept the defendant's evidence in that respect.
6. I return then to the content of the Chinese Court Proceedings Affidavit.
7. Paragraph 3 of the Chinese Court Proceedings Affidavit was in the following terms:

"On 3 June 2014, LIU Tuo, Hong Kong Jiayi and I signed a Loan Agreement, The circumstances at the time of signing were: first of all, TIAN Hao, the representative of Hong Kong Jiayi, suggested that LIU Tuo should be included in the agreement as a general guarantor. The reason was that the company needed a local person as a guarantor when signing an agreement with a foreign national. Because security was offered and the priority of LIU Tuo's guarantee was placed after the security, I agreed to let LIU Tuo sign his name. Secondly, when reaffirming the contents of the agreement, I clearly remembered that there were very detailed descriptions about the security in the agreement, and the information of the security was hand-written. Other people who presented also saw the information about the land size. Finally, after finishing reading the agreement, TIAN Hao suggested to have dinner first and the agreement would be signed after the dinner. After the dinner, LIU Tuo and I signed the agreement, TIAN Hao stated that since the company representative LIU Weizhu did not present, the agreement had to be taken back to the company, and therefore he took away all the documents."

(Emphasis added.)

1. In paragraph 8 the defendant stated:

"On 8 October 2015, after I acquired some funds, I arranged LIU Tuo to pay 1 million yuan on my behalf as the repayment for the principle of the loan."

1. The affirmation at the conclusion of that affidavit stated:

"I guarantee the truthfulness of the the contents above. If there is anything untrue, I am willing to bear legal consequences."

1. It is appropriate to address two matters at this juncture concerning, firstly, the Chinese Court Proceedings Affidavit and secondly, the 26 September 2015 email.
2. As to the first matter, the defendant's evidence under cross-examination as to the Chinese Court Proceedings Affidavit again reflected on his credibility as a witness. There are two aspects to this consideration.
3. First, the defendant gave evidence that he had only read the guarantee at the end of the Chinese Court Proceedings Affidavit and no other part of the affidavit before he signed the affidavit. This evidence, strains credulity given the nature of the jurat that appeared at the close of the affidavit which made clear there were legal consequences for the making of a false statement. The defendant may have said (but he did not) that he did not read the affidavit because of its similarity to the 6 December 2016 email draft of the statement but, even if that were the case, it would simply confirm that he had affirmed an affidavit in terms which he had well understood from the events preceding the making of the affidavit.
4. Secondly, the defendant was given a reasonable opportunity in giving his evidence to identify, with precision, which parts of paragraph 3 of the Chinese Court Proceedings Affidavit he said were incorrect. In that respect, he only corrected one word, namely the word "general" appearing in the fourth line. His evidence in the Chinese Court Proceedings in that passage (recognising that change) was:

"..."TIAN Hao, the representative of Hong Kong Jiayi, suggested that LIU Tuo should be included in the agreement as a [general] guarantor. The reason was that the company needed a local person as a guarantor when signing an agreement with a foreign national. Because security was offered and the priority of LIU Tuo's guarantee was placed after the security, I agreed to let LIU Tuo sign his",

1. In that light, I agree with the plaintiff that the effect of the defendant's concession in cross-examination was:
 1. it was Mr Tian Hao's (of Jiayi) suggestion that the plaintiff be a guarantor;
 2. the plaintiff was only a guarantor because the company needed a local person as a guarantor when signing an agreement with a foreign national; and
 3. that the defendant only let the plaintiff sign his name as guarantor because there was security offered in priority to the plaintiff's guarantee.
1. As to the second matter mentioned, the defendant attached to the Chinese Court Proceedings Affidavit a copy of the 26 September 2015 email, to which I will again return briefly.

2. The plaintiff no longer has the original email file in his possession, custody or control. In an affidavit dated 29 November 2023 in these proceedings there was incorporated in a bundle of discovered documents (Exhibit 14) responding to an order for discovery dated 2 November 2023. The plaintiff stated that he last had possession, custody and control of the email between the 26 September 2015 and 29 November 2016. The plaintiff explained:

"I was unable to recall the precise circumstances in which the document left my possession, custody or control but it is possible that it was included amongst emails which I deleted from my email account on or about 26 September 2015 or at some point prior to me ceasing to use the email account on or about 29 November 2016, which I describe in further detail in paragraph [16] below."

1. As mentioned earlier, I will return to the issue of the 26 September 2015 email but for present proceedings note both before the Chinese court and in these proceedings the plaintiff relied on the 26 September 2015 email being prepared by the defendant to show payment made by him to Jiayi of RMB 1 million was at the request of the defendant.
2. The significance of the email is that it predates the commencement of the Lower Court Proceedings and, hence, bears upon the defendant's contention that the steps taken by the defendant in the Chinese Court Proceeding were solely to assist the plaintiff in establishing a defence.
3. In cross-examination the plaintiff accepted that it was possible that he received the email, and that he possibly may not have received it (I do not consider this response to be inconsistent with his response in discovery). In cross-examination, the plaintiff gave evidence that he made the payment of RMB 1 million following a telephone call with the defendant during which the defendant requested him to make the payment. It may be noted that the defendant accepted in cross-examination that he did ask the plaintiff to make the payment and that the request could have been made by telephone.

The Lower Court Judgment

1. It is appropriate that some particular attention be given to the Lower Court Judgment.
2. Under the introduction 'Facts and reasons', the Lower Court observed:

"However, after the loan under the Loan Agreement became due, LAM Kin failed to perform relevant duties for repayment. Only the defendant LIU Tuo made a repayment of RMB 1 million yuan to the plaintiff as the interests for overdue payment on 8 October 2015. The plaintiff subsequently requested the repayments multiple times but the efforts were unsuccessful."

1. The arguments presented by the plaintiff, were summarised by the Lower Court as follows:

"The defendant LIU Tuo argued that: 1. The Loan Agreement provided by the plaintiff was not true. The true Loan Agreement should contain a mortgage as guarantee and the guarantee provided by such mortgage should have priority over the guarantee provided by a person. 2. In this case, the loan was part of the business cooperation between the plaintiff and the borrower

Kin. The plaintiff was at fault for the overdue of the repayments for the loan. This was a sum of deposit paid to a company in Singapore for the issuing of a letter of credit. The plaintiff also sent someone to Singapore for investigation and the loan was issued to the defendant with the approval of the plaintiff. The plaintiff had misunderstandings about the fact that the company in Singapore failed to obtain a letter of credit. 3. The term of the guarantee has expired, so the defendant is exempted from the liabilities. The term of the loan was 15 days, which started on 4 June 2014. 15 days after that date was 19 June 2016. As a result, the period for guarantee had passed already. The remittance made by the defendant on 8 October 2015 to a third party was a remittance made on behalf of LAM Kin. 4. The amount of the plaintiff's claim was too large. The daily interest rate for the interests for overdue payment claimed by the plaintiff was 0.1%/day. The annual interest rate was as high as 36%. Meanwhile, the plaintiff claimed liquidated damages and litigation fees. According to Article 29 and 30 of the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Private Lending Cases, the plaintiff's claim exceeded the prescribed standard of an annual interest of 24%. In relation to the litigation fees claimed by the plaintiff, the defendant argued that due to the subordinative nature of guarantee, the guaranteed debts should not exceed the scope of the principal debts. In the current case, the plaintiff did not form any agreement with LAM Kin in relation to the payment of litigation fees, but reached an agreement on litigation fee within the scope of the guarantee. The scope of the guarantee is clearly larger than the scope of the principal debt. This breached the fundamental principles and the relevant rules in the Guarantee Law of the People's Republic of China. Even according to the agreed terms in the agreement, the litigation fee should be categorised as other costs prescribed by relevant rules of the Supreme People's Court and shall not exceed the 24% requirement for the annual interest rate. To sum it up the defendant believed that the defendant should not bear relevant liabilities for guarantor, and the amount of the plaintiff's claim was too large."

(The defendant emphasised in submissions the italicised passages above.)

1. The Court noted:

"The defendant, LIU Tuo, did not recognise the Loan Agreement (Exhibit 1) provided by the plaintiff, and applied for authentication. Authentication showed that the signature and finger prints in the relevant Loan Agreement were all effected by LIU Tuo himself."

1. The Lower Court summarised the issues in the proceedings as follows:

"The key issues in this case are: 1. Whether the term of guarantee has expired. 2 Whether the agreed daily interest rate of 0.1% breaches the relevant rules made by Supreme People's Court. 3. Whether the scope of the guarantee exceeds the scope of the principal debt. This was mainly about the legal service fee. 4. The degree of proof of the authentication outcome."

1. Some particular findings made by the Lower Court rejecting the plaintiff's defence were:

"Although the defendant LIU Tuo disputed the authentication outcome about whether the concerned Loan Agreement was effected in one single printing process, the defendant did not provide sufficient evidence to overturn the authentication outcome. As a result, this court does not support this challenge...

...In this case, the parties formed no agreement in relation to the interest rate within the term of the loan, but in relation to overdue payments, the parties agreed that the a [sic] liquidate damage would be paid to Jiayi at a daily interest rate of 0.1% since the date of breach. This agreement has already exceeded the limit prescribed by law and this court has adjusted it. The liquidated damage for overdue payments will be calculated at an annual interest rate of 24%...

...It was also expressly agreed that the term of the guarantee was 2 years after the maturity of the principal debt. In this case, the term of the loan was 15 days and started from the day that Jiayi transferred the fund into the account designated by LAM Kin. On 4 June 2014, Jiayi transferred the funds into LAM Kin's account. LAM Kin's performance became due on 19 June 2014. The term of guarantee provided by the defendant LIU Tuo was from 20 June 2014 to 19 June 2016. On 8 October 2015, the defendant LIU Tuo transferred 1 million yuan into the account of LIU Xiuying, who was a third party designated by the plaintiff. The defendant provided Exhibit 2 and 3 to prove that the 1 million yuan was a repayment actively made on behalf of LAM Kin. However, the Exhibit 2 provided by the defendant was a written affidavit from LAM Kin and the Exhibit 3 was a print of emails. LAM Kin did not appear in the court as a witness, and it was impossible to affirm that the contents of the emails are directly related to the funds involved in this case...

...From the perspective of the cash flow of this repayment, it was transferred from LIU Tuo's account directly into the account of a third party designated by Jiayi, and it was impossible to ascertain that it was related to LAM Kin. It is reasonable to infer that the principal debt of this case became due on 19 June 2014, but neither the debtor nor the guarantor actively made repayments on time. It was not until 8 October 2015 that the guarantor LIU Tuo made a repayment of 1 million yuan to the creditor. It should be inferred that the creditor Jiayi made a claim to the guarantor LIU Tuo. Based on the above analysis, the repayment made by LIU Tuo on 8 October 2015 should be viewed as assuming the guarantee liabilities within the term of guarantee after the creditor made a claim for its interests. Since that day, the term of guarantee turned into limitation of actions. As long as the plaintiff filed the case prior to 8 October 2017, the litigation would be within the limitation of actions...

...In this case, the scope of guarantee does not exceed the scope of the principal debt. After LIU Tuo assumes the liabilities under the guarantee, he could make his claims against LAM Kin...

(Emphasis added.)

1. The defence by the plaintiff italicised above would have had the effect of resulting in a dismissal of the Chinese Court Proceedings either because of security in land or because the guarantee had expired. However, in the view of the Court in the Lower Court Proceedings, the payment of the plaintiff of RMB 1 million extended the limitation period so proceedings were within time. The authentication of the Jiayi Loan Agreement resulted in the Court not

finding there was a priority in claiming on the security before proceeding against the guarantor.

2. The plaintiff had sought to overcome that obstacle in the Chinese Court Proceedings by arguing that the payment was, in substance, made by the defendant. The defendant submitted that essentially the same argument was advanced in these proceedings, although I would note that the Chinese Court in dismissing the plaintiff's argument stated that its decision was influenced by the fact that the defendant did not "appear in the court as a witness" to affirm or contest the emails relating directly to the monies under dispute in the Chinese Court Proceedings. A significant issue of that kind in this case is the authenticity of the 26 September 2015 email (which appeared to be Exhibit 3 in the Lower Court Proceedings).
3. As was earlier mentioned, on 27 September 2017, the Lower Court Judgment was delivered.

The Appeal Proceedings and Preceding Events

1. The Appeal Proceedings were heard on 9 March 2018. I will return to those proceedings after considering some intermediate circumstances.

6 March 2018

1. On 6 March 2018, the plaintiff sent the defendant a WeChat message ("6 March 2018 WeChat message") which, translated into English, stated:

"We need to appear in court. The key issue would be how to calculate the interest and how to deal with the 1,000,000.

You probably need to go to Tianjin on Thursday the 8th."

(I note that the defendant gave evidence that the WeChat message contained the words "You need to say we have money." immediately before this extract.)

1. In the period 2014 to 2018, Ms Meng and the plaintiff were business partners in China. Ms Meng is also a friend of the plaintiff and defendant. There was a dispute as to the precise relationship between Ms Meng and the plaintiff. In the first defendant affidavit, the defendant adduced that the description of Ms Meng as a business partner of the plaintiff and himself was incorrect. Rather, the defendant alleged that Ms Meng was a "domestic partner" of the plaintiff.
2. The plaintiff denied that Ms Meng "is or was ever my domestic partner" in the second plaintiff affidavit. However, the plaintiff accepted in cross-examination he had a romantic relationship with Ms Meng prior to 2014.

"Q. What was your relationship with Ms Ming in the period 2014 to 2018?

A. INTERPRETER: You mean Ms Meng?

Q. Ms Meng.

A. INTERPRETER: We were business partners in China.

Q. Did you have any other relationship with Ms Meng at that time?

A. INTERPRETER: For a very brief period of time, we were in a romantic relationship.

Q. What was that time?

A. INTERPRETER: Before I became known to Mr Lam – prior to 2014, Mr Lam.

Q. What about after 2014?

A. INTERPRETER: For various reasons, we became friends."

1. The defendant gave evidence as to the relationship between the plaintiff and Ms Meng in the Appeal Proceedings as follows:

"Presiding Judge: What was the location for signing this agreement.

LAM Kin: A restaurant in Beijing. I forgot its name. LIU Tuo knows that.

Presiding Judge: Who was there?

LAM Kin, TIAN Sheng and WANG Yi from the respondent company and SHI Shanxin, SHI Guang from the respondent company, and LIU Tuo, MENG Linjiao and me.

Presiding Judge: What is your relationship with MENG Linjiao? Why she was there?

LAM Kin: MENG Linjiao and LIU Tuo were lovers."

1. Ms Meng appeared as a witness in the Appeal Proceedings and gave the following evidence:

Presiding Judge: Witness MENG Linjiao, what is your relationship with the parties of this case?

MENG Linjiao: I have long term cooperation with the appellant LIU Tio, it is a relationship of business cooperation...

...

Presiding Judge: When the agreement was signed, were you there?

MENG Linjiao: Yes, I was.

Presiding Judge: How were you related to the signing of this contract?

MENG Linjiao: I was a partner of LAM Kin and LIU Tuo. I organised a dinner with them."

1. The defendant contended "that around but before 8 March 2017", the plaintiff asked the defendant to give evidence for him in the Appeal Proceedings including saying the words "the million paid back Jiayi comes for you, not from me. This is the strategy I have discussed with my lawyers."

2. That proposition was derived from the first defendant affidavit although the dates given by the defendant in the defendant's written submissions in this respect do not correspond to the affidavit which refers to the conversation occurring "around, but before, 6 March 2018". The plaintiff denied the conversation had occurred.

3. The portion of the defendant's affidavit under consideration in this respect was as follows:

"Around, but before, 6 March 2018, Tuo Liu said to me:

"You should give evidence for me in my appeal."

"I want you to say the million we have paid back to Jiayi comes from you, not from me.

This is the strategy I have discussed with my lawyers."

"It will show that you are fulfilling your obligations as borrower and could help get me off the hook.""

1. The difficulty with the defendant's evidence in this respect is that, if the conversation he referred to occurred in the form extracted in his affidavit and, as the defendant stated, the conversation occurred prior to 6 March 2018, it is difficult to understand why the plaintiff would later send the 6 March 2016 WeChat message, which suggested to the defendant, with respect to the Appeal Proceedings, there was an issue of "how to deal with the 1,000,000". If the defendant's account in his affidavit was to be accepted, the plaintiff had already said how the "1,000,000" should be dealt with.
2. I prefer the objective evidence in the form of the 6 March 2018 WeChat message, which I note does not include the additional words contained within the first defendant affidavit: "You need to say we have money."
3. It was submitted by the defendant that the 6 March 2018 WeChat message represented an attempt by the plaintiff "to influence the outcome of the appeal in conjunction with" [the defendant]. The context in which that message was sent concerned the question raised in the Appeal Proceedings as to whether the term of the guarantee in the Jiayi Loan Agreement had expired or not. The suggestion in the defendant's submission is that the plaintiff was endeavouring to create a circumstance in which false evidence would be given to pervert the course of justice.
4. What was said to be the false evidence by the defendant was that a guarantee in the Jiayi Loan Agreement was, in substance, not a general guarantee but rather a mere formality in which the plaintiff was a witness. That was not of course, the content of the WeChat message in question but there is a more fundamental issue.

5. In the Appeal Proceedings, the defendant stated that the guarantee was for the sake of formality and that the plaintiff was merely a witness (and the agreement was written in that fashion). I understand that the defendant now says, in his case here, that evidence was a lie but in these proceedings, under cross-examination, he confirmed the substance of his evidence in the Appeal Proceedings in that respect.
6. The defendant also stated in his first defendant affidavit that, up to the time of the Appeal Proceedings, the plaintiff said to him several times "If we lose this case, if we fail, we need to buy more time from the Court. We need more time to get money." The defendant could not remember if the statement attributed to the plaintiff was, in fact, also made by Mr Wang or Mr Yuan at a meeting on 8 March 2018 but it may have been. It was said to have been said by at least one of the lawyers before the Appeal Proceedings. The plaintiff denied that conversation. I do not accept the defendant's evidence in that respect. This is one of three examples of the defendant attributing this type of statement to the plaintiff. As I will find below, I will reject those attributions to the plaintiff, for essentially the same reasons as I will give with respect to those other accounts. I do not find this account any more convincing and it has a self-serving aspect to it which is found in those later accounts.

8 March 2018

1. It appears to be common ground that a meeting occurred between the plaintiff, the plaintiff's lawyers, the defendant and Ms Meng. The plaintiff stated that Ms Meng was present at the meeting because she would give evidence at the Appeal Proceedings.
2. The defendant gave evidence that that meeting occurred at a coffee shop located on the first floor of the Wanda-Vista-Tianjin Hotel to discuss the Appeal Proceedings. The defendant stated that one or both of the lawyers acting for the plaintiff discussed the amount of RMB 1 million that had been repaid to Jiayi by the plaintiff and stated, "This should be a payment from you, not from Tuo Liu." The defendant then stated one or both of the plaintiff's lawyers asked him to send a statement to the plaintiff on WeChat that identified him as the true borrower under the Jiayi Loan Agreement to show that the borrowing was not connected with the plaintiff and that he was merely a witness.
3. The plaintiff denied the conversation between the defendant's lawyers and the defendant or that the request to send a statement of the kind identified above was made.
4. I prefer the evidence of the plaintiff in this respect for the following reasons:
 1. As mentioned earlier, the Court should not lightly infer that one of the plaintiff's lawyers asked the defendant to give false evidence.
 2. The proposition in (1) is true as a general proposition, but it is buttressed by two factors operating in this matter:
 1. in cross-examination in these proceedings the defendant accepted that on no occasion did the plaintiff's lawyers suggest that he "should give false evidence"; and

2. the serious allegation was made in circumstances where the defendant could not articulate who made the statement from the lawyers and where no allegation against the lawyers of this kind was pleaded.
1. The request which is attributed to the lawyers may be doubted because the lawyers were already in possession of the Chinese Court Proceedings Affidavit which went some way towards the propositions they were allegedly proposing would be put and because the defendant was due to give evidence the next day.
1. The plaintiff gave evidence that, during a meeting he had with the defendant on 8 March 2018, he told the defendant that his lawyer, Mr Yuan, suggested that he should prepare an agreement which sets out the terms for the repayment of the money which the plaintiff had paid, and would have to pay, in the event that the plaintiff was unsuccessful in the Appeal Proceedings, to which the defendant agreed.
2. Counsel for the defendant also relied on WeChat messages of 8 March 2018, from Ms Meng to the plaintiff. The series of WeChat messages was forwarded by the plaintiff to the defendant. Those messages from Ms Meng appear to have been sent around 9:00pm, apparently after the meeting, and were as follows:
 1. The lawyer was guiding you along his line of argument, you two idiots;
 2. From now on, say you were never in touch with each other until late 2016;
 3. The lawyer could only guide you. He couldn't just ask you to lie;
 4. If asked about the previous phone calls between you, just say you were just chatting rather than talking about the case;
 5. Mr Lam should say he didn't know Tian contacted you; and
 6. He only knew that he would ask you to help him pay the 1 million once you got the money, nothing else other than this.
1. The defendant submitted that Ms Meng was encouraging the plaintiff and the defendant in her WeChat messages to put forward agreed and false evidence. It was further submitted that the plaintiff passed Ms Meng's message to the defendant for that purpose. The defendant contended that what the plaintiff was inciting the defendant to do was to deceive the Appeal Court to "affect the outcome of the appeal [which was] consistent with [the plaintiff] subsequently seeking to deceive the Appeal Court by providing [the Agreement] in order to delay enforcement of its judgment." The Agreement should, it was submitted, be understood as a vehicle to "buy time" from the Court by showing there was imminent means for the judgment to be paid. Reliance was placed in that latter respect.

2. It is understandable that the defendant would suggest this communication encourages the plaintiff and the defendant to engage in a deception of the Chinese Court. It was submitted that it was beyond reasonable contentions that Ms Meng was advising the plaintiff that false evidence should be given to the courts in the Chinese Proceedings. The plaintiff forwarded the 'advice' to the defendant.
3. The effect of the defendant's submission is that the communication from Ms Meng and the plaintiff's forwarding of the message to the defendant is demonstrative of a deception perpetrated by these persons upon the Chinese Courts. However, it does not support a proposition that the plaintiff or the defendant acted upon the advice.
4. Some observations should be made in that respect:
 1. The communication from Ms Meng seems to undermine, to some extent, the defendant's suggestion in his evidence that the plaintiff's lawyers had asked him to lie. She stated: "The lawyer could only guide you. He couldn't just ask you to lie."
 2. It is unclear what Ms Meng meant by the lawyers guiding the plaintiff and the defendant. The lawyers may well have been discussing potential defence, but these propositions could not have been the blunt suggestion by the defendant as to inappropriate conduct by the plaintiff's lawyers as Ms Meng chided the plaintiff and the defendant about their lack of understanding of potential strategies – she referred to "you two idiots". This also is suggestive that there was not a discussion between the lawyers and the plaintiff and the defendant about concocting a false narrative for the Chinese Proceedings.
 3. The suggestion that the plaintiff and the defendant should state they "were never in touch with each other until late 2016" or that the defendant did not know Tian had contacted the plaintiff were not matters which ultimately featured in the defendant's evidence in the Appeal Proceedings, and, hence, 'the advice', at least to that extent, was not heeded. In cross-examination, the defendant indicated that he did not give evidence consistent with Ms Meng's advice in the Appeal Proceedings.
 4. The final proposition does seem to be an encouragement by Ms Meng to give false evidence, although it does not follow that Ms Meng was suggesting that the lie be that the defendant had asked the plaintiff to pay RMB 1 million.
 5. The defendant said he did not pay much attention to Ms Meng's observations.
 6. Rather than the 8 March 2018 WeChat message from Ms Meng illustrating a pattern of deception by the plaintiff and the defendant, I agree with the submission of the plaintiff that it has had the opposite import, namely, it is powerful evidence that the defendant would simply ignore a suggestion to be dishonest and give his own evidence to the contrary.

7. In those circumstances, and given that the defendant had been conferring with the plaintiff's lawyers, I do not infer that the plaintiff passing Ms Meng's message to the defendant constituted an attempt to influence the defendant as opposed to conveying a message received which was plainly intended for both the plaintiff and the defendant.

9 March 2018 - The Appeal Proceedings

1. As earlier mentioned, the Appeal Hearing was on 9 March 2018.
2. The plaintiff did not give evidence at the trial or in the Appeal Proceedings. It was suggested he was present with the defendant which he denied.
3. The Court is in receipt of the transcript of the Appeal Proceedings which form a basis for the following portion of the judgment.
4. Two witnesses gave evidence on the plaintiff's behalf at the hearing of the appeal, one being the defendant.
5. The issues of fact raised by the plaintiff in the Appeal Proceedings were as follows:

"Attorney for the Appellant: Yes, we do. The contents of the agreement signed by the parties are different from what we consider as the facts. This is the content of the entire agreement. The signed agreement should contain the information about a piece of mortgaged land. The appellant did not assume joint liability under the guarantee. He only provided a general guarantee, with the land as a precondition. The right to counterplea was abandoned in the guarantee, but there should be no such terms. These are the main inconsistencies."

1. In the Appeal Proceedings, the Court described the issues as follows:

"Presiding Judge: The court has listened to the opinions of both parties and now the key points of the dispute are summarised as the following: 1. Whether the Loan Agreement of this case is genuine? Is it the representation of the true intention of the parties? Is it the agreement between the parties? 2. Whether the term of the guarantee provided by the appellant has expired? What is the nature of the 1 million yuan paid by the appellant to the third party LIU Xiuying?"

1. One aspect of Ms Meng's evidence was:

"MENG Linjiao: I have looked at the so-called agreement for joint guarantee. I am doubts about several issues. The original copy of the agreement which I had looked at is inconsistent with the facts in three aspects. First, Mr. LAM Kin mortgaged a piece of land in Australia. It was a piece of mortgaged land of more than 40000 acres. It was real. I read the agreement very carefully. It was an agreement of several pages and I read every page carefully. Mr. LIU Tuo did not assume joint liabilities. On the last page of the agreement, it contained the information that the location for court arbitration was Tianjin, while I dare to say that I am sure that the location for signing the agreement was Beijing. I have certain disagreements with these three issues."

1. Further, Ms Meng gave evidence:

"Presiding Judge: Witness MENG Linjiao, do you believe that the agreement signed by the parties is not the Loan Agreement submitted by the parties of this case?

MENG Linjiao: I dare say that it is 100% not.

Presiding Judge: Was the agreement you described signed in your presence?

MENG Linjiao: I was there.

Presiding Judge: Who else was there?

MENG Linjiao: LAM Kin, LIU Tuo, me, and the chief manager of the company Mr. TIAN Hao. LIU Weizhu was not there. He did not present. When signing the agreement, there were at least 6-7 copies, and there were Party A, B and C. In principle, we sign agreements in duplicate, so there were at 6 copies. Mr. Tian said that the agreement needed to be sealed and signed by LIU Weizhu, so he took all copies away.

Presiding Judge: When the agreement was signed, were you there?

MENG Linjiao: Yes, I was.

Presiding Judge: How were you related to the signing of this contract?

MENG Linjiao: I was a partner of LAM Kin and LIU Tuo. I organised a dinner with them.

Presiding Judge: Is there any other creditor-debtor relationship between the appellant and the respondent?

MENG Linjiao: No. Only this one."

1. The defendant's evidence was also recorded in the transcript of the Appeal Proceedings, inter alia, as follows:

"Presiding Judge: As a witness appearing in the court, you should give a true statement of the facts you know. You should not give false testimony. There are legal consequences for giving false testimony. Do you understand?

LAM Kin: Yes, I understand.

Presiding Judge: What is your relationship with the respondent?

LAM Kin: Debtor-creditor relationship.

Presiding Judge: What is your relationship with the appellant?

LAM Kin: Cooperative partner.

Presiding Judge: What do you want to prove?

LAM Kin: I used a piece of land in Australia as the mortgage for the loan. The reason for asking LIU Tuo to provide the so-called guarantee was merely a matter of formality. It was not an actual guarantee.

Presiding Judge: That's all?

LAM Kin: Yes

Presiding Judge: You mean that you mortgaged a piece of land in relation to the Loan Agreement. What was role played by LIU Tuo?

LAM Kin: It was a guarantee for the sake of formality.

Presiding Judge: Was it a general guarantee or a joint guarantee?

LAM Kin: LIU Tuo was a witness, eyewitness, not a guarantor. This was our understanding at that time and the agreement was also written in that way."

(Emphasis added.)

1. Further, the defendant gave the following evidence as to the giving of a guarantee by the plaintiff and the authenticity of the Jiayi Loan Agreement:

"Attorney for the Appellant: Please describe the process for signing the agreement.

LAM Kin: In terms of the process for signing the agreement, we were in a restaurant at that time. Before the dinner, we already signed a formal agreement at a law firm in Hong Kong with LIU Weizhu from the respondent company. Then in Beijing, he wanted it to be a personal act, not an act of the company, lending money to me as an individual. At the dinner, it was said that the way of the loan should be changed, and a loan to a person would require mortgage. I said I had a large piece of land in Australia and its value could cover RMB 5 million yuan. He said ok. He asked whether the land was subject to any mortgage, I said no mortgage, just a clean title of land. That was how we started it and it was generally agreed. Nothing was said about finding a local resident to provide a guarantee for the sake of formality. After the first agreement was prepared, it was said that to complete the agreement, a local witness in Beijing would be required to provide a guarantee for the sake of formality. I said what was the meaning of a guarantee for the sake of formality. It was just a witness, to prove the existence of the debtor-creditor relationship. At that time, LIU Tuo was not dining with us. He was in a conversation in another place. I called him over. If there was a real need to ask him to provide a guarantee, I would not do that.

Attorney for the Appellant: After LIU Tuo arrived, did you see the contents of the agreement drafted by the respondent? Is there any difference between that agreement and your current agreement?

LAM Kin: The exact size of the land. At that time, we calculated the size of the land and it was 47850 acres. We agreed on the spot that this could be used for mortgage, in case I failed to perform my obligation for repayments.

Attorney for the Appellant: You mentioned the concept of a guarantee for the sake of formality. What were the words used in the agreement? A guarantee for the sake of formality, or some kind of guarantor? What was term used in the agreement?

LAM Kin: I saw that once at that time. We had no duplicate, so I really forgot the exact wording.

Attorney for the Appellant: In your affidavit, you said that on 8 October 2015, you asked LIU Tuo to make a repayment. Can you explain the background of this matter to the court?

LAM Kin: The background was that when I was in breach, we discussed about performing the obligations according to the original agreement, which means conveying that land to the creditor...

Presiding Judge: Witness LAM Kin, you are the debtor. Why you don't have the Loan Agreement?

LAM Kin: LIU Weizhu took the copies away and did not give them back to us afterwards. As a result, I don't have the Loan Agreement.

Presiding Judge: What was the location for signing this agreement.

LAM Kin: A restaurant in Beijing. I forgot its name. LIU Tuo knows that.

Presiding Judge: Who was there?

LAM Kin, TIAN Sheng and WANG Yi from the respondent company and SHI Shanxin, SHI Guang from the respondent company, and LIU Tuo, MENG Linjiao and me.

Presiding Judge: What is your relationship with MENG Linjiao? Why she was there?

LAM Kin: MENG Linjiao and LIU Tuo were lovers.

Presiding Judge: What do you think about the size of the land in that agreement? What information was provided in relation to the land number and location?

LAM Kin: There was a land number.

Presiding Judge: Can you tell us the land number now?

LAM Kin: I can't remember it.

Presiding Judge: How many pieces of land do you have in Australia?

LAM Kin: Just one, the size of the land is some 47000 acres."

(Emphasis added.)

1. In cross-examination, the defendant identified only the words in italics in the above two extracts from the Chinese Court Proceedings transcript as being untrue.
2. The attorney for the respondent made the following submissions as to that evidence:

"Attorney for the Respondent: We think that the statements made by the two witnesses do not satisfy the requirements for new evidences in appeal for civil actions, so they should not be admitted into evidence by the court. The statements made by the two witnesses were all oral. There is no evidence to support them. We think that the fact-finding for this case should be based on the original copies of the written evidences provided by the respondent, and the opinions of the authentication."

1. Attorneys for the appellant and the respondent then made the following submissions about the Jiayi Loan Agreement:

"Presiding Judge: Did LIU Tuo transferred 1 million yuan to a third party, LIU Xiuying, on 8 October 2015?

Attorney for the Appellant: Yes.

Presiding Judge: Why did he transfer that 1 million yuan?

Attorney for the Appellant: It was because LAM Kin wished to make a repayment of 1 million yuan to the respondent. Since the respondent used various methods to distrain LAM Kin's passport, watch and other belongings, LAM Kin was unwilling to have contact with the respondent. As a result, he asked LIU Tuo to transfer the money to the respondent.

Presiding Judge: Did the circumstances you mentioned exist? What is source of this 1 million yuan? Whose money was it?

Attorney for the Appellant: We used emails to prove the backgrounds of this 1 million yuan. From the contents of the emails, it should be considered as LAM Kin's money.

Presiding Judge: Was the 1 million yuan transferred from LIU Tuo's account?

Attorney for the Appellant: Yes.

Presiding Judge: How can you prove that this 1 million is LAM Kin's money, not the appellant's?

Attorney for the Appellant: LAM Kin said please pay 1 million yuan on my behalf first, that 1 million yuan is the repayment from me. It can be deducted from the capital we used for our cooperation.

Presiding Judge: Are the emails from LAM Kin to LIU Tuo the only evidences you are relying on?

Attorney for the Appellant: Yes.

Presiding Judge: Is there any evidence to show that LAM Kin transferred 1 million yuan to the appellant first, and the appellant transferred 1 million yuan to LIU Xiuying several days later?

Attorney for the Appellant: No. Because LAM Kin had a cooperative relationship with LIU Tuo. They had this kind of authorisation.

Presiding Judge: You claim that the appellant provided general guarantee, then why the appellant made this 1 million yuan repayment from his money?

Attorney for the Appellant: LAM Kin wished to make the repayment. He asked the appellant to make a repayment of 1 million in advance on his behalf.

Presiding Judge: Why LAM Kin did not directly transfer the money to the lender?

Attorney for the Appellant: There are records at the embassy. LAM Kin failed to make repayments and the respondent believed that LAM Kin cheated him with the company in Singapore. As a result, he found some people to detain LAM Kin and LAM Kin was required by the Embassy in Australia to go back to Australia once every month for visa interviews. Due to this transaction process, LAM Kin was unwilling to have contact with the respondent. As a result, he asked LIU Tuo to transfer the money.

Presiding Judge: Did the respondent receive the 1 million yuan transferred by the appellant?

Attorney for the Respondent: Yes, we did."

1. On 19 March 2018, the Appeal Court handed down judgment dismissing the appeal.
2. The primary reasons for judgment were as follows:

"...This court considers the following as the focuses of the dispute: 1. Whether the Loan Agreement genuine; 2. Whether the term of guarantee in the Loan Agreement has expired, and whether the appellant was exempted from assuming joint liabilities. For the first focus of the dispute, on 3 June 2014, Jiayi as the lender signed the loan agreement with the borrower LAM Kin and the guarantor LIU Tuo, who assumed joint liabilities. The Loan Agreement expressly defined the rights and obligations of the parties. It stated that the appellant assumed joint liabilities, and stated other contents such as the term of guarantee and the scope of guarantee. The appellant claimed that the Loan Agreement was signed due to fraud. Therefore it was not a true representation of the intentions. However, the appellant had no further evidence to support this. The grounds for appeal could not be established. The appellant disputed the authentication outcome, but failed to provide sufficient evidences to prove that challenge. As a result, the findings made by the court of first instance in relation to the Loan Agreement was not improper. For the second focus of the dispute, the Loan Agreement expressly stated that the term of guarantee was 2 years the maturity of the principal debt. In other words, the term of guarantee was from 20 June 2014 to 19 June 2016. On 8 October 2015, LIU Tuo paid 1 million yuan into the account of LIU Xiuying, who was a third party designated by respondent. This was sufficient to demonstrate that the appellant had assumed the joint liabilities for payment. The term of guarantee was transformed into the limitation of action on 8 October. The appellant argued that he should not be jointly liable under the guarantee, but such proposition had no support in law. In relation to the amounts of the principal and interest calculated by the court of first instance, neither party expressed their disagreement. These amounts shall therefore be affirmed..."

1. As to the evidence, the Chinese Court did not accept the evidence of the defendant and Ms Meng as they were "related" to the plaintiff and there was not other comparable evidence. The facts found in the Lower Court Proceedings were summarised in the Appeal Judgment as follows:

"Through negotiation, the parties agreed that the term of the loan was 15 days, starting from the day that Party A transferred the fund into the account designated by Party B. Party B should repay the principal to Party A after the loan became due. Party C agreed to assume joint liabilities as guarantor for the debts incurred by Party B under this agreement. The scope of the guarantee covered all the fees, including the principal of the principal debt, interests, liquidated damages, damages, fee for preservation measures in litigation, legal service fee and the costs for recovering the debts. The term of the guarantee was 2 years after the maturity of the principal debt. Party C promised that when Party B failed to perform the duty of repayment in accordance with this contract, Party A had the right to request Party C to be jointly responsible for the principal debt within the scope of the contract, regardless of whether Party A had other guarantees for the principal debt...

...On 8 October 2015, the defendant LIU Tuo transferred 1 million yuan into the account of LIU Xiuying, who was a third party designated by Jiayi. The key issues at the first instance are: 1. Whether the term of guarantee has expired. 2 Whether the agreed daily interest rate of 0.1% breaches the relevant rules made by Supreme People's Court. 3. Whether the scope of the guarantee exceeds the scope of the principal debt. This was mainly about the legal service fee. 4. The degree of proof of the outcome of authentication..."

1. The defendant made a number of submissions about the absence of a stipulation of land in the Jiayi Loan Agreement. There is a factual dispute about the Jiayi Loan Agreement as to whether there was any specification of land in the document when it was signed, notwithstanding that the document in evidence before the Court has entries regarding land that are blank. In particular, Ms Meng and the defendant gave evidence in the Appeal Proceedings that the Jiayi Loan Agreement when signed had land in it. The defendant said that is why he signed the Jiayi Loan Agreement.
2. The plaintiff defended the proceedings brought by Jiayi by contending that Jiayi could not sue him before first enforcing its security over land. The blank section of the agreement was never completed; there was a fingerprint attesting to the authenticity of the page of the document which would have had the security "if there had...been a security". It was submitted that the plaintiff accepted in his evidence in chief there was not any security specified in the terms of the Agreement.
3. Reference was then made to the meeting which occurred on 26 November 2016 and to the plaintiff's evidence that the meeting was attended by the plaintiff's lawyers and the defendant where 'land' as discussed. This reference was followed by attention being given to the email of 29 November 2016 (this was written in traditional Chinese). It was suggested that the defendant was familiar with the language but not simplified Chinese, except by way

of signature. It was contended that the plaintiff was asked to point to a document written by the defendant in simplified Chinese but he could not. The 26 September 2015 email was written in simplified Chinese.

4. The defendant contended that these steps and those following were about how the proceedings were to be defended or "the shaping up of defences".
5. The defendant then referred to communications by Ms Meng addressed to the plaintiff before the Appeal Proceedings and the evidence in the Appeal Proceedings suggesting false evidence should be given.
6. It was submitted that in the Appeal Proceedings the following occurred regarding land as security:
 1. The lawyer for the plaintiff submitted the contents of the agreement signed, did, in fact, contain information about "a piece of mortgaged land". Further, it was submitted the plaintiff did not assume joint liability, but only provided a general guarantee with land as a pre-condition. The plaintiff only gave a general guarantee and the defendant's land took priority. Jiayi prepared different versions of agreements "and them together for signing... the original copies were all taken away..." There were "five or six original copies and the copies were seen to be inconsistent... the original loan agreement... contained a mortgage of the land".
 2. Ms Meng gave evidence that the original copy of the agreement contained reference to a piece of land owned by the defendant in Australia (40,000 acres). The defendant had mentioned his land to Ms Meng.
 3. The defendant gave evidence he used a piece of land in Australia "as a mortgage for the loan"; the guarantee was a mere formality ("it was a guarantee for the sake of formality and the plaintiff was only "a witness". The plaintiff was brought in after the final Jiayi Loan Agreement as a "local witness"). The actual size of the land was 47,850 acres which, in the case of breach, was also to be conveyed to the creditor.
1. As to the payment of RMB 1 million by the plaintiff to Jiayi, it was submitted the plaintiff "used emails to prove the background of this yuan 1 million" to the contend the money should be considered "[the defendant's] money": (reference was made to the email of 16 September 2015 email which was said to be manufactured). In this respect, it was submitted "There never was an electronic communication. The plaintiff never received it". Further, it was submitted "there was a great incentive and motivation to put before the Chinese court the best evidence that could be put without calling [the plaintiff]". Reference was made to the plaintiff not receiving the email and the request being made by telephone.
2. The key propositions adopted by the defendant with respect to land were:
 1. The proposition that there was land or security in the form of land with the Jiayi Loan Agreement merely to produce a defence to the Appeal Proceedings.

2. However, "they never had any land". The defence was manufactured. The plaintiff and the defendant joined interests to "defeat the creditor". It was submitted that "they went to trial on the fact that there was real estate in the agreement, yet [the plaintiff] said in this Court, this is the document and the document doesn't have real estate in it".
3. It was not suggested in submissions by the defendant that there was no intention to form legal relations because of the blank land section of the Jiayi Loan Agreement, being blank.
1. I do not accept the defendant's contentions in this respect, and in particular, that the evidence given by the defendant at the Chinese Court Proceedings was relevantly, a lie designed to deceive the Chinese Court for the following reasons:
 1. The plaintiff accepted that the Chinese Court had found the Jiayi Loan Agreement was authentic and, therefore, was inchoate in the sense that the security provision was left blank, notwithstanding there was a provision for security in that agreement. He accepted that the Jiayi Loan Agreement before this Court was signed by him, although he stressed that at the time of the Chinese Court Proceedings both he and the defendant did not think the signatures were authentic and that land, as security, had formed part of the agreement.
 2. The plaintiff and the defendant had a genuine belief that security was offered for the Jiayi Loan Agreement.
 3. The defendant had discussed security with Jiayi, and in particular, the use of his land.
 4. The defendant's belief was consistent with his evidence not only in the Appeal Proceedings, but the evidence he gave in this Court as to those parts of his evidence in the Chinese Court Proceedings which were not a lie.
 5. That evidence as to the provision of security by his land holdings was entirely consistent with his earlier statements leading up to the Chinese Court Proceedings, namely, the Chinese Court Proceeding Affidavit and the earlier versions of that document which, again, were confirmed as true by the defendant in these proceedings.
 6. The reliance on the security was thought to be a viable defence by the plaintiff's lawyers in the Chinese Court Proceeding, notwithstanding the inchoate nature of the contract.
 7. The 26 September 2016 email was relevant to the additional defence of the Chinese Court Proceedings as to whether the guarantee had expired. I will deal at length with the defendant's contention that the email is false, and that he did not send it, in a later section of this judgment dealing with that topic. It is sufficient to note, at this juncture, that the evidence in these proceedings where a copy of the email appears was a screenshot from the defendant's phone. That fact was inconsistent with his evidence that the first time he saw the email was when it was presented to him for signing. The evidence is also inconsistent with the defendant's account in that he did not prepare the email or did not send it. I will find below that this evidence is consistent with the defendant, at least, preparing the email.

Aftermath of the Appeal Proceedings

1. In 2018 to 2019, the People's Court of Tianjin Binhai New Area could enforce its judgments by:
 1. seizing property of the judgment debtor;
 2. selling property of the judgment debtor, including by auction;
 3. freezing bank accounts of the judgment debtor;
 4. automatically deducting funds from bank accounts of the judgment debtor; and
 5. restricting the ability of the judgment debtor to travel, including by plane or train.

10 March 2018

1. The day after the Appeal Hearing, the plaintiff forwarded to the defendant a message from his lawyers summarising what had occurred in Court the day before. The defendant submitted that the report focused on the need to explain the initiative for the RMB 1 million payment was from the defendant, not the plaintiff and quoted the following passage:

"On the guarantee period we argued that it was Director Mr Lam who offered to pay the debt, so it should be recognised that Mr Lam, rather than our side made the payment."

1. This submission again related to the conduct of the plaintiff's lawyers.
2. The full text of the relevant paragraph from the plaintiff's lawyer was as follows:

"Director Liu, today's hearing mainly focused on the authenticity of the agreement and if the guarantee period had expired. We argued that there were more than one version of the agreement, and that the other party had replaced the original one with another version. We requested that they provide all versions. The other party denied it all and insisted that the original agreement was prepared in triplicate, of which two were provided to our party and Director Lam respectively, and that there was no other version of the agreement. On the guarantee period, we argued that it was Director Lam who offered to pay the debt, so it should be recognized that Lam, rather than our side, made the payment. The other party held that since the first-instance judgement had a definite ruling in that regard, it should be upheld."

1. When seen in the context of the full version of the lawyer's report, it is clear that the lawyer's report is consistent with the solicitor acting professionally and providing a report to his client in the course of the proceedings. The lawyer's report reflects upon the arguments in the Chinese Court Proceedings on behalf of the plaintiff. That argument does not exactly correspond with the evidence given by the defendant in those proceedings, even though his evidence as to the true nature of the guarantee arrangement would be consistent with the submissions made as recorded in the report.

Late March / early April 2018

1. The defendant also stated that in late March or in early April 2018, the plaintiff said to him:

"I have discussed with my lawyer how to deal with repayment, The Court wouldn't accept that Jiayi should take money back from you, not me.

My lawyers say that one way to buy more time is to get an agreement from you that you will repay and that looks to be binding. The lawyer says you have to say that you are expecting money soon to satisfy the debt."

This was the first time I had heard of the possibility that there should be such an agreement:

"If I can't get more time and I can't pay the money, they will put me on a [bad person's / defaulters] list and this will be public."

1. The plaintiff agreed that a conversation occurred in this period but denied the conversation deposed by the defendant.
2. The plaintiff stated that a conversation occurred between his lawyer, Mr Yang, and the defendant during that period. The plaintiff stated that he was present and the conversation was to the following effect:

"Lawyer Yuan said: Mr Liu might lose the case. I am preparing a testimony for the proceedings. Did you borrow money from Hong Kong Jiayi?

Mr Lam said: Yes.

Lawyer Yuan said: Did you suggest that Mr Liu should be a guarantor?

Mr Lam said: Yes.

Lawyer Yuan said: If Mr Liu loses the case then he will be liable to make repayments. To be fair, there should be an agreement between you and Mr Liu."

1. Whilst the time periods identified in the respective accounts generally correspond there may be a temporal difference as the defendant's account plainly relates to a period after the Appeal Judgment and the plaintiff's account concerns the period beforehand (which, given the date range, must at least have been immediately before the Appeal Judgment).
2. In many respects, the defendant's version of this conversation is unexceptional. There is contemplation of putting an agreement before the Chinese Court which would be relevant to enforcement proceedings if the Agreement was binding. That approach is entirely consistent with the plaintiff's account of the conversation albeit that it occurred between Mr Wang and the defendant.

3. However, the defendant introduced into his version of the conversation the words "an agreement from you that you will repay and that looks to be binding". The implication of that attribution is that the plaintiff and the defendant would enter into a non-binding agreement with a view to deceiving the Chinese Court or a Public Official handling the Chinese Court Proceedings.
4. There are a number of difficulties with the defendant's account in that respect and I do not accept it.
5. The first is that, if the conversation was, in fact, with the plaintiff's lawyers, I have a similar, if not greater, reservation in accepting the defendant's version of the words said to be spoken by the lawyer on the defendant's account. To the extent that the defendant stated that the words "[m]y lawyers say...get an agreement...that looks to be binding" suggested that the plaintiff received legal advice to the effect that the plaintiff and the defendant should enter into a non-binding agreement with a view to deceiving the Chinese Court or public official.
6. I reject that proposition as it is fundamentally inconsistent with the WeChat messages between the plaintiff and his lawyer who drafted the Agreement, Mr Wang, (being the WeChat messages of 14 and 24 April 2018), which showed careful attention to the terms of the Agreement, where it could be enforced, and the need to obtain Australian legal advice in relation to the Agreement.
7. Secondly, my general observations as to the lack of credibility of the defendant's evidence must have sway in the circumstances of this particular issue. The plaintiff's account of this conversation does seem quite plausible. On the defendant's own account, given in the Chinese Court Proceedings, the proposition advanced by Mr Yuan as to the need for an agreement to be fair would seem explicable, particularly as it is raised in anticipation of the determination of the Appeal Proceedings after a loss in the Lower Court Proceedings.
8. Thirdly, the immediate context was that the plaintiff was seeking to avoid the severe consequences of enforcement and, in particular, being placed on the bad credit list. The proposition to create the Agreement, in the light of the answers received by Mr Yuan from the defendant appears reasonable. On the other hand, the use of the words "looks to be binding" in the first defendant affidavit is self-serving and ultimately convenient to the case the defendant wishes to bring.
9. Fourthly, what casts significant doubt on this aspect of the defendant's account is that which occurred from mid to late April 2018, which I will discuss below, which shows that the plaintiff had given instructions to his solicitor to draft the Agreement in such a way to pay careful attention to the terms of the Agreement, were it to be enforced and the need to obtain Australian legal advice in relation to the Agreement.
10. The defendant submitted that the severe consequences of enforcement provided the obvious reason for the plaintiff to seek to delay enforcement by showing that he had a means to satisfy the Judgment Debt. However, that submission overlooks the fact that there

may well have been a legitimate basis for the plaintiff to insist on such an Agreement having regard to my findings as to the nature of their prior dealings. The fact that the plaintiff would have sought to delay enforcement is not inconsistent with the Agreement having legal effect.

13 and 14 April 2018

1. On 13 April 2018, the plaintiff's lawyer, Mr Wang, sent a WeChat message with a draft of the Agreement to the plaintiff. The message with the plaintiff's reply was as follows:

"Chief Manager Liu, I have prepared an agreement according to your requirements. Please have a look at it.

Received. I will have a look. Thank you."

1. On 14 April 2018, the plaintiff replied to the message on the previous day at 9:47am in the follow terms:

"1. LIU Tuo's nationality should be included. Also, note down clearly the residential address, telephone number and email of both Party A and; Party B.

2. Clause 9: This contract will come into effect after being signed by both parties. The contract will be have English and Chinese versions and each version will be in in quadruplicate. If these is any inconsistencies between the English and Chinese versions, the English version shall prevail. The Chinese version will have 4 copies and the English version will also have 4 copies. Party A and Party B will hold 2 copies for every version respectively. The copies shall have same effects in law.

...

3. Clause 10:...the court of the State in which the land of Party A locates has exclusive jurisdiction."

1. A short time later the plaintiff stated:

"Maybe it is better to agree that the place of judgment should be the place in which the land locates.

Maybe it is better to agree that the place of the hearing should be the place in which the land locates."

27 April 2018

1. The amended form of the Objective Facts Document stated that, on 27 April 2018, the plaintiff sent a WeChat message to the defendant which stated:

"Also, the Judge and lawyer said please provide an effective proof of repayment, agreements between the borrower and lender and related documents as soon as possible."

1. That entry corresponds to SOAF 32.
2. The Objective Facts Document prepared by the defendant referred to the WeChat message stating, "an effective proof of repayment".
3. However, the WeChat message of 27 April 2018 ("the 27 April 2018 WeChat message") was as follows:

"@Tony Chief Manager Liu, please check for the revised agreement. Since Australian law might be applicable to the agreement, it might be wiser to let an Australian lawyer review it. Of course, it will be eventually decided by you and Chief Manager Lam.

Also met with the enforcement judge this time. Documents for reliability should also be provided in order to avoid being listed on the list of people with bad credits. Also, it is necessary to talk to TIAN Hao. He is waiting for our documents.

You need to look at the agreement between us and see if it has any problem. This needs to be submitted to the judge.

The evidence for the repayment from Singapore will only be recognised with the support of documents for relevance. Also, please let me know whether I should go as soon as possible."

1. The defendant made the following submission in writing about this message:

"The Plaintiff's Opening Submissions also rely upon a message appearing as if sent from Mr Liu to Mr Lam, which states "it might be wiser to let an Australian lawyer review it", which Mr Liu, in submissions, accepts is a message from Mr Liu's lawyer passed on from Mr Liu's to Mr Lam. The message was advice from the lawyer given to Mr Liu for him to act on. Mr Liu did not bother to obtain any Australian advice. You would expect him to do so if it was intended to sue on this document in New South Wales."

1. It is plain, as accepted by the plaintiff, that the first entry in the WeChat message is a copy of a message from the plaintiff's lawyer. But that fact simply signifies that the plaintiff was conveying to the defendant the advice he had received.
2. When the defendant was challenged in cross-examination as to why the plaintiff would pass on to the defendant his lawyer's suggestion that Australian legal advice be obtained (as the Agreement would be governed by Australian law), if the agreement was never intended to have legal effect, the defendant stated that the process was to make the Agreement "look real". This suggestion seems nonsensical, as presumably the defendant meant "look real" to a Chinese Court Official, as the plaintiff only made a threat to sue in December 2018. Just why a Chinese Court engaged in Enforcement Proceedings would be influenced by the Agreement being assessed by an Australian lawyer is unclear and ultimately reflects poorly on the defendant's credit.

3. The defendant submitted that, in fact, the plaintiff did not obtain any Australian advice which he may have been expected to have done if he intended to use the Agreement in New South Wales. In a broad sense, there is some force in that submission. However, the advice from the plaintiff's lawyer to seek the opinion of an Australian lawyer, when the Agreement was to be governed by the law of Australia, would also suggest that the instructions to the Chinese lawyer were that the Agreement would have legal effect albeit in Australia.
4. Further, the WeChat message suggested the defendant examine the Agreement to see if there were any problems. This sits ill with any notion that the defendant would, regardless of content, simply sign the document upon its receipt a WeChat message of, as discussed below, 1 May 2018.
5. The defendant contended the communication of the Agreement by the WeChat message on 1 May 2018 was an invitation to treat or a precursor to an offer. I will return to that consideration in the context of considering the exchanges between the parties on 8 May 2018 but, in any event, these exchanges also sit against the notion that the instrument was brought into existence for some other end other than that of having legal effect.
6. The defendant made a related submission about the engagement of a lawyer to draft the Agreement and issue of whether there was an intention to create a legally binding relationship. In the defendant's written submission, the following proposition was advanced:

"In opening submissions, it was argued for Mr Liu that Mr Liu's engagement of a lawyer in China to draft the Agreement Sued Upon indicates that it was intended to create a legally binding relationship. However, the lawyer referred to is a Mr Wang, who was engaged by Mr Liu for the purpose of defending the Chinese Proceedings. The involvement of Mr Wang in drafting the Agreement Sued Upon is consistent with Mr Lam's contention that the sole purpose of the creation of the documents which became Agreement Sued Upon was to provide to the Chinese Court. The fact that the agreement was drafted by a lawyer therefore does not weigh in favour of the parties' intending the agreement to be legally binding."

1. I do not accept this contention. If the defendant's various contentions that the plaintiff's lawyers were providing illegitimate advice to the plaintiff and defendant over the Chinese Court Proceedings is put aside (as I have previously rejected it), then it would seem to be a sound decision for the plaintiff to use his lawyer, Mr Wang, to draft the Agreement as the Agreement logically and practically sprung out of the issues ventilated in the Chinese Court Proceedings.
2. The defendant alleged that a conversation was also alleged to have occurred between the defendant and the plaintiff on 27 April 2018 which is denied by the plaintiff. The conversation is recorded in the second defendant affidavit as follows:

"Mr Liu: "You need to sign an agreement for repayment to me. I have no money. I cannot get money back from Meng or my brother. I need this agreement to buy time from the court."

Mr Lam: "I don't have anything other than what I will get in Singapore."

Mr Liu: "My lawyers have told me that it would be helpful if you could provide post-dated cheques from Singapore to show that you have funds to pay me.""

1. The difficulty with that evidence is that the defendant stated that he did not have "anything" other than what he would "get in Singapore" whereas, on the defendant's account, his company Millennium owned land in Australia at that time as the defendant had actually said in his evidence in the Chinese Court Proceedings. A further difficulty is that I do not accept that the plaintiff said that he had forwarded Tianhe monies to his brother and Ms Meng or that he had in fact done so.

1 May 2018

1. On 1 May 2018, the plaintiff sent the defendant a copy of the Agreement via WeChat, which the plaintiff had caused to be prepared (notwithstanding the WeChat message of 27 April 2018 containing a request to check the revised Agreement, it apparently only reached the defendant at this date). It was identical to the Agreement signed by the defendant on 9 May 2018.
2. As at 1 May 2018, the plaintiff had RMB 4.5 million in his bank account. The plaintiff refused to answer where this money was from.
3. On 7 May 2018, execution of the Appeal Judgment was commenced against the plaintiff's assets.

8 May 2018

1. On 8 May 2018, the plaintiff sent a message to the defendant ("the 8 May 2018 WeChat message") which stated:

"Chief Manager Lam needs to sign every page of the above document (and also fill in the information for the land). I can then forward it to the Enforcement Division of the court. Urgent! Give me the hard copy when meeting with me. Call me when it is convenient to you."

1. The defendant's evidence about that document (in an expanded form in anticipation of the discussion of later issues) was as follows:

"Q. I showed you a WeChat message, before we came to this document, where Mr Liu asked you to bring a hard copy I'm paraphrasing. He asked you to bring the original copy of the agreement with you to the hotel, or words to that effect. Do you remember that message?

A. Yes.

Q. Let me be precise about this because it's important evidence.

A. Yep.

Q. Page 449, tab 68. Just let me know when you have that page 449, sir.

A. Yes.

Q. Can you see the language in the text from Mr Liu to you, "Give me the hard copy when meeting with me"? Do you see that?

A. Yes.

Q. That's referring to the copy of the agreement that we sue on, which you have signed in English; is that right?

A. No.

Q. What's he referring to there, with "the hard copy"?

A. Like a we never discussed this message. We did not discuss this message.

Q. He says, "Chief Manager Lam needs to sign every page of the above document". You accept we're talking about the agreement at this point?

A. Yes.

Q. "and also fill in the information for the land", that's referable to the agreement we sue on, as well; is that right?

A. I didn't fill in the land information.

Q. I'm sorry, I didn't hear that answer.

A. I didn't fill in the land information.

Q. We will come back to the agreement in a moment.

A. He didn't ask me for the land information, either.

Q. That answer is not responsive.

A. Okay. Sorry.

Q. Please, just attend to my question.

A. Sorry.

Q. The statement, "and also fill in the information for the land", we're talking here about the agreement that we sue on; is that right?

A. Yes.

Q. Rather, Mr Liu is talking, in his message, about the agreement we sue on. Do you agree with that?

A. Yes.

Q. Then, when he says, "I can then forward it to the enforcement division of the Court", he's, again, talking about the agreement we sue on; is that right?

A. Yes.

Q. Then the word "urgent", he's then also talking about the agreement we sue on?

A. Yeah.

Q. And the statement, "Give me the hard copy when meeting with me", he's also talking about the agreement we sue on, isn't he?

A. Yes.

Q. Let's turn back to the agreement, behind tab 73, page 465. Did you bring a hard copy of the agreement, signed in English, to the hotel in Shenzhen on the 14th?

A. No.

Q. That was "No", was it?

A. No. No any copy.

Q. Did Mr Liu ask you about that?

A. No.

Q. Why do you think he didn't ask you about that?

A. I don't know. We didn't discuss.

Q. He's saying to you, isn't he, that he needs the agreement, it's urgent? He's clearly

A. Yes.

Q. Would you accept that he's almost panicked about the fact that he needs this document signed? Would that be a fair description?

A. There's assumption, you know.

Q. What I'm asking is you observed him, you spoke with him. Would you accept there was almost a degree of panic exhibited in his behaviour, because he wanted this agreement signed? Would you accept that?

A. Yes.

Q. He knew that, if he didn't have the agreement signed and provide it to the Court, he might be put on what's called "the bad persons list"?

A. Yes.

Q. He knew that, if he was put on that list, he might lose some of his personal liberties?

A. Yes.

Q. He might not be able to travel on certain types of transport, or that sort of thing?

A. Yes.

Q. He might have his assets sold?

A. Yes.

Q. So it's pretty important to him to have this agreement, isn't it?

A. Yes.

Q. I put to you that, if you didn't bring the agreement with you to the meeting with Mr Liu, he would have asked about it, wouldn't he?

A. We did not discuss this.

Q. He just forgot about it? Is that what you think happened?

A. I don't know.

Q. You know that Mr Liu says that he wanted the agreement signed with your Chinese signature. Do you understand that that's what he says in this case?

A. You refer to the WeChat message?

Q. No. I'm just talking generally about his position in this case. You were here when he was giving evidence, over the last few days, weren't you?

A. Yes.

Q. You heard the evidence that he gave?

A. Yes

Q. You understand his position to be that he wanted you, as well as your English signature, to sign the document with a Chinese signature? You understand that's his position; right?

A. Yes.

Q. You understand it's his position that he wanted that because you had signed other documents in the Chinese proceedings, such as the appeal transcript, with a Chinese signature. He wanted the signature on the agreement to match those other signatures.

A. I did not sign the Chinese signature.

Q. No. I'm talking about Mr Liu's view of the case. You understand that's his position, don't you?

A. Yes."

(Emphasis added.)

1. No objection was taken by senior counsel for the defendant to this cross-examination.
2. I pause to observe that this evidence and the passage from the 8 May 2018 message was controversial as it related to the offer and acceptance issue.
3. During the course of the defendant's re-examination (but in the absence of the witness), senior counsel for the defendant submitted that the WeChat message sent by the plaintiff to the defendant on 8 May 2018 in which a request, amongst other things, that "the hard copy" (of the Agreement) be brought when they meet, was, in fact, a copy and paste from a WeChat message received by the plaintiff from Mr Yuan, such that it was the plaintiff's lawyer requesting that the plaintiff provide him with a hard copy and not the plaintiff.
4. The issue in re-examination arose from senior counsel for the defendant asking him "who the WeChat message was between and how it was conveyed?" followed by a question as to whether he had received the document.
5. The passage of the transcript of the proceedings in this respect was as follows:

"Q. Can I ask you your understanding of who the WeChat was between and how it was conveyed? Firstly, if you'd look at 449, did you receive that document?

WILLIS: Your Honour, I'm not sure this is arising. If my friend wants to suggest by reference to the transcript there's some confusion. The witness was asked about who sent it, who received it and gave answers. I don't think they were confusing. My friend disagrees, I'm happy for him to do it by reference to the transcript.

ROBINSON: Just let me do my way.

Q. How did you read this email?

HIS HONOUR: The objection's been made, Mr Robinson. You can't ignore it, so what do you say about it?

ROBINSON: Your Honour, it's been put to this witness on a basis which is not borne out by the actual text. I'll give you an example, if I may go to the transcript then. If you go to 258, line 25 and I've just picked out one aspect of this to illustrate the point the questions proceed on the basis and I read 25 "I showed you...remember that message?" With great respect to the cross examiner, that is not what the WeChat message says. If you wish to have the witness outside, that's

WILLIS: I'm content not to. In relation to the objection, your Honour

ROBINSON: The reason I'm asking this question is that the text which is being quoted to the witness and which is the basis of the cross examination is not borne out.

WILLIS: Your Honour, immediately after that it says, "Let me be...it's importance evidence," he's taken to the document and I read verbatim what the document says, and then ask him what it means. There's no confusion in that.

ROBINSON: I don't want to be seen to be, in any way, suggesting answers to the witness so I've suggested the witness goes outside.

WILLIS: I agree, your Honour.

IN THE ABSENCE OF THE WITNESS

ROBINSON: This is the way in which the document reads. It's sent by Liu to Lam; that much is common ground. What, however, is in the chief manager Lam is a cut and paste of what the lawyer said to Liu. If you know that, it says, "Chief Manager Lam needs to" so he's speaking in that person "sign every page...meeting with me." That's a reference of bringing back the hard copy to the lawyer. This is Yan telling Liu what has to be done and how it will be done. It's not a question which, as was put in the cross examination, that it was Lam who was supposed to take the document to the hotel in Shenzhen. That's the proposition I want to establish.

HIS HONOUR: The means to deal with that is one of two things, not cross examining the witness in re examination. That is taken objection to the question as being falsely putting the terms of the text to the witness or, alternatively, make the submission in due course that you just made. I don't see how you can explore it in the way you're proposing to do so with the witness in re examination.

ROBINSON: He wasn't asked whether this was instruction to him or to Liu.

HIS HONOUR: Is that the question you're proposing to put? Because it seemed to me you were taking a different course a moment ago.

ROBINSON: I am taking a different course, yes. I was going to ask him, firstly, how he interprets this document.

HIS HONOUR: In re examination?

ROBINSON: It arises because of the way in which the document's been deployed in cross examination.

HIS HONOUR: I uphold the objection. That doesn't preclude you, Mr Robinson, from asking the question that you just formulated one moment ago concerning whether it was he or Liu who was involved in this document.

ROBINSON: I'm sorry, I didn't quite catch your Honour then.

HIS HONOUR: You formulated a question one moment ago that you hadn't formulated to this point concerning who was in fact involved in this document, Liu or Lam. You can ask that question, it seems to me.

ROBINSON: I think I'll leave that to an address, your Honour, on the text of it

1. As will be observed, senior counsel had intended to interrogate his witness as to whether the invitation to bring a hard copy in the 8 May 2018 WeChat message was an invitation from the plaintiff or the plaintiff's lawyers as to what was to be done and how it was to be done. In short it was submitted that the defendant was not asked "whether this was an instruction to him or the plaintiff".
2. The defendant made the following written submission focusing upon the evidence of the defendant in cross-examination extracted above:

"Mr Liu also relies on a message which appears, similarly to the message in the preceding paragraph, to be a message from Mr Liu to Mr Lam. Mr Lam was cross-examined on the basis that the text in this message was written by Mr Liu and directed towards Mr Lam. However, the premise for this cross-examination was a proposition put to Mr Lam as fact and not as a question; the question that was asked in respect of this message was premised as:

Mr Liu asked you to bring a hard copy - I'm paraphrasing. He asked you to bring the original copy of the agreement with you to the hotel, or words to that effect.

Mr Lam accepted the cross-examiner's premise as indicated above and went on to answer questions based on that premise, rather than addressing the accuracy of whether the message contained a request from Mr Liu to Mr Lam. In contrast to that false premise, the text of the message indicates that, similarly to the message at CB-D p 438, it was most likely initially written by Mr Liu's lawyer and passed on to Mr Lam. The message begins with "Chief Manager Mr Lam needs to sign every page of the above document (and also fill in the information for the land)". This written is in the third person (Mr Lam needs to...), and uses a formal way of addressing Mr Lam, indicating it is not directed to Mr Lam. The appellation "Chief Manager Mr Lam" was also used in the message on 27 April 2018 at CB-D p 438 which Mr Liu accepts was written by his lawyer. The message goes on to say: "I can then forward it to the Enforcement Division of the court", which again indicates that it is a direction written by a lawyer. The message ends with the direction "Give me the hard copy when meeting with me". Mr Liu's evidence (on each of the alternative accounts in his affidavits) is that it was he who brought the hard copy of the Agreement Sued Upon to a meeting with Mr Lam on 14 May 2018."

1. This submission is quote artificial and cannot be accepted.
2. Even on the assumption that the words used in the communication were those of the plaintiff's lawyers, it is plain that the plaintiff forwarded to the communication to the defendant for him to take the steps referred to in the communication.
3. Whilst the cross-examination of the defendant proceeded upon the basis of a (correct) premise that the plaintiff had been asked, by the message, to bring a hard copy of the signed Agreement to the meeting, counsel for the plaintiff adjusted his questions so as to ensure accuracy. Accordingly, the questions proceeded from a reference to the actual text of the message appearing in the Court Book. After some initial prevarication, the defendant

confirmed that his understanding at the time was that the message was referring to the Agreement and that he understood he was being asked to provide a hard copy of the signed Agreement. Upon a reading of the transcript, and my observations of the witness, my view is that the defendant had no difficulty in understanding that the communication he was considering involved a request communicated by the plaintiff. He certainly did not suggest or give the impression that he understood that he was receiving a copy from the plaintiff's lawyers. It is implicit from a reading of the 8 May 2018 WeChat message, and the evidence given in cross-examination, that the defendant was asked to provide a hard copy of the signed agreement to the plaintiff so he could provide it to his lawyers.

4. Further, in my view, the cross-examination is not misleading, the defendant understood what he was being asked and agreed with the propositions put.
5. There is a further dimension to this issue. It was not disputed by the defendant that the WeChat message was received by him from the plaintiff. It is true that the introduction to the email by the reference to "Chief Manager Lam" is written in formal language in the third person but there is no reason why, if that was an extract from the communication from the plaintiff's lawyers (which has never been identified in the evidence), why the defendant would not have, as he did, understand this to be a request from the plaintiff himself. Whether that was by the plaintiff writing the script or adopting a message from his lawyers, in terms, to convey to the defendant is beside the point.
6. In any event, components of the 8 May 2018 WeChat message which tend to indicate the communication or part of it was written by the plaintiff. For example, the message does not end, as submitted by the defendant, with the words "give me the hard copy when meeting with me" but rather with the words "call me when it is convenient to you". The same may be said of the word "urgent" which appeared immediately before the passage referred to by the defendant. That is consistent with the plaintiff's mindset as to the need for urgency at the time as was accepted by the defendant in cross-examination.
7. In my view, the evidence indicates that the defendant understood that he was being asked by the plaintiff (by whatever means) to sign the Agreement and to bring a hard copy of it to a meeting as I will now discuss he accepted. He carried out the former but disputed he carried out the latter.
8. There was a further submission advanced by the defendant that when the defendant received the Agreement on 8 May 2018, he could not recall reading or discussing that or any earlier draft of the Agreement and he only read the Agreement quickly. He deposed it was not his intention to carry a responsibility for more than half the Judgment Debt and signed the agreement because the plaintiff and his lawyers had told him it would be helpful to do so, so as to delay court action against the plaintiff in circumstances where he was unable to retrieve monies from his de facto partner Ms Meng or the plaintiff's brother, Xu Guang ("Mr Guang" or "the Plaintiff's brother"). The attempt was to buy more time.

9. Whatever may be the hesitancy and equivocation contained in that evidence by the defendant it cannot alter that he signed the Agreement; the defendant contending this was acceptance of it. I have earlier dealt with (by way of rejection) his acceptance of the offer by the plaintiff. I have earlier dealt with propositions in evidence by the defendant that he was encouraged to take a particular course which was fraudulent by the plaintiff's lawyers and the plaintiff himself.
10. The defendant advanced a further submission regarding the 8 May 2018 WeChat message as to why the 8 May 2018 WeChat message did not constitute an offer. By this contention, the 8 May 2018 WeChat message (when seen with the 1 May 2018 WeChat message) should be considered an offer to treat. The submission was expressed in the following terms:

"The above version (sent to Mr Lam on 1 and 8 May 2018) was clearly an offer by Mr Liu for Mr Lam to negotiate the agreement further by making such changes as he saw fit. It would not be understood by a reasonable person in Mr Lam's position as an expression of willingness to contract on those terms. It is properly characterised as an invitation to treat, or a pre-cursor to an offer.

Mr Lam's act of sending of the three files to Mr Liu on 9 May 2018 must be regarded as the relevant offer. In the analysis of offer and acceptance, it is properly construed as an offer to contract upon the file containing the three page agreement in Mandarin."

1. The issues raised by that submission will be returned to later in this judgment under the heading "The Offer and Acceptance Issue".
2. I return then to the next chronological step.

9 May 2018

1. As mentioned earlier, the defendant admitted that on 9 May 2018 he signed, with an English signature, the Agreement that had been provided to him by the plaintiff and sent it (in the identical form as was provided to him) to the plaintiff by WeChat.
2. On 9 May 2018, the defendant also signed the Advocatus Law Document with an English signature (Advocatus Law are the Singapore lawyers of BS Tech). The defendant also signed a two-page letter from Ignatius to Advocatus law dated 2 May 2018 (which was not pleaded as part of the Agreement).
3. He sent these documents to the plaintiff in three files over WeChat.
4. The Agreement was subsequently executed by the plaintiff. The time and manner of execution of the Agreement (except in relation to the defendant's English signature) is in dispute. I will return to consider these questions.

11 May 2018

1. On 11 May 2018, the plaintiff paid approximately RMB 4.219 million to the Chinese Court. The plaintiff said he obtained this money from "many different businesses" and from savings. Issues were raised as to the responsiveness of the answers in this respect.
2. The defendant submitted that the source of the money was material as he contended it was partnership funds derived from Tianhe. The plaintiff submitted that it was from his own account, as noted, from various possible sources. The issues raised by the defendant as to the plaintiff's responses in this respect were reasonable, even though it appeared the plaintiff was trying to keep private his business dealings. However, the availability and use of Tianhe funds is dealt with extensively later in this judgment.

14 May 2018

1. The plaintiff stated that the defendant met with him in the defendant's hotel room in Shenzhen on 14 May 2018 and the parties signed the Agreement. The defendant's case was that he was not at the hotel room in Shenzhen at the time the Agreement was (on the plaintiff's case) signed and the Agreement was signed at some other time by the plaintiff. This aspect of the evidence is highly controversial, and I will return to it below under a separate heading dealing with the same.

28 May 2018 to December 2018

1. Between 28 May 2018 and 3 August 2018, the defendant transferred SGD 200,000 to Huge Fairway, being half the funds, the defendant received in payment of the Singapore judgment against BS Tech.
2. By 24 June 2018, the plaintiff had submitted a repayment schedule to the People's Court of Tianjin Binhai New Area in relation to the Judgment Debt.
3. On 9 October 2018, the defendant transferred RMB 300,000 to the People's Court of Tianjin Binhai New Area in partial satisfaction of the Judgment Debt.
4. Between 2017 and 2019, the defendant caused payments to be made to Bai Hua, the ex-wife of the plaintiff, at the plaintiff's request.
5. The plaintiff was in constant communication with the defendant from May 2018 onwards in relation to obtaining funds to pay the judgment, however he did not refer to suing the defendant under the Agreement until 20 December 2018.
6. The plaintiff has never expressly asked to be reimbursed by the defendant for the RMB 1 million paid by the plaintiff "out of his own money" to Jiayi on 8 October 2015.
7. On 20 December 2018, the plaintiff sent the defendant a WeChat message in which he threatened to sue the defendant ("the 20 December 2018 WeChat message"). The WeChat message, relevantly, stated:

"Only by paying off the debt, can I solve the problem. 1) can you actually borrow some money?, (2) Will Singapore be able to solve part of the problem?, (3) I will sue you first, (4) I am in a total mess..."

1. The plaintiff and the defendant agreed that they had a telephone conversation which followed this WeChat message but have differing accounts of the conversation.
2. The plaintiff alleged, and the defendant denied, that they had a conversation to the following effect:

"Mr Lam: "Your message says that you will sue me. What is this about?"

Mr Liu: "I need to sue you because none of your promises were realised. You should pay the money back to me in accordance with the agreement as soon as you can.""

1. The defendant alleged, and the plaintiff denied, that the conversation was in the following terms:

"Mr Lam: "Your message says that you will sue me. What is this about?"

Mr Liu: "I may need to sue you so that I can show the Court that I am doing this to get more time to avoid the Court taking action against me. I need to show the Court that I am being active.""

1. I do not accept the defendant's evidence in this respect.
2. The defendant accepted in cross-examination that he understood the reference by the plaintiff in the 20 December 2018 WeChat message to "sue you" was a reference to suing the defendant under the Agreement, and also that it was a big step in Chinese culture to threaten to sue someone.
3. The plaintiff alleged, and the defendant denied, that they had further conversations prior to, and after, the 20 December 2018 WeChat message in which the following statements were made:

"Mr Liu: "Lam, I need you to repay the money as you promised under the agreement. This is not working."

Mr Liu: "Lam, when will you repay me the money?"

Mr Lam: "I have money to repay you. I have real estate which I can sell as well as stocks in Australia. As you know, I am also expecting money from proceedings in Singapore.""

1. I do not accept the defendant's evidence in that respect having regard to his acceptance that the 20 December 2018 WeChat message concerned a threat to sue under the Agreement.
2. On 24 January 2019, the People's Court of Tianjin Binhai New Area issued a Notice of Concluding a Case after payment of RMB 9,469,485.52.
3. On 20 April 2020, these proceedings were commenced.

Particular Issues**The 26 September 2015 Email**

1. The relevant portions of the 26 September 2015 email was set out earlier in this judgment (at [183]). The gravamen of the email was, in my view, that the debt to Jiayi was the defendant's debt ("payment on my behalf") and that the plaintiff should be reimbursed for the payment. The reference in the document to "profits of our cooperation" is an apparent reference to the Tianhe Venture.
2. If the email was sent by the defendant to the plaintiff then it is an admission by him as to those matters, inconsistent with the notion of a partnership between the plaintiff and the defendant and, because the communication predates the commencement of the Lower Court Proceedings, cannot be said to be a document prepared to assist the plaintiff with his defence of those proceedings (as the defendant advanced with respect to later documents, earlier discussed in this judgment). The question is, however, should the Court find the email was one produced by the defendant.
3. The defendant's case in that respect is that the 26 September 2015 email was fabricated by the plaintiff and reflects adversely on his credit. I agree with the counsel for the plaintiff that, having regard to the way in which the defendant constructed his argument in this respect the allegation made is serious and is tantamount to an allegation of fraud. It should be assessed having regard to the standard in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Warner v Hung*, in the matter of *Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* (No 2) [2011] FCA 1123; (2011) 297 ALR 56 at [48].
4. The defendant's arguments in this respect were reflected in arguments addressed in written submissions as to the plaintiff's credit and as to the RMB 1 million payment although it should be noted in that context the defendant argued that, if the Court found the plaintiff had received RMB 7 million sometime after 11 September 2015 from Tianhe and used RMB 1 million of that money to repay Jiayi, it must follow that the plaintiff recognised the liability which he and the defendant owed to Jiayi as a joint partnership liability. I note that I will find that it was not established on the evidence that the plaintiff did receive RMB 7 million and that the defendant's argument as to the existence of a joint partnership liability was not accepted.
5. Ultimately, I do not accept that the defendant has established the 26 September 2015 email is a fabrication at the hands of the plaintiff.
6. In the first plaintiff affidavit, the plaintiff stated that he received the 26 September 2015 email from the defendant on 26 September 2015. He then stated that he made a payment to Liu Xiuying (the payee appointed by Jiayi) on 8 October 2015 of RMB 1 million. He stated that the payment was made on behalf of the defendant.

7. The defendant submitted that the plaintiff made the RMB 1 million payment to Jiayi by reason of his receipt of the 26 September 2015 email. In the first plaintiff affidavit, the plaintiff stated that he received an email from the defendant on 26 September 2015 and that by this email he understood the defendant wanted him to pay RMB 1 million to Jiayi as part payment under the Agreement.
8. It was from this springboard that senior counsel for the defendant submitted that the evidence in the first plaintiff affidavit was "completely at odds with his oral evidence".
9. The Court's attention in that respect was directed in support of that proposition to the following passage from the plaintiff's evidence:

"Q. Do you say you received that email?

A. INTERPRETER: Once I had my WeChat account, I rarely checked my email box.

Q. Are you saying that you may not have received that email?

A. INTERPRETER: Possible.

Q. Is it possible you received it?

A. INTERPRETER: Possible.

Q. In what other communication did Mr Lam ask you to pay any money to Jiayi?

A. INTERPRETER: By telephone and email.

Q. Could you show me the other email where Mr Lam asks you to pay the 1,000,000 RMB in September 2015?

A. INTERPRETER: I can't find it.

Q. There is none, is there?

A. INTERPRETER: I'm not too sure."

1. Reference is also made to the following exchange in cross-examination as to receipt of request to pay the RMB 1 million by telephone:

"Q. You didn't mention this in your affidavit, did you?

A. INTERPRETER: No. Nobody asked."

1. The contentions put by the defendant in this respect in written submissions were as follows:
 1. The plaintiff's oral evidence moved away from the account he gave in the first plaintiff affidavit by saying it was only possible that he received the 26 September 2015 email.
 2. The plaintiff denied the reason for the RMB 1 million payment was because of the receipt of the 26 September 2015 email.

3. The plaintiff's oral evidence was that the defendant had asked him to pay money to Jiayi by telephone or other emails and those matters were not mentioned in his affidavit.
4. The plaintiff's only explanation for not referring to those conversations was that "Nobody asked".
1. It is true that the oral evidence of the plaintiff does shift from his affidavit evidence in indicating, in the above passage of evidence, that it was only possible that he received the 26 September 2015 email. He also acknowledged that it is possible that he may not have received it. However, the plaintiff later made the frank admission that he had not made the RMB 1 million payment to Jiayi in response to the 26 September email which was received later from the defendant by responding to a telephone call from the defendant.
2. I accept the defendant's submission that the first time he mentioned the telephone conversation with the defendant, regarding the RMB 1 million payment, was in his oral evidence and that it had not featured in his affidavit. His explanation for that omission is less than satisfactory.
3. However, it is not correct to submit that the reference to payment by telephone conversation is inconsistent with the evidence that he gave in his affidavit where, as mentioned, it was asserted that he forwarded the RMB 1 million payment because of the receipt of the 26 September 2015 email. The affidavit did not deal with any other form of request although it is a glaring omission. However, it must be noted that the evidence about the telephone conversation did not come in cross-examination unresponsively or in a way volunteered by the plaintiff, but rather because he was asked by what other communication the defendant asked him to pay any money to Jiayi.
4. It is reasonable that the defendant raised the issue as a matter going to credit. But the evidence does not establish that the defendant did not request the payment of the RMB 1 million to Jiayi. It certainly does not prove the plaintiff fabricated the 26 September email.
5. The defendant admitted in cross-examination that he did ask the plaintiff to make the RMB 1 million payment and that request could have been made by telephone. The defendant's evidence in this respect was as follows:

"Q. No, it's not true. I see. Do you accept that, around the date of this email, you asked Mr Liu to pay 1 million to Jiayi?

A. Yes.

Q. Is that a request that you made in a conversation by telephone with Mr Liu, around this time?

A. Could be.

Q. But you're not sure?

A. Not sure.

Q. Could it have been this email, where you made that request?

A. Could have been face to face, could have been on the phone."

1. A further contention advanced by the defendant was that another part of the plaintiff's evidence was "equally incredible". This submission was advanced on the following bases:
 1. The defendant approached the plaintiff with a printed screenshot already signed by the defendant.
 2. The plaintiff and the defendant applied their signatures to the email in a hotel or a restaurant.
 3. When asked about the email account "SJTMr LiuTuo@163.com", the plaintiff gave evidence that "163.com combined the two of them into one" and "I stopped using this email address, and my company needed this email address, so all the emails were deleted".
1. I do not accept the defendant's submissions for the following reasons.
2. First, the passage of the evidence which was relied upon by the defendant to make this submission was as follows:

"Q. The document at 199, when did you first see that document?

A. INTERPRETER: I can't remember the date, but Mr Lam approached me with the document saying that this document could be given to the lawyer.

Q. Where was that? Where did that happen?

A. INTERPRETER: Beijing.

Q. On what occasion?

A. INTERPRETER: After we were sued by Jiayi. I can't remember the date.

Q. He gave it to you, you're saying?

A. INTERPRETER: Mr Lam.

Q. Mr Lam gave it to you?

A. WITNESS: Yes.

Q. When he gave it to you, was it a printed out email style?

A. INTERPRETER: Yes.

Q. Just as it is here?

A. INTERPRETER: Amongst other documents.

Q. What did you do with it?

A. INTERPRETER: I said okay. So, I give this to my lawyer with Mr Lam's signature. And the lawyer said to me: "You have to sign it with your fingerprint", which is required by court documents in China. So, that's what I did.

Q. Look at court book 199, is that your fingerprint on the bottom of the document?

A. INTERPRETER: Yes.

Q. Is that your signature next to the fingerprint?

A. INTERPRETER: Yes.

Q. And the other signature?

A. INTERPRETER: That's Mr Lam's.

Q. Where were these signatures made?

A. INTERPRETER: Either in a hotel or restaurant, can't remember."

1. The plaintiff's evidence in that passage was not that he was approached by the defendant with a printed screenshot already signed by the defendant. His evidence was that the defendant approached him with the 26 September 2015 email "saying that this document could be given to the lawyer". The balance of his evidence was consistent with the earlier findings that I have made that the 26 September 2015 email was signed on 7 April 2017 in Beijing in the presence of the plaintiff's lawyers. In the evidence the plaintiff does not identify the date but does refer to steps being taken after the suit by Jiayi was commenced. I do not consider the evidence to be internally contradictory in that sense.
2. Secondly, the defendant also referred to the plaintiff's evidence in the first plaintiff affidavit that he received the 26 September 2015 email from the defendant (I have earlier discussed this evidence). In the defendant's written submissions, it was contended that the plaintiff had stated that the defendant provided a copy of his statement (which annexed the 26 September 2015 email) to the Court and the plaintiff's lawyers. Reliance was then placed upon the second plaintiff affidavit to the conversation which was said to have occurred on the 7 April 2017 meeting. The submission proceeded upon the basis that this was the conversation in which the defendant said he was provided a hard copy of the Chinese Court Proceedings Affidavit and the 26 September 2015 email. I have earlier set out this conversation attested to by the defendant and the plaintiff's version. However, if it is suggested that the conversation related to the 26 September 2015 email then the proposition misstated even the effect of the defendant's own evidence in the second defendant affidavit in which he stated that the conversation concerned the Chinese Court Proceedings Affidavit.
3. Thirdly, and most significantly, the document in evidence before the Court referencing the 26 September 2016 email, which was signed by the defendant, was a screenshot taken on the phone of the defendant. This is apparent on the face of the email and was accepted as fact by the defendant. I agree with the submission by the plaintiff that the necessary corollary of

the acceptance of this fact, again as accepted by the defendant in cross-examination, was that the defendant must have had a copy of the 26 September 2015 email on his phone in order to be able to take a screenshot of it. Further, as the defendant accepted that must mean he took the screenshot on his phone. I further agree that the only real reason that the defendant would have a copy of the 26 September 2015 email on his phone, as displayed in this exhibit before this Court (Exhibit 5 p 200), is because he had previously sent it. If the plaintiff had fabricated the email and asked the defendant to sign it, the email would have never made its way onto the defendant's phone in this fashion.

4. On this basis, the defendant's evidence that he was handed a copy of the screenshot of the email on 7 April 2017 at the meeting with the plaintiff and his lawyers cannot be accepted.
5. It was also submitted by the defendant that no explanation had been given as to why the defendant would have taken a screenshot of the email or provided it to the plaintiff's lawyers, but that submission again stands contrary to the defendant's concession in cross-examination regarding the source of the copy exhibited before the Court as the 26 September 2015 email.
6. Nor is the defendant's evidence in this respect overcome by the hypothesis developed in the defendant's submissions as to why the defendant had not taken a screenshot as follows:
 1. if in 2017 the plaintiff had remembered his long deleted email and asked the defendant for it for use in the Chinese Proceedings;
 2. for some (unexplained) reason the defendant, or the plaintiff and the defendant, decided that the best way of using that email was not for the defendant to forward it to the plaintiff or his lawyers, but for the defendant to screenshot the email and print a hard copy for physical delivery to the plaintiff's lawyer; and
 3. in circumstances where the defendant's request for the plaintiff to repay the specified sum of RMB 1 million had been referred to as early as in an email from the plaintiff to the defendant of 30 November 2016 (but with no mention of the 26 September 2015 email at all).
1. It is not implausible that the plaintiff had sought to employ the 26 September 2015 email in the Chinese Court Proceedings or that, if he did not have a copy of the email himself, that he would ask the defendant to produce it for that purpose.
2. The reference to an email of 30 November 2016 is presumably a reference to the 30 November 2016 WeChat message in which a draft of the defendant statement or affidavit is found. A reference was specifically made in that document to the plaintiff making the RMB 1 million payment at the defendant's request. As earlier mentioned, the defendant maintained that position in the 6 December 2016 email. He understood that the statement would be used in the Chinese Court Proceedings. He then made a statement to the same effect in the Chinese Court Proceedings Affidavit.

3. In those circumstances, the absence of a specific reference to the 26 September 2015 email in the 30 November 2016 WeChat message does not demonstrate that the defendant did not take a screenshot of the email or that he provided the screenshot to the plaintiff or his lawyers.
4. Apart from denying that he did produce the 26 September 2015 email, the defendant could not recall seeing it before 7 April 2017, and he had searched his computer records for the 26 September 2015 email but could not find it (collectively, "the first propositions"). The defendant also stated that the 26 September 2015 email could not have been produced by him because it was in Simplified Chinese which does not use characters that the defendant uses when writing.
5. My earlier conclusions to this point indicate reasons why the first propositions should be rejected. To those findings there should be added the consideration that the defendant admitted to signing the 26 September 2015 email so that it could be used as evidence in the Lower Court Proceedings; a step that would seem inconceivable if he had discovered for the first time on 7 April 2017 that the plaintiff had produced (fraudulently) the email which he had never sent.
6. I propose then to turn to the defendant's reliance upon the 26 September 2015 email being written in Simplified Chinese.
7. I do not accept the defendant's evidence in that respect. The defendant conducted some of his schooling in Hainan where he was taught to write in Simplified Chinese. He also had experience of work in China where Simplified Chinese is the standard script. The defendant's evidence that he has subsequently forgotten how to write in Simplified Chinese is implausible.
8. I note that a series of questions were put to the plaintiff in cross-examination essentially challenging him as to why it was necessary for him to make payment on behalf of the defendant as requested in the email. These propositions were no doubt advanced to demonstrate that the request was unnecessary, and that the defendant could have made the payment himself. However, if that proposition is advanced in order to demonstrate that the 26 September 2015 email was a fabrication I do not accept it. That is because the defendant admitted, in cross-examination, that:
 1. he had an equivalent to RMB 1,000,000 available to him at that time;
 2. the reason he wanted the plaintiff to transfer the funds (instead of himself paying the funds) was because the defendant couldn't transfer that sum from outside of China due to the limit of USD\$50,000 per annum on incoming transfers; and
 3. he was worried that the interest on the debt was spiralling out of control.

1. The objective evidence demonstrated that there was an annual limit of USD\$50,000 that the defendant would be able to pay in China or out of China on an annual basis. At the inclusion of the defendant's written submissions on the making of the RMB 1 million payment to Jiayi and the 26 September 2015 email, the defendant made further submissions of a global character in addition to the myriad of other submissions that he had made concerning whether the Court would accept the 26 September 2015 email was a fabricated document which on the defendant's case must be seen as an allegation of fabrication of the document by the plaintiff. It was also submitted that the defendant's evidence should be preferred to the evidence of the plaintiff as to the 26 September 2015 email.

2. The global written submissions advanced by the defendant were as follows:

"First, it was clearly critical to support Mr Liu's defence in the Chinese proceedings that the payment of RMB 1 million be shown to come from Mr Lam, through Mr Liu, and not from Mr Liu. The 26 September Email was deployed for that purpose. Mr Liu had a reason to fabricate the document.

Second, promise to repay by deduction from profits of our joint co-operation just does not make sense. Whether described as partnership or otherwise, Mr Liu and Mr Lam's work in relation to Tianhe certainly provided "profits of our co-operation." There would be no conceivable reason for Mr Liu giving Mr Lam about RMB 1 million on 6 and 8 October, and at the same time advancing him RMB 1 million to pay a personal liability, when the money advanced to Mr Lam could have been used for that purpose.

This proposition holds true even if contrary to all objective evidence the payment of funds came (as Mr Liu said it did) from his own money.

Third, the text of the 26 September Email relied on by Mr Liu was inherently improbable as a document written by Mr Lam on 26 September 2015:

- (a) the peculiar and obscure reference to Mr Tian "having done something unethical" to Mr Lam is not cogent in the context of facts known to Mr Liu and Mr Lam, as of September 2015. Mr Liu knew well that Mr Lam had been taken by people from Jiayi, who had driven him to Tianjin to discuss the money that was owing under the Jiayi Loan Agreement; Jiayi personnel had taken Mr Lam's passport and watch; and this was why Mr Liu had taken Mr Lam to the King Parkview Hotel in May 2015, such that there is no reason for any reference back to those events by Mr Lam in an elliptical way to say Mr Tian did "something unethical" to Mr Lam was not previously known, in some detail, to Mr Liu; Mr Liu (ultimately) adhered to his affidavit evidence and accepted in cross examination that he knew the detail of the "unethical" conduct prior to 26 September".
- (b) Mr Tian or Jiayi having done something unethical to Mr Lam could not be a rational reason for Mr Lam to seek payment by Mr Liu for RMB 1 million on Mr Lam's behalf, even if payment was not to a third party account. Mr Lam could have made such a payment with no interaction with Mr Tian or Jiayi at all.

Fourth, Mr Liu's legal representatives in the Chinese proceedings accepted that there was no evidence to show Mr Lam had transferred RMB 1 million to Mr Liu prior to Mr Liu transferring RMB 1 million in partial satisfaction of the Jiayi debt. This was only explained as being because Mr Lam and Mr Liu had a cooperative relationship between them.³⁹⁰ Mr Liu does not suggest, by documents or evidence, that RMB 1 million was ever having transferred or repaid from Mr Liu to Mr Lam, or of any follow up or request by Mr Liu in respect of it.

Fifth, the proposition that repayment of the RMB 1 million could be "deducted from the profits of our cooperation" if real, would have been most sensibly a reference to cooperation in respect to Tianhe. The replacement of the Tianhe auditor this had occurred on the very day before 26 September 2015, entitling Mr Liu and Mr Lam to a lump sum of between them, 2/3 of RMB 5 million or 2/3 of RMB 15 million. There was a distribution from Mr Liu to Mr Lam of HKD 1,200,000 on 6 October and 8 October 2015. If Mr Liu had truly advanced RMB 1 million on behalf of Mr Lam after 26 September 2015, and on 8 October 2015, it defies credulity that the deduction from our cooperation would not have been simply and immediately made by withholding that payment, which on Mr Liu's account was due to him.

Sixth, the 26 September Email is in simplified Chinese, which Mr Lam cannot write.

Seventh, the alternate explanation as to the source and timing of this payment is plausible, indeed, highly likely. Mr Lam says Mr Liu told him that RMB 7 million was paid by Tianhe to Mr Liu after 11 September 2015.³⁹¹ Mr Liu disputes this. He does not though, dispute that he disbursed HKD 1,200,000 to Mr Lam on 6 October and 8 October 2015. It is inherently probable that the source of the three payments, two to Mr Lam and one to Jiayi was the RMB 7 million payment Mr Lam says Mr Liu told him he had received after 11 September 2015.

Eighth, the document put in evidence by Mr Liu is a copy of a screenshot of a forwarded copy of the email on which he seeks to rely. The circumstances in which Mr Liu says a copy of the screenshot was given to his lawyers are inherently improbable." ("the defendant's global submissions").

1. I do not consider that the defendant's global submissions are sufficient to support a finding that the 26 September 2015 email was a fabrication. Nor do I consider that those global propositions warrant a conclusion that the defendant's evidence should be preferred, even aside from my general findings as to the credit of the defendant.
2. There are two bases for that conclusion. The first is that, the aforementioned findings that I have made regard the 26 September 2015 email sit powerfully against any contrary proposition sought to be advanced by the defendant.
3. Without unnecessarily repeating those earlier findings there are some particular matters of note as follows:

1. the 26 September 2015 email was a screenshot taken on the defendant's phone resulting in a conclusion, which I have drawn, that the email was on the phone of the defendant because he had sent it, irrespective of whether the plaintiff had or had not received it.
2. The defendant admitted that he did ask the plaintiff to make the RMB 1 million payment. He accepted he could have done so by telephone. This is confirmatory that such a request was made and, notwithstanding his failure to mention a telephone communication in his affidavit, corroborates the plaintiff's account that he was asked to make the payment by that means.
3. There is a further aspect to the assessment of the plaintiff's credibility in this respect. His communication of the existence of a telephone communication to make the RMB 1 million payment did not derive from an unresponsive answer but to an open-ended question by senior counsel to the defendant as to whether the request for RMB 1 million had been made by any other means than the 26 September 2015 email. What then followed, was cross examination of the plaintiff, which given the entirety of the considerations which I have discussed above merely confirms the likelihood that the communication from the defendant to pay the RMB 1 million was made by telephone to the plaintiff. The 26 September 2015 email was produced to the plaintiff at some stage as a document produced by the defendant bearing upon or confirmatory of the request by the defendant to make the RMB 1 million payment. That is demonstrated by the following passage of the evidence was as follows:

"Q. Could you tell me when those conversations occurred, and what were the circumstances surrounding the conversations?

A. INTERPRETER: I can't quite remember. It should be a few days before the date when I made the payment.

Q. You didn't mention this in your affidavit, did you?

A. INTERPRETER: No. Nobody asked.

Q. Those conversations that you have now given in the witness box, did not occur, did they?

A. INTERPRETER: Not true.

Q. Is it your case that you paid the 1,000,000 RMB based upon the email request of 26 September 2015?

A. INTERPRETER: It was requested by telephone and then later on, Jiayi's case occurred and when we met, he provided this document to me.

Q. I'm asking you, Mr Liu, whether you paid the 1,000,000 RMB because you got the email of 26 September 2015?

A. INTERPRETER: No. I got notification by telephone before I made the payment."

1. In those circumstances, the plaintiff could not have provided the 26 September email to the defendant on 7 April 2017 at a meeting with the plaintiff's lawyers.
2. The weight of the evidence is strong against the plaintiff having fabricated the 26 September email.
1. In that light I will turn briefly to the defendant's global submissions below.
2. The sixth and eight propositions must be rejected in the light of my earlier conclusions.
3. The first proposition is relatively weak. If the document was placed in the hands of the plaintiff's lawyers, it had a legitimate forensic purpose in the proceedings. It would appear that it was used in that way. The fact that the document was critical to his case in the Chinese Proceedings cannot logically underpin a proposition that he must have been motivated to fabricate it.
4. As to the second proposition, counsel for the defendant submitted that there was no conceivable reason for the plaintiff giving the defendant about RMB 1 million on 6 and 8 October 2015 while at the same time advancing the defendant RMB 1 million to pay a personal liability (being a reference to the Jiayi loan). It was submitted that the monies received on 6 and 8 October 2015 could be used for that purpose. However, there was a plausible explanation for the defendant requesting the plaintiff make the RMB 1 million payment for the Jiayi loan which was given in the defendant's own evidence and supported by objective evidence. It is reasonably apparent that both the plaintiff and the defendant were treating payments which had any relationship to the Tianhe Venture separately to issues arising with respect to the Jiayi loan. As to proximity in time, that may have been the case if the defendant's contention that the payment was made on 8 October was sustained. However, I have found in the accordance with the material before the Court that the payment of the RMB 1 million occurred between September and December 2015.
5. As to the third proposition, the fact that the defendant employed a euphemism to describe the alleged activity of the "Jiayi enforcers" may be nothing more than the defendant expressing himself in a discrete manner, particularly where he had previously said that he did not wish to repeat matters to police or otherwise publicise what had happened. Furthermore, it was unnecessary for the defendant to spell out the circumstances to which he was referring because he had already advised the plaintiff as to what had occurred.
6. The fact that the defendant may have chosen a course of payment in the circumstances that the defendant's counsel may not have agreed with is hardly to point, particularly when his own evidence provided a rational reason for him approaching the plaintiff to make the payment.

7. As to the fourth proposition, the defendant is correct to submit that there does not appear to be any evidence that the RMB 1 million payment was paid by the defendant to the plaintiff prior to him making the payment to the Chinese Court or, any payments afterwards. Nor does it appear that either party made any follow up communication with respect to the amount. However, in the context of what the parties have described as cooperative relationships that consideration cannot be in any way definitive.
8. The fifth proposition appears to repeat, in substance, what was advanced as the second proposition. Furthermore, there is a suggestion that the Tianhe payments were payable immediately after the appointment of the auditor. I prefer the plaintiff's evidence that those payments were first received on 22 March 2016 in the sum RMB 5 million.
9. The seventh proposition is suggestive of the real source of the contentions advanced by the defendant in the fifth proposition. This has, as its base, a proposition that the plaintiff was paid RMB 7 million around but prior to 8 October 2015. I will reject the defendant's evidence that he was told this by the plaintiff as a fabrication. I have also preferred the plaintiff's evidence that he did not receive such a payment. I note additionally to my earlier findings, in this respect, that in the first defendant affidavit:

"144. Around December 2015, I had a telephone conversation with Tuo Liu In which he told me:

"I have paid back Jiayi 1 million. I told Jiayi that we still have the Tianhe deal money coming in. They are comfortable that they will get their money back"

1. That component of the defendant's affidavit was immediately followed by the following paragraph:

"145. I accepted what he told me was true and I was not concerned that we would not find the money to pay Jiayi out of the Tianhe income. Tuo LIU did not tell me where the 1 million had come from, I assumed (but did not ask) that it came from the Tianhe payment referred to at paragraph '137."

1. There is an obvious tension between the statement attributed to the plaintiff in December 2015 and the earlier statement attributed to him by the defendant in September 2015 where he had said he had already picked up "dollars 7 million" in cash from Tianhe. The explanation given in paragraph [145] of the first defendant affidavit is no doubt intended to deal with this tension but, in my view, does not adequately explain it.
2. As to the eighth proposition, I have earlier dealt with the origins of the screenshot of the 26 September 2015 email as lying with the defendant. For reasons given above and below I do not consider there is an inherent improbability in the account given by the plaintiff as to the receipt of the email by his lawyers.
3. On the balance of probabilities, the 26 September 2015 email was not a fabrication at the hands of the plaintiff and rather was produced by the defendant. It was consistent with the request the plaintiff said he received from the defendant by telephone to pay RMB 1 million

to Jiayi. Whether the plaintiff received the 26 September email at or about the time of its production or at some later time, for the purposes of using the email in the Chinese Court proceedings, it is clear that he or his lawyers did receive the document from the defendant and, it thereby reflected the views of the defendant.

Whether the Statement of Agreed Facts and Issues in Dispute is an "agreement" for the purposes of s191 of the Evidence Act 1995 (NSW)

1. At the commencement of this judgment and later in the discussion of monies paid by Tianhe, the Court identified an issue in relation to the SOAF or, more particularly, the component of that document described as "Agreed Facts". By way of brief reminder, the dispute concerned the word "paid" in paragraphs 17 and 18 of the Agreed Facts. The plaintiff contended that the word in each case should be read as or changed to "payable".
2. That issue manifested late in the proceedings after the formal close of the defendant's case but not before the tendering of some documentary evidence. Counsel for the plaintiff essentially made an application to vary the form of the Agreed Facts. At that point, the Court raised the question of s 191 of the Evidence Act under the understanding that the SOAF had been tendered on that basis.
3. On the following day and immediately before the commencement of closing submissions, the senior counsel for the defendant identified that the SOAF had not been tendered at all and sought to rectify that oversight by tendering the Agreed Facts component of the SOAF. The plaintiff objected to that tender. Arrangements were made for the resolution of the issue by written submissions which were received as supplementary written submissions. I shall respectively refer to the supplementary submissions of the plaintiff and the defendant.
4. In the light of those submissions, two issues were ventilated for resolution by the Court as follows:
 1. Whether the SOAF was an "agreement as to facts" for the purposes of s191 of the Evidence Act. This part of the judgment deals with that question.
 2. If the answer to the first question is in the affirmative, what use may the Agreed Facts be put to in dealing with the evidence in the proceedings. That question will be dealt with in the next section of the judgment.
1. The first question is, strictly speaking, not a question of fact but of law, but it is convenient to deal with the issue at this juncture because it directly bears upon the further findings of fact which will follow this consideration.
2. I will commence that discussion by first considering some background considerations.

The Order of Justice Chen

1. The Agreed Facts and Issues document was filed on 13 October 2023 pursuant to orders made by Chen J on 12 May 2023.

2. Chen J had directed the parties to file a detailed Statement of Agreed Facts and Issues in dispute, with such Statement to be signed by counsel for each party.

The Process of Agreement of the Agreed Facts and Issues

1. The communications by which the Agreed Facts and Issues were initiated, negotiated, and came to be finalised are included in Exhibit 17.
2. Exhibit 17 contains 20 communications between the parties in the period 26 July 2023 to 13 October 2023.
3. The first draft of the proposed Agreed Statement of Facts and Issues contained a predecessor set of words to those ultimately settled upon as Agreed Facts 17 and 18, proposed by the defendant, as follows:
 18. On 6 October 2015, Lam receives HKD 780,000 from Huge Fairway Trading Limited (Huge Fairway) a company associated with Liu.
 19. On 8 October 2015, Lam received HKD 420,000 from Huge Fairway.
1. The response to that first draft, from Piper Alderman for the Plaintiff, was by letter dated 1 August 2023. The solicitors for the Plaintiff amended Agreed Facts 18 and 19 to include the words now sought to be varied, as follows (with the amended marking as included in the document from the Plaintiff's solicitors):

"18. On 6 October 2015, Lam received HKD 780000 from Huge Fairway Trading Limited (Huge Fairway) a company associated with Liu- being part payment of the amount paid by Tianhe.

19. On 8 October 2015, Lam received HKD 420,000 from Huge Fairway being part payment of the amount paid by Tianhe."
1. In the correspondence which followed, from 4 August 2023 to 22 September 2023, seven revised versions of the SOAF were exchanged. In every one of these revisions, the form of paragraphs 18 and 19 (renumbered from 1 September 2023 as Agreed Facts 17 and 18) of the Agreed Facts remained unchanged, adopting the words proposed for the Plaintiff.
2. The Agreed Facts and Issues were signed by the three counsel for the parties and filed on 13 October 2023.

The chapeau to the SOAF

1. The SOAF contained a chapeau which was expressed in bold in the following terms:

"This document has been prepared in accordance with the orders made by Chen J on 12 May 2023 to assist the Court in considering the issues in dispute on the Statement of Claim and Amended Defence, and is without prejudice to the argument the parties might have pursued in the absence of this document, each of the parties being entitled to rely on the terms of the above pleadings which they have filed in the proceedings. The document is not intended to, and does not, enlarge or narrow the issues in dispute but instead seeks to provide a convenient summary of the

questions posed in these proceedings."

Agreed Facts 17 and 18 found elsewhere

1. The same agreed factual position as stated in [17] and [18] of the Agreed Facts component of the SOAF is also found in the Joint Chronology and reflected in the plaintiff's opening submissions.
2. The Joint Chronology signed by legal representatives for the parties, was filed on 2 February 2024 contains the same terminology.
3. In the plaintiff's opening submissions, the plaintiff advanced, again, Agreed Facts [17] and [18] in the same terms as they appear in the Agreed Facts and Issues. The reference sources cited by the plaintiff as set out in those opening submissions are the Agreed Facts and Issues and the affidavit of the defendant. However, the reference to the first defendant's affidavit incorporates a reference to payment he received from Huge Fairway on 6 and 8 October and an assertion as to a statement attributed to the plaintiff which was contested in the proceedings as part of a dispute as to whether the plaintiff received RMB 7 million in addition to a payment of RMB 6.5 million from Tianhe.
4. In oral opening submissions, the plaintiff's counsel did not address the timing of individual payments from Tianhe to the plaintiff or from the plaintiff to the defendant, but made a submission as to the timing of the Tianhe payments consistent with Agreed Facts [17] and [18]:

"...whatever money was paid by Tianhe to them, and ultimately was paid directly to my client, would then be distributed one third each to the person who actually did the work, Mr Bowie Cheng, to Mr Lam for the referral and to my client.

There is a dispute in the proceedings, and this is really the gravamen of the factual dispute about how much was paid by Tianhe deal to my client which was then to be distributed one third each to those parties. My client says he was paid 6,500,000 RMB."

1. This is not a concession as to the accuracy of pars [17] and [18] of the SOAF but, when properly understood, in terms of the issues in the proceeding, the reference to RMB 6.5 million sits contrary to what is contained in those paragraphs.

Legislative provisions

1. Section 191 of the Evidence Act provides:

191 Agreements as to facts

- (1) In this section--

"agreed fact" means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

- (2) In a proceeding--
 - (a) evidence is not required to prove the existence of an agreed fact, and
 - (b) evidence may not be adduced to contradict or qualify an agreed fact, unless the court gives leave.
- (3) Subsection (2) does not apply unless the agreed fact--
 - (a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding, or
 - (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.
- 1. Section 192 then provides in relation to any issue of the Court granting leave:

192 Leave, permission or direction may be given on terms

 - (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
 - (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account--
 - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
 - (b) the extent to which to do so would be unfair to a party or to a witness, and
 - (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
 - (d) the nature of the proceeding, and
 - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.
- 1. The status of facts agreed under s191(2) must depend upon whether the defendant can satisfy the pre-conditions set out under s191(3):
 - 1. The agreed fact is to be stated in an agreement in writing.
 - 2. The agreement in writing must be signed by (for present purposes) legal counsel representing the parties.
 - 3. The agreed fact must be adduced in evidence.
- 1. It follows from the aforementioned discussion that the following requirements of s 191(3) are satisfied in the present case:

1. stated in an agreement in writing; and
2. have been signed by legal counsel for the parties.
1. As to the third requirement the SOAF has sought to be tendered with respect to the Agreed Facts with an objection made to the tender so far as it concerns the aforementioned aspects of paragraphs [17] and [18].

Consideration of the application of s 191

1. The plaintiff made the following submissions as to why the Agreed Facts component of the SOAF was not an agreement as to facts for the purposes of s 191 of the Evidence Act:
 1. The chapeau relevantly stated that the document was "without prejudice to the arguments the parties might have pursued in the absence of this document". What the chapeau makes plain is that the document is, in substance, an aide memoire or, at the very least, makes plain that the plaintiff preserved his right to raise an argument concerning factual matters (including about the timing of when the funds were "paid" by Tianhe).
 2. Whilst not determinative, it is informative that there is no statement in the document to the effect that it has been prepared pursuant to s 191 of the Evidence Act. It would expect that if the defendant had intended the document to have this effect, he would have included such a notation.
 3. Whilst not determinative, it is informative that the orders made by Chen J on 12 May 2023 did not refer to s 191 of the Evidence Act, nor indicate that the document would be binding on the parties. The order reflected what is provided for in paragraph (d) of the Usual Order for Hearing found in Practice Note SC CL 1. It cannot be the case that the usual order for Hearing requires parties to enter into an agreement for the purposes of s 191 of the Evidence Act.
 4. At the very least, the chapeau would have cast doubt on the question as to whether the plaintiff regarded the document as constituting an agreement for the purposes of s 191 of the Evidence Act and the defendant could have, but did not, write to the plaintiff to confirm the position. Rather, counsel for the defendant remained silent on the issue and through the adoption of a very strained construction of the document, they sought to deploy it after the evidence had closed.
 5. The Court may readily infer that it did not even occur to the defendant that the SOAF could operate as a statement of agreed facts until after the close of evidence. Section 191(2)(b) provides that evidence may not be adduced to contradict or qualify an agreed fact, yet very experienced senior counsel did not object to the plaintiff adducing such (allegedly) contrary evidence and elected to cross-examine on the fact as if it were a live issue in the proceedings.
1. My assessments of the contentions advanced by the plaintiff in this respect are as follows:

1. The chapeau says nothing about reserving a change of position in relation to Agreed Facts. Were it to do so, the document would not be compliant with Chen J's orders. That is plain from the use of the words "the issues in dispute" and "the document is not intended to, and does not, enlarge or narrow the issues in dispute". The reference to "without prejudice to the argument the parties might have pursued in the absence of this document" in the chapeau was, in my view, directed to considerations of the issues in dispute and the questions in the proceedings.
2. It is not a necessary condition for the provisions of s 191 of the Evidence Act to operate that a notation would be incorporated in the Agreed Facts document. The clearer indication that it was intended to be caught by the provision is the signature of all counsel.
3. There is nothing in the orders of Chen J which characterises the SOAF as anything other than a formal binding document intended to have operative effect, and to the extent admissions were contained, as admissions with the purpose of facilitating the conduct of these proceedings.
4. Whether the use of the Agreed Facts within the SOAF by the defendant is strained is immaterial to the determination here under consideration.
5. It was not necessary for counsel for the defendant to alert the plaintiff who was legally represented, to that which, on the face of the document is obvious.
6. There is some real force to the fifth proposition advanced by the plaintiff, particularly given the timing of the tender of the SOAF and cross-examination of the plaintiff. However, those considerations do not change the character of the document such as to render it other than what it purports to be, even though they do relevantly and directly concern the next question I will address below. Nor do those considerations alter the fact that the preconditions under s 191(3) are met. There is of course the issue of objection taken by the defendant to the tender of the SOAF, but that objection was relevantly confined to a part of paragraphs [17] and [18] of the Agreed Facts component of the SOAF, which, as expressed, conveyed the content of what was agreed between the parties. The fact that that position was reached after long negotiations simply serves to confirm the fact that the parties intended to incorporate the words which are found in those paragraphs.
7. When viewed in light of all of those considerations, there is no proper basis, in my view, to object to the admissibility of the SOAF, even if tendered late in the proceedings.
1. It follows from my response to the submissions advanced by the plaintiff and, my assessment of the preconditions under s 191(3), that the Agreed Facts component of the SOAF is an agreement for the purposes of s 191 of the Evidence Act.

The use to which the SOAF can be put

1. In its written submissions, the defendant exposed in fairly stark terms a use to which it intended to employ the admissions found in paragraph [17] and [18] of the Agreed Facts component of the SOAF. Most of those issues relate to the subject matter of the next heading within this judgment. It is convenient to capture them here whilst minimising, so far as possible, repetition in that following section. The intersection with the defendant's case is as follows:
 1. The withdrawal of the admission in paragraph [17] and [18] is tantamount to a withdrawal of an admission that HKD 1.2 million was paid to the defendant from Huge Fairway, a company associated with the plaintiff, being a part payment of the amount paid by Tianhe by 8 October 2015. The defendant went further to submit that the withdrawal of the admission that the alteration to paragraphs [17] and [18] amount to a withdrawal of an admission that funds had been paid by Tianhe before 6 October 2015 and before 8 October 2015.
 2. The admissions need to be considered in the light of the evidence the plaintiff gave in the proceedings concerning his receipt of a payment from Tianhe in September and October 2015. The defendant submitted that the plaintiff's evidence on the subject was confused, equivocal and unsatisfactory. The defendant also contended that the plaintiff's confusion appeared to arise from his attempt to provide a logical explanation for, on one version of events, his payment of money to the defendant in September and October 2015, while he sometimes said that he did not receive Tianhe money until March 2016.
 3. Reference was made to a number of statements made during cross-examination in relation to the payment receipt of monies in connection with Tianhe in September to October 2015, which, whilst bearing heavily on the subject matter of the next heading of this judgment, are convenient to set out in the light of the immediate issue and the later issue. It was submitted that the plaintiff gave the following evidence:
 1. asserted he was paid by Tianhe in February 2015 and March 2016
 2. agreed he was paid 5,000,000 RMB on 22 March 2016 and 1,500,000 RMB on 2 August 2016. This is consistent with his affidavit evidence;
 3. said he paid the defendant in September and October 2015 with his own money as an "investment";
 4. said he received a payment in September and October 2015;
 5. said he was not paid money in September and October 2015;
 6. said money he paid out after March 2015 was out of money received from Mr Zhang;
 7. said he received 5 million in March 2015;
 8. said he could not remember if anybody received any money in March 2015 from this venture;

9. said he received 1.5 million in March 2015;
10. said he did not receive any payments from Tianhe in September and October 2015, but received payments in 2016.
1. Ultimately, the defendant wished to advance the following propositions in his case in this respect:
 1. the agreed payment in respect of the Tianhe Venture from Tianhe to the plaintiff, the defendant and Bowie Cheng, to be split equally, was for far more than RMB 5 million;
 2. the plaintiff did receive a large payment, being an amount of, or up to, RMB 7 million around but prior to 8 October 2015;
 3. of that sum, the plaintiff disbursed HKD 1.2 million to the defendant;
 4. of that sum, the defendant disbursed the equivalent HKD 1.2 million or greater sum to Bowie Cheng;
 5. to the extent that some of the plaintiff's evidence under cross-examination sought to deny receipt of a substantial amount of funds from Tianhe in respect of the Tianhe Venture around or prior to 8 October 2015, that evidence was false; and
 6. the inherent probability was that the RMB 1 million paid to Jiayi on 8 October 2015 came from the same source as the HKD 1.2 million paid to the defendant.
1. The above recitation of the use to which the defendant wished to employ the terms of paragraphs [17] and [18] of the SOAF bring in to sharp relief a forceful submission advanced by the plaintiff. It was submitted as follows:
 1. Senior counsel for the defendant cross-examined on evidence consistent with the plaintiff's evidence-in-chief which was admitted without objection. That evidence was as follows:
 1. he did not receive a RMB 7 million tranche from Tianhe, which the defendant claims was paid in about September 2015;
 2. the total amount he received from Tianhe was RMB 6.5 million received in two tranches on 22 March 2016 and 2 August 2016 being after the dates in paragraphs [17] and [18] of the SOAF.
 1. The evidence of the plaintiff in that respect was admitted without objection.
 2. Section 191 does not provide a power to retrospectively, after the close of evidence, reject evidence.
 3. It is simply too late for the defendant to rely upon the admission and the Court should adjudicate the dispute on the basis of the relevant evidence adduced, without objection, by the parties.

4. Shutting out the plaintiff at this stage would represent a failure of procedural fairness.
1. The plaintiff did not seek leave of the Court to rely on evidence in contravention of the admission. Nor did he seek leave to withdraw the admission, although that position was taken on the basis that the plaintiff had been denied an opportunity to seek that leave. However, the plaintiff did seek that the Court adjudicate on the basis of the entirety of the relevant evidence adduced.
2. The defendant properly conceded that, notwithstanding the tender of the Agreed Facts in the SOAF, the Court remained at liberty to determine whether the Agreed Facts were to be accepted as true and determine what weight to attribute to that evidence: *Australian Securities and Investments Commission BHF Solutions Pty Ltd (2022) 293 FCR 330*; [2022] FCAFC 108 ("BHF") at [24].
3. The defendant was also correct to submit that difficulties have been recognised by the Courts as to the manner in which the provisions of s 191 are to be given effect; particularly where:
 1. agreed facts are at a high level of generality and omit detail and nuance;
 2. other evidence, for example, documentary evidence, address the same facts as those which have been agreed; or
 3. what has been presented as Agreed Facts are, in reality, statements of argument and conclusion.
1. It was submitted that none of those difficulties operate in the present case. I accept that, for the most part, that contention is correct. It is certainly true of the first of those factors. I have significant doubts the argument advanced by the plaintiff that the word "paid" in paragraph [17] and [18], being a word that denotes the past tense can be readily explained as being reflective of the time at which the document was prepared (being during the course of the proceedings), not October 2015. Thus, I do not consider the Court should approach this issue as an extension of that proposition, namely, that the Court should construe the Agreed Facts as being that, at the time the SOAF was prepared, those funds had been "paid".
2. Further, the proposition advanced by the plaintiff sits entirely against the framework of the SOAF which speaks in terms of a chronology of events so that the use of a word in the past tense reflects a past event in that chronology. The approach to paragraph [17] and [18] proposed by the plaintiff as to the construction of those paragraphs strains any ordinary process of the construction of the words in question.
3. Nonetheless, I consider that, in circumstances where the defendant did not object to the relevant parts of the plaintiff's evidence, had led evidence to the contrary, cross-examined upon that evidence including by the use of the Agreed Facts and not raised the tender of the SOAF until just before closing submissions, the Court should be careful in simply applying the terms of pars [17] and [18] as admissions, conclusive of those facts without careful

scrutiny of the evidence bearing upon the subject matter of the Agreed Facts, particularly where that evidence is in a documentary form.

4. Furthermore, as I have mentioned, there is significant force in the plaintiff's submission that, even if there were a power, after the close of evidence, to retrospectively reject a party's evidence, (that is, following cross-examination and the making of forensic decisions based on the admitted evidence) the Court should not do so as the plaintiff would be denied the opportunity to seek the leave of the Court to rely on the evidence, notwithstanding any admission. This would raise questions of procedural fairness.
5. I will, therefore, consider during the course of the examination of the evidence in the next section, whether the evidence before the Court warrants any displacement or modification of the Agreed Facts.

What did the Plaintiff Receive as Payments from Tianhe? What was the source of the RMB 1 million Payment made to Jiayi by the plaintiff?

1. I will commence by discussing, in the broad, the respective cases of the parties as to these issues.
2. On the plaintiff's account and on his pleadings, he received:
 1. RMB 5 million on 22 March 2016, being the amount paid by Tianhe for the work conducted; and
 2. RMB 1.5 million on 2 August 2016, being an amount paid as reimbursement for costs incurred.
1. I note that the defendant submitted that the plaintiff changed his evidence in respect of the second payment from being for an unidentified costs and expenses as opposed to what the defendant quoted as being "to start a new project, but that project was not a very big one – not a familiar one – it's only for 1,500,000 only". However, I do not consider this criticism is based upon a fair representation of the plaintiff's evidence, which in a full extract from the evidence the defendant was referring to was as follows:

"A. INTERPRETER: The 1.5 was not to reimburse previous expenses. It's to start a new project, but that project was not a very big one – not a familiar one – it's for 1.5,000,000 only."

1. Particularly having regard to some of the difficulties of the evidence being taken through an interpreter I do not consider that it may be concluded that the plaintiff's evidence is inconsistent in that respect.
2. The defendant challenged the veracity of the plaintiff's evidence on this saying there was only his account in cross-examination to substantiate the payment as an expense as there was no documentary recording and no list of expenses.

3. In the second plaintiff affidavit, the plaintiff acknowledged he had received RMB 6.5 million from Tianhe in two payments, one of which was RMB 1.5 million. In the same affidavit he referred to a promise from Mr Zhang to pay RMB 5 million to him shared equally with the defendant Mr Cheng and the plaintiff for the acquisition of a new auditor. Later in that affidavit he described the source of the RMB 1.5 million to be a reimbursement for costs but nonetheless attributed the payment to the agreement with Tianhe.
4. The plaintiff's evidence in this respect is unsatisfactory. However, he ultimately accepted that the payment of RMB 6.5 million not only came from Tianhe but as part of the Tianhe deal. I make a factual finding in those terms.
5. The defendant's account of the monies received by the plaintiff from Tianhe ultimately was that the plaintiff had received:
 1. a first tranche of 7 million RMB sometime after 11 September 2015 which, as mentioned, was allegedly paid in cash into the boot of the plaintiff's car ("Alleged RMB 7 Million Tranche");
 2. a second tranche on 22 March 2016 which the defendant originally alleged in both his pleading and evidence was RMB 6.5 million, which the defendant ultimately stated was RMB 5 million ("RMB 5 Million Tranche"); and
 3. a third tranche on 2 August 2016 of RMB 1.5 million, I have found was ultimately in conformity with the plaintiff's evidence ("RMB 1.5 Million Tranche").
1. It should be observed that the defendant stated in two earlier defences and in his sworn evidence, before the evidence giving rise to the above propositions that the plaintiff had received RMB 6.5 million as a second tranche. The plaintiff submitted that this was illustrative of the "speculative and uncritical exercise which the plaintiff had undertaken in seeking to determine what Tianhe had paid to [the plaintiff]".
2. With one minor exception, there was no dispute as to the monies which were paid by the plaintiff to the defendant in relation to the Tianhe Venture:
 1. on 6 October 2015, Huge Fairway paid HKD 780,000 to Millennium, (which the defendant described as a payment to him);
 2. on 8 October 2015, Huge Fairway paid HKD 420,000 to Millennium, (which the defendant described as a payment to him);
 3. on 6 April 2016, the plaintiff paid HKD 702,987 to the defendant; and
 4. on 11 August 2016, the plaintiff paid HKD 341,490 to the defendant.
1. The minor exception is that the defendant alleged the plaintiff gave him RMB 100,000 in early 2016 in cash and told him "This is Tianhe money that you can use for your expenses on this trip" and the plaintiff denied this.

2. As I will discuss, the plaintiff gave evidence that he did not receive Tianhe monies until March 2016. There was no dispute that the payments made on 6 April and 11 August 2016 came from Tianhe monies but the plaintiff's evidence, which I will discuss in greater detail below, was that their first two payments were from his own monies.
3. As earlier noted, the plaintiff made a payment to Jiayi of RMB 1 million. I have earlier discussed the date for the making of that payment as being in the date range of around September to December 2015.
4. The defendant stated that the issue as to the RMB 1 million payment essentially came down to the following competing propositions:
 1. The plaintiff's account of his payment of RMB 1 million to Jiayi was that he made this payment after receiving the 26 September 2015 email from the defendant and he did this using his own funds.
 2. The defendant submitted the explanation for this payment and its timing started with the defendant's evidence that after 11 September 2015, the plaintiff told the defendant that he had received RMB 7 million in cash.
1. The defendant's case in that respect, when posited against the contention that the applicant had received from Tianhe RMB 7 million in September/early October 2015 was expressed in the following way:

"...there is on Mr Lam's submission a connection between Mr Liu receiving money from Tianhe in late September or early October 2015 and Mr Lam's contention that Mr Liu had RMB 1 million of Tianhe partnership funds which was available for, and was in fact used for, repayment to Jiayi on or around 8 October 2015, a highly important and contested factual matter."

1. The issues raised by the defendant as to the RMB 7 million or a very large amount, paid by Tianhe to the plaintiff prior to 8 October 2015 (as contended for by the defendant) were as follows:
 1. If the Court finds that the plaintiff did receive RMB 7 million, or some other substantial sum, from Tianhe, and used RMB 1 million of that money to repay Jiayi, it must follow that the plaintiff recognised the liability which he and the defendant owed to Jiayi as a joint partnership liability.
 2. The initial question was whether the Court should find that RMB 7 million or a very large amount was paid by Tianhe to the plaintiff prior to 8 October 2015. The first important enquiry was whether Tianhe did pay the plaintiff RMB 7 million (or a lesser but still large amount) prior to 8 October 2015.
 3. If the Court finds that such a payment was made, it follows that;
 1. The plaintiff had funds available to him, from which RMB 1 million could readily be paid to Jiayi;

2. The plaintiff had given false evidence in these proceedings.
1. Furthermore, the defendant submitted that, if a payment of RMB 7 million, or a very large sum, was paid to the plaintiff in late September or early October 2015, then on a balancing of accounts as between the plaintiff and the defendant as partners, there is a substantial amount owing by the plaintiff to the defendant.
2. The defendant's evidence was that the plaintiff received a total of RMB 13.5 million from Tianhe in connection with the Tianhe Venture. The defendant was entitled to RMB 4.5 million of those funds pursuant to the agreement with the plaintiff to share the profits and liabilities of the Tianhe Venture equally as between them and Mr Cheng. The defendant gave evidence that he received the equivalent of RMB 1,863,317, a shortfall against 1/3 of the amount payable to the defendant, subject to any finding of what was received by the plaintiff from Tianhe.
3. In order to address these issues, it is appropriate to revisit some of the background, albeit in a consolidated form and with minimum repetition.
4. On 16 March 2015, the trading of Tianhe on the Hong Kong Stock Exchange was suspended because its auditors refused to sign off on its accounts.
5. The parties were in agreement as to the terms of a conversation they had in mid-2015 concerning the trading suspension of Tianhe. In substance, the plaintiff told the defendant about the opportunity to work on the removal of Tianhe's suspension, which had occurred because Tianhe's auditor, Deloitte, would not sign Tianhe's audit certificate and would not resign. The intention was for the plaintiff and the defendant to find "professionals, lawyers, forensic accountants, auditors to help Tianhe and to resume trading".
6. In mid-2015 (and after the above conversion) the defendant introduced the plaintiff to Mr Cheng (who was an accountant who, according to the defendant, had a practice of "introduc[ing] accountants and auditors to large businesses" and was also a "business advisor"). Mr Cheng agreed to assist with seeking the removal of Tianhe's suspension. Mr Cheng was an accountant who owned the firm Zenith.
7. In July or August 2015, it was orally agreed between Tianhe (through Mr Zhang), the defendant and the plaintiff that each of the plaintiff, the defendant and Mr Cheng would share equally from a total specified amount if a new auditor was appointed for Tianhe. As previously mentioned, there is conflicting evidence as to the total amount specified to be paid by Tianhe. As mentioned above, an important conflict of evidence is as to what Tianhe actually eventually paid.
8. On 25 September 2015, Tianhe announced the appointment of Zhinghui Anda CPA Limited as its auditors.

9. The defendant apparently raised an issue as to the calculation of the HKD 780,000. The plaintiff's evidence was that the amount derived from differences in exchange rates, and the payment made through a "group". He also referred to making up front payments. Whilst the evidence is ambiguous there does not appear to be any evidence to contradict it.
10. The defendant gave evidence that he did not find out about the RMB 1 million payment until a telephone conversation with the plaintiff in around December 2015. If that was to suggest that the defendant did not know that the plaintiff was going to make the payment sometime around 8 October 2015 then it cannot be accepted as his own evidence that he requested the plaintiff to make the payment. It may perhaps be explained on the basis that the payment was confirmed to him at some later time, but there was a problem with the evidence in that respect.
11. A question was raised as to whether the plaintiff had paid monies to Mr Cheng arising out of the Tianhe Venture. The Plaintiff's evidence was that he could not clearly recall but that he thought the payment was possibly the same as made to the defendant, mainly HKD 1.2 million. I do not agree with the defendant that the plaintiff's evidence with respect to payments to Mr Cheng is evasive and non-responsive. I do not agree that the event establishes what payments, if any, were made by the plaintiff to Mr Cheng in a similar sum to that paid to the defendant.
12. However, contrary to the defendant's position, the plaintiff did not accept that monies he may have paid to Mr Cheng came from monies received from Tianhe. Rather he emphatically stated that the monies were his own. That latter consideration connects directly to the defendant's contention that the payments made by the plaintiff on 6 and 8 October 2015 derived from an amount of the Alleged RMB 7 Million Tranche which had been received presumably between the appointment of Tianhe auditors of 25 September 2015 and the first payment on 6 October 2015. I will later find that the evidence does not support that the plaintiff received those monies.
13. There then followed as mentioned above the receipt by the plaintiff of RMB 5 million from Mr Zhang on 22 March 2016 which funds were connected to the Tianhe Venture. There followed a transfer of HKD 702,987 from the plaintiff to the defendant out of the Tianhe funds on 6 April 2016.
14. On 2 August 2016, the plaintiff received a final tranche of RMB 1.5 million from Mr Zhang. As earlier mentioned, the plaintiff accepted these funds were proceeds of the Tianhe Venture. The plaintiff transferred HKD 341,490 of these funds (equivalent to approximately RMB 291,803) to the defendant on 11 August 2016.
15. I turn then specifically to the proposition advanced by the defendant that the plaintiff had received RMB 7 million in late 2015, or a very large sum, in addition to the receipt of payments of RMB 5 million and RMB 1.5 million.

16. As a great deal of attention was paid to the date in which the alleged payment was received, I will turn firstly to the defendant's propositions in that respect. In written submissions, the defendant contended that the payment was made in late September or early October 2015. In the same submission the defendant contended that the plaintiff received a large payment of at least RMB 3, 951,832 and up to RMB 7 million "around but prior to 8 October 2015". In the Further Amended Defence filed by the defendant 3 November 2023 ("FAD") the date of the receipt of the monies was given as being "in and about early September 2015".
17. The defendant submitted that the plaintiff's evidence that he did not receive any more than RMB 5 million on 22 March 2016 and RMB 1.5 million on 2 August 2016 and, in particular, that he did not receive RMB 7 million or a large amount of payment from Tianhe in addition to those payments should not be accepted.
18. Without traversing the entirety of those submissions, the following propositions were central:
 1. Despite that he then says that he caused the four payments on 6 October 2015, 8 October 2015, 6 April 2016 and 11 August 2016 referred to at paragraphs 114, 124 and 125 to be made to the defendant "in relation to his share of the Tianhe monies." That is, his own affidavit evidence describes the two payments in October 2015 as being in relation to the Tianhe monies, despite him also giving evidence that he did not receive any funds from Tianhe until five months later in March 2016.
 2. The plaintiff's denial that the payments to the defendant of large amounts of money in early October 2015 were as a result of Tianhe funds received by that time should be rejected. The plaintiff's evidence in cross-examination as to the denial was confusing, contradictory and unsatisfactory.
 3. The plaintiff's confusion appeared to arise from his attempt to provide a logical explanation for the payments he made in early October 2015, if those payments did not derive from Tianhe monies.
 4. I note before proceeding to further examine the plaintiff's evidence in this respect that I do not consider that the use of the words "in relation to his share of the Tianhe monies" in [73] of the second plaintiff affidavit may in any way be conclusive of these issues as the plaintiff maintained consistently that the first two payments were from his own monies albeit in recognition of monies that would be forthcoming to the defendant as a result of the Tianhe arrangements.
1. Before I turn to the balance of the plaintiff's evidence it is necessary to recognise from an evidentiary viewpoint there are in fact two related matters which arise for consideration, namely, whether payments were received by the plaintiff prior to March 2016 and further whether those funds were for RMB 7 million or some other large payment.

2. There can be no doubt that the plaintiff's evidence in cross-examination as to those two issues was both confused and contradictory. However, it does not follow that his evidence may be described as unsatisfactory in a pejorative sense.
3. I have closely read the plaintiff's evidence in cross examination in this respect and it is quite apparent that he was confused as a result of questions being advanced to him based upon a date range rather than particular events or particular payments made. When it became clear to him that he was not giving evidence about the payments he had received for RMB 5 million and RMB 1.5 million, the plaintiff consistently gave evidence that the total amount received by him was RMB 6.5 million and that no other payments were received from Tianhe.
4. A starting point for the provision of my reasons for that conclusion makes reference to an earlier passage of the plaintiff's evidence which was as follows:

"Q. Mr Liu, what was the total amount of proceeds from the Tianhe venture which you received in the period September and October 2015?

A. INTERPRETER: One is 5,000,000. The other is 1,500,000. But it's not only for me, it's for three people.

Q. It's to be shared between those three people equally, is that right?

A. INTERPRETER: Yes.

Q. Are you referring to a payment of 5,000,000 which you said was paid to you later than September and October 2015? Or are you saying that 5,000,000 was paid in the period September, October 2015?

A. INTERPRETER: 5,000,000 was received on the 22 March 2015. The 1,500,000 was received in February 2016.

Q. Are you sure about those dates?

A. INTERPRETER: Yes.

Q. That's the truth, is it?

A. INTERPRETER: Yes.

Q. Is that the only money you ever received from the Tianhe transaction?

A. INTERPRETER: Yes."

1. The plaintiff then gave the following evidence slightly later in his cross-examination:

"Q. It follows, does it not that you could look forward to receiving a payment from Tianhe after the September announcement of the new auditors?

A. INTERPRETER: Yes.

Q. Did you receive a payment in September and October 2015 from the Tianhe proceeds?

A. INTERPRETER: I did.

Q. How much were you paid?

A. INTERPRETER: 5,000,000.

Q. When were you paid that money?

A. INTERPRETER: There's two payments. One in February 2015, the other in March 2016."

1. When clarification is received, the plaintiff's evidence as to the non-receipt of payments in September and October 2015 was emphatic as follows:

"Q. On what date?

A. INTERPRETER: On 22 March 2016, I received 5,000,000. I can't remember, but I received a payment 1.5,000,000 8 January 2016.

Q. You mean the 2 August, don't you? These payments, they're disputed payments.

A. INTERPRETER: Yes, August.

Q. Are we agreed the 22 March 2016 for 5,000,000 RMB and 2 August 2016 for 1,500,000 RMB?

A. INTERPRETER: Yes.

Q. What was paid to you in September and October 2015?

A. INTERPRETER: No payments were received.

Q. You told Mr Lam that you had received 7,000,000 RMB during that period, did you not?

A. INTERPRETER: Didn't.

Q. You didn't tell him that?

A. INTERPRETER: No.

Q. How much did you receive in that period?

WILLIS: Which period?

ROBINSON: In that period.

WILLIS: What's that?

ROBINSON: September, October 2015.

A. INTERPRETER: No payments."

1. This confusion and apparent contradiction remerged later again in the cross-examination.

2. Thus, on the same page of the transcript (p 138) the plaintiff gives the following pieces of evidence.

"Q. And you received a payment?

A. INTERPRETER: Yes.

Q. At that time in September and October 2015?

A. INTERPRETER: Yes."

...

"Q. I want to ask my question that I've asked a number of times. Would you tell me the total amount of money you received from Tianhe in the period September, October 2015?

A. INTERPRETER: One payment of 5,000,000 – the other of 1.5,000,000.

Q. You must have been paid some money in September and October?

A. INTERPRETER: No."

1. Again, once there is a clarification as to the RMB 5 million and RMB 1.5 million amounts, the plaintiff returned to his consistently stated evidence.

2. This is illustrated again in the following portion of his evidence:

"Q. Mr Liu, no payments were received in March 2015, were they?

A. INTERPRETER: I did, 5,000,000.

Q. You must mean 2016.

A. INTERPRETER: 15."

1. In the supplementary submissions by the defendant as to the SOAF (as I have earlier set out) the proposition had been advanced critically that the plaintiff had given evidence that he had received RMB 1.5 million in March 2015. It is true that the plaintiff did refer to March 2015 (as to RMB 5 million payment) but the cross-examiner himself sought to clarify he meant 2016 which the plaintiff did not immediately embrace until the following part of his evidence which followed shortly thereafter as follows:

"Q. Yes, it's in the court bundle. Would you look at page 209 of the court bundle, that may assist you.

A. INTERPRETER: Sorry, it is 2016."

1. There is no question that payment of the RMB 5 million Tranche, on the evidence, cannot have occurred in March 2015. In my view, it is best explained by the plaintiff having been mistaken about the year. When it was put to him that he made the RMB 1 million payment to Jiayi in October 2015 from Tianhe proceeds, the plaintiff said at one point "I'm not even sure if Tianhe has any proceeds at that time", being a reference to September/October 2015. He subsequently acknowledged this error about the years (as mentioned above).
2. There is a further issue that arises with respect to at least the second aspect of apparent contradictions of the plaintiff's evidence that I have referred to at page 138 of the transcript (extending to page 140) where the plaintiff apologises for misunderstanding the applicable year.
3. At T138:3-6, a question put to the plaintiff incorrectly referred to 6 October 2016, being: "Are you now saying to his Honour that that was your money that was paid to the defendant in the sum of 780,000 Hong Kong dollars on the 6 October 2016?". The reference to "2016" in that question was an error because the payment referred to was made in October 2015. The confusion caused by this question was evident in the plaintiff's response at T138:13 where, in response to the question "Are you telling his Honour that you made the payment of 780,000 Hong Kong dollars out of your own money?", the plaintiff stated "If that's after the payment time, then that is the money I received from Mr Cheng [of Tianhe]". That response from the plaintiff clearly demonstrated the confusion caused by the question incorrectly referring to 2016 rather than 2015.
4. Similarly, the plaintiff was adamant in his cross-examination that the payments he made to the defendant on 6 and 8 October 2015 were from his own money.
5. In my view the plaintiff remained consistent and clear in his evidence in relation to two aspects of his case. First, that a total of only RMB 6.5 million was received by him from Tianhe and, secondly, that the RMB 1 million paid to Jiayi was paid from his own money and not from any Tianhe proceeds.
6. The plaintiff similarly maintained his evidence that the first two payments to the defendant in October 2015 were made from his own funds.
7. I turn next to the defendant's evidence as to these matters.
8. In addition to my broader observations about the credibility of the defendant's evidence, there are some particular features of the defendant's accounts in this respect which must give rise to very substantial doubts about the honesty and reliability of his evidence where there is no documentary evidence in support.
9. The defendant stated that some days after a meeting at Mr Zhang's house around July or August 2015, the plaintiff rang him to indicate that Mr Zhang was going to make a payment of "7 million dollars as the first payment".

10. The defendant also deposed in the first defendant affidavit that, in a trip he made to China in September 2015 but after 11 September 2015, the plaintiff said to him "I have picked up 7 million in cash in bags from Mr Zhang. I put the money in the boot of my car. I am going to deposit it into the bank." The defendant also stated that the plaintiff said to him that there was enough money to pay back Jiayi and the defendant should leave it with him.
11. The plaintiff denied this conversation or that he received any amount of the Alleged RMB 7 Million Tranche. There was no documentary evidence in support of the defendant's claim that this statement was made.
12. It should also be noted that the plaintiff made inquiries with his bank in China with a view to adducing documentary evidence falsifying this allegation but was told that the bank only keeps account records for a period of 3 years.
13. Given the entirety of the transactions which are in evidence between the plaintiff and defendant and others, it is implausible that the alleged conversation above between the plaintiff and defendant referred to "dollars" as opposed to "yuan". Further, the plaintiff does not use that currency in his day-to-day life, as he is ordinarily a resident of China. It is unlikely that he had referred to that particular currency or would have received payment in that particular currency.
14. A further aspect of the implausibility of the defendant's account in this respect is that it would have Mr Zhang paying the first tranche in cash, when both the second and third tranche (on the defendant's account) were paid by electronic funds transfer.
15. A further difficulty with the defendant's evidence in this area is that on his own account, the trigger for the payment of RMB 15 million was the resignation of the Tianhe's auditor and the appointment of the new auditor and the trigger for the transfer of shares was Tianhe's relisting on the Hong Kong stock exchange. It is in this context that the plaintiff made a submission that "Accordingly, there is an inconsistency between Mr Lam's account of what Mr Liu said (being that more money will be coming in when Tianhe starts trading) and Mr Lam's account of the deal struck with Tianhe." A further issue as to the credibility of the account is that the alleged conversation between the plaintiff and the defendant the Alleged RMB 7 Million Tranche occurred prior to the appointment of a new auditor with Tianhe.
16. Further, the proposition that the plaintiff was paid a substantial amount in cash, and that cash was physically fitted in the boot of a car, is inherently implausible.
17. There is another aspect of the defendant's evidence in this respect which is also quite unsatisfactory. The defendant suggested that the plaintiff used part of the Alleged RMB 7 million Tranche to acquire a Ferrari, Range Rover, Mercedes S450 and Mercedes GLE450 and two expensive watches. He attributed to the plaintiff the statement "More money will be coming in when Tianhe starts trading again on the Exchange. You don't need to worry about that. I need to use current funds to refurbish/polish up my image to give the impression of a successful businessman." The plaintiff denied the entirety of the proposition and the

conversation.

18. The defendant conceded in cross-examination that he was speculating that the plaintiff had used part of the funds comprising the Alleged RMB 7 million Tranche to purchase the red Ferrari and that he was not aware that the plaintiff had, in fact, purchased the vehicle in 2013. On the evidence, the plaintiff did not own either of the Mercedes. They were owned Ms Meng. He occasionally drove them because of Beijing's policy to reduce automobile traffic which restricted cars from travelling on certain days based on their number plates.
19. The plaintiff submitted that the defendant's evidence as to the conversation concerning the \$7 million cash was a recent invention. That is no doubt correct in my view, it is a fabrication, even taking into account the further aspect of the defendant's case as to later conversations and transactions to which I will now turn.
20. There was another dimension to the defendant's case in relation to the Alleged 7 million RMB Tranche which relied upon conversations or exchanges in 2016 and 2018.
21. The defendant submitted that the defendant's affidavit evidence, on which he was not cross-examined, was that after becoming aware that the plaintiff was being sued by Jiayi, the plaintiff told him that he had transferred Tianhe funds to the plaintiff's brother, and Ms Meng. The conversation was said to have occurred between the RMB 1 million payment to Jiayi and the Lower Court Judgment.
22. The actual conversation recorded in the first defendant affidavit was as follows:

"Tuo Liu said:

"No, I only paid Jiayi 1 million."

I said:

"That's shocking news. What happened to the rest of the money?"

Tuo Liu said:

"I transferred money to my brother (I knew Tuo Liu's brother, Xu Guang) and Meng in."

I said:

"How much are you being sued for?"

Tuo Liu said:

"6.5 million."

I said:

"You need to get back the money from your brother and Meng Lin."

Tuo Liu said:

"I will try."

I said:

"If that is not enough money you can sell some of your cars."

Tuo Liu said:

"Yes, if It is not enough, I will.""

1. The defendant did not expressly refer to the transfer of Tianhe funds to Mr Guang. However, the reference to "the rest of the money" and "I transfer the money to my brother" and further, "you can sell some of your cars" is no doubt intended to connect to the earlier part of the first defendant affidavit evidence regarding the statements made by the plaintiff as to the receipt of \$7 million dollars in cash (which was included in the boot of a car) and the plaintiff having acquired a large number of prestige cars after the receipt of such monies. I have found that evidence not to be credible.
2. Attention should also be given to the defendant's evidence that he said that it was "shocking news" that the plaintiff had only made the RMB 1 million payment to Jiayi sometime in July or August 2016. In addition to the plaintiff denying this conversation there are some serious difficulties with this part of the defendant's evidence because:
 1. the defendant's own evidence is to the effect that the Alleged RMB 7 Million Tranche was not used to repay Jiayi but rather, the plaintiff allegedly told him he had "kept some", sent the defendant some, and that "there will still be 8 million to come, so we have plenty to cover the Jiayi debt" (being a conversation which is also denied by the plaintiff); and
 2. the plaintiff received payments in respect of the RMB 5 Million Tranche and RMB 1.5 Million Tranche at or before the alleged conversation. I agree with the submission of the plaintiff that "it cannot sensibly be contended that the defendant expected this same money to be used to repay the Jiayi debt.
1. It was further submitted by the defendant that the defendant followed up the plaintiff with a request for monies to be returned from Mr Guang and Meng in early April 2018, which the plaintiff said he would do. This reference is to the defendant allegedly saying to the plaintiff that he (the plaintiff) had made, inter alia, a mistake in not using "the Tianhe money to pay Jiayi back" to which the plaintiff allegedly agreed and said that he would get the money back from his brother and Ms Meng and would sell the cars. It is not explained in this account or in any other account why the plaintiff may have forwarded the Tianhe monies to his brother and Ms Meng. He was not asked why he had done so. Nor was it explained how the plaintiff's acquisition of cars, as contended by the defendant, would have been made, as well as distributing the Tianhe monies (which the defendant alleged are \$7 million dollars or the Alleged RMB 7 Million Tranche).

2. In oral evidence, the plaintiff spoke about a communication with his brother to borrow money. The plaintiff's evidence was that he spoke to his brother during the enforcement period (which must be after the Appeal Judgment on 19 March 2018) to assist him in repaying the monies. His evidence was that his brother did not hold money on his account.
3. On 3 April 2018, the defendant received a WeChat message from the plaintiff which he understood to be a copy and paste of a message sent to the plaintiff from Mr Guang (which is at Exhibit 5, Tab 60 p 416-419). The defendant set out his understanding of that message which does no more than confirm what is obvious from the text. The defendant submitted that Mr Guang did a calculation of what he considered to be the amount of the "Jiayi Judgment" and then worked out the outstanding debt after "deducting the 4.5 Million RMB in your account".
4. This communication was prior to the Appeal Judgment. The only reference in the WeChat message concerning RMB 4.5 million is in the passage extracted by the defendant as part of a series of calculations. The relevant full quote as to those calculations is "Deducting the 4.5 million RMB in your account, the outstanding debt is 2.15 million RMB. Once the outstanding debt is paid, this case is over!". The plaintiff's brother does not refer to him having to loan the balance of RMB 2.15 million.
5. The plaintiff was cross-examined about the expression "4.5 million RMB in your account". His evidence was that:

"Q. He says less 4,500,000 RMB in your account?

A. INTERPRETER: It's written like that, yeah.

Q. Did you have 4,500,000 in your account?

A. INTERPRETER: I don't know. I don't know. Should be.

Q. You think that's right?

A. INTERPRETER: Yes.

Q. That was your own money?

A. INTERPRETER: It's my own money.

Q. Was there anybody else who had an interest in that money 4,500,000?

A. INTERPRETER: No.

Q. How did you obtain that amount of money in your bank account, Mr Liu?

A. INTERPRETER: Why can't I have this amount?

Q. I just said to you where did you get it from? What business was it that got you 4,500,000 in your bank account?

A. INTERPRETER: I don't remember exactly but why should I answer this question, "How I get my money"? It's not like you are from the tax authority.

Q. Can you tell me where that money came from, please.

A. INTERPRETER: Can I refuse to answer that question?"

1. Two observations may be made about that evidence. The first is that the plaintiff was plainly prevaricating in his penultimate and ultimate answer in the extract. However, as I will now turn, the defendant invited the Court to draw an inference that the money in question was as a result of a connection between the RMB 4.5 million and the receipt of Tianhe monies and that is why he was 'evasive'. However, it does not follow that a connection of that kind necessarily follows. First, the evasion may equally be said to correspond to the plaintiff providing unsatisfactory evidence as a means to avoid disclosure of his sources of income and business interests. The second consideration is that no direction was sought from or given by the Court to require the plaintiff to answer the question.
2. The defendant next submitted that it was apparent from the record of the Chinese Court that there was a single payment of RMB 4,218,675 paid towards the Judgment Debt to the credit of the plaintiff on 11 May 2018. The plaintiff was asked about the source of that money. The defendant submitted that his answers were similarly evasive and that he had said he had been doing business "like finance for other people"; and said that in China he had many transactions, many businesses, different businesses, and savings as well.
3. The evidence in that respect was as follows:

"Q. Where did you get 4.2 from if it was you who paid it in?

A. INTERPRETER: I have been doing business.

Q. How did you make the 4.2 in your business?

A. INTERPRETER: So, I participated in other transactions like finance for other people ..(not transcribable).. or I can't make profit from other businesses?

Q. Which other businesses? Where did you make the profit?

A. INTERPRETER: In China, I have many transactions, a lot of businesses. So, why can I have profit from those?

Q. Just tell me where that money came from, from what business?

A. INTERPRETER: Many different businesses. And also, on top of that, I have savings as well.

Q. That is Tianhe money, isn't it, which you have not distributed?

A. INTERPRETER: No.

Q. Could you show me any documents with respect to this 4,200,000 RMB?

A. INTERPRETER: You want me to present some document that's seven years, eight years ago? I can go back and dig up whether I have any agreement or not, I'm not sure.

Q. Mr Liu, you say you borrowed all of this money from your friends and relatives to pay off the judgement debt, did you not?

WILLIS: Your Honour, that's not what he said.

ROBINSON: Let me just put it more generally.

Q. Did you borrow from your relatives and friends to pay the judgement debt?

A. INTERPRETER: It was a big amount. Some were from my account, some were paid from my account.

Q. You paid the 4,200,000 in one lump sum, did you not?

A. INTERPRETER: I don't know. So, because the payment was made from the bank by deduction.

Q. How can you tell that from the documents?

A. INTERPRETER: It's written here, bank deduction."

1. The plaintiff's evidence in this respect does seem evasive in terms of giving a precise definition of the source of the monies. However, it was incorrect to put to him that the entirety of the sum was borrowed. As the plaintiff gave evidence some was from his account and some from borrowings. There was not a single lump sum payment, but payments made by bank deductions. He was challenged as to whether the relevant documents did in fact refer to bank deductions. He maintained that they did, and the matter was not taken any further by the defendant's counsel. He denied that the money derived from "Tianhe money".
2. Whilst some aspects of the plaintiff's evidence in this respect are unsatisfactory, I do not consider that the evidence establishes that the payment made to the Chinese Court of RMB 4,218,675 was from a singular amount of RMB 4.5 million held on account by the plaintiff's brother (or as the original evidence from the defendant suggested, by his brother and Ms Meng). More significantly, I do not consider that this passage of the evidence establishes that all or almost all of the amount paid to the Chinese Court came from Tianhe funds received by the plaintiff in 2015.
3. It was suggested, without explanation, that the funds in question were well known to Mr Guang and most probably held in an account controlled by him which was then used, in essence, out of the plaintiff's funds, to pay the whole of the amount. I do not consider that the evidence sustains that proposition, particularly when the starting point of it relies on accounts by the defendant which I have already found lack credibility. The plaintiff denied that the RMB 4.2 million was money from the Tianhe transaction, which had not been distributed.

4. Having regard to the entirety of the above analysis, I do not accept that the evidence establishes that the plaintiff was paid RMB 7 million, or a substantial payment, if not RMB 7 million, in the immediate aftermath of the change of auditors of Tianhe.
5. In the supplementary written submissions, the defendant advanced a number of contentions predicated upon his contention that the plaintiff was in receipt of those amounts. In the light of the findings made above I do not accept those contentions. In particular, I do not accept the propositions advanced by the defendant, driven as it did from a contention that the plaintiff had received a large payment of approximately RMB 7 million around but prior to 8 October 2015, that the RMB 1 million paid to Jiayi on 8 October 2015 came from the same source as the HKD 1.2 million paid to the defendant, namely, monies paid to the plaintiff from Tianhe Venture.
6. The defendant made a number of allegations in his evidence that he told the plaintiff, and, on some occasions, the plaintiff told him that they should use money earnt on other ventures to repay their debt to Jiayi.
7. This evidence was implausible and bore upon the defendant's credit as a witness for the following reasons:
 1. The defendant alleged that he and the plaintiff said to each other "often" "whatever money we get from any of our deals must go to Jiayi". The plaintiff denied this.
 2. The defendant alleged that upon the receipt of the Alleged RMB 7 Million Tranche, the defendant said "We now have the money. We can pay Jiayi back" to which the plaintiff allegedly responded "Leave it with me. I will handle it." The plaintiff denied this conversation occurred. The conversation is also inconsistent with the defendant's own evidence and the objective documentary evidence because:
 1. the defendant alleged that the plaintiff received two payments in respect of the Alleged RMB 7 million Tranche. His receipt of this money, and failure to return it or use it to pay Jiayi, is directly inconsistent with his contention that there was an agreement that the money would be used for that purpose; and
 2. on 26 September 2015, being in the same month the conversation is said to have occurred, the defendant sent an email to the plaintiff asking him to pay 1 million yuan to Jiayi "on his behalf". In that respect I note that I reach a conclusion below that the 26 September 2015 email is authentic and was produced by the defendant.
1. The defendant alleged he had a conversation with the plaintiff between 22 March 2016 and 6 April 2016, being after the receipt by the plaintiff of the RMB 5 Million Tranche, where he said "We should have enough money now to pay back all of the Jiayi debt" and the plaintiff allegedly said "Okay, I will pay them in full to settle the matter". The plaintiff denied this conversation. There was no objective documentary evidence in support of the defendant's contention and it does not accord with steps the plaintiff was required to take to ultimately pay the Judgment Debt.

1. In the light of those findings, if the word "paid" in paragraphs 17 and 18 of the SOAF was intended to convey conclusively that the payments from Huge Fairway to the defendant on 6 and 8 October 2015 were derived from monies received by the plaintiff from Tianhe in or in connection to the Tianhe Venture, the agreed position, now disputed by the plaintiff, cannot be accepted in the light of the evidence before the Court. It is unnecessary to construe whether the expression "paid" was intended to mean payable but required to do so I would find that when used in the SOAF, the word "paid", as earlier mentioned, was meant to convey the literal meaning that the plaintiff had not used his own funds but funds received from Tianhe as part of the Tianhe Venture and that on the defendant's case the amount received was in the order of RMB 7 million.
2. In answer to issue 3, on the evidence, I find that the plaintiff did not receive the RMB 7 Million Tranche contended for by the defendant in September/October 2015. Whilst an alternative large payment was alleged by the defendant, the basis for it has not been identified with any clarity or by reference to evidence to support it (other than references given to a RMB 7 million payment).
3. In my view, the plaintiff received for Tianhe a total of RMB 6.5 million over two payments of RMB 5 million on 22 March 2016 and RMB 1.5 million on 2 August 2016. The payment made by the plaintiff from Tianhe monies were those specified earlier in this section of the judgment.

The Circumstances of entry of the Agreement and was the Agreement executed by both parties?

1. As earlier discussed, the defendant received a copy of the Agreement on 8 May 2018 from the plaintiff by WeChat message in which he was asked to sign the Agreement. I have found that the evidence indicated that the defendant understood that he was being asked by the plaintiff to do so and to bring a hard copy of it to a meeting.
2. The defendant stated that he signed the Agreement with his English signature and returned the document, so executed, to the plaintiff by WeChat on 9 May 2018.
3. The defendant submitted that he also signed the Advocatus Law document with his English signature and returned it in a pdf form to the plaintiff.
4. The first three pages of the Agreement before the Court contained 2 signatures other than the defendant's English signature. One of those signatures is that of the plaintiff in the lower left-hand corner. The other is a signature in Simplified Chinese character which appears on the lower right-hand side of the English signature of the defendant. The plaintiff contended that the signature is that of the defendant and the defendant resisted that notion. A related consideration is whether the Agreement was signed by the defendant at a meeting between himself and the plaintiff at the Grand Hyatt Hotel in Shenzhen, China ("the Grand Hyatt") on 14 May 2018 in the defendant's hotel room.

5. In part, those considerations require consideration of the evidence given by the plaintiff and the defendant. In part, those issues attract a consideration of the report of Mr Dubedat. I will commence with further consideration of the defendant's evidence.
6. In the first defendant affidavit, the defendant stated that he did sign the Agreement with his English signature (as he did for the Advocatus Law document). He stated that he did not sign a Chinese signature to the Agreement. He then gave the following evidence as to a meeting in Shenzhen on 14 May 2018:

"I was in Shenzhen on 14 May 2018. I travelled to Shenzhen from Beijing on China Southern Airlines flight C2156, with an arrival at Shenzhen at 12.25pm. I travelled to the Grand Hyatt Hotel directly from the airport arriving not before 2.00pm. A copy of my travel itinerary from Australia Peace Travel dated 13 May 2018 is at page 315 of Exhibit KL-1. On this stay I met with Tuo Liu, including in my hotel room."

1. The defendant accepted that the plaintiff had signed the Agreement but that he was unaware of how the signature appearing at the lower right-hand side of the page affixed to the Agreement as a Simplified Chinese Signature came to be on the document.
2. In short, it was unknown to him how a version of his alleged signature in Chinese came to be added to the Agreement.
3. The defendant was cross-examined as to the circumstances of the execution of the Agreement and gave the following evidence:
 1. He had absolutely no reservations or difficulties whatsoever in applying his English signature to the Agreement and accepted that he did so on an earlier date.
 2. He accepted that if the plaintiff had asked him to sign the Agreement with a Chinese signature, he would have done so.
 3. He accepted the WeChat messages exchanged between himself and the plaintiff in the period before the meeting reflected a sense of urgency on the plaintiff's behalf about getting the Agreement finalised and signed. That evidence corresponds with my earlier findings as to the severe implications in China of failing to meet financial obligations.
 4. After some prevarication in cross-examination the defendant accepted that, by the 8 May 2018 WeChat message, he had been asked to bring a copy of the Agreement signed in English to their meeting.
1. It was in that context that the following cross-examination of the defendant occurred:

"Q. Can you please tell his Honour this, because I'm struggling to understand: What conceivable reason would Mr Liu, or anyone else, have to apply your signature to the document, in circumstances where (1) Mr Liu knows that you'll sign it if he asks, and (2) you're in the same room and available to do it? What conceivable reason would anyone have to apply your signature to the document?"

A. I don't know. I think we have more important things than this at the time when we discuss.

Q. He's going to lose his house. What could be more important to him?

A. We had many we had many other deals going.

Q. I'm going to ask the open-ended question again. Actually, no, I won't. I think your answer is consistent with you're saying you had more important details, so, either Mr Liu didn't feel the need to raise it, because there were more important things to talk about, or he forgot. Is that broadly what you're saying, or have I misunderstood?

A. We have more important things to talk about.

Q. Than him being put on the bad persons list and having his assets seized?

A. (No verbal reply)."

1. I turn next to the plaintiff's evidence regarding the circumstances in May 2018.
2. In the first plaintiff affidavit, the following evidence is given by the plaintiff:
 1. The defendant and the plaintiff met in the lobby of the Grand Hyatt at approximately 10.00am and went to the defendant's hotel room.
 2. The defendant referred to the Agreement prepared by Mr Yuan which had been discussed and asked him whether he was happy with the Agreement or whether it required any amendment. At that juncture the plaintiff had not provided a copy of the Agreement to the defendant.
 3. After the defendant indicated that he wished to "take a look" at the Agreement the plaintiff then handed the Agreement to the defendant including the letter which the defendant sent to him on 3 May 2018. The defendant then read the Agreement and indicated that he had no objection as the document was consistent with what had previously been discussed.
 4. The defendant also, on this version of events, stated that he promised to repay the plaintiff before the end of the year and that his land in Australia had been mortgaged. He also indicated that if he could not repay the money he would sell the land.
 5. After this conversation the defendant signed each page of the Agreement and attachments.
 6. That was followed by the following evidence:

"...I used the facilities in the Business Centre at the Hotel to make a photocopy of the Agreement which Mr Lam had already signed. I then returned to Mr Lam's hotel room Mr Lam's hotel room and asked Mr Lam to re-sign each page of the Agreement (both copies) with his Chinese signature. I then observed Mr Lam sign what I believed to be his Chinese signature on both copies of the Agreement."

1. The plaintiff then explained that he had sought the defendant sign the Agreement in Chinese in anticipation of the executor of the Court comparing the signed Agreement (with the Chinese signature) with documents on the Court file that had been signed by the defendant with that signature. Those two documents consisted of the Chinese Court Proceedings Affidavit and the Appeal Proceedings transcript (which I have found was signed by the defendant).
2. The plaintiff then described taking the following steps and identified the signatures at the bottom of each page of the Agreement as follows:

"Once Mr Lam signed both copies of the Agreement with his Chinese signature, I then signed each page of both copies. Mr Lam kept the copy of the Agreement which contains three original signatures. I kept the copy of the Agreement which contains a photocopy of Mr Lam's non-Chinese signature and the original of Mr Lam's Chinese signatures. At Tab 14 is a copy of the Agreement which is in my possession. The signature at the bottom left of each page is my signature, the signature which appears in the middle at the bottom of each page is Mr Lam's English signature and the signature at the bottom right is Mr Lam's Chinese signature."

1. The signatures were applied to the Chinese language version of the Agreement. Next all parties left the Grand Hyatt at approximately 11.20am.
1. In the second plaintiff affidavit, the plaintiff stated that he had read the first defendant affidavit and in that light gave the following evidence:
 1. He agreed that he had received a signed copy of the Agreement from the defendant on 9 May 2018 (and that only an English signature was applied by the defendant).
 2. He explained that he had replaced his mobile phone so he did not have a copy of that WeChat message.
 3. He arranged with the defendant to meet him at the Grand Hyatt on 14 May 2018 so as to sign the Agreement in his presence so that the Agreement bearing the Chinese signature could be submitted in the Lower Court Proceedings and be verified by an "authentication agency". As to the version he took to the Grand Hyatt he stated, again after reading the first defendant affidavit, that he may have taken the Agreement signed in English by the defendant to the meeting at the Grand Hyatt.
 4. Lastly, he was certain that the defendant signed his Chinese signature on the Agreement whilst at the Grand Hyatt.
1. The defendant submitted that this further evidence was not a correction or qualification of the original evidence given by the plaintiff but was a complete reconstruction after he reviewed the first defendant affidavit and had received the Amended Defence from the defendant. Counsel for the defendant invited the Court to reject the evidence as the reconstruction cannot be put down to mere mistaken recollection. There was tailoring of the evidence.

2. The defendant also submitted that the restated version of the circumstances surrounding the execution of the Agreement in the second plaintiff affidavit represented the only way in which the Agreement with the defendant's original English signature could have been at the Grand Hyatt on 14 May 2018. It was also submitted that the reconstruction is the only way that the plaintiff's initial version that the defendant took an Agreement with 3 original signatures from the Grand Hyatt could stand.
3. It was also submitted that the plaintiff's initial evidence was intended to convey that the defendant was given an opportunity to further review and amend the document, so building on the false premise that the Agreement was a serious and well considered document. The defendant submitted that this view of events was reinforced by the plaintiff's affidavit account continuing, following the defendant's receipt of the document, an entry that the defendant had said: "I have no objection. This is what we have previously discussed and decided to do".
4. I accept that the version of events in the first plaintiff affidavit in which the plaintiff purports to give the defendant an opportunity to read and amend what is apparently an unexecuted agreement cannot be accepted as a true recollection of events in the light of the fact that the plaintiff himself accepted that the Agreement had been signed with the defendant's English signature by that time upon a request from the plaintiff to do so. The signed version of the Agreement had been sent by WeChat message to the plaintiff. There is some force in the defendant's submission that the construction of at least the opening events given in the first plaintiff affidavit was intended to give the veneer of a serious and well considered document. I do not accept the plaintiff's evidence that the defendant said "I have no objection", which account is nonsensical in the light of a written acceptance of the Agreement having already been received.
5. The plaintiff's evidence in cross-examination on the first plaintiff affidavit in this respect also lacks credibility in so far as his evidence is that he invited the defendant to consider if he wished to amend the Agreement.
6. I do not accept the plaintiff's explanation in the second plaintiff affidavit that his confusion regarding receipt of the signed Agreement was because he lost his mobile phone "so I do not have a record of that WeChat message".
7. The defendant submitted that the plaintiff's strained credulity was because the plaintiff had exhibited WeChat messages between 13 April 2018 and 8 May 2018 to his first affidavit. Reference was made in that respect to the documents appearing under tab 61, 62, 65, 68, 73, 73A of Exhibit 5. Save for the last of those documents they deal with, as I have earlier discussed, engagements leading to the production of the signed copy of the Agreement by the defendant. However, the exception is the actual signed copy of the Agreement itself. I do note that the references given by the defendant do not include the copy of the WeChat message of 9 May 2018 actually attaching the Agreement signed by the defendant using his English signature. Nonetheless, there is ample material to indicate that the explanation

provided is inadequate.

8. The defendant submitted that doubt may also be cast upon the plaintiff's reasoning that he obtained the Chinese signature of the defendant upon the Agreement because he needed to have the document verified by "an authentication agency". The basis for this submission was that the only document that was verified by the agency was the Jiayi Loan Agreement which had the English signature of the defendant.
9. The plaintiff's evidence in this respect was consistent between the first plaintiff affidavit and the second plaintiff affidavit. It was also the case that authentication was a consideration that loomed large in the Chinese Court Proceedings. The plaintiff had been active in dealing with that issue. I do not consider that his evidence about that matter may be rejected when he stated that he took into account that consideration as being necessary step to be taken for the Lower Court Proceedings, particularly when he was under some real pressure at the time to meet the requirements of those proceedings.
10. Significant attention was directed by the defendant to the notation added by the plaintiff as an additional page to the Agreement. The notation was not signed by the parties and was in the following terms:

"Note: This Loan Agreement and its attachments are signed by the parties face to face at 11:18 am on 14 May 2018 at MR LAM kin's hotel room which was room 3115 of the Grand Hyatt Shenzhen in China"

1. In the fourth plaintiff affidavit he explained he added this entry on 15 May 2018 "due to advice from his lawyers".
2. The plaintiff's explanation for the affixing of the notation is not satisfactory.
3. The wording was added to a document which, according to the plaintiff, had already been executed by the parties. Further, on the evidence before the Court, the document could not have been executed at 11.18am as expressed by the plaintiff in the notation and otherwise in his evidence. I have not placed any reliance in reaching that conclusion upon the defendant's evidence but rather upon the objective evidence. An airline itinerary issued at 9.42pm on 13 May 2018 by email showed that the defendant's flight from Beijing to Shenzhen on 14 May 2018 arrived at 12.25pm. The plaintiff gave evidence that the travel time from the airport to Grand Hyatt was 1 hour.
4. Nor do I accept the plaintiff's evidence that he merely recorded the time as a "general time" or that the travel itinerary may have been amended. Having regard to the evidence before the Court, the explanation is implausible.
5. However, the submissions advanced by the defendant's counsel as to conclusions which may be drawn from those unsatisfactory aspects of the plaintiff's evidence do tend toward overstatement and extravagance (as I have also alluded to elsewhere in this judgment).

6. The defendant submitted that the plaintiff's reconstruction of events from his first affidavit to his second affidavit reflected poorly on his credit.
7. If that was intended to be a submission directed to a concern over his evidence as to aspects to the events of 14 May 2018 then the submission may be readily accepted. So too may the submission that the notation was most likely intended to give a veneer of authenticity of the document.
8. However, the defendant's submission evolved to one in which it was contended that the defendant's evidence as to the events of 14 May 2018 reflected on his "credit generally" (which I do not accept, particularly in the light of my earlier findings as to the credit of the plaintiff as a witness when the subject of criticism).
9. Similarly, it was submitted that the plaintiff had incorporated the notation because he "well knew [the document] had not been executed in the circumstances set out in his written note. He sought to disguise that circumstance as best he could by including another unnecessary addition to the document". This submission is made in circumstances where there was nonetheless a "face to face" meeting between the plaintiff and defendant on 14 May 2018 in the hotel room of the defendant albeit later than 11.18am.
10. An alternative view of the notation, and one agitated by the counsel for the plaintiff, was that the plaintiff had been mistaken in his entry as to the time of the meeting. I will return to that notion before briefly mentioning two other aspects of the defendant's case in this respect.
11. The first of those submissions contained paragraphs 229 to 233 of the defendant written submissions are as follows:

"229. Mr Liu's oral evidence was that all the attachments sent to him by Mr Lam were brought with him to the Shenzhen Hotel. To the extent that Mr Liu says that he included all documents sent to him by Mr Lam, and did not choose which of the documents would become an attachment to the agreement, that was, of course, not the case on any view of the events.

230. The letter from Ignatius J & Associates to Advocatus Law dated May 2018²⁹⁸ was excluded. Mr Liu disavows any knowledge of that exclusion and says under cross examination that he feels that the first time he saw that document was in the witness box on 19 February 2024; although under further cross-examination says that it is possible that he received the letter at the same time as the other documents which are alleged to be part of the Agreement Sued Upon.
231. It is submitted the evidence given by Mr Liu as to the attachment being constituted by all the documents sent by Mr Lam to Mr Liu (a reference to all the pages CB-D-Tab 51-pages 453-463B) was false.
232. There was a clear reason for excluding the Ignatius J & Associates letter of 2 May 2018 from what Mr Liu claimed to be attachments forming part of the Agreement Sued Upon submitted to the Chinese courts. That letter raises a disagreement with Advocatus about the

way in which costs would be dealt with in the Singapore proceedings between Millennium and BS Tech, and threatens that unless agreement was reached as to costs in terms put forward by Ignatius J & Associates there is "no agreement"; such that there would be an obvious doubt as to whether the post-dated cheques which were supplied and included as a purported part of the Agreement Sued Upon would be honoured; and, therefore could not be relied upon by the Chinese courts as a source of funds by Mr Liu.

233. Mr Liu's dealing with the exclusion of the Ignatius J & Associates 2 May 2018 letter from what he says was the Agreement Sued Upon and his oral evidence in that regard reflects that it was Mr Liu who unilaterally made choices as to what documents he wished to assemble to constitute the Agreement Sued Upon; that he did so without communication or recourse to Mr Lam; and that he avoided presentation of that letter to the Chinese courts in order to avoid difficulty with the Chinese courts in persuading that he has a certain source of funds for the payment."

1. I do not consider the passage of evidence relied upon by the defendant in this respect reflects adversely on the plaintiff's credit. It is true that he indicated that he had not excluded any documents that he had received as attachments to the Agreement, but that evidence was given in the abstract. When he was taken to the document, he initially did not recall it but then identified its provenance by being pointed to the defendant's signature. There is insufficient evidence to conclude that the plaintiff adopted an approach to these documents which was deceptive although it may be concluded that he made some forensic choices of what documents were to be provided to the Chinese Court.
2. The second aspect of the defendant's case in this respect, and one that requires significantly more attention is as follows:

"Mr Liu then deposes that the version Mr Lam sent on 9 May 2018 signed with his English signature might in fact be what he (Mr Liu) took to the hotel. Although Mr Liu cannot remember what version of the agreement he took to the hotel, or whether he made photocopies of it at the hotel, Mr Liu remains "certain" that Mr Lam signed his Chinese signature at the hotel. Mr Liu does seek to reconcile the handwritten annotation that the agreement was signed at 11:18am with Mr Lam's travel itinerary."

1. That submission is a component of a broader submission advanced by the defendant that:
 1. It is entirely fictitious that the defendant signed the Agreement with a Simplified Chinese signature either on 14 May 2018 or at any other time.
2. That it is fictitious that the plaintiff signed the Agreement in front of the defendant on 14 May 2018.

1. It may be observed, at the outset of considering those submissions, that the defendant did not suggest in cross-examination or submissions just who it was or by what process it was that an apparent non-English signature of the defendant was attached to the Agreement. In addition to this submission, it was contended as follows:

"...I'm not accusing Mr Liu, but the motivation to do so would be brought home to Mr Liu or some person who was associated with Mr Liu. That matter does not need to be resolved. When he did so is relevant to the second part of my argument on acceptance because he would have to do so within a reasonable time, and he would also have to convey the acceptance to Mr Lam."

1. Senior counsel in this passage does not invite the Court to resolve the question of whether the plaintiff or someone on his behalf affixed the defendant's signature but suggested the Court, perhaps, inferentially, might find that the plaintiff had a motivation to do so. Furthermore, the passage leaves the question begging as to whether, in fact, the defendant did affix his Chinese simplified signature and if not, whether there was any conceivable basis upon which the signature may have been affixed if not by either a forgery by some person or by the means of the defendant affixing his Simplified Chinese signature to the document at the meeting held between the plaintiff and defendant on 14 May 2018. I note in that respect, that one matter arising from Mr Dubedat's opinion, which does not appear to have attracted challenge was that the Simplified Chinese signature on the Agreement was not a cut and paste from some other document.
2. It is important to emphasise at this juncture that whether the proposition was advanced by senior counsel directly or by a more indirect means, it is not open to the Court to find that the plaintiff engaged in dishonesty in relation to the signatures appearing on the Agreement in the absence of cross-examination on the point or at least pleadings or an opening by the defendant's counsel that he was dishonest in that respect: *Nadinic v Drinkwater* [2017] NSWCA 114 at [109] per Leeming J with whom Beazley P and Sackville AJA (on this point) agreed. None of those steps was taken by the defendant in this case.
3. No different conclusion arises with respect to some other person affixing their signature when it is obvious that any other person so acting would be, in the circumstances, acting in the interests of the plaintiff.
4. Furthermore, it is difficult to envisage that the defendant was suggesting someone other than the plaintiff is implicated in some wrongdoing associated with the affixing of the Simplified Chinese version of the defendant's signature because the defendant otherwise submitted that the Agreement was produced for nefarious reasons by the plaintiff in order to deceive, at least, the Chinese Courts. Interestingly, the defendant agreed that he is implicated in those deceptive processes including giving evidence before the Chinese Courts in every material respect except for affixing his Simplified Chinese signature to the Agreement for its production to the Chinese Courts.

5. Even putting aside, the application of a Briginshaw standard, and for present purposes, Mr Dubedat's evidence, in my view, on the balance of probabilities, the defendant did affix his signature to the Agreement at a meeting with the plaintiff at the Grand Hyatt in Shenzhen on 14 May 2018 for the following reasons:
 1. This evidence is clear that, irrespective of the time of the meeting, a meeting did occur on that day in the defendant's hotel room.
 2. The defendant agreed that he was asked to bring the Agreement with his English signature to the meeting. He said he did not do so but that, in the meeting, no questions were asked of him about the Agreement or him affixing a signature to it. He gave evidence that the Agreement was not discussed with him. Apart from the general view that I have formed about the defendant's credit, this evidence cannot be accepted in the light of the context in which the meeting occurred, and as I have found, the plaintiff's desire to obtain, for whatever reason, the defendant's Chinese signature on the document. It might be noted in that respect that the Agreement was presented to the Chinese courts in a form which contained the defendant's English signature and, in my view, his Simplified Chinese signature.
 3. That context was that there was at forefront in the plaintiff's mind the desire to have the Agreement executed and placed before the Chinese courts because of the very significant adverse consequences he would face upon enforcement which he considered could be delayed by the use of the Agreement. There was a real sense of urgency.
 4. If the Agreement could have been simply used in the Chinese Court Proceedings without the Simplified Chinese signature then the plaintiff could have taken that course after signing the document himself from 9 May 2018.
 5. As to the likelihood of the defendant affixing his Chinese signature in the meeting, the plaintiff is right to point to the defendant's evidence that he had no reservations in affixing his English signature and would have affixed his Simplified Chinese signature if he was asked to do so. The evidence was that from time to time the defendant would affix his name by signature in Simplified Chinese on documents.
 6. The defendant's evidence was that he knew that the plaintiff was under significant and urgent pressure to complete the Agreement by the time of the meeting on 14 May 2018.
 7. In the circumstances leading up to the execution of the Agreement the plaintiff must have known that the defendant would sign the Agreement with a Chinese signature if he asked.
 8. The notion that the plaintiff and the defendant had more important things to talk about at the time of the meeting than the Agreement is fanciful.
 9. The defendant had the opportunity to sign whilst in the hotel room with the plaintiff. No other explanation has been offered as to how the Simplified Chinese signature came to be affixed to the Agreement. It has not been suggested, unless by way of forgery, that the

Simplified Chinese signature appearing on the Agreement does not appear as being the same as that normally used by the defendant. As Mr Dubedat opined, and as I will discuss below, the Simplified Chinese signature appearing on the Agreement is comparable to other simplified Chinese signatures affixed by the defendant to other documents.

10. Lastly, I am prepared to draw an inference that the time 11.18am written in the notation was simply an error by the plaintiff. It was written the day after a meeting actually occurred. As the defendant submitted, the notation was more likely to have been written to give the appearance of formality, but the actual time specified in the notation was irrelevant for that purpose. Irrespective of the time, the meeting actually did occur sometime after the defendant's arrival in Shenzhen from Beijing.
1. There is one further consideration and that is when the plaintiff affixed his signature to the Agreement. It was not disputed that the plaintiff's signature does appear on the bottom left hand side pages of the Agreement. It is said that the signature may have been affixed at any time up to the filing of the document in the Chinese Court. However, the much greater likelihood is that the signature of the plaintiff was affixed at the meeting on 14 May 2018. That conclusion is overwhelming in the light of a conclusion that, on the balance of probabilities, the defendant affixed his signature on 14 May 2018.
2. In the light of those conclusions, it is unnecessary to resolve the issues ventilated by the parties as to Mr Dubedat's report. Rather I propose to briefly touch upon Mr Dubedat's opinion, some of the controversies attached to it and one particular aspect relevant to the above conclusion.
3. Mr Dubedat is a highly experienced forensic document examiner with over 35 years of relevant experience, including as a document examiner employed by the New South Wales police and in the private sector.
4. There is no objection ultimately taken to the admission of Mr Dubedat's evidence or, as I have earlier mentioned, cross-examination of him.
5. The plaintiff's summary of Mr Dubedat's evidence will suffice for present purposes.
6. Mr Dubedat explained, in detail (at paragraphs [3] to [10] of his report), the documentary examination techniques and methodology which he adopted (in considering all signatures he was asked to consider), including infrared examinations, indentation examinations using an electrostatic detection device, microscopic examinations and macroscopic examinations.
7. Mr Debedat reached two conclusions relevant to the defendant's simplified Chinese signature which appeared on the Agreement. In doing so, Mr Dubedat expanded upon the methodology section of his report and articulated how his conclusions were reached (see paragraphs [36] to [48] of his report).

8. First, Mr Dubedat compared the signature in simplified Chinese characters contained on the Agreement (which the defendant disputed signing) with a sample of other signatures in simplified Chinese, which included the defendant's simplified Chinese character signature on the Appeal Proceedings transcript (which the Court has inferred was applied by the defendant to that transcript). In answer to the question: "to the extent to which it is possible [could you please] determine whether the author of [the simplified Chinese character signature on the Agreement] is the same author of the Sample Signatures Type 2" (which included the signatures on the Appeal Proceedings transcript), Mr Dubedat found that the "signatures are comparable". In my view, that conclusion is borne out by the obvious likeness apparent in the following diagram:
1. Secondly, when Mr Dubedat was asked to compare examples of the defendant's traditional Chinese character signature with the simplified Chinese character signature on the Agreement, Mr Dubedat concluded that the signatures are "partially comparable" (partially, because the second character of Mr Lam's name appears different in the two types, whereas the first character appears the same in both). In that context, Mr Dubedat identified two hypotheses which, in his expert opinion, are supported by his extensive examination and comparisons of the similarities between the defendant's traditional Chinese character signature and the simplified Chinese character signature on the Agreement. Those two hypotheses are as follows:
 1. the simplified Chinese character signatures on the Agreement were written by the same writer as the defendant's Traditional Chinese character signatures, and any differences are due to natural variation, accidental formations, or some other factor(s); and
 2. the simplified Chinese character signatures on the Agreement were written by the same writer as the defendant's Traditional Chinese character signatures, and any differences are due to the signatures having been deliberately written illegibly or in an unusual manner, so as to afford the signatory some plausible grounds for disclaiming the signature, should it be deemed expedient.
1. The defendant's written submissions on the opinions expressed by Mr Dubedat were, in substance, as follows:

"Relevantly, Mr Dubedat was asked "the extent to which it is possible to determine whether the author of Type 2 of the Question Signatures is the same author of Sample Signatures Type 2" and "the extent to which it is possible to determine whether the author of Type 2 of the Question Signatures if the same author of Sample Signatures Type 3".³⁰⁹

240. In respect of the first of these questions, Mr Dubedat opined that the Type 2 sample signatures and Type 2 question signatures were "comparable", but "as the defendant denies signing any of the 'Type 2' signatures they cannot be used as specimen signatures".³¹⁰ This was in accordance with the fourth assumption he was asked to make.³¹¹

241. In a section of his report headed "'Type 2' and 'Type 3' Signature Examination", Mr Dubedat concluded that "the 12 original questioned 'Type 2' signatures on documents Q1 to Q3 have probably been written by the same writer who wrote the specimen 'Type 3' signatures." That is, Mr Dubedat opined that the author of the 'Type 2' signatures on the Agreement Sued Upon was probably the same person as the author of the 'Type 3' signatures which Mr Lam accepts he applied to sample documents 16 and 17. He noted that this opinion "is qualified due to; (1) the limited number of specimen signatures and; (2) the limited number of strokes being compared in the signatures."

However, in the section of his report where he specifically answered the questions he was asked and gave his concluding opinions, Mr Dubedat was only willing to say: "These signatures are partially comparable; and based on the assumption that portions examined in both the "Type 2" and "Type 3" signatures are common or "like" material."³¹³ This conclusion was significantly weaker than that expressed in the previous section of his report. In the section where Mr Dubedat actually answers the question he was asked, he does not conclude that the comparative signatures were probably written by the same person.

243. The Court should give no weight to Mr Dubedat's conclusions for the following reasons.

244. First, the report contains no explanation of the reasoning process by which the conclusions the expert has arrived at flow from the facts so as to reveal that the opinion is wholly or substantially based on the expert's expertise: see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [37]. Although this objection to the admissibility of [36]-[48] and [50]-[51] of Mr Dubedat's report was withdrawn, the absence of a proper explanation of his reasoning process remains highly relevant to the weight to be given to his conclusions: *Makita* at [85], [86], [90].

245. In the section of his report headed "Methodology", commencing at [3], Mr Dubedat explains various document analysis methods he used. At [9]-[10] he explains his approach to "signature comparisons" of the Type 2 and Type 3 signatures. The extent of his explanation of that process is as follows, in relation to the Type 3 signatures (see [9]):

Features examined, and as far as could be determined on the reproduction specimen signature include the design and construction of the letter forms, fluency of execution, size, relative size, ratio, slope, letter spacing, letter connections, pen lifts, ticks and tapers.

Mr Dubedat does not explain what any of these concepts mean (including apparent terms of art such as "ticks and tapers". He then says of his comparison of the Type 3 signatures to the Type 2 signatures (at [10]): "An assessment was then made of the similarities and/or differences found with a view to determining the genuineness or otherwise of the questioned signatures on an individual and collective basis". There is no further explanation of what this "assessment" process involved, or how it was conducted.

247. There is little further light shed on this in [36]-[48] of the report. At [37], Mr Dubedat says that an "initial inspection" revealed that "the first two main characters in each type of signature appear similar". He then describes what the characters consist of, with no explanation of why they appear similar. At [39], Mr Dubedat then says of the Type 2 signatures and the Type 3 signatures that a "comparative examination" (again not explained) "revealed a number of similarities between them". The similarities are then said to "include" various of the matters that were listed at [9], as well as "fluctuating pen pressures", again without any explanation of what these terms mean.
248. At [41], Mr Dubedat refers only to (unexplained) "similarities" and in [42] he refers to (unexplained) "pictorial similarities ... in the initial portions of the signatures".
249. Most critically, there is no detailed analysis or comparison of the actual features of the signatures by reference to those signatures, which are reproduced in Appendix 9 of the report. One would expect Mr Dubedat to refer to those reproductions and explain which parts of them provide the basis for his conclusion that their "fluency of execution" or "form, design and construction" are similar. Mr Dubedat simply does not perform that task, and the Court has no way of knowing the process by which he arrived at his conclusions. In this respect, his reasoning and conclusions amount to little more than an assertion that "I looked at the signatures and they appear similar". A conclusion of this kind, unsupported by any reasoning, should be given no weight by the Court.
250. Secondly, Mr Dubedat's analysis was limited to the first of the two Chinese characters in the Type 2 and Type 3 signatures. At [10], Mr Dubedat states: "It should be noted that only the first half of the "Type 2" and "Type 3" signatures which have been written in a foreign script were compared to one another." Thus, Mr Dubedat's analysis was only of half of the signatures in question. That again substantially undermines the weight that can be given to his conclusions.
251. Thirdly, even in respect of the first Chinese character in each signature type which he did compare, Mr Dubedat did so "on the assumption that these portions of the signatures are common or "like" material and are able to be compared to one another using standard handwriting methodology" (see [10]). His conclusion at [51] was stated to be based on this assumption. Mr Dubedat's report does not prove the truth of this assumption, nor does any other evidence in the proceedings. Because the very basis upon which Mr Dubedat's rests has not been established, the conclusions he expresses cannot be accepted.

Fourthly, Mr Dubedat's opinion is qualified by the fact that one of the two documents containing specimen Type 3 signatures was a copy, as was one of the four question documents (see [36]). This meant that no "useful microscopic examinations" could be conducted on these signatures (see [25]). Mr Dubedat's opinion is further qualified due to "the limited number of specimen signatures" and "the limited number of strokes being compared in the signatures" (see [46]).

253. Taking all these matters together, the Court cannot have any confidence in Mr Dubedat's opinions and they should be given no weight.
254. Mr Lam anticipates that Mr Liu will rely on this handwriting evidence as a strong objective fact which supports his version of events on 14 May 2018. However, given the weakness of Mr Dubedat's ultimate conclusion, if attributed any weight, it is only one factor to be considered against the evidence as a whole. In this regard, the objective evidence (in the form of the travel itinerary³¹⁴ and Mr Liu's evidence that it takes "more than one hour" to get from Shenzhen airport to Mr Lam's hotel) far outweighs it and renders Mr Liu's version of events impossible."
1. I note that there were also supplementary oral submissions made by Mr Smith in addition to those made by Mr Robinson which I have considered for the purpose of dealing with this issue.
 2. I accept that the defendant may challenge the weight to be given to Mr Dubedat's opinion, even in circumstances where his report was admitted without objection, and his evidence was not contradicted by an expert called for the defendant, both of which circumstances apply in this case: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 ("Makita") at [59], [61], [85], [86] and [90] (Heydon JA). I also accept that the principles stated in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [37] (French CJ, Gummow, Hayne, Crennon, Kiefel and Bell JJ), applying *Makita*, are applicable to the assessment of weight, namely, that expert evidence must explain how the field of specialised knowledge in which the expert is expert by reason of training, study and experience and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the propounded opinion. It should also be observed that the High Court accepted that the expression of opinion based on specialised knowledge may, in particular circumstances, require little explicit articulation or amplification, once the witness has described his or her qualifications or experience.
 3. There is substance to the defendant's challenge to the weight to be given to Mr Dubedat's opinion based upon the comparison of Type 2 and Type 3 signatures based upon the defendant's written submissions I have extracted above. However, it is unnecessary to reach a final conclusion in that respect having regard to my conclusions below as to comparisons drawn between Type 2 signatures.
 4. The defendant submitted that the Court should give little or no weight to the opinion of Mr Dubedat in comparing Type 2 signatures with other Type 2 signatures (see paragraph [50] of the report) because the expert had complied with his instructions that, as the defendant denied signing any type 2 signatures, they cannot be used as specified specimen signatures. It was said, in that light, that the expert did not embark upon an analysis of the respective Type 2 signatures because of the assumption that he was asked to make.

5. However, in this case, one of the signatures that the expert was asked to examine was the simplified Chinese character signature which I have found was applied by the defendant to the transcript of the Appeal proceedings. Hence, whilst the expert was precluded in the conclusions that he could make by virtue of that signature being denied by the defendant (as the defendant did in these proceedings), in substance, at least one of those signatures has now been found to be a signature of the defendant.
6. Whilst the opinion of the expert cannot, therefore, be conclusive, the logic of that consideration is that the signature appearing on the Agreement as a Simplified Chinese signature is, in fact, in the opinion of Mr Dubedat comparable to that of his actual signature. As I have mentioned above, that conforms with the observations made by the Court.
7. I would not suggest that these considerations are in any way determinative in and of themselves of whether the Simplified Chinese signature that appeared in the copy of the Agreement before the Court is the signature affixed by the defendant, it does represent a factor contributing to the reasons I have given above as to why it is appropriate, on the evidence, to conclude that the defendant did so affix his Simplified Chinese signature to the agreement.
8. In my view, on the balance of probabilities, the defendant did sign the Agreement on 14 May 2018 at the Grand Hyatt in Simplified Chinese characters in addition to his English signature. That last consideration flows from the fact that consistently with the argument advanced by the defendant, the plaintiff must have had the copy of the Agreement signed by the defendant using his English signature at the time that the Simplified Chinese signature was affixed. The plaintiff affixes his Chinese signature, in my view, during the meeting or soon thereafter.

THE OFFER AND ACCEPTANCE ISSUES

1. On the first day of the hearing of this matter, senior counsel for the defendant articulated an unpleaded allegation concerning a contended deficiency in the offer and acceptance of the Agreement. As earlier mentioned, ultimately, with some procedural adjustments, the proceedings were braced to deal with that issue.
2. Although expressed in a different order in written submissions, ultimately the plaintiff advanced its case to demonstrate offer and acceptance on two alternative bases.
 1. The primary basis was that there was offer and acceptance when the plaintiff and the defendant signed the Agreement in the defendant's hotel room in Shenzhen of 14 May 2018.
 2. Alternatively, offer and acceptance was completed by the defendant signing the Agreement with his English signature and forwarding it to the plaintiff on 9 May 2018 because:

1. the offer was made by the plaintiff when the Agreement was sent to the defendant by WeChat message for execution on 8 May 2018 with an accompanying statement in the WeChat message which I have earlier set out in this judgment; and
 2. the offer was accepted (and the acceptance was communicated) when the defendant sent the Agreement, signed with an English signature, back to the plaintiff via WeChat on 9 May 2018.
1. At the outset of dealing with the defendant's submissions I note my acceptance of the principles articulated by the defendant as bearing upon the resolution of this issue. These were as follows:
 1. The conventional analysis of whether a binding agreement has arisen is by reference to the existence of offer and acceptance: *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at 678; *The Crown v Clarke* (1927) 40 CLR 227 at 234, 239-240, 243.
 2. An offer is conduct which a reasonable person in the position of the offeree would understand to be an expression of willingness to contract on specified terms: *Heydon on Contract* (Thomson Reuters, 1st edition, 2019) ("Heydon on Contract") at [2.10].
 3. By contrast, an invitation to treat is an offer to negotiate, not an offer to be bound by a contract: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 266.
 4. The offer and acceptance must precisely correspond. Any departure from the offer will result in the purported acceptance being ineffective.
 5. In *Redowood Pty Ltd v Mongoose Pty Ltd* (2004) 49 ACSR 172; [2004] NSWSC 101, Einstein J extracted from Anson's Law of Contract, 27th Edition at [85] as follows:
 1. If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance or as to the coincidence of the terms of the acceptance proposed and those of the offer. These requirements may be summed up in a general rule sometimes called the mirror image rule.
 2. This statement of principle was adopted on appeal: *Redowood Pty Ltd v Mongoose Pty Ltd* [2005] NSWCA 32 at [130] (Bryson JA, Spigelman CJ agreeing). See also *Quadling v Robinson* (1976) 137 CLR 192 at 201.
 3. As the author of *Heydon on Contract* at [2.350] states, "normally an apparent variation in the acceptance of terms in the offer, or the introduction of some additional term, will prevent the purported acceptance from being an acceptance."
 1. The defendant's primary response and primary contention as to offer and acceptance was that there was no identity of offer and acceptance in relation to the Agreement. It was accepted by this contention that the analysis of the issue must be reconciled with findings of fact which are in dispute regarding the events of 14 May 2018.

2. That submission proceeded upon the following bases:
 1. Three WeChat files were forwarded to the plaintiff on 9 May 2018, the Agreement, the Advocatus Law document and the Ignatius Document. Each were signed by the defendant using his English signature.
 2. The version of the Agreement propounded by the plaintiff contained 3 pages in Simplified Chinese and the Advocatus Law Document. It was the plaintiff himself that included the Advocatus Law Document as an attachment to the Agreement. He did not attach the Ignatius Document.
 3. The version of the Agreement exchanged contained provision for further additions to be inserted and contemplated an English version would come into being and prevail over the Mandarin version in the event of an inconsistency.
 4. Clause IX of the Agreement stated that the contract was to take effect after being signed by both parties and the document contained provision for two signatures.
 5. I pause at this juncture to note that those factual underpinnings relied upon by the defendant to this point made be accepted and are consistent with my earlier findings.
 6. The communications by the plaintiff on 1 and 8 May 2018 did not constitute an offer but were rather an invitation to treat. I will reject that proposition below.
 7. The act by the defendant in sending 3 WeChat files to the plaintiff on 9 May 2018 should be regarded as the relevant offer. I will also reject that proposition below but, as with the immediately previous contention represents only an alternative conclusion in this judgment given the findings that I have made with respect to the execution of the Agreement on 14 May 2018.
 8. The plaintiff's purported acceptance of that offer by signing the three pages of Chinese characters and the five pages of the Advocatus letter and cheques, which he chose to attach to the three-page Agreement, did not precisely correspond with the defendant's offer.
 9. By attaching the five pages, there is a representation made that the defendant would cause Millennium, to pay the proceeds of the post-dated cheques issued by BS Tech to the plaintiff account in discharge of the debt the subject of the indemnity.
 10. This is precisely the meaning which the plaintiff intended that the document would convey to a third party. The plaintiff stated to the defendant in that respect the Agreement would be used "as evidence that I would be receiving funds to be able to satisfy the Judgment Debt, to avoid being placed on the list of people with bad credit".
 11. In contractual terms, the attachment added by the plaintiff has the capacity of being a pledge of the proceeds of the cheques to the account of the plaintiff. This is from the written document or alternatively from a contract partly written and partly oral.

12. The plaintiff made numerous requests for the post-dated cheques "as an effective proof of repayment agreements".
 13. It is obvious that the defendant signed his English signature to the five pages. He did so at the request of the plaintiff. The signing of the five pages gave a degree of authentication to the documents. There is an association between the agreement and the five pages.
 14. There is a clear reason why the plaintiff did not elect to also attach the Ignatius Document.
 15. At no time did the defendant agree that those five pages would be attached to the three-page agreement and have the status of being incorporated into the contract.
 16. Alternatively, if the Court construed the three files sent by the defendant on 9 May 2018 together as the relevant offer, the plaintiff excluded the letter from Ignatius, which had been signed by the defendant and was one of the three separate files sent by the defendant to the plaintiff. The fact that it was signed indicated that it was intended to have the same standard and effect and was no different to the other signed documents. On no analysis, if the plaintiff wished to accept an offer, constituted by the three files, was it open to him to unilaterally exclude two of the pages signed by the defendant.
 17. For these reasons, there was no exchange of offer and acceptance which corresponded and no binding agreement in the terms of the Agreement arose.
1. Having regard to the Court's determination that the Agreement was executed by the plaintiff and defendant when together in the defendant's hotel room in Shenzhen these contentions cannot be sustained as appeared to be anticipated in the opening part of the defendant's submissions in this respect.
 2. There can be no issue regarding the attachment of the Advocatus Law Document being undertaken without the defendant's agreement because the Advocatus Law Document bears the Plaintiff's Chinese signature and the Defendant's English and Chinese signature.
 3. Similarly, the Ignatius Document formed no part of the Agreement there reached as is evident from that document, in the evidence before the Court, only bearing the English signature of the defendant.
 4. Furthermore, on the conclusions reached by the Court, the conditions under cl IX were met. The defendant did not advance submissions that the blank sections of the Agreement was a matter that went to the question of offer and acceptance. In any event, I do not consider that the non-completion of those blank sections by the parties, which are merely mechanical entries, may result in the conclusion that there was not offer and acceptance.
 5. The balance of my reasoning concerns the alternative basis upon which plaintiff contended there was offer and acceptance. In dealing with those issues I shall first address some particular contentions advanced by the defendant as to the Advocatus Law Document and the Ignatius Document. As I note above, these arguments do not gain traction if, as the Court has concluded, the agreement was reached on 14 May 2018. But to the extent they may be

found to be relevant in that respect, then the conclusions I reach below are equally applicable to circumstances where the parties reached agreement on 14 May 2018. I also note, even if it were found the plaintiff signed the Agreement sometime after the 14 May 2018 meeting, given the transaction that occurred in that meeting, that later signature could not undermine the existence of offer and acceptance as the defendant would have known then and there that the plaintiff would not only enter the Agreement but would rely upon it in the Chinese Court Proceedings.

6. If the Court's findings with respect to the Agreement being reached on 14 May 2018 were not accepted, I would conclude the alternative basis relied upon by the plaintiff for offer and acceptance, should be accepted, having regard to the aforementioned principles. Further, on the evidence, I consider that the 8 May 2018 WeChat message constituted an offer.
7. My reasons for that alternative conclusion are as follows:
 1. it is a misapprehension to approach the question upon the basis that, on the evidence, the WeChat messages of 1 and 8 May 2018 operated in the same way.
 2. It is plain that the 1 May 2018 WeChat message did, in fact, constitute an invitation to treat. That communication needs to be seen in conjunction with the WeChat message of 27 April 2018 in which the plaintiff plainly invites the defendant to examine the Agreement and identify if there are any problems.
 3. The 8 May 2018 WeChat message contains no such uncertainty or equivocation. It was not an offer to negotiate.
 4. The incompleteness of entries as to land and other blank spaces in the document do not make any material difference to that conclusion. The form of the document before the Court does not have those provisions completed so that they are mere mechanical entries which do not affect the substance of that agreement. In any event, the defendant relied upon the same document as constituting an offer from the defendant to the plaintiff.
 5. The WeChat message of 9 May 2018 which I will discuss below, does not contain, the indicia of an offer by the defendant to the plaintiff. It was merely returned to the plaintiff with the defendant's signature.
1. In those circumstances, in my view the offer was accepted, and the acceptance communicated when the defendant sent the Agreement, signed with an English signature, to the plaintiff via WeChat on 9 May 2018.
2. I deal with particular submissions advanced by the defendant in that respect below.
3. First, as to the attachment of the five pages without an apparent express agreement of the defendant, I do not consider that fact to result in a finding that there is not offer and acceptance for a number of reasons as follows:
 1. The terms of the Agreement were comprised of the three pages.

2. Even without the express agreement to attach the five pages, the defendant responded to and accepted the plaintiff's offer by signing the five pages.
3. Whether the parties had a different understanding as to the attachment of the Advocatus Law Document does not affect, as a matter of law in the circumstances, there being offer and acceptance forming a contract. In the text, Heydon on Contract it was stated:

"Acceptance of an offer (or counter-offer) is conduct which, to a reasonable person in the position of the offeror, is a final and unqualified expression of assent to the terms of the offer (or counter-offer). However, a variation in the alleged acceptance which favours the offeror is not treated as a material variation.

"The acceptance must correspond with the offer and must be clear and unqualified, and will fail to take effect if it attempts to vary the offer or add new terms." There must be nothing "equivocal" and nothing "left to be done". The communications must not be "in direct negation" of each other and must not be "antagonistic to and inconsistent with each other". Whether a communication accepts the terms of an offer without modification, or instead varies its terms, is a question of construction. Divergence in wording does not necessarily entail differences in substance."

1. The Advocatus Law Document does not create any right in or obligation on the parties. Nor does it vary the operative terms of the Agreement. Whether or not the attachment added by the plaintiff has the capacity of being a pledge of the proceeds of the cheques to the plaintiff does not alter the terms of the contract constituted by the Agreement.
2. At its highest the attachment of the five pages might constitute a representation but even then, it is not antagonistic to the terms of the contract itself and I do not accept that it may be found, applying the principles in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (at 282-283), to be an implied term:

"In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

1. It may be argued that the attainment of the Advocatus Law document constitutes a representation which forms an implied term of the Agreement such that the proceeds of the cheques are to be paid to the plaintiff's account and the defendant will cause Millennium to make that payment. However, that implication cannot be drawn in this case because the implication is not necessary to give business efficacy to the contract constituted by the Agreement and it was not so obvious that "it goes without saying". In the first part, the contract is plainly effective without any such implication because there is an obligation pursuant to an indemnity to make a payment from the defendant to the plaintiff regardless of the source of funds (it is not necessary to imply a term that the cheques would be used in order to satisfy, in part, that indemnity). In the second part, the cheques may be attached for

their provision to the Chinese Court to show that the defendant had a source of funds to satisfy his obligations under a guarantee but the implication is not obvious.

2. Secondly, the same analysis may be applied with even greater force to the Ignatius Document. Those documents do not purport in any way to create any right or obligation on the parties to the Agreement, do not vary the operative terms of the Agreement and cannot constitute representations, let alone, ones having some contractual significance.
3. Thirdly, to the extent that the defendant contended, under this alternative basis for offer and acceptance, that offer and acceptance failed because of the failure to meet the terms of cl IX, I also consider the defendant's submission fails. I accept the submission by the plaintiff that the clause should be construed as an effective date clause rather than regulating the contract in such a way as to providing a code governing offer and acceptance. An illustration of the operation of cl IX is to give effect to the terms of cl VI, if there is a mortgage over the subject land. The effective date provided by cl IX is the date from which the plaintiff has a caveatable interest (the defendant cannot sell, transfer, gift or mortgage the property under the obligations under Clause VI). It is unnecessary to consider the plaintiff's further argument with respect to the acceptance, namely, the provisions of cl IX may constitute an agreement to waive any requirement to communicate acceptance.
4. The defendant made an alternative submission that acceptance was not communicated by the plaintiff, predicated upon well accepted principles that acceptance does not have the effect of creating a contract until it is communicated to the offeror: *Farmers' Mercantile Union and Chaff Mills Ltd v Coade* (1921) 30 CLR 113 at 118; *Nunn Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74 at 83.
5. It should be said at the outset that the defendant accepted that his argument in this respect must fail if the Court found, as it has, that the defendant and the plaintiff affixed their Chinese signatures to the Agreement in the defendant's hotel room in Shenzhen on 14 May 2018.
6. The defendant's argument in this respect must also be rejected because it is predicated upon the basis that the plaintiff's execution of the three pages and five pages was an acceptance of an offer made by the defendant on 9 May 2018. As I have found, the offer was forwarded by the plaintiff on 8 May 2018 and accepted by the defendant on 9 May 2018.
7. It is unnecessary then to deal with the balance of the defendant's argument which proceeds upon the basis that, if the defendant and plaintiff did not affix their signatures on 14 May 2018, it was unknown when the plaintiff signed the Agreement, and it was not communicated until the commencement of proceedings.
8. As to the offer and acceptance issue, I find there was an offer and acceptance in relation to the Agreement. My primary conclusion is that the offer and acceptance occurred when the parties signed the Agreement in the hotel room of the defendant at Shenzhen on 14 May 2018. If that conclusion were not accepted, I would find that, when the plaintiff asked the

defendant to sign the Agreement via WeChat on 8 May 2018 and the defendant signed the Agreement with his English signature and returned it to the plaintiff via WeChat on 9 May 2018 there was respectively offer and acceptance. In either case, there was offer and acceptance such that the Agreement constituted a contract between the parties.

WAS THE JIAYI LOAN AGREEMENT ENTERED INTO BY ANY PARTNERSHIP

Were the plaintiff and defendant in a partnership?

1. In respect of the Jiayi Loan Agreement, the CAN deal and the Tianhe Venture, the defendant contended that he and the plaintiff entered into a partnership (or two separate partnerships) in respect of the Jiayi Loan Agreement and the Tianhe Venture. The defendant accepted that he, as the party alleging the existence of the partnership, bears the onus of proving it, in the sense of a factual or evidentiary onus.
2. The relevant pleaded allegations regarding the proposition that the Jiayi Loan Agreement was entered into by a partnership were as follows:
 1. the Partnership was said to have been entered into in China (FAD [3](b))
 2. the terms of the Partnership Agreement were said to have been partly oral and partly implied (FAD [3(c)]), with the only pleaded terms being that:
 1. the parties would share equally all profits and liabilities arising from various business ventures entered into by the Partnership ([3(e)(i)]; and
 2. liability for loans taken out by or on behalf of the Partnership would be shared jointly including any right of indemnity arising pursuant to the guarantee given by the plaintiff pursuant to the Jiayi Loan Agreement (FAD [3(e)(ii)]);
 1. a non-exhaustive list of the Partnership's activities includes: (i) entry into the Loan Agreement; (ii) the receipt and use of the funds advanced under the Loan Agreement; (iii) the payment of the Judgment Debt; and (iv) the Tianhe Venture (but only so far as it concerned the plaintiff and the defendant and not Mr Cheng FAD.[3(d)], and the cross-references to [3(f)], [5(b)], [5(d)], [9(a)], [20(b)] and [26]; and
 2. the Partnership was said to have been terminated in early 2020 (being a matter in respect of which there is no evidence, nor any pleaded allegation as to the fact or event that resulted in the termination of the partnership) (FAD [3(g)]).
1. The pleadings in relation to the existence of a partnership with respect to the Tianhe Venture were unclear. FAD [3(d)] has a cross-reference to FAD [26] which stated that the Tianhe Venture was undertaken within the scope of, and by, the partnership and a third-party Mr Cheng. The "partnership" is defined in FAD [3] by reference to the Jiayi Loan Agreement which says that the partnership was continued or alternatively entered or varied to include various activities, as I have mentioned, which included the Tianhe Venture. The plaintiff and defendant were said to be equal partners in the Tianhe Venture and, in

particular, had equal shares to a payment of RMB 7 million made by Tianhe to the plaintiff in and about early September 2015.

2. Both because of this circularity and lack of clarity in the drafting the alleged scope of the partnership arising from the Tianhe Venture remains unclear except that it is incorporated as part of the non-exhaustive list of activities which were pleaded and said to be part of the partnership. It is unclear when the partnership was said to have formed except perhaps by reference to the Tianhe Venture itself.
3. The defendant submitted that for the purposes of analysing the relationship of the plaintiff and the defendant in relation to the Jiayi Loan Agreement and the Tianhe Venture to determine whether the Agreement was intended to be legally binding, by use of the word "partnership", the defendant did not mean anything more than an agreement between him and the plaintiff to share the profits and liabilities of the Jiayi Loan Agreement and the Tianhe Venture equally. He further submitted that in, that context, he did not rely on any specific aspect of New South Wales partnership law.
4. I agree with the defendant's submission that a partnership (whether under NSW law or Chinese law) must ultimately be founded in a contract or agreement between the parties. The defendant contended that the governing law of that contract would be the law of China, as the legal system with the closest and most real connection with the contract: *Bonython v The Commonwealth* [1951] AC 201 at 219; (1950) 81 CLR 486 at 498. However, the defendant did not rely on any provision of foreign law in relation to his allegation of partnership. He was content to rely on the presumption that the law of partnership in China is the same as the law of partnership in New South Wales: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; [2005] HCA 54 at [125], [249], [275].
5. Accordingly, the plaintiff submitted that the defendant, consistently with the abovementioned contention by the defendant, must necessarily attempt to rely on the presumption that the law of partnership in China is the same as the law of the *lex fori* (being New South Wales) to fill this evidentiary lacuna in this case.
6. The plaintiff then submitted that the Court would not infer that the law in relation to partnership in China, which does not have a common law system, is the same as the law of partnership in New South Wales, with the partnership regime being governed by statute, the common law and equitable principles. That, it was contended, was a complete answer to the entirety of the defendant's defence concerning the alleged partnership.
7. It is unnecessary for the Court to resolve those questions because in my view, if the relevant law is presumed to be the same as the law of partnership in New South Wales then the defendant's contention that the partnership existed between the plaintiff and defendant with respect to the Jiayi Loan Agreement, the CAN deal and Tianhe Venture must fail.

8. In that light, I turn then briefly to the law of partnership in New South Wales before considering the contentions of the defendant regarding the partnership being formed for the Jiayi Loan Agreement and the CAN deal.
9. Section 1 of the Partnership Act 1892 (NSW) ("Partnership Act") defines partnership as "the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership". The words "carrying on a business" denotes "the repetition of acts...and activities which possess something of a permanent character", and may be distinguishable from a joint venture in relation to single transactions: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8; 29 ALR 577 at 582; 54 ALJR 345 per Mason J ("Hope"); *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749 at [78] per Crennan J ("Forbes"); although, see *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 15; 60 ALR 741 at 750; 59 ALJR 676 at 681 ("United Dominions") where Dawson J suggested that the emphasis which will be placed on continuity "may not be heavy". The Partnership Act also prescribes rules for determining the existence of a partnership.
10. Under New South Wales law, a partnership is a relationship arising from agreement, either express or implied. The agreement may be inferred from the circumstances proved in evidence such that the Court may impute to the parties a tacit agreement to operate a business as partners. The question of whether a partnership exists is a question of fact which does not depend on the private intentions of the parties but rather, is judged by their acts. The onus of proving the existence of a partnership lies upon the party who stands to benefit from establishing the relationship, in this case being the defendant: *Minter v Minter* (2000) 10 BPR 18,133; [2000] NSWSC 100 at [83] (Santow J).
11. The indicia or characteristics of a partnership have been described as including (i) a mutual interest in the carrying on of the business for profit or gain; (ii) mutual confidence that the parties will engage in the venture for joint advantage only; (iii) sharing of profits and losses from the venture; and (iv) mutual agency in that each party is a principal and may bind the other: *Yacoub v Commissioner of Taxation* (2012) 292 ALR 128; [2012] FCA 678 at [24].
12. Partners owe fiduciary obligations to, amongst other things, avoid profiting personally from partnership opportunities and information and to account for benefits obtained from partnership business: *Chan v Zacharia* (1984) 154 CLR 178 at 199 ("Chan v Zacharia"). Until accounted for, such benefits are held on constructive trust for the other partners: *Chan v Zacharia* at 199. In the absence of any agreement to the contrary, the partners are entitled to share equally in the capital and profits of the partnership, and every partner is jointly liable with all other partners for all debts and contractual obligations of the firm incurred as partner: Partnership Act, ss 9, 24(1). Partners are entitled to have joint debts paid from partnership assets in the first instance: *Woods & White v Hopkins* [2016] WASC 16 at [76]-[88]. A partner is ultimately only liable for his or her proportionate share of a partnership debt, because a partner who pays more than that share is entitled to contribution from the other partners: see generally *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; [2002] HCA 17 at [14]-

[18], [43]-[49], [90]-[93]; *Friend v Brooker* (2009) 239 CLR 129; [2009] HCA 21 at [38]-[49].

13. The parties' subsequent conduct is admissible on the question of whether a partnership, the terms of which were partly oral and partly implied, existed: see *Fazio v Fazio* [2012] WASCA 72 at [10] and [192] – [195]; *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 at [143]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1; [2015] FCA 825 at [722].

No partnership with respect to Jiayi Loan Agreement or the CAN deal

1. It is useful to make a number of preliminary observations with respect to this issue.
2. Firstly, it should be emphasised that the conclusions reached under this heading are very much dependent upon the findings of fact already made by the Court under the section of the judgment dealing with fact finding.
3. Secondly, counsel for the plaintiff is correct to submit that, if the Court were to find that the Jiayi Loan Agreement was entered into as a partnership transaction, it would follow that, each of them would be liable for half of the Jiayi Loan. In contrast, the Agreement would have the effect of casting sole responsibility for the Jiayi loan liability onto the defendant. In those circumstances, counsel for the plaintiff is correct to submit that a finding that there was a partnership with respect to the Jiayi Loan Agreement is incompatible with the obligation cast by the Agreement. The notion of a partnership agreement and the Agreement cannot, in that respect, stand together.
4. Thirdly, counsel for the plaintiff is also correct in submitting that, if there was a partnership in respect of the Jiayi Loan Agreement, the plaintiff must fail in relation to the test whether or not the Agreement was intended to have legal effect. The converse is also the case, namely, that, if the Agreement did have legal effect, the Court may find that there was no partnership agreement. As will be evident from the structure of this judgment I have approached the partnership issue first in order but will ultimately find that there was an intention to create legal relations with respect to the Agreement; a conclusion that sits ill with any proposition that there was a partnership arrangement with respect to the Jiayi Loan Agreement. Nonetheless I will address the entirety of the partnership issues below.
5. Fourthly, the defendant contended that the partnership arose "in and after 2011" when the defendant and the plaintiff entered into business partnerships in China such, that by June 2014, when the Jiayi Loan Agreement was signed the defendant and plaintiff had been in an ongoing partnership which was continued. It was contended, in the alternative, that a partnership agreement was entered or varied to include the Jiayi Loan Agreement. Thus, it was argued that the Jiayi Loan Agreement was entered into in or by an existing partnership between the plaintiff and defendant or alternatively the agreement between the plaintiff and the defendant in relation to the CAN deal and Jiayi Loan Agreement gave rise to a partnership.

6. As I have earlier found, the plaintiff and the defendant would refer from time-to-time opportunities and business contacts to each other with the expectation of receiving a financial reward. This is what occurred in relation to the Tianhe deal. As I have also found, the plaintiff referred the deal to the defendant, who, in turn, introduced Mr Cheng to Tianhe with that introduction being the sole involvement of the defendant. The defendant alleged the existence of a partnership between him and the plaintiff, but it would not appear that he included, inexplicably, Mr Cheng in the partnership. In any event, those arrangements and relationships do not amount to conducting a business giving rise to a partnership. I will find below there was not a partnership relationship between the plaintiff and defendant with respect to the Tianhe Venture.
7. Fifthly, I agree with the submission of the plaintiff that the defendant's evidence given during cross-examination about the nature of his dealings with the plaintiff cast serious doubt on the defendant's contention that he formed a partnership as distinct from a cooperative relationship involving a mutual referral of business with the plaintiff.
8. Those aspects of the defendant's evidence in cross-examination are discussed below. In addressing the various aspects of the evidence below to address the present issue, I do not repeat but apply the earlier analysis of the evidence bearing upon each aspect of the evidence. The relevant aspects of the evidence are as follows:
 1. In about 2013, the defendant had a series of discussions with the plaintiff about some possible business opportunities. The defendant knew sellers of commodities in Hong Kong and the plaintiff knew buyers of commodities in China.
 2. The defendant thought that they each may be able to refer contacts to each other and both make some money. Prior to the CAN deal, no referrals resulted in any projects coming to fruition.
 3. The defendant had a similar informal referral arrangement with other people, including Albert and Gami, who the defendant said were not his partners.
 4. In 2013, the defendant and the plaintiff went about building a network of people who may be able to refer opportunities to each other, including Mr Zeng and his wife. It was not a business referral system that involved only the defendant and the plaintiff, but it was a large team of people who would refer to each other.
 5. Despite referring to Albert and Gami as "business partners" in his affidavit evidence, the defendant sought to resile from that position in cross examination and instead referred to them as "friends". When asked in cross-examination, by reference to his affidavit, why he was seeking to distance himself from the phrase "business partners" in relation to Albert and Gami, he gave evidence that "Partner in Australia means different to our understanding in China", and that, when referring to them as "business partners" in his affidavit, he was not referring to partners in the sense that term is understood in Australia, but that they had a cooperative relationship.

6. The defendant described his relationship with the plaintiff as "very different" in cross-examination. However, the plaintiff submitted, correctly in my view, that there was nothing in the evidence, aside from the defendant's allegations concerning conversations he had with the plaintiff, which I have rejected in this respect including in relation to the CAN transaction, which rises above an informal referral relationship like the one the defendant had with others in his referral network.
7. The defendant's confirmation of the 29 November 2016 email as true is inconsistent with their being as partnership between himself and the plaintiff as to the Jiayi Loan Agreement. In that document, the defendant accepted that, if he had not offered collateral underpinning the Agreement, he would not have asked the plaintiff to sign the Agreement. This notion sits contrary to the defendant's contention that there was an agreement to share profits and losses in relation to the Jiayi Loan Agreement and is also consistent with the plaintiff's case that he was merely a guarantor.
8. The 6 December 2016 email is inconsistent with the notion of there being a partnership between the plaintiff and defendant arising out of or relating to the Jiayi Loan Agreement. The proposition that the plaintiff was not asked to act as a guarantor and would only have signed the Jiayi Loan Agreement if there was sufficient security from the defendant is inconsistent with the notion that there was a sharing of profits and losses.
9. The defendant's evidence as to the Chinese Court Proceedings Affidavit, was that the plaintiff was only a guarantor to the Jiayi Loan Agreement because the company needed a local person as a guarantor and the defendant only let the plaintiff sign his name as a guarantor because there was security offered in priority to the plaintiff's guarantee.
1. I nextly turn to the propositions advanced by the defendant in support of the finding of a partnership with respect to the "Jiayi liability". The defendant submitted that the following factual premises established that the plaintiff and the defendant entered into the CAN transaction and the Jiayi Loan Agreement as partners "and in combination, makes their joint liability as partners compelling":
 1. The evidence as to the circumstances immediately preceding the defendant's execution, by English signature, of the Agreement. The objective facts support the Court finding that the parties intended that the Agreement was not to serve the purpose of requiring the defendant to pay the plaintiff any money at all, but to delay or defeat actions against the plaintiff by Jiayi by deceiving the Chinese courts into believing that the plaintiff had an imminent source of funds available to him.
 2. The conduct of the defendant and the plaintiff in conducting the Tianhe Venture as partners (with Mr Cheng) and then the plaintiff using monies recovered from the Tianhe partnership (RMB 1 million) to partially repay the Jiayi liability evidences an involvement by the plaintiff in applying partnership moneys (Tianhe) to a partnership liability (Jiayi).

3. furthering the CAN transaction, including by dealing with Jiayi and BS Tech prior to and after the entry of the Jiayi Loan Agreement demonstrates an integral involvement of the plaintiff with Jiayi, at least consistent with him having a material financial stake in the Jiayi Agreement, and quite inconsistently with him being a "mere witness" through a happenstance attendance at a dinner which he knew nothing about.
4. The plaintiff guaranteed the Jiayi Loan Agreement which would rationally not occur if he did not have some material interest in the outcome of the transaction.
5. The defendant distributing, and the plaintiff receiving out of the Jiayi project, funds recovered from BS Tech which was itself a participant in a critical aspect of the CAN project.
1. It is plain that the Court has already resolved some of the propositions underpinning this submission adversely to the defendant. I will not repeat the metes and bounds of the findings here, but note the following corresponding to each of the above numbered contentions:
 2. As to the first proposition, the defendant executed the Agreement by applying his English and Chinese signatures. Contrary to the defendant's case I have not accepted that the defendant gave false evidence in the Chinese Court Proceedings but rather that his evidence in these proceedings as to the circumstances of the Jiayi Loan Agreement were, in substance, false. As was his evidence in relation to the Agreement. I have found that as is reflected in the above summary of the concessions in the defendant's evidence.
 3. I have found that the plaintiff entered into the Jiayi Loan Agreement in circumstances where the defendant only let the plaintiff sign his name as a guarantor because there was a security offered in priority to the plaintiff's guarantee in the form of real property.
 4. Rather than there being no explanation by the plaintiff as to why the defendant would convert a 50% of potential liability to a 100% liability, the reality was the plaintiff had not accepted a 50% liability for the Jiayi Loan agreement in entering into it and nor had the defendant expected him to do so. The explanation then for the Agreement was that it was to give effect to the manner in which the parties had entered the Jiayi Loan Agreement.
 5. That it may have had the collateral benefit of providing a means for the plaintiff to demonstrate to the Chinese courts that funds were available to meet the enforcement of the Judgment Debt does not, in that context, attract the additional evidentiary value of demonstrating the Agreement was a ruse by the plaintiff and the defendant affected upon the Chinese Court.
 6. It was also submitted by the defendant that the formal agreement constituted by the Agreement was inconsistent with the plaintiff's and defendant's conduct up to that date and "explicable only by reference to the desire to present it to the Chinese courts". Reference was also made in that respect to oral agreements and implied understandings in relation to the Jiayi Loan Agreement and the Tianhe Venture. However, as is evident from the aforementioned reference to aspects of the defendant's evidence in cross-examination, and

as demonstrated by my earlier factual findings, there was a consistent course of conduct in the lead up to the signing of the Agreement through communications and WeChat messages (in the context of findings by the Court) which demonstrated the substantive arrangements between the parties as to the Jiayi Loan Agreement and why attention was being directed via the plaintiff's lawyers to the formation of a formal agreement.

7. Secondly, I have rejected, as a matter of evidence, the premise underpinning the second contention, namely, that the monies recovered from the Tianhe Venture were used by the plaintiff to partially repay the Jiayi liability.
8. As to the third proposition, the financial interests surrounding the CAN transaction need to be seen in the light of my rejection of the defendant's evidence as to the nature of the transaction, and the circumstances under which the Jiayi Loan Agreement was entered. I have accepted that the defendant did describe the plaintiff as a "mere witness" or words to that effect having regard to his evidence in the Appeal proceedings.
9. The fourth proposition cannot be accepted in the light of the findings that I have made. The circumstances in which the plaintiff entered into the Jiayi Loan Agreement correspond to an acceptance by the defendant as to liability.
10. I will return briefly to the fifth proposition below, but I do not consider that it could constitute a basis for a finding of an existence of the partnership claims by the defendant.
11. For completeness, I will below deal briefly with some of the historical features relied upon by the defendant to establish the existence of a partnership. However, it is important to observe that the considerations as to the primary planks of the defendant's case to demonstrate the plaintiff and the defendant were partners with respect to the Jiayi Loan Agreement (as predicated on my earlier findings of fact) must mean the defendant has failed in making good that proposition on the evidence.
12. The defendant relied upon the following circumstances after entry into the Jiayi Loan Agreement as supporting a conclusion that the plaintiff and the defendant entered into a partnership in relation to the CAN deal and Jiayi Loan Agreement.
13. The defendant's contentions in that respect were as following facts and circumstances:
 1. The dealings between the defendant and the plaintiff in June 2014 concerning the way in which they would minimise their risk arising from any failure of BS Tech to procure an instrument from a European bank that would provide a guarantee for CAN's borrowing of EUR 10 million.
 2. The plaintiff and Ms Meng travelling to Singapore to meet with BS Tech in July or August 2014.
 3. The payment of RMB 1 million by the plaintiff to Jiayi on or around 8 October 2015. The substance of the contention that the defendant made in this respect was that, if the Court finds that the plaintiff did receive RMB 7 million, or at least some other substantial sum,

from Tianhe and used RMB 1 million of that money to repay Jiayi, it must follow that the plaintiff recognised a liability that he and the defendant owed to Jiayi as a joint partnership liability. I have rejected all the premises upon which that contention as to the establishment of a joint partnership liability were based.

4. The defendant transferring half the funds received from BS Tech as a result of the proceedings Millennium brought against it in Singapore.
1. I have earlier discussed the first and second contention advanced by the defendant and rejected the contention that they properly formed a basis for a finding that there existed a partnership between the plaintiff and the defendant as to the Jiayi Loan Agreement. Given my observations above as to the third contention (which I have rejected) there only remains the fourth contention.
2. The fourth contention was expressed in the following way by the defendant in written submissions:

"368. The documentary evidence shows that Mr Lam transferred SGD 200,000 to Huge Fairway, being precisely 50% of the funds recovered from BS Tech, over three occasions about two weeks after funds were received from BS Tech:

- (a) Mr Lam received SGD 100,000 from BS Tech on 19 April 2018;
- (b) Mr Lam received SGD 100,000 from BS Tech 18 May 2018;
- (c) Mr Lam paid Mr Liu SGD 50,000 on 28 May 2018;
- (d) Mr Lam received SGD 100,000 from BS Tech on 18 June 2018;
- (e) Mr Lam paid Mr Liu SGD 60,000 on 29 June 2018;
- (f) Mr Lam received SGD 100,000 from BS Tech on 18 July 2018;⁴¹⁰ and
- (g) Mr Lam paid Mr Liu SGD 90,000 on 3 August 2018.

369. This conduct is consistent with, and highly suggestive of, a partnership in which profits and losses were to be split 50/50. Contrary to the documentary evidence, Mr Liu deposes that Mr Lam paid him a single payment of SGD 100,000 from Millennium, which he says was to compensate him for the money he was "expending" in relation to the claim brought by Jiayi, including on legal fees.⁴¹² The basis of this assertion is not explained. Mr Liu appears to be suggesting that Mr Lam transferred him funds as an unprompted act of goodwill. This account should be rejected because:

- (a) it is inconsistent with the documentary evidence that BS Tech made its payments totalling SGD 400,000 to Mr Lam commencing with a SGD 100,000 payment on 19 April 2018 (in that Mr Liu says he received the funds "around the end of 2017");

- (b) it is inconsistent with the documentary evidence that Mr Lam paid Huge Fairway SGD 200,000, not SGD 100,000; and
 - (c) it is implausible that the payment (whether SGD 100,00 or SGD 200,000) was to compensate for payment of legal fees, when it is not suggested Mr Lam had any knowledge of the details of those fees, or even the amounts charged."
1. To commence the discussion of this contention I will briefly recap the relevant factual background.
 1. in the beginning of 2014, the defendant met Mr Lai from CAN, being a subsidiary of Much Rise, having been introduced by two of his business associates, Albert and Gami;
 2. CAN told the defendant that it needed EUR 10 million to buy land for a larger factory and as a second stage, EUR 40 million Euro to build a production facility;
 3. in exchange for the defendant assisting with obtaining finance, Mr Lai would give the defendant a 10% share in the business. This involved the entry into a joint venture agreement, under which Millennium was given 10% of the shares in a CAN entity. The plaintiff was not a party to the joint venture agreement and it did not confer any benefit on him. Nor did the plaintiff hold any shares in Millennium;
 4. the defendant needed to raise money in relation to the CAN deal (being EUR 10 million);
 5. two business associates of the defendant, being Albert and Gami, suggested that the defendant contact BS Tech. The defendant was told by Albert and Gami that:
 1. BS Tech would charge a fee of 4% per annum to introduce a bank lender to provide a facility in the amount of EUR 10 million (being a fee of EUR 400,000); and
 2. "Jiaso" (a Malaysian industrial company) would provide assets as security to BS Tech (although it is unclear why BS Tech would need security given its role was to introduce a lender which would advance the funds) and would charge EUR 190,000 or 1.9% of face value;
 1. BS Tech was engaged but did not produce the funds required which were borrowed from Jiayi. They were sued by the defendant and the defendant recovered SGD 400,000; and
 2. the defendant transferred SGD 200,000 to Huge Fairway via three payments (on 28 May, 29 June and 3 August 2018).
 1. There are a number of flaws in the proposition advanced by the defendant that the payment of monies to Huge Fairway in this fashion illustrated the existence of a partnership between the plaintiff and the defendant for the following reasons:

1. Whilst the plaintiff denied the conversation, the defendant stated in the first defendant affidavit that the money "received from Singapore would be used 50/50". It was also stated that half would cover "the legal fees for Singapore" and "the other half would go to pay the Jiayi debt". This was demonstrative of the defendant being a debtor under the Jiayi Loan Agreement. It was certainly not consistent with a division of money between the parties.
2. Counsel for the plaintiff was correct to submit that, whatever other limitations there may be with that evidence, it is not demonstrative of a partnership. In other words, on that account, the plaintiff intended to use the money in part to pay his own legal fees and to pay off his debt under the Jiayi Loan Agreement.
3. My conclusion in this respect is that the defendant has not established on the evidence that the plaintiff and the defendant were in partnership in relation to the Jiayi Loan Agreement. Furthermore, I have concluded that no funds arising from the Tianhe deal (or for that matter any alleged partnership funds) were used to repay Jiayi.
1. In addition to the conclusions above, I accept the plaintiff's submissions that the evidence does not support existence of a partnership according to New South Wales law (having found it unnecessary to decide the question of whether the laws of China are the same as the laws of New South Wales) because:
 1. there is no documentary record whatsoever recording the terms of the partnership agreement;
 2. I have not accepted the defendant's evidence as to the alleged conversations concerning the terms;
 3. The defendant gave evidence in China which is fundamentally inconsistent with the existence of a partnership, being evidence which the defendant accepted was largely true in these proceedings (as I have described above); and
 4. the alleged partnership as to the Jiayi deal was to be conducted through Millennium and the defendant never fulfilled his obligation under that supposed agreement to transfer 50% of the shares in Millennium to the plaintiff.

No Tianhe Venture partnership

1. I nextly propose to deal with the question of whether there was a partnership between the plaintiff and the defendant in relation to the Tianhe Venture.
2. This issue was raised as a defence. It is a flawed defence because I will find against the existence of a partnership in this respect and also contrary to the defendant's factual contentions underpinning claims in this respect. There are other flaws in this aspect of the defendant's case which I will discuss below.

3. I will turn firstly to the consideration of whether there was a partnership between the plaintiff and the defendant in relation to the Tianhe deal.
4. In my view, there is cogent reasons why a partnership of this character was not formed for the following reasons:
 1. the Tianhe deal was, in substance, a single referral which does not constitute the "carrying on of a business" or possess the quality of something of a permanent character": Hope at 582; (Mason J); Forbes at [78] (Crennan J); although, see United Dominions at 15 where Dawson J suggested that the emphasis which will be placed on continuity "may not be heavy";
 2. Mr Cheng was in the same position as the plaintiff and the defendant in relation to the Tianhe deal. There is no proper basis upon which the Court may conclude that a partnership arose between the plaintiff and the defendant, but not between the plaintiff, the defendant and Mr Cheng; and
 3. the Tianhe deal is consistent with the plaintiff's evidence that from time to time he and the defendant would refer opportunities and business contacts to each other with the expectation of a financial reward. The Tianhe deal was offered to the plaintiff. What followed was the defendant being asked to help the plaintiff locate someone who could assist by doing the necessary auditing work. The defendant did just that when he identified and introduced Mr Cheng to the deal.
1. In any event, the defendant has not established on the evidence that the defendant has received less than his full entitlement to the fees paid by Tianhe. That conclusion proceeds from the findings that I have made that the plaintiff received from Tianhe RMB 6.5 million (and not an additional RMB 7 million) and by reference to the totality of the so-called partnership accounts of which there is no evidence and by reference to the actual payments made by the plaintiff to the defendant. That assessment proceeds on the basis that it is relevant to the plaintiff's entitlement to recover damages under the Agreement that a partnership was formed between himself and the defendant in relation to the Tianhe Venture. The further issues arising in this respect will be dealt with later in this judgment in considering whether there was a set-off or a repayment.

Conclusion

1. It follows in answer to issue 4 is that the plaintiff did not hold any monies for any partnership with the defendant. It also follows that for the purposes of issue five that given there was no partnership between the plaintiff and the defendant, no partnerships were used to repay Jiayi.

WHETHER THE AGREEMENT WAS INTENDED TO CREATE ENFORCEABLE LEGAL RELATIONS

1. As stated in Heydon on Contract (at [4.20]), the "rule protects a promise who reasonably relied on the apparent intention inherent in the promise from the risk that the promisor can escape liability by relying on an uncommunicated intention not to be bound".
2. The inquiry may take account of: (i) the subject-matter of the agreement; (ii) the status of the parties to it; (iii) the parties' relationship to one another; and (iv) other surrounding circumstances: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [25] (Gaudron, McHugh, Hayne and Callinan JJ) ("*Ermogenous*").
3. In determining the issue of whether there was an intention to create legal relations, what is required is an objective assessment of the state of affairs between the parties as distinct from the identification of any subjective reservation or intention and it does not involve a search for the uncommunicated subjective motives or intentions of the parties: *Ermogenous* at [25]. The "intention" in this context concerns what would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements or actions happened.
4. In addition to their pre-contractual conduct, the parties' subsequent conduct is relevant and admissible on the question of whether they intended to form a legally binding agreement: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [25] (Heydon JA); *Sagacious Procurement Pty Ltd v Symbion Health Ltd* (formerly *Mayne Group Ltd*) [2008] NSWCA 149 at [99]-[105] (Giles JA, with whom Hodgson JA and Campbell JA agreed).
5. There was an issue between the parties as to onus and whether any presumptions operated upon the determination of whether there was an intention to create enforceable legal obligations by the making of the Agreement. In particular, the question was raised as to whether there is a presumption that, in commercial transactions, there is an intention to create legal relations, and, the onus of proving the absence of such intention, rests with the party who asserts that no legal effect is intended ("the presumption"). The conclusion I will reach in that respect is ultimately in conformity with the judgment of Chen J in *OLI 1 Pty Ltd (in liq) v OLG 1 Pty Ltd (No 2)* [2022] NSWSC 1199 at [49], namely, the legal onus of establishing the existence of establishing an agreement and the intention to create legal relations remains with the party asserting it.
6. Central to the debate about this question was the judgment of the majority in *Ermogenous* and, in particular, whether that judgment should be confined to the specific facts of that case or have general application.
7. Before turning to the relevant passages of the judgment of the majority, reference should be made to the decision of the Full Federal Court in *Shahid v Australasian College of Dermatologists* [2008] FCAFC 72; (2008) 168 FCR 46 ("*Shahid*"). In that matter, the parties

proceeded on the basis that no presumption would operate vis-à-vis commercial agreements. Jessup J proceeded on the basis that the matter should be determined in accordance with the agreed position of the parties vis-à-vis the presumption, but stated (at [211]), in obiter, that it should not be assumed that he accepted the correctness of that position, but rather:

1. the principle for which *Edwards v Skyways Ltd* (*Edwards*) [1964] 1 WLR 349 ("Edwards") stands (i.e. that, in a business context, and where the requirements of a contract are otherwise established, the person proposing that the parties did not intend to create legal relations bears the onus of so proving) has stood the test of time;
2. the principle in *Edwards* is consistently referred to in the standard texts on contract law;
3. the principle has the authority of the English Court of Appeal (see *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239); and
4. his Honour would pause before regarding it as self-evident that in *Ermogenous* – a proceeding concerned not with business affairs but with the engagement of a member of the clergy – the High Court had, without reference either to *Edwards* or to the cases dealing with commercial situations, dispensed with the presumption.

1. In *Edwards*, Megaw J stated at [355] as follows:

"Scrutton L.J. expressed it thus, in *Rose and Frank Co. v. J. R. Crompton & Bros. Ltd.* [7]:

"Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention."

In the same case, Atkin L.J. said [8]:

"To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour v. Balfour*. [9] If the intention may be negatived impliedly it may be negatived expressly."

In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds — an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."

1. I also mention, the judgment of Young CJ at Equity in *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235; (2005) 12 BPR 23,021 at [48] who referred favourably to the existence of the presumption arising in commercial contracts, but did not refer to, or engage with, the majority observations in *Ermogenous*.
2. The relevant passages of the judgment of the majority in *Ermogenous* in this context [25] and [26] were in the following terms:

[25] Because the inquiry about this last aspect may take account of the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.

[26] In this context of intention to create legal relations there is frequent reference to "presumptions". It is said that it may be presumed that there are some "family arrangements" which are not intended to give rise to legal obligations and it was said in this case that it should not be presumed that there was an intention to create legal relations because it was a matter concerning the engagement of a minister of religion. For our part, we doubt the utility of using the language of presumptions in this context. At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof. In this case, where issue was joined about the existence of a legally binding contract between the parties, there could be no doubt that it was for the appellant to demonstrate that there was such a contract. Reference to presumptions may serve only to distract attention from that more basic and important proposition."

1. I agree with the submission advanced by Mr Smith of counsel for the defendant that those passages of Ermogenous suggest that the principles stated by the High Court were not intended to be confined to the particular circumstances of the engagement of a member of the Clergy but also extended to proceedings of a commercial character, that is, proceedings concerning business affairs.
2. At [25], the High Court indicated that the nature of the inquiry into whether there was an intention to create legal relations was such that there was an "obvious difficulty in formulating rules intending to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist". The Court stated that it would be "wrong to do so".
3. Having identified classes of cases where presumptions would not ordinarily arise in [26], the Court went beyond the illustrations given such as family arrangements or the engagement of a Minister of religion, to doubt "the utility of using the language of presumptions in this context". The context referred to by the Court was not the immediate examples referred to but the broader context. This is illustrated by the final sentence of [26]: "reference to presumptions may serve only to distract attention from that more basic and important proposition", namely, the question of which party bears the onus of proof, and, where an issue has been joined about the existence of a legally binding contract between the parties, the party asserting the existence of the contract has the relevant onus.
4. I will apply these principles below to the parties' submissions in this area but in doing so note that many of the issues raised in the respective cases have already been dealt with at length earlier in this judgment. I do not intend to repeat the earlier analysis but will refer succinctly to the implications of those earlier findings in the present context.
5. The defendant contended that the Agreement was not intended to create enforceable legal obligations and was executed solely for the purpose of delaying or preventing enforcement of the judgment sum by the Chinese Courts.
6. The submissions of the defendant in relation to this issue was significantly interlaced with submissions on the question of partnership such that it was submitted that the existence of a partnership would inevitably result in a finding that in entering into the Agreement there could not have been an intention to create legal relations. In other words, the two propositions could not stand together.
7. That contention must be correct. However, I have found against the existence of a partnership between the plaintiff and defendant in the various partnership arrangements sought to be established by the defendant and hence that incompatibility cannot arise in the present case. That consideration does not result in a purely neutral consideration. One of the objective circumstances that must be taken into account in considering whether there was an intention to create legal relations is that there was no partnership and there was no profit sharing arrangement in the respective arrangements reached between the parties.

8. A further aspect of the defendant's contentions in this respect was that it was not the intention of the defendant to carry a responsibility for more than half of the Judgment Debt (presumably again a reference to partnership arrangements) and that he signed the Agreement for reasons other than the creation of a legal relationship including:
 1. the arrangement was developed as a deception in order to buy time for the plaintiff to deal with the enforcement action;
 2. this was done because the plaintiff was unable to retrieve monies from his defacto partner Ms Meng and his brother;
 3. the agreement was to construct "an edifice of consideration, formality and deliberate entry into [the Agreement] by [the plaintiff] which bespeaks a willingness to give fabricated evidence, conscious [the Agreement] was vulnerable to attack; and the plaintiff's desire to give false evidence to defend its integrity".
1. Plainly that summary of the defendant's contentions sits ill with a great many of the findings and conclusions that have already been reached in this judgment. I do not propose to repeat all of those conclusions but would provide some particular examples before I turn to the factors which additionally strongly indicate why there was an intention to create legal relations in the making of the Agreement.
2. Lying at the heart of the contentions advanced by the defendant in this respect was, in essence, that the plaintiff and the defendant conspired to give false evidence in the Chinese Court Proceedings. I have ultimately found, to the contrary, namely, that the truth lay in the evidence given by the defendant in the Chinese Court Proceedings. This is so much so that the defendant in these proceedings, when pressed in cross-examination, ultimately confirmed much of the evidence that he gave in the Chinese Court Proceedings as well as the Chinese Court Proceedings Affidavit (and related documents in preparation for the making of that affidavit and the giving of the defendant's evidence).
3. In that light, I will briefly attend upon some of the matters raised by the defendant as follows:
 1. In its proper form, the 6 March 2018 WeChat message does not sustain, the defendant's contentions in this respect for reasons given earlier.
 2. I have rejected the defendant's evidence as to statements attributed to the plaintiff in late March and early April 2018 in which the plaintiff was said to have communicated to the defendant that he needs the Agreement to "buy time" and the Agreement needed to be in a form that "looks to be binding". I have also rejected the defendant's account of a conversation on 27 March 2018 in which he suggested the plaintiff had used the same expression that he needed the Agreement to buy time from the Court. For completeness, I note that I have also rejected a similar account given by the defendant as to the defendant referring to 'buying time' sometime prior to the Appeal Proceedings.

3. Having rejected the defendant's version of those various conversations, I further note that, even if it was to be found the conversations occurred, I agree with the submission of the plaintiff that they are not inconsistent with there being a binding agreement. In other words, the conversation would demonstrate that the plaintiff and the defendant intended that the binding agreement be presented to a Court or a Public Official in China to assist the plaintiff in relation to enforcement proceedings.
4. Rather than the 8 March 2018 WeChat message from Ms Meng illustrating a pattern of deception by the plaintiff and the defendant (and I have found it did not), I agree with the submission of the plaintiff it has had the opposite import, namely, it is powerful evidence that the defendant would simply ignore any suggestion to be dishonest and gave his own evidence to the contrary.
5. As to the defendant's submissions as to inappropriate conduct by the plaintiff's lawyers or their collusion in the deception said to be perpetrated by the plaintiff and the defendant, I have earlier rejected all of the defendant's contentions in that respect including, in this part of the defendant's submissions, the reliance on the report written by those lawyer's immediately after the hearing in the Appeal Proceedings.
6. Whilst I have found parts of the plaintiff's evidence as to the circumstances of the signing of the Agreement to be unsatisfactory, I have nonetheless found that the Agreement was executed by the defendant using his English signature (forwarded on 9 May 2018) and his Simplified Chinese signature which he affixed to the Agreement at a face-to-face meeting with the plaintiff in Shenzhen on 14 May 2018 in broad consistency with the plaintiff's evidence. I have also found, if that conclusion be found to be incorrect, that the exchanges between the plaintiff and the defendant on 8 and 9 May 2018 constituted offer and acceptance of a contract being the Agreement.
7. Nextly, as to the terms of the Agreement, as I have discussed, the document which constituted the Agreement was exchanged between the plaintiff and the defendant for the defendant's consideration. The fact that the Agreement provides to the defendant until 31 December 2018 to pay the Judgment Debt may be consistent with the purpose of showing the Chinese Court that the earliest time the plaintiff could obtain payment was 31 December 2018. But it is also consistent with a bona fide arrangement consistent with the financial capacity of the defendant. It is certainly not inconsistent with the notion of there being a binding agreement that the terms would be delayed. Nor, as I have mentioned is the fact of the Agreement acting as a break on Enforcement Proceedings necessarily inconsistent with there being a binding agreement.
8. The defendant made the following submissions (I note that part of [234] has been earlier extracted in this judgment):

"234. A further indication that the Agreement Sued Upon was not intended to be binding is that the land of Mr Lam said to be "pledged" as security is almost entirely left blank, other than latitude and longitude co-ordinates which are meaningless to support any attempt at

identification and enforcement.³⁰⁴ While there was provision for the parties to attend to the mortgage of the land, no steps were taken to mortgage the land, with no follow up or complaint by Mr Liu. Further the Agreement Sued Upon declared that it "is written in Chinese and English" with the English version to prevail in event of inconsistency.³⁰⁵ There is no suggestion in any evidence that there was ever an English version. There could be no reason to show a Chinese court a translation into English. The translation into English would be immaterial to a Chinese court. Although his lawyer suggested to Mr Liu he obtain Australian legal advice, Mr Liu did not do that.

235. The related curiosity if the Agreement Sued Upon was intended to be binding is that there was not a final version of the agreement with all of the blanks filled out, including the title details of the mortgaged land, or an English version brought into existence, or that final English version being signed by the parties."

1. It will be recalled that the defendant previously submitted that the omission of references to land as security in the case advanced to the Chinese Courts including the evidence of the defendant and Ms Meng was fake and a fabrication to create a defence in the Chinese proceedings. This was said to be illustrated by the absence of land in the Jiayi Loan Agreement. I have earlier rejected that contention.
2. As previously mentioned, it was not suggested by the defendant that the blank spaces for land and security in the Jiayi Loan Agreement meant that there was an absence of an intention to create legal relations as is put with respect to the Agreement. Notwithstanding the Agreement, as stated in the recital, has a direct relationship to the Jiayi Loan Agreement and the security which, in the case of the Agreement, is in the interest of the plaintiff (cl V).
3. It is true that the Agreement only refers to latitude and longitude co-ordinates which would insufficiently support identification and enforcement, but there is a provision to mortgage the land in Australia said to be held by the defendant. The defendant says there was no such land (without proof of the same), but it may readily be inferred that the land referred to in the Agreement was the land referred to in the defendant's evidence in the Chinese Proceedings. I have found that the parties had a genuine belief as to the evidence of that land.
4. Whilst the absence of details of security in the Agreement is a relevant consideration as to the intention to create legal relations, it does not, in these circumstances, and when taken with the other factors I have and will discuss, warrant a conclusion that there was an absence of an intention to create legal relations in forming the Agreement. The absence of proof of an English Version of the Agreement cannot, in my view, indicate a lack intention to create legal relations, particularly noting that the plaintiff did seek the advice of lawyers in China who did, in turn, suggest he obtain advice from an Australian lawyer. He did not do so, but the Chinese Lawyers conceded it to be a prudent step in view of the terms of the Agreement.

5. The defendant also placed some reliance on communications made between the defendant and the plaintiff between July 2018 and December 2018. It is contended that, in those messages, they discuss how the Judgment Debt can be satisfied and, in the course of doing so, the plaintiff forwarded a privileged communication from his lawyers to the defendant. These communications were said to create, together with pre-contractual conduct (which I have rejected) a compelling inference that the agreement was not intended to give rise to legally binding obligations but was directed to prevent enforcement action against the plaintiff. I deal with those conclusions next.
6. I do not consider that the message from the plaintiff to the defendant on 13 June and 3 July 2018 offers any real support to the above contentions where reference is made to the attendance of the Court to effect enforcement or the establishment of a repayment schedule. The reference to the word "we" contained in the message of 24 June 2018 does not, in my view, permit a conclusion that the plaintiff regarded the Judgment Debt as a "joint obligation". The fact that the Judgment Debt may be seen as a joint problem, in the sense that it affected both parties, is hardly surprising as this is the very issue that the Agreement was intended to address, namely, to indemnify the plaintiff having regard to the circumstances in which the Jiayi Loan Agreement was entered into by the parties. I also consider that the reliance on the language used in this respect is somewhat strained. One matter omitted by the defendant in this respect is the reference to communications on 20 December 2018 by the plaintiff threatening to sue the defendant. I reject that the defendant's account of a conversation in which he queried why there is a threat to sue, and a statement attributed to the plaintiff that he needed to show the Court that he was taking this action to buy more time. That evidence is implausible. In my view, the true position is that the plaintiff was seeking to enforce the defendant's obligations under the Agreement.
1. Having dealt with those arguments by the defendant adversely to the proposition sought to be advanced by the defendant, I propose to touch briefly upon the 16 factors relied upon by the counsel for the plaintiff which, at least in combination, provide substantial objective circumstances that the parties had an intention to create legal relations when they executed the Agreement. I deal with the factors relied upon by the plaintiff below with an avoidance of the repetition of analysis and conclusions that I have earlier made.
2. First, there was no dispute between the parties that the plaintiff and the defendant both intended that the Agreement would be provided to a Chinese court or public official to assist the plaintiff in relation to the proceedings brought by Jiayi.
3. The plaintiff contended that the Court would infer that the parties did not intend to defraud a Chinese court or public official, particularly in circumstances where there is no pleading of fraud in this case. I accept that submission although, in any event, I have earlier found on the evidence that there was not an intention to defraud the Chinese Court and the defendant gave truthful evidence before that Court.

4. As I have mentioned earlier, the use of the Agreement to assist the plaintiff in the proceedings brought by Jiayi is not inconsistent with the Agreement also creating binding rights and obligations as between the plaintiff and the defendant. The Agreement would also satisfy the Chinese Court it was not necessary to seize and sell the plaintiff's assets to pay the Judgment Debt.
5. Secondly, the Jiayi Loan Agreement did not refer to the plaintiff as a joint borrower but rather as a guarantor. The circumstances in which that guarantee arrangement was entered into, as I have described, did not envisage joint obligations.
6. Thirdly, the plaintiff engaged lawyers in China to prepare the Agreement. This is a clear indication that the parties intended the Agreement to be of operative legal effect. I have earlier rejected the defendant's contentions that the behaviour of the defendant's lawyers was either inappropriate or would serve to confirm that the Agreement was a mere artefact with no legal effect.
7. Fourthly, as was discussed in relation to the previous factor, the manner in which instructions were given to the plaintiff's lawyers who prepared the Agreement, and the advice provided by the lawyers, was also strongly indicative of the Agreement being a document which was intended to have legal effect.
8. Fifthly, the WeChat messages sent between the plaintiff and Mr Wang on 14 and 24 April 2018 disclose, as the plaintiff submitted, a genuine interest concerning how and when the Agreement will become binding and where it can be enforced.
9. The 27 April 2018 WeChat Message is, in my view, and having regard to my earlier findings in this respect, inconsistent with the notion that the Agreement was not intended to have legal effect given it communicated to the defendant a suggestion by the plaintiff's lawyer that Australian legal advice be obtained and asked the defendant to examine the document to see if there are any problems.
10. Sixthly, I have found that the 26 September 2015 email is not a fabrication at the hands of the plaintiff and, in all likelihood, it was prepared by the defendant. As it predates the commencement of the Lower Court proceedings, it cannot be said to be prepared to assist the plaintiff in perpetrating a fraud in his defence of the Lower Court Proceedings.
11. Nextly, the 29 November 2016 email, the 6 December 2016 email and the Chinese Court Proceedings affidavit are each inconsistent with the existence of partnership and consistent with the plaintiff's account that he was a mere guarantor at the request of Jiayi (this corresponds to the plaintiff's contentions 7-9).
12. As to the plaintiff's submissions 10 and 11, I have earlier discussed the 8 March and 9 March 2018 WeChat messages and their connection to the plaintiff and defendant entering into a contract in terms of the Agreement.

13. Similarly, I have discussed the significance of the defendant's evidence in the Appeal Proceedings and the admission in cross-examination as to the truth of significant portions of that evidence.
14. I have referred to evidence of the plaintiff as to a conversation between the defendant and Mr Yuan in March or early April 2018. That conversation is consistent with the parties' entry into a binding agreement. Even if the substance of the evidence of the defendant as to the conversation were accepted, save for the reference to the Agreement being made to look like it was binding (which I have rejected) the conversation was not inconsistent with there being a binding agreement. In fact, the evidence demonstrates that the parties intended the Agreement to be binding including that the Agreement would be provided to a Chinese Court (this corresponds to factor 13 in the plaintiff's contentions). I have earlier rejected the defendant's accounts of conversations with the plaintiff concerning 'buying time' (see the plaintiff's contention 14).
15. After the People's Court of Tianjin Binhai New Area issued a Notice of Concluding a Case on 24 January 2019 (after payment of RMB 9,469,485.52), the plaintiff pursued the defendant at least twice, in writing, seeking payment under the Agreement. This is a relevant factor in demonstrating the parties had intended to create legal relations.
16. I mention two further considerations in this respect.
17. First, the plaintiff sent a WeChat message to the defendant on 15 February 2019 stating "Can you repay a part of the money?". When asked about this in cross-examination, the defendant: (i) contended that this message was a reference to a "Singapore process", and (ii) that the plaintiff had not expended any money on this Singapore process. However, it makes little sense to request that the defendant "repay" money if the plaintiff had not expended money. This reference is plainly a reference to the defendant's obligations under the Agreement.
18. Secondly, the plaintiff sent a WeChat message to the defendant on 23 August 2018 asking him to "return some money to me" as he was in "urgent need" after having to mortgage his house to the bank and sell his car to pay the judgment sum. In relation to that document, the following important exchange occurred in cross-examination:

"Q. The reason he's asking you to return money to him is he's talking about paying him under the agreement that we sue on, isn't he?

A. Yes."

1. This is a frank concession by the defendant that the plaintiff was asking for payment to be made under the Agreement, with the necessary corollary that the Agreement had operative effect.

Conclusion: Intention to create legal relations

1. The evidence, including the objective circumstances to which I have referred, results in the conclusion that the plaintiff and the defendant intended to affect legal relations when entering into the Agreement. The Agreement was also used by the plaintiff to assist him in delaying the enforcement of the Judgment Debt, but that fact is not inconsistent, in all the circumstances, with the Agreement also having legal effect as between the plaintiff and the defendant.
2. Issue 2 should be answered that the Agreement was intended to give rise to enforceable legal obligations.

ALLEGATIONS OF TRUST AND FIDUCIARY RELATIONSHIPS

1. In the FAD the defendant makes various pleadings under the heading "Plaintiff holds monies for the Partnership or the Defendant – Tianhe Payments".
2. The pleadings under that heading were as follows:
 28. In and about early September 2015, a payment of RMB \$7,000,000 was made by Tianhe to the Plaintiff arising from the Tianhe Venture for the benefit of the Plaintiff, the Defendant and Bowie Cheng in equal shares (the Tianhe 7 million tranche).
 29. The Plaintiff has paid to the Defendant two payments from or in respect of the Tianhe 7 million tranche, by or through the account of Huge Fairway Trading Limited (Huge Fairway) being:
 - (a) HK\$780,000 on or about 6 October 2015; and
 - (b) HK\$420,000 on or about 8 October 2015.
 30. Between September and December 2015 the Plaintiff paid the Lender RMB\$1,000,000 from or in respect of the Tianhe 7 million tranche.
 31. During the period On or about 22 March 2016 to 25 May 2016, a payments totalling of RMB\$6,500,000,5,000,000 were was made by Tianhe arising from the Tianhe Venture for the benefit of the Plaintiff, the Defendant and Bowie Cheng in equal shares (the Tianhe 6.55 million tranche).
 32. The Tianhe 6.55 million tranche was paid by Tianhe to the Plaintiff for the benefit of the Plaintiff, the Defendant and Bowie Cheng.
 33. On or about 6 April 2016, the Plaintiff paid the Defendant HK\$702,987 from the Tianhe 6.55 million tranche.
 34. On or about 2 August 2016 Tianhe made a payment of RMB\$1,500,000 arising from the Tianhe Venture, for the benefit of the Plaintiff, the Defendant and Bowie Cheng in equal shares (the Tianhe 1.5 million tranche).

35. On or about 11 August 2016 the Plaintiff paid to the Defendant HK\$341,490 in respect of the Tianhe 1.5 million tranche, by and through the account of Huge Fairway.
36. By reason of the matters set out in paragraphs 28, 31 and 34 the Plaintiff has already received RMB\$10,000,000,9,000,000 of Partnership funds, arising from the Tianhe Venture, or alternatively received RMB\$5,000,000,4,500,000 on trust for the Defendant;
37. To the extent the DefendantPlaintiff has used Partnership funds to repay monies to the Lender, then such repayment is:
 - (a) a partial payment in satisfaction of the Agreement, or alternatively
 - (b) in equity to be set off against the Plaintiff's claim in these proceedings;
38. To the extent the DefendantPlaintiff has not used Partnership funds received from the Tianhe Venture to repay the Lender and has not paid to the Defendant the portion of those funds to which the Defendant is entitled under the Partnership then the Plaintiff is in breach of the term of the Partnership Agreement pleaded in paragraph 3(e) (ii) above and his fiduciary dutiesduty to account to the Defendant for Partnership dealings and transactions and:
 - (a) the Plaintiff's liability to the Defendant for those breaches is in equity to be set off against the Plaintiff's claim in these proceedings; and
 - (b) the Plaintiff's claim cannot proceed without recognising the Plaintiff's fiduciary duty to account to the Defendant.
1. Those pleadings proceeded on the basis of the well-established principles advanced by the defendant which form the basis of what appears below.
2. I have earlier referred to the fiduciary obligations of partners.
3. The plaintiff is correct to submit that there is a singular reference to a "trust" in par [36] of the pleadings and neither the circumstances said to give rise to the trust nor the species of trust is articulated. There was not articulated, with any greater precision the nature of any trust in the opening or closing submissions of the defendant.
4. A further difficulty with the pleadings is an absence of articulation of what constitutes the fiduciary duty owed by the plaintiff in par [38] of the pleadings or what is said to give rise to a duty to account. There is no articulation of the facts and circumstances relied on to assert the existence of the relationship nor the scope of the duty, other than a general reference in opening to it arising by reason of the partnership. As stated by Ward CJ in *Eq in Galati v Deans* (No 2) (2018) 133 ACSR 516; [2018] NSWSC 1813 at [93], "[t]he nature and scope of the alleged fiduciary duties need to be clearly articulated and there should be clarity as to what fiduciary duty is alleged to have been breached and by whom".

5. I agree with the submissions of the plaintiff that these issues, which were raised by the plaintiff, are not idle pleading points. If it is said that the trust and fiduciary duties arise out of the partnership relationship, which certainly appears to be the case with respect to the fiduciary allegation, then two questions immediately arise for consideration:
 1. whether the Court would presume that, in conformity with New South Wales law, under Chinese law, partners owe each other fiduciary and trust like duties; and
 2. whether, on the findings made by the Court, any fiduciary duty may be found as arising out of a partnership.
1. It is apparent from the submissions of Mr Smith in closing oral submissions that the claim based on a fiduciary duty arises solely out of a reliance upon the existence of a partnership. It was submitted that the relationship of cooperation and sharing of profit and risk (and liability) give rise to the existence of a partnership (based on the very simple sense of an agreement between two persons to share revenues and liabilities).
2. I have found there is no partnership arising in relation to the Jiayi Loan Agreement or the Tianhe Venture. Before proceeding to the first question mentioned above, it should also be mentioned that I have rejected many of the propositions upon which the aforementioned pleadings are based. The pleading in par [36] of the FAD proceeds upon the basis that the plaintiff was in receipt of RMB 7 million in and or about early September 2015 from the Tianhe Venture.
3. I have earlier found it unnecessary to resolve the question as to whether the defendant has proven, as a matter of evidence, the content of Chinese partnership law for the purposes of determining the contentions as to the existence of partnerships in relation to the Jiayi Loan Agreement and Tianhe Venture.
4. To briefly recap, the plaintiff contended that there had been no evidence adduced by the defendant concerning the content of Chinese partnership law and accordingly the defendant must necessarily attempt to rely on the presumption that the law of partnership in China is the same as the law of the *lex fori* (being New South Wales) to fill this evidentiary lacuna.
5. It was in that context that submissions were made regarding *Damberg v Damberg* (2001) 52 NSWLR 492; [2001] NSWCA 87 ("Damberg").
6. The defendant had submitted that the Court should reject the plaintiff's contention that the presumption should apply and had sought to distinguish the judgment in *Damberg* in the case of the issues regarding partnership. The following submissions were made in that respect:

1. In Damberg, the presumption was, in fact, applied in relation to the law of resulting trusts and presumption of advancement in Germany (see [161]). This would have resulted in the husband and father in a family law dispute retaining six properties which he had transferred to his children in Germany (see [12]-[27]). The husband's children then submitted that the resulting trusts should not be recognised because the properties were transferred into the children's names by the husband for the illegal purpose of avoiding German capital gains tax.
 2. It was in respect of this latter issue only that Heydon JA (at [162]) refused to apply the presumption. The factors his Honour relied on in declining to apply the presumption, were: (i) German capital gains tax law must be statutory; (ii) German law is not a common-law based system; (iii) the children were asserting that the husband's conduct was criminal and fraudulent, which depended on the specific terms of the legislation; (iv) German tax law was likely to have special machinery and highly individual provisions; and (v) "Taxation law cannot be assumed to be a field resting on great and broad legal principles likely to be a part of any given legal system".
 3. Apart from the fact that Chinese law is not a common-law based system, none of these factors applies in the present case. There is no reason to think that Chinese partnership law is necessarily statutory. Even if it was, the defendant was not seeking to rely on specific, idiosyncratic aspects of it, only the existence of a commercial agreement for the joint sharing of profits and liabilities in relation to business ventures. That Chinese law recognised such a concept was not seriously open to doubt; indeed, these aspects of partnership law were very much a field resting on broad legal principles likely to be part of any legal system. The defendant is also not making serious allegations of wrongdoing by reference to the law he invokes. The attempt to liken this case to the outcome in Damberg is inapt.
1. It should be noted that the defendant also made the following submissions:

"Secondly, the mere fact that the foreign legal system is not common-law based is not itself a reason for the presumption to be inapplicable: In the matter of Blackmores Limited [2023] FCA 624 at [20] (in which Jackman J applied the presumption in relation to the indoor management rule and Japanese law); CC/Devas (Mauritius) Ltd v Republic of India (No 2) [2023] FCA 527 at [34] (in which Jackman J applied the presumption in relation to the Dutch law of assignability of property); Nygh's Conflict of Laws in Australia (LexisNexis, 10th edition, 2019) at [17.37]."
 1. In the present context, the defendant accepted that he relied upon particular aspects of partnership law involving the existence of fiduciary obligations and the obligation to account, but submitted the presumption should nonetheless be applied "because those concepts are matters likely to find reflection in any legal system". The conclusions of Heydon J in Damberg refusing to apply the presumption focused, inter alia, upon the children asserting that the husband's conduct was criminal and fraudulent which depended upon specific terms of the legislation.

2. Here, it was submitted, reliance was placed upon two people sharing profits and revenues and, to the extent monies were received as part of that venture, they needed to be accounted for to the other party as a fiduciary obligation of partners.
3. What is clear from the judgment of Heydon J in *Damberg* is that courts have been reluctant to state exhaustively when they will assume that the unproved provisions of foreign law are identical with those of the *lex fori* (see *Damberg* at 162).
4. Whilst it is unnecessary to determine the question, I have significant reservations about applying the presumption in the present case. There are some real difficulties in presuming that the fiduciary duties owed between partners are the same in China as Australia when China is not a common law jurisdiction and part of those obligations arise under statute law in New South Wales pursuant to the Partnership Act.
5. I have less reluctance in respect of a duty to account. Whilst it is a duty arising in equity which attaches specific criteria, it is not inconceivable that the law in China in relation to commercial transactions would not apply common law principles and, as the defendant correctly submitted, the fact a foreign legal system is not common law based is not alone a reason for the presumption to be found to be inapplicable, in that context.
6. Putting aside the question of presumption, I do not consider that the defendant has established a breach of any fiduciary duty or trustee duty because no *Jiayi* or *Tianhe* partnership has been found. In any event, any alleged breach is not a defence to a contractual claim under the Agreement which does not concern a partnership.

EQUITABLE SET-OFF AND REPAYMENT

1. There was no dispute as to the principles stated by the defendant with respect to this defence.
2. In *HP Mercantile Pty Ltd v Dierickx* (2013) 306 ALR 53; [2013] NSWCA 479, Emmett JA stated (Beazley P and Meagher JA agreeing) at [136]:

"For there to be an equitable set-off, the set-off must essentially be bound up with and go to the root of, challenge, call in question, or impeach the title of the claimant. Equitable set-off is available where the party seeking it can show a recognised equitable ground for being, to the relevant extent, protected from its adversary's demand."

1. Emmett JA then (at [137]) gave three examples of situations in which impeachment will exist: where a mortgage is granted to a solicitor as security for costs and the mortgagor client has a cross-claim against the solicitor for faulty work; where a builder has a claim for money due under a building contract and there is an unliquidated claim against the builder for damages for breach of that contract; and where a lender fails to provide promised further advances for a development project and the borrower is, therefore, unable to complete the project and repay the advances actually made.

2. In *Hawes v Dean* [2014] NSWCA 380, the Court of Appeal (at [63]) endorsed the statement of principle extracted above and said (at [65]):

"In all the hypothetical cases to which Emmett JA referred, two wrongs or defaults are so closely connected that a net position or result ought in equity to prevail between the parties because it would be unconscionable to allow one of them to insist on its legal right without first accommodating the other's countervailing legal right. It is the existence of that unconscionability that causes the first party's claim to be "impeached" (that is, undermined and defeated) by the second party's claim."

1. There must be such a connection between the claim and the cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim: *Forsyth v Gibbs* [2009] 1 Qd R 403; [2008] QCA 103 ("Forsyth") at [10] (Keane JA, McMurdo P and Fraser JA agreeing).
2. One example where equitable set-off may arise is where the defendant's liability under the originating claim arose only because of, or was contributed to by, the originating claimant's breach of duty.
3. Equitable set-off may arise even if the claim relied upon by the party invoking set-off does not arise from the same transaction or same contractual relationship: *Mao v Bao* [2023] NSWCA 278 at [61]-[62], citing *Norman v FEA Plantation Ltd* (2011) 195 FCR 97; [2011] FCAFC 99 at [156] and *Forsyth* at [14]-[15].
4. Finally, equitable set-off has a substantive, not merely procedural, operation: *Miwa Pty Ltd v Siantan Properties Pte Ltd* (2011) 15 BPR 29,545; [2011] NSWCA 297 ("Miwa") at [53]-[56], citing *Roadshow Entertainment v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462 at 481. Thus, "an equitable set-off can be asserted as soon as circumstances subsist which support the equitable set-off, and regardless of whether proceedings have been brought at that time": *Miwa* at [53]. Where equitable set-off is found to have arisen, it substantively extinguishes the plaintiff's claim from the time it arose, which will often be prior to any court proceedings having been commenced. It follows that a defendant need not advance a cross-claim in the proceedings in order to rely on equitable set-off.
5. The starting point of the defendant's submissions is that the Court should apply the presumption of identity of foreign law in relation to the principles of equitable set-off.
6. In summary, the defendant relied upon the following "set-off and related defences" (the contentions below shall be referred to as the first, second, third and fourth contentions respectively):

1. The plaintiff failed to use funds received from Tianhe to pay down the loan under the Jiayi Loan Agreement (both of which were partnership transactions). That failure caused interest to accrue on the Jiayi Loan and Judgment Debt which otherwise would not have been incurred. It was submitted this was a breach of the plaintiff's partnership obligations to the defendant and his liability to account to the defendant must be set off against any entitlement the plaintiff is found to have under the Agreement.
2. To the extent the plaintiff has not repaid the defendant his share of the funds received from Tianhe, that was also a breach of the plaintiff's partnership obligations and his liability to account to the defendant must be set off against any entitlement the plaintiff is found to have under the Agreement.
3. To the extent that the plaintiff has used Tianhe partnership money to pay down the judgment sum he is precluded from suing the defendant for the judgment sum.
4. The defendant paid RMB 300,000 to the Second Intermediate People's Court of Tianjin in satisfaction of the Judgment Debt, which amount must be deducted from the quantum of the plaintiff's claim, if otherwise established.
1. The principal component of the defendant's submissions as to the first contention (with emphasis in *italics*) was as follows:

"398. As to the first ([388(a)], Mr Liu's claim is pursuant to clause 1 of the Agreement Sued Upon, which, on the translation Mr Liu propounds, imposed an obligation on Mr Lam to bear ("it will borne") "the debts assumed by Party B due to the above-mentioned cases" and "paid by Party B [Mr Liu]". Accordingly, Mr Lam's obligation was to indemnify Mr Liu for such amounts that Mr Liu himself was required to pay to satisfy the Judgment Debt.

399. The Judgment Debt itself arose from Mr Liu's liability as guarantor under the Jiayi Agreement. The term of the Jiayi Loan was 15 days, commencing on the day Jiayi advanced the loan funds (clause 2.2). Clause 5.2 provided that if the loan was not repaid upon its maturity, "liquidated damages will be paid to [Jiayi] at a daily interest rate of 0.1% from the date of breach to the date on which the principal, interests and liquidated damages are paid off." Jiayi advanced the loan amount on 5 June 2014. Interest therefore began to run from 20 June 2014 when the loan was not repaid. That interest (along with the obligation to repay the principal) was a partnership liability.
400. The Appeal Court found that as at 4 July 2016, the outstanding amount under the Jiayi Loan was RMB 6,483,333.31.

...

402. Mr Liu's duties as a partner obliged him to use partnership funds to repay partnership liabilities... Again, for the purpose of illustration, if the Court accepts Mr Liu received RMB 7 million on September-October 2015, then by 22 March 2016, he had sufficient partnership funds to do so. His failure to use those funds to repay the Jiayi Loan and thereby stop interest accruing further was a breach of his partnership duties, such that he is liable to Mr Lam for the interest which accrued on the Jiayi Loan amount after 22 March 2016.
403. The "Enforcement Sum" claimed as the total amount paid by Mr Liu to discharge the Judgment Debt is RMB 9,469,485.52. Adopting 4 July 2016 as the date on which the Jiayi Loan should have been repaid (favourably to Mr Liu and for ease of calculation), the failure to use the partnership funds received from Tianhe to do so caused a further RMB 2,986,152.21 in interest and other costs to be incurred.
404. Mr Liu is liable to Mr Lam for breach of his partnership duties for that amount. That amount forms part of the amount now claimed in these proceedings. It only arose because of the plaintiff's breach of duty, which is a recognised category of case in which equitable set-off will arise...Accordingly, if Mr Lam is otherwise found liable under the Agreement Sued Upon, that amount must be set off against Mr Liu's claim, with the result that Mr Lam is only liable for RMB 6,483,333.31, being the amount that was due to Jiayi as at 4 July 2016 (approximately \$1,396,711.63)."
1. The second contention was advanced as an alternative to the first contention. The principal aspect of the submissions were as follows:
- "405. The second ([388(b)]) aspect of Mr Lam's set-off defence is that Mr Liu's failure to pay Mr Lam his full share of the Tianhe funds was also a breach of Mr Liu's partnership duties for which he is liable to Mr Lam and which amount must be set-off against any liability Mr Lam is found to have under the Agreement Sued Upon.
- ...
- ...
408. ... Mr Liu was not entitled to retain partnership funds from Tianhe for his own benefit, and is required to account to Mr Lam for those funds. The amount of Mr Lam's share of the Tianhe funds which he has not been paid is RMB 2,637,068. Interest should run on that amount at Civil Procedure Act 2005 (NSW) rates from 2 August 2016.
409. Once it is accepted that the Jiayi Loan was a partnership transaction, any liability which Mr Lam is found to have under the Agreement Sued Upon arose from, and is necessarily intimately connected with, that partnership dealing. If the Court accepts that the Tianhe venture was also a partnership dealing, the connection between the Jiayi Loan, Mr Lam's liability under the Agreement Sued Upon and the funds received from the Tianhe venture is readily apparent. Otherwise, Mr Liu would succeed on a claim which arose out of a partnership dealing, without accounting to Mr Lam for monies Mr Liu owes pursuant to the very same partnership. That is a situation in which "two wrongs or defaults are so closely

connected that a net position or result ought in equity to prevail between the parties because it would be unconscionable to allow one of them to insist on its legal right without first accommodating the other's countervailing legal right": ... Accordingly, to the extent Mr Lam is found liable under the Agreement Sued Upon, Mr Liu's liability to account to Mr Lam for the RMB 2,637,068 of partnership funds which Mr Lam has retained must be set-off against that liability."

(Emphasis added.)

1. As to the third contention, the defendant submitted as follows:

"410. As submitted at [359] to [366] above, the Court should find that all or a substantial part of the repayment of approximately RMB 4.2 million which Mr Liu made to the Chinese Court on 11 May 2018 was partnership money he received from Tianhe. Mr Lam is entitled to be credited for half the amount of partnership money that was used. This must be set off against any entitlement Mr Liu is found to have under the Agreement Sued Upon."

1. As to the fourth contention, the defendant submitted as follows:

"411. It is an agreed fact that Mr Lam transferred RMB 300,000 to the People's Court of Tianjin Binhai New Area on 9 October 2018, and that this amount was applied in partial satisfaction of the Judgment Debt.

412. Mr Liu's claim is for the "Enforcement Sum", being the total amount required to discharge the Judgment Debt, which Mr Liu alleges he paid in full. It being accepted that Mr Lam paid RMB 300,000 of the Enforcement Sum, this amount must be deducted from Mr Liu's claim, if otherwise established. Any other approach would result in double recovery by Mr Liu."

1. The starting point of the consideration of the defendant's defence requires a review of the aforementioned principles.
2. Equitable set-off is available where the party seeking it can show a recognised equitable ground for being, to the relevant extent, protected from his or her adversary's demand and the mere existence of cross demands is not sufficient. For there to be an equitable set-off, the set-off must essentially be bound up with and go to the root of, challenge, call in question, or "impeach" the "title" of the applicant.
3. The premise of the first contention is that the Jiayi Loan and the Tianhe Venture were or arose out of a partnership. I have rejected that proposition. Indeed, the very consideration of these defences proceeds upon the bases that the Court has found that there was an intention to create legal relations in relation to the Agreement and there was no partnership in respect of the Jiayi Loan Agreement or CAN deal. Similarly, the alternative, second contention faces the same difficulties as it proceeds upon the bases of a partnership with respect to the Jiayi Loan Agreement (as earlier italicised). The alternative contention states on its foundation "once it is accepted that the Jiayi Loan was a partnership transaction".

4. Different issues arose with respect to the third contention. The obligation sued upon in these proceedings arises out of the Agreement. This aspect of the set-off defence proceeds upon the bases that the "repayment" to the Chinese Court "was partnership money [the plaintiff] received from Tianhe. It was pleaded in the FAD ([37]) that the plaintiff had used "Partnership Funds" to repay monies to the Lender [Jiayi] and that such repayments were either a partial payment in satisfaction of the Agreement, or alternatively "in equity to be set-off against the Plaintiff's claims in these proceedings".
5. The repayments relied upon by the defendant do not concern funds from the defendant to the plaintiff but rather funding from, on the defendant's case, Tianhe and the plaintiff. The gravamen is that the plaintiff should have distributed monies received under the Agreement (even if a generous approach were taken to how the parties divided various amounts under the respective transactions).
6. I agree with the submission of the plaintiff that this defence does not go to the root of, challenge, call in question, or "impeach" the "title" of the plaintiff to his contractual damages. The claim is based upon the notion of the plaintiff using partnership funds to pay Jiayi. The obligation sued upon in these proceedings arises out of a different agreement unconnected to any alleged partnership. If the plaintiff were to use partnership funds to pay (contrary to my earlier findings) (being a payment from the plaintiff to Jiayi) this would not constitute a repayment under the Agreement.
7. The position may be different under a cross-claim but none is brought by the defendant.
8. There is no dispute as to the fourth contention provided it is dealt with as a necessary adjustment under the Agreement (reducing the loss) as opposed to a cross-claim.
9. Finally, there is a factual issue undermining the defendant's contentions in this respect.
10. The defendant sought an opportunity to make submissions on the first contention if the Court found an off-set and the Court found that the plaintiff "received a different amount from Tianhe in September – October 2015" than that contented for in submissions from the defendant. There would seem to be no remainder in that submission as the Court has not found the plaintiff received RMB 7 Million or another large sum in that period.
11. The Court has found the plaintiff received RMB 5 million on 22 March 2016 and RMB 1.5 million on 2 August 2016. On the calculations provided by the defendant in opening submissions the amounts received by the defendant would exceed a third share of RMB 6.5 million.
12. There is no basis for a set off or repayment save for, potentially the monies referred to with the fourth contention by the defendant. I shall make provisions in final orders to deal with that question as an adjustment may be required in that respect, subject to any submissions made by the plaintiff as to any accounting for the amount in this claim.

WHETHER INTEREST CLAIMED UNDER THE AGREEMENT IS PENAL

1. The issue raised by the defendant in this respect is whether the interest rate for overdue payments of 0.05% per day (18.25% per annum) prescribed in cl III of the Agreement is a penalty and, if so, whether any other interest rate should apply (Issue 7(b)). The plaintiff claimed interest at this rate from the date the SOC was filed, namely 20 April 2020. Alternatively, he claimed interest at the lower contractual rate of 0.02% per day, or in accordance with the Civil Procedure Act 2005 (NSW), s 100.
2. The relevant principles were adequately stated in the defendant's written submissions as the correct approach to a commercial contract. The following is based on those principles.
3. A contractual provision *prima facie* imposes a penalty if it is collateral to a primary stipulation and, upon the failure of the primary stipulation, imposes on the first party an additional detriment to the benefit of the second party: *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 at [10].
4. A provision will be penal where the stipulated sum is extravagant or out of all proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to follow from the breach: *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28 ("*Paciocco*") at [29], [54], [158]-[162], [221] [331]. In *Paciocco* at [331], Nettle J stated:

"For the same reason, the fact that the late payment fee may have been set by reference to what other banks were charging in the context of a competitive banking market is essentially irrelevant. As Lords Neuberger and Sumption observed in *Cavendish*, although the penalty rule originated out of equity's concern to prevent exploitation at a time when credit was scarce and borrowers were particularly vulnerable, the modern rule is substantive, not procedural. It does not normally depend for its operation on establishing that advantage was taken of one party. An obligation to pay a fee does not cease to be penal just because the obligee's competitors impose similar penalties on their customers. Where there is an incentive constituted of an obligation to pay a sum of money conditioned on a breach of contract of which the amount is wholly disproportionate to the greatest costs which would have been conceived of at the time of entry into the contract, the obligation will be regarded as penal unless there be some aspect of the contract which makes it possible to say that the amount of the obligation is not wholly disproportionate to the interest protected by the bargain."

1. The essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage: *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87, cited in *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231; [2016] NSWCA 328 ("*Arab Bank*") at [72].
2. In *Arab Bank*, McDougall J (with whom Gleeson JA and Sackville AJA agreeing) distilled the principles emerging from *Paciocco* as follows at [74]:

- "(1) Lord Dunedin's propositions [in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79] were not "rules of law", but "distillations of principle": at [143] (Gageler J); compare at [32] (Kiefel J) and at [260] (Keane J).
- (2) The essence of a penalty is that it is a collateral stipulation, the (or a predominant) purpose of which is to punish the borrower for breach, and thus to compel performance: at [29] (Kiefel J); at [127], [159], [166] (Gageler J); at [254], [259], [273] (Keane J).
- (3) One way of testing whether the impugned stipulation is penal — intended to punish — is to inquire whether the sum that it stipulates to be payable on breach (as I have indicated, the equitable origins and continuing equitable operation of the principle have no present relevance) is to ask whether the stipulated sum is extravagant or out of all proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to follow from the breach: at [29], [54] (Kiefel J); at [158]–[162] (Gageler J); at [221] (Keane J).
- (4) "Damage" in this sense is not limited to damages recoverable upon breach of contract, but may extend to damage, or losses, caused by the impairment of other legitimate commercial interests that were intended to be protected by the stipulation: at [33], [42]–[47] (Kiefel J); at [145], [160]–[162] (Gageler J); at [216], [283] (Keane J).
- (5) The analysis is to be made at the time, and taking into account the circumstances applicable, when the contract was made; not at the time of breach; the analysis is prospective, not retrospective (or as is said in some judgments, is *ex ante*, not *ex post*): at [62] (Kiefel J); at [169] (Gageler J).
- (6) Mere disproportion between the stipulated sum and the possible damage is not enough to indicate "penalty"; the disproportion must be such that it is unconscionable for the lender to rely on the stipulation: at [54] (Kiefel J); at [164] (Gageler J); at [221], [240], [279] (Keane J)."
1. The plaintiff submitted that the Court should answer the first part of this issue in the negative. It was submitted:
 1. The indemnity that operates in cl I of the Agreement operates on debts assumed by the plaintiff from the Chinese Court Proceedings and incorporates other liabilities or costs including interest and litigation costs.
 2. However, that does not constitute a proper bases on which to conclude that cl III contains a penalty interest rate.
 3. The defendant has to make payment under the indemnity to pay the debt by December 2018. If he did not, the plaintiff had to meet the debt. In evidence, the plaintiff said he did not know when that would be and that he would be faced with borrowing or selling assets.
 4. The 0.05% interest rate is designed to meet a situation where the plaintiff borrowed money and paid interest on any outstanding amount on the Judgment Debt.

5. Where the Chinese Courts struck down the interest payable that reduction was only reduced to 24% which is much higher than 18.25% (the annual equivalent of the rate in cl III).
6. In *Paciocco* at [331] (see [795] above), it was stated that the amount said to be penal will not be so unless it is wholly disproportionate to the greatest costs which could have been conceived at the time of entry into contract. The plaintiff could only have conceived the possibility that, if he were to borrow money, he "may have to pay 24%". He seeks 18.25%.
7. If the Court were to find the interest rate to be penal, it is necessary to demonstrate what interest rate would not have been penal. The plaintiff's claim achieves that end.
1. The plaintiff gave evidence regarding the default interest rate in cl III of the Agreement in the second plaintiff affidavit in the following terms:

"This document is a WeChat message between myself and Lawyer Yuan about making repayments towards the Judgment Debt. At the time I was borrowing money to make repayment for the Judgment Debt. Ultimately the sum of 9,469,485.52 yuan (being the Enforcement Sum referred to in paragraph 26 of my First Affidavit) was paid to satisfy the Judgment Debt. Of that amount:

129.1 approximately RMB6.3 million was deducted from my various bank accounts; and

129.2 my property was mortgaged with the SPD Bank in China for the sum of RMB3 million."

Prior to obtaining the mortgage from the SPD Bank but after my bank accounts were deducted, I entered into a number of loan agreements with relatives to borrow a total sum of RMB4 million so that I could make repayments towards the Judgment Debt.

At the time the Agreement between me and Mr Lam was being prepared (which was prior to my borrowing funds from relatives), I did not know what means I would use to satisfy the Judgment Debt and whether I would need to borrow money or sell assets. If I was required to borrow money then I was aware from my own business dealings that the interest rate under those loans could be as high as 24% per annum, being the highest interest rate permitted for private loans in China. This informed the decision to include a default rate under clause III of the Agreement of 0.05% per day which equals an annual rate of 18.25% per annum."

(The document the plaintiff is referring to above is a WeChat message dated 31 August 2018 which was between himself and his lawyer, Mr Yuan.)

1. The plaintiff made five payments towards the Judgment Debt between 7 and 11 May 2018. He then made the fifth payment of RMB 4,219,675.63. By 11 May 2018 he had paid RMB 4,314,930.73. I agree with the submission of the defendant that, whilst the plaintiff may not have known fully the means by which he would have repaid the Judgment Debt at the time of signing the Agreement, he did know that approximately half of the Judgment Debt had been paid by that time.

2. By cl I of the Agreement, the defendant indemnified the plaintiff for all liabilities, fees and loss the plaintiff incurred as a result of the Lower Court Judgment. The indemnity included interest which the plaintiff had to pay on the Judgment Debt.
3. Clause I also provided an obligation to pay interest at 0.02% per day from 13 July 2016, notwithstanding the Lower Court Judgment was not delivered until 27 September 2017 and the plaintiff, as mentioned, was fully indemnified for his liability to pay the Judgment Debt including interest.
4. The first consideration for the Court as stipulated in *Andrews* is whether the higher interest rate in cl III is collateral to a primary stipulation. In my view the higher interest rate in clause III is collateral to a primary stipulation (the obligation in clause I and II to indemnify the plaintiff for "all debts" by 31 December 2018) and, upon the failure of that primary obligation, it imposed an additional detriment on the defendant to the benefit of the plaintiff. It is, therefore, *prima facie* penal.
5. The next question is whether the provisions of cl III do, in reality, create a penal condition. In my view the interest for overdue payments in cl III of the Agreement is penal and unenforceable for the following reasons:
 1. The plaintiff was fully indemnified under cl I for the accrual of interest and Judgment Debt.
 2. The interest payable under cl III increased the interest rate under cl I from 0.02% per day to 0.05% per day. It is unnecessary to reach a conclusion that the interest rate of 0.02% per day was a windfall in order to reach a conclusion that the interest rate under cl III was extravagant or out of all proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to flow from the breach.
 3. The evidence of the plaintiff that he may have had to borrow with an interest rate as high as 24% does not overcome that consideration. The circumstances operating at the time the Agreement was entered into were such, as I have mentioned, that the plaintiff had already paid approximately half of the Judgment Debt. I agree with the submission advanced by the defendant that, in those circumstances, he could never have been close to the circumstance where he would need to borrow the entire Judgment Debt at the maximum rate under Chinese law.
 4. Furthermore, assuming the maximum interest rate permitted for private loans in China was 24%, the evidence does not establish under what interest terms the plaintiff would have had to borrow. The plaintiff's evidence does not rise any higher than the possibility he may have been charged the highest interest rate permissible under Chinese law. In any event, the primary interest rate under cl I of about 7.3% per annum would have adequately protected the plaintiff against speculative, unquantified risk that he would have had to pay interest on borrowed funds as a result of a breach by the defendant, particularly if that rate operated from 13 July 2016.

5. The fact that the plaintiff's claim to interest operates under the SOC from 2020 does not obviate the conclusion that the interest under cl III is penal because the analysis of whether a contractual position is a penalty needs to be undertaken at the time the contract is made in the circumstances that then prevailed: Arab Bank (at [74(5)]).
1. The question then arises as to what interest rate, if any, the Court would fix that was not penal in nature. That consideration received little attention in the parties' submissions. My preliminary view is that interest would be awarded upon the judgment sum awarded by the Court from the date specified in the SOC. Furthermore, as the rate specified in cl I of the Agreement was not attacked by the defendant as being penal per se (even though described as a 'windfall'), my preliminary view is that the first part of the plaintiff's alternative claim on interest should be applied, namely, the lower contractual rate of 0.02% per day. However, it would seem appropriate to receive further submissions by the parties in that respect and I will make provision to do so in my final orders.
2. With respect to Issue 7(b), the Court finds that the plaintiff's claim for interest at 18.25% per annum under cl III of the Agreement is unenforceable as a penalty. The Court's preliminary view is that interest should be applied on the judgment sum in accordance with the first alternative claim for interest by the plaintiff, but the Court will make an allowance for further submissions of the parties in those respects in the orders accompanying this judgment.

MITIGATION OF LOSS

1. In my view there has been mitigation of loss by the plaintiff.
2. The plaintiff's defence in the Lower Court Proceedings and the Appeal Proceedings proceeded on the basis that he had no liability to Jiayi. It is reasonable that he would not make payments to Jiayi in respect of his liability as guarantor until such time as the judgment in the Appeal Proceedings was handed down (which occurred on 19 March 2018). Retaining lawyers to assist in defending the Lower Court Proceedings and pursuing the Appeal Proceedings was not an unreasonable act of mitigation.
3. As mentioned above, the plaintiff started making payments toward the Judgment Debt promptly after the judgment in the Appeal Proceedings was handed down on 19 March 2018 (with the first three payments being made on 7 May 2018).
4. On the evidence, the plaintiff did his best to obtain funds to pay the Judgment Debt as promptly as possible, which he ultimately did, notwithstanding the defendant's failure to make payment under the Agreement.

CONCLUSION

1. Subject to the question of adjustment for payment made by the defendant of RMB 300,000 to the second Intermediate People's Court, there should be judgment for the plaintiff.

2. The interest under cl III of the Agreement has been found to be penal and unenforceable. There remains a question as to what interest rate, if any, should be applied from 20 August 2020. The Court has expressed a preliminary view but makes provision for further submissions in this respect. The program for the same should be reflected in the Short Minutes of Order which the Court has directed will be filed and served.
3. No submissions on costs have been received. If there is an agreed position then that may be reflected in the Short Minutes of Order the Court will direct to be filed. If not, those Short Minutes of Order should provide for directions as to the receipt of submissions and evidence as to costs.

Orders

1. The Court orders and directs:
 1. The plaintiff shall file and serve Short Minutes of Order reflecting this judgment within 28 days of the publishing of the judgment.
 2. If there is any dispute as to the form of the Short Minutes of Order filed and served by the plaintiff in accordance with Order (1), then the defendant shall file and serve an alternative form of Short Minutes of Order within 35 days of the publishing of this judgment.
 3. The Short Minutes of Order shall make provision for the receipt by the Court of submissions as to any adjustment to the judgment sum for any monies paid into a Chinese Court by the defendant, interest and costs (not exceeding five pages) in the event of any dispute as to those matters. The Short Minutes of Order shall also make provision for the filing and service of evidence in the case of a dispute as to costs.
 4. In the event any one or more of the issues concerning monies paid into a Chinese Court by the defendant, interest and costs are resolved, the parties shall provide a note accompanying the Short Minutes of Order to that effect in which case the Court may deal with the consent orders administratively in Chambers.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 18 October 2024

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/19297cedcf6ae644ed68495f>

CASE PAGE <https://chat.esheria.ai/case-law/australia/liu-v-lam-2024-nswsc-1306-2024>

Prepared on 27 October 2026 · Esheria