Neutral Citation Number: [2021] EWHC 3264 (Comm)

Case No: CL-2017-000376

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2021

Before :

MR JUSTICE FOXTON

- -

Between :

MMD MINING MACHINERY DEVELOPMENTS LIMITED **BEIJING MMD MINING MACHINERY CO LIMITED**	**Claimants**
- and -	
WANG KAI LANG **(also known as VICTOR LANG)**	**Defendant**

- -
- -

David Cavender QC and **Oliver Butler** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
The Defendant in person.

Hearing dates: 15, 16 and 17 November 2021
Written submissions: 21 and 24 November 2021
Draft judgment to parties: 25 November 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 03 December 2021 at 10:00 am"

Mr Justice Foxton :

1. In this case, the Claimants ("MMD UK" and "BMMD") seek declarations as to the meaning and effect of an entire agreement clause in a written agreement ("the 2009 Agreement") entered into between the Claimants and the Defendant ("Mr Lang"). The case is unusual because:

    i) by far the greater part of Mr Lang's Defence and Part 20 Claim has been struck out as a result of his failure to give any disclosure; but

    ii) many of the declarations the Claimants seek invite the court to determine issues raised by the Defence and Part 20 Claim.

Introduction

2. The Claimants are both companies in the MMD group, which specialises in the manufacture and supply of mineral and rock-crushing machinery. MMD UK is an English company, and BMMD its Chinese subsidiary.

3. On 15 December 2009, the Claimants and Mr Lang entered into the 2009 Agreement which conferred the right on Mr Lang, in certain circumstances, to receive payment of 20% of the net book value of BMMD, or its sale proceeds. Clause 10.6 of the 2009 Agreement ("Clause 10.6") provides:

    > "This agreement is in substitution for and replaces all and any agreements, arrangements or understandings whether written or oral and howsoever arising relating to any interest which Mr Lang may have, claim or assert in [BMMD] or its ownership, profits or shares. Any such existing agreements, arrangements or understandings are hereby terminated with immediate effect".

4. The present proceedings were brought by the Claimants after Mr Lang alleged that he had a 20% interest in BMMD pursuant to an alleged oral agreement with the founder of the MMD group, Mr Alan Potts (who died in 2017), which interest was said to pre-date the 2009 Agreement ("the 20% Agreement"). In his Defence and Part 20 Claim, Mr Lang also relied upon an alleged oral agreement he reached with Mr Potts in 1997 that profits of MMD's China business would be split 50/50 as between the two of them ("the Profit-Sharing Agreement").

5. In his Defence and Part 20 Claim, Mr Lang brought a number of challenges to Clause 10.6, and advanced claims under the alleged 20% and Profit-Sharing Agreements. The issues which Mr Lang raised included:

    i) A claim to rectify the 2009 Agreement to delete Clause 10.6.

    ii) An alleged conventional estoppel as to the meaning and effect of Clause 10.6.

    iii) An argument that Clause 10.6 was ineffective as a matter of Chinese law.

    iv) A plea that Mr Lang was induced to enter the 2009 Agreement including Clause 10.6 by fraudulent statements made on the Claimants' behalf by Mr Tedcastle, and is entitled to damages as a result.

6. However, in June 2021, Mr Lang's Defence and Part 20 Claim were struck out by Julia Dias QC, sitting as a deputy High Court judge, as a result of Mr Lang's failure to comply with an "unless" order requiring him to provide disclosure.

7. In July 2021, Mr Lang applied for, and was granted, partial relief against that order, being permitted to advance (and only to advance) one paragraph of his Defence and Part 20 Claim which contends that Clause 10.6 is ineffective as a matter of Chinese law.

8. The Claimants seek a number of declarations which are intended to determine the various challenges that Mr Lang has brought to Clause 10.6:

   i) That Clause 10.6 is valid and enforceable according to its terms.

   ii) That Mr Lang has no entitlement to rectification of the 2009 Agreement so as to delete Clause 10.6 on the grounds of unilateral mistake.

   iii) That the Claimants are not estopped by convention from relying on the true construction and effect of Clause 10.6.

   iv) That Clause 10.6 has the effect of estopping Mr Lang from asserting any interest in BMMD arising under any agreement which pre-dates the 2009 Agreement.

   v) That Mr Lang is not entitled to damages on the basis that the effect of Clause 10.6 was fraudulently misrepresented to him.

   vi) That Clause 10.6 is not invalid and ineffective as a matter of Chinese law.

   vii) That there were no oral agreements to the effect of the Profit-Sharing Agreement and the 20% Agreement.

The nature of Mr Lang's participation in the trial

9. An issue arose at the start of the trial as to the basis on which Mr Lang (who appeared as a litigant in person) was entitled to participate in it. Formally, the Claimants' position was that Mr Lang should not be permitted to cross-examine the Claimants' factual witnesses, nor to make submissions to the Court about contemporaneous documents, and that his role should be limited to cross-examining the Claimants' Chinese law expert, and making submissions about Chinese law. However, it became clear in the course of opening that Mr Cavender QC was content to approach this issue pragmatically.

10. I was referred to a number of authorities on this issue. In Kliers v Schmerler [2018] EWHC 1350 (Ch), after reviewing a number of the authorities, Mr M H Rosen QC observed at [16] that "there may be no general principle whereby a defendant whose defence has been struck out, still less one who has been consequentially debarred from defending, has the absolute right to test the claimant's case in cross-examination and to make further submissions in every case". Edwin Johnson QC (as he then was) provides a useful summary of the relevant principles in Times Travel v Pakistan International Airlines Group [2019] EWHC 7322 (Ch).

11. It is clear from these cases, and indeed inherent in the fact that Mr Lang's Defence and Part 20 Claim have been struck out, that Mr Lang cannot be permitted to advance a positive case, or to use the cross-examination of the Claimants' witnesses in an attempt to do so. There would be an obvious unfairness in permitting such a course in circumstances in which Mr Lang had failed to provide the disclosure necessary to allow

any such case to be fairly adjudicated (Byers v Samba Financial Group [2020] EWHC 853 (Ch), [121], [124]).

12. However, it remains for the Claimants to discharge, on the evidence before the Court, such burden of proof and persuasion as lies on them to obtain the relief they seek (as there would be if Mr Lang had not served a Defence at all, but the Claimants had sought judgment on the merits instead of in default: CMOC Sales & Marketing Limited v Persons Unknown [2018] EWHC 2230 (Comm), [14]). This is a case in which, as I understand the position, the Claimants wish to obtain a judgment on the merits, rather than asking the Court to enter judgment by reason of the absence of a defence alone (c.f. Byers v Samba Financial Group [2020] EWHC 1006 (Ch), [12]-[14] and [17]).

13. I concluded that, in the exercise of my discretion on the particular facts of this case, I would permit Mr Lang to cross-examine the factual witnesses called by the Claimants, solely for the purpose of testing that evidence rather than advancing a positive case, and to make submissions on the basis of the documents before the court, provided this was done without crossing the line into impermissibly advancing a positive case or attempting to give evidence through the vehicle of submission. Mr Cavender QC did not resist this course. In addition, given Mr Wang's status as a litigant-in-person, I raised what appeared to be relevant contemporary documents with Mr Cavender QC in the course of the Claimants' closing, in an attempt to ensure that the Claimants' case was properly tested. I wish to record my gratitude for the comprehensive submissions I received in response.

The evidence

14. The Court heard from three factual witnesses, who were questioned by Mr Lang within the constraints set out above.

15. The Claimants' first witness was Ms Judy Cusimano, who held various roles in the MMD group from 1989 onwards. She gave evidence that from 2000 onwards, Mr Lang had been pushing for a shareholding in BMMD. She stated:

> "Based on my recollection of the various meetings between Alan [Potts] and Victor [Lang] between 2000 and 2009, I do not recall them ever having reached an agreement about any kind of interest in BMMD prior to them signing the 2009 Memorandum of Understanding"

(a document signed on 27 November 2009 which I shall also refer to as the "2009 Memorandum of Understanding" and which I address below). She gave evidence that in the meetings she remembered, "the discussions were always on the basis that Mr Lang wanted – but did not have – an interest in the value of BMMD".

16. Mr Lang asked Ms Cusimano about a number of the contemporary documents, but Ms Cusimano (understandably) said that after so many years she could not remember whether or when she had seen the documents, even those referring to her. Ms Cusimano was clearly an honest witness. However, it was apparent from Ms Cusimano's evidence that she has very little present recollection of the events covered by her statement. In these circumstances, in considering what weight to accord to her recollection some 12 to 20 years on, I have been guided by what the contemporaneous documents show and the inherent probabilities.

17. The Claimants' second witness was Mr Gary Blakemore who worked in various accountancy capacities in the MMD group. He gave evidence as to the staff remuneration

policy in the group, particularly so far as bonuses were concerned. Mr Blakemore was called to respond to Mr Lang's case that there was an agreement, consistently acted on including after the 2009 Agreement, that Mr Potts and Mr Lang were paid the same share of profits from MMD's China business. Mr Blakemore referred to various documents recording payments of staff bonuses, and said:

> "I am not aware of anything to suggest that Victor Lang was remunerated other than in accordance with the principles and approach in place across the MMD Group throughout the relevant period as explained in this statement".

He also said that he was "not aware of anything (either from my recollection or arising from my financial analysis) to suggest that Victor's bonus from BMMD was calculated other than in accordance with the principles and approach across the MMD Group throughout the relevant period".

18. Mr Blakemore also addressed a point raised by Mr Lang that the profits of MMD Asia Pacific Ltd ("MMD Asia Pacific", an Isle of Man company) had been evenly distributed as between Mr Potts and Mr Lang. Based on the records of MMD Asia Pacific, Mr Blakemore had prepared a table which appeared to show payments to Mr Potts and Mr Lang from that company diverging in date of payment and amount. Mr Blakemore concluded:

> "Contrary to Victor's claims that he and Mr Potts would share equally in the net profits, it can be seen that the percentage of Asia Pacific's net profits that what Victor actually received (whether by dividend or bonus or both) during that time fluctuated from anywhere between 0% to a maximum of 23% … Whilst Victor and Alan received the same value of payments in 2007, 2008 and 2011 … this was not the case in 2009, 2010, 2012, 2013, 2014 and 2015".

19. It became clear during Mr Lang's questions that there was very limited utility to the exercise Mr Blakemore had performed because, as he explained:

> "These clauses from my statement are simply statements of fact from the financial statements of Asia Pacific Ltd ... I can't comment on what the actual payments were for or agreed between".

He confirmed that he had no personal knowledge to assist on the issue of how the various totals were made up. Nor was he privy to the minutes of MMD Asia Pacific. For reasons I explain below, I have not found it necessary to make any findings or declarations as to the basis on which distributions were made by MMD Asia Pacific, because the only relief which the Claimants seek relates to the question of whether the Profit-Sharing Agreement as defined in the Defence and Part 20 Claim was entered into.

20. The Claimants' final witness of fact was Mr Ian Tedcastle who, before his retirement some 10 years ago, had been a tax accountant in the firm of Cooper Parry who advised the MMD group on tax matters. He gave evidence that he was not aware of any arrangement between Mr Potts and Mr Lang in relation to BMMD before the 2009 Memorandum of Understanding, but he accepted that he could not "recall being involved in any dealings between Alan Potts and Mr Lang" before 27 November 2009. It became clear in the course of Mr Tedcastle's evidence that he too had no real recollection of the documents exchanged at the time, including those to which he had been a party. Mr Tedcastle referred to various tax concerns that would have arisen if a 20% share in

BMMD had been transferred to Mr Lang (concerns which appear in the contemporaneous documents, as I explain below).

21. Mr Tedcastle was an honest witness, and as I explain below, I am satisfied that he acted honestly in his dealings with Mr Lang in the run-up to the 2009 Agreement.

22. Finally, I heard expert evidence on Chinese law from two experts:

    i) For the Claimants, Professor Lei Chen, who holds the Chair of Chinese Law at Durham Law School, Durham University.

    ii) For Mr Lang, from Mr Cao Lijun, a partner in Zhong Lun Law Firm.

23. I found both experts to be impressive, and able to defend their divergent positions. I have resolved those disputes which it is necessary to resolve by reference to the Chinese legal sources available to me and the cogency of the analysis on particular points.

The background facts

24. Mr Lang appears to have begun working with Mr Potts and the MMD group in Beijing in 1997. At some point, a decision was taken to establish a Chinese company within the MMD group. It is clear from the documents that from a relatively early stage, there were discussions between Mr Potts and Mr Lang about Mr Lang having a 20% interest of some kind in the business of the MMD group's Chinese entity, once established, but that there were also difficulties to be overcome before that could be done, and that the precise mechanism by which this might be achieved remained in a state of flux.

25. A note of discussions involving Mr Lang and Mr Potts on 26 and 29 November 1999 records:

    > "Having previously discussed Victor Lang's continuing involvement with ZFK [his own company] and his future plans it was agreed that he would receive a 20% portion of net profits from MMD Beijing".

    At this stage, therefore, it appears to have been envisaged that Mr Lang would receive a profit share, rather than equity stake, in the Chinese business, and the deal under consideration was a time-limited agreement (to last 3 years on a renewable basis). However, there is nothing to suggest any contract on these lines was ever drafted. The note is quite clear that what was proposed was "20% of net profit but not a shareholding", and there are sections which refer to the 20% profit share as an aspiration rather than a "done deal" (for example the note refers to "Victor looking for 20% of net profit").

26. A note of a meeting on 19 and 20 July 2000 suggests that at that point, it was contemplated that it would be Mr Lang's company, ZFK, rather than Mr Lang himself, who would receive a profit share, and that this would take the form of a commission. The notes record "Victor requests Alan to pay bonus for all profits MMD China has made since set up in China. Alan asks Victor to put forward a proposal". Those notes are not consistent with a binding agreement having already been reached that Mr Lang and Mr Potts would split all such profits equally.

27. The handwritten note of the meeting on the second day suggests that Mr Lang was not asking for a shareholding at that stage, stating "Victor asks for $100k for three years' work and no shares". However, by 23 November 2000, the discussion appears to have moved towards Mr Lang acquiring a 20% shareholding in the Chinese company, instead

of the $100,000 previously discussed. An email from Rob Jackson (who worked for the MMD group) to Mr Lang sent at around this time referred to Mr Potts considering giving Mr Lang “an equity stake in the facility”.

28. There were further discussions at a meeting attended by Mr Potts and Mr Lang on 23 November 2000, in which a share structure which would give Mr Lang 20% was discussed. By this stage, I am satisfied that there was a general understanding that steps would be taken to give Mr Lang something akin to a 20% interest in the business of the new Chinese company, and that the possibility of this being a shareholding rather than some other form of interest was under consideration, but not yet agreed.

29. On 1 December 2000, the MMD group incorporated a company in England called MMD Asia (Sizings) Ltd (“MMD Asia UK”) which it was envisaged would carry on at least some of the sales business arising from the MMD group’s operations in China, and Mr Lang was made a 20% shareholder in that company.

30. On 14 January 2002, shortly before BMMD was incorporated, a telephone discussion involving Mr Potts and Mr Lang took place referring to the plan to incorporate a new Chinese company in which Mr Lang was to have a shareholding of 20%.

31. BMMD was incorporated in 2002 as a wholly owned subsidiary of MMD UK. It was incorporated under the Chinese Wholly Foreign-Owned Enterprises Law (2000 version) (“the WFOE Law”). As I explain below, I am satisfied that as an individual and Chinese national, Mr Lang could not be a shareholder in such a company, and in any event, this was clearly the contemporary perception of MMD and of Mr Lang. This made the process of giving effect to the understanding that Mr Lang should, in some shape or form, have a 20% share in the business of the new company more difficult.

32. By 2005, it appears to have been envisaged that the plan could be implemented by transferring BMMD into the ownership of MMD Asia UK (in which, as I have noted, Mr Lang already had a 20% shareholding). These plans were sufficiently advanced that minutes were produced for a board meeting of MMD UK dated 18 August 2005 recording the transfer of BMMD to MMD Asia UK, and MMD Asia UK’s annual report and accounts for the year-ending 28 February 2005 refer to such a transfer having taken place on 1 March 2005. However, all the other documents available – including BMMD’s own report and accounts for the year-ending 31 December 2009, as well as the 2009 Agreement itself - confirm that the transfer never took place, and that BMMD remains a subsidiary of MMD UK to this day. A further minute of a joint board meeting for MMD Asia UK and MMD UK dated 22 August 2005 suggests that the transfer had been delayed due to ongoing enquiries in China. Other documents suggest that there were also UK-tax concerns associated with the decision not to proceed.

33. On 5 April 2006, the MMD group incorporated MMD Asia Pacific in the Isle of Man, of which Mr Lang was (once again) a 20% shareholder.

34. Meanwhile, discussions continued as to how to give Mr Lang a 20% interest of some kind in BMMD. Notes of a meeting dated 5 April 2007, recording the attendance, inter alia, of Mr Potts and Mr Lang, refer to BMMD having “80%20% mutual ownership Ann/Alan/Victor”, but the overall tenor of the note is that this is something which the parties were looking to achieve rather than an accomplished fact (e.g., the note refers to “favours V Lang getting 20%” in BMMD). At around this time (or at least, dated on the same date), Mr Potts signed a document which has been referred to as the 2007 Shareholder Statement which provided:

> "In event of my death, I as Chairman of [MMD UK] and [BMMD] hereby certify that eighty percent (80%) of the total ownership of [BMMD] is owned by [MMD UK] … while the other 20% of the same ownership is owned by [Victor Lang] who is, in fact, the silent partner or legally speaking the dormant partner of the [BMMD] based upon our oral contract.
>
> I furthermore testify to the fact that Victor Lang's investment equalling twenty percent of the ownership of BMMD came from profits generated through MMD by the efforts of [Mr Lang]".

35. The document was witnessed by Mr Clive Spencer, a group employee who is recorded as having been present at the meeting of 5 April 2007, and it seems probable that the document was signed at or around that meeting.

36. I heard no evidence as to the circumstances in which this document came into being – Mr Lang was not permitted to give such evidence, Mr Potts is deceased and the Claimants' witnesses were either unaware of it or had forgotten it. In particular, there was no evidence as to whether (given the words "In event of my death"), the document was intended to provide some form of protection for Mr Lang in the event that Mr Potts died before the final arrangement addressing Mr Lang's interest was put into place.

37. My conclusions as to this document are as follows:

    i) In so far as the document was purporting to confirm an existing state of fact, I am satisfied that the arrangements to date reflected a clear plan to give Mr Lang a 20% interest of some kind in BMMD, but that there had not, as yet, been any binding agreement to give Mr Lang a 20% shareholding in BMMD (not least because this was not, or was not believed to be, legally permissible).

    ii) As, for reasons I explain below, I cannot accept that the 2009 Memorandum of Understanding and 2009 Agreement were intended to give Mr Lang some form of *additional* 20% interest in BMMD, over and above an existing 20% interest, I am satisfied that the 2007 Shareholder Statement was simply a way-point in the continuum of discussions which culminated in the 2009 Agreement.

    iii) On its own terms, the 2007 Shareholder Statement was not a statement made by Mr Potts in his personal capacity, but on behalf of MMD UK and BMMD:

        a) The statement is said to have been made "as Chairman of MMD [UK] and [BMMD]".

        b) Mr Potts held no shareholding in BMMD personally, and therefore was not in a position personally to grant Mr Lang a 20% interest in BMMD.

        c) Mr Potts' signature was clearly identified as being on behalf of MMD UK and BMMD.

38. The process of giving effect to the longstanding plan to give Mr Lang a 20% interest of some kind in BMMD was still work-in-progress a year later, by which time a further difficulty to its fruition had become apparent, resulting from the build-up of profits in BMMD itself rather than, as the MMD group at least had originally anticipated, in MMD companies outside China. As Ms Cusimano noted in an email to Mr Lang on 29 April

2008, the "tax holiday" which BMMD had enjoyed for a certain period after its formation was due to come to an end, creating a significant potential exposure to Chinese tax.

39. There were also UK-tax issues. Emails involving Mr Victor Green (who was concerned with financial and tax matters on behalf of the MMD group) and Ms Cusimano, and sent in June 2008, referred to a plan to remove BMMD from MMD UK for tax reasons by selling it (directly or indirectly) to MMD Asia Pacific, noting that Mr Lang was "intended to own 20% of BMMD" as a consequence of such a sale. It was noted that the unintended accumulation of profit within BMMDwould give rise to adverse tax consequences on such a transfer. The terms, and structure, of the plan under discussion are inconsistent with Mr Lang having already been given a 20% shareholding in BMMD. Mr Tedcastle, in a note to Mr Green on 19 June 2008, suggested that "as an alternative it may of course be simpler for Alan/Ann to give [Mr Lang] a shareholding in MMD (say 10% which might equate to 20% of BMMD or whatever shareholding they agree on)". A note of an audit visit conducted by Victor and Roy Green from 22 to 26 June 2008 suggests that the plan at that stage was still to transfer BMMD from MMD UK to MMD Asia UK as a means of giving Mr Lang a 20% interest. The continuing uncertainty as to the structure within which any interest might be held, and whether it would be through MMD UK, MMD Asia Pacific or MMD Asia UK all reinforce the conclusion that there had, as yet, been no concluded agreement as to the form which Mr Lang's 20% interest in the business of BMMD should take.

40. An email and attached paper sent by Mr Roy Green to Mrs Potts and Mr Victor Green on 14 July 2008 are to similar effect: it was noted that it had been agreed that Mr Lang was entitled to a 20% stake in BMMD if and when it became legally possible, but the fact that BMMD was a "Wholly Owned Foreign Enterprise" ("WFOE") prevented any individual or Chinese ownership of shares in that entity. The paper identified the goals sought to be achieved as "to move ownership of [BMMD] from [MMD UK] in the most tax efficient and least troublesome manner" and "for [Mr Lang] to have a 20% stake in [BMMD] via a parent company".

41. The right structure to adopt, and the tax implications of particular approaches, were further discussed in papers circulating within the MMD group (but not involving Mr Lang) in late 2008. In March 2009, a loan extension agreement relating to a loan made by MMD UK to BMMD, and signed by Mr Lang, recorded that BMMD was 100% owned by MMD UK, which I am satisfied reflected the formal legal position at that time.

42. On 27 November, the 2009 Memorandum of Understanding was signed by Mr Potts on behalf of MMD UK and Mr Lang. This provided:

> "1. On the event of any sale of [BMMD] Victor Lang shall be entitled to an amount equal to 20% of the sale proceeds or net book value whichever is the greater.
>
> 2. In the event of Victor Lang's retirement after attaining aged 60 he shall be entitled to a payment equal to 20% of the net book value of [BMMD].
>
> 3. In the event of Victor Lang's death prior to retirement his named dependents shall be entitled to a payment equal to 20% of the net book value of [BMMD].
>
> 4. This memo of understanding will be subject to a legal agreement to be drawn up between the parties at the earliest opportunity and until such time shall not be legally binding on either party".

In the version in the bundle, the words "net book value" in clause 2 have been underlined in hand, and there is a comment in Chinese characters next to them. I have concluded that this is likely to be Mr Lang's handwriting

43. The 2009 Memorandum of Understanding involved something rather different (and commercially less desirable) to the outright grant of a 20% shareholding in BMMD, not least because it contemplated a contractual right to receive money rather than a proprietary interest, it was a contractual right which would only arise in certain circumstances, and it was limited to a percentage of sale proceeds or net book value rather than carrying the usual incidents of share ownership. The terms of the 2009 Memorandum of Understanding are consistent with my view that neither MMD UK nor Mr Lang thought a legally binding 20% share in BMMD had already been granted to Mr Lang before this document was signed. I am satisfied that the 2009 Memorandum of Understanding was part of the continuum of ongoing discussions, rather than contemplating a separate and additional right on the part of Mr Lang in relation to 20% of the value of BMMD over and above a 20% shareholding already provided to him. Further, the fact that the 2009 Memorandum of Understanding was itself expressed not to be binding pending the conclusion of a formal legal agreement reflected what I am satisfied was the understanding of MMD UK and Mr Lang throughout this process: that a formal legal agreement would be necessary to give Mr Lang an interest in BMMD.

44. There followed activity on the MMD group-side – not involving Mr Lang – to draw up the legal document. A firm of solicitors, Nelsons, was instructed by Mr Tedcastle on the MMD group's behalf, who sent a draft agreement through to Mr Westmoreland and Mr Roy Green on 8 December 2009. Those internal documents clearly show those on the MMD group side looking to include terms to promote MMD UK's interests, but there is absolutely nothing to suggest that there was any belief or plan that Mr Lang would not appreciate what he was being asked to sign up to or not feel able to object. Mr Tedcastle's email of 8 December 2009 stated:

> "I presume we would want Victor to sign this first or raise whatever objections he may have although I would prefer Alan to be satisfied with the content before sending this to Victor".

45. Mr Westmoreland in reply agreed with the suggestion Mr Potts should see the document before it was sent to Mr Lang and stated, "it was also my understanding that Victor should dispose of his equity shares in the event of the agreement coming into effect". That was confirmed to be a reference to Mr Lang's 20% interest in MMD Asia Pacific in subsequent emails. Mr Tedcastle responded that he had been looking to limit the draft agreement to the issue of BMMD (and that was its final form). That exchange, and its outcome, do not suggest that those on the MMD group side were looking to take unfair advantage of Mr Lang when the 2009 Agreement was signed. However, one issue raised for the MMD side which did find its way into the final version of the 2009 Agreement was raised by Mr Victor Green on 8 December 2009:

> "Payment: how do we obtain redress if after the payment has been made Victor breaches any of his obligations and covenants. Also, does Victor have a contract of employment with Beijing where those obligations and covenants are set out?"

46. The conditioning of the rights which Mr Lang was to be given on compliance with his employment contract had not featured in the documents before this point, or in the 2009 Memorandum of Understanding itself, and it has come to loom large between the parties, because MMD UK and BMMD have purported to invoke those rights.

47. A second issue raised within the MMD group which also found its way into the final terms of the 2009 Agreement emerged in an email sent by Mr Roy Green to Mr Tedcastle on 8 December 2009. The email suggests that Ms Cusimano had recently found the 2007 Shareholder's Statement, a copy of which was attached to the email. Mr Green said:

> "See memo attached – found by Judy which must be negated by the new agreement. Alan not keen on the transfer of BMMD to MMD Asia UK. Victor's 20% ownership of MMD Asia Pacific Ltd is not disputed".

48. At the hearing, Mr Lang expressed concern about this email, as well as about Clause 10.6 which was presumably included within the 2009 Agreement as a result. However, I do not think the exchange has a nefarious connotation. Unless the commercial deal had been that the rights contemplated by the 2009 Memorandum of Understanding were to be *additional* to an existing 20% interest, then it necessarily followed that the rights which Mr Lang was to get under the 2009 Agreement were the final and exclusive resolution of the long-standing discussions about granting him a form of 20% interest. Further, the email confirmed that Mr Lang's 20% interest in MMD Asia Pacific was to remain unaffected.

49. I am satisfied that the 2009 Memorandum of Understanding, and the 2009 Agreement which memorialised it, were not intended to give Mr Lang a further 20% entitlement on top of an existing 20% interest he had already acquired, but to determine the final, legally binding, form of the 20% entitlement which had been under discussion for so long. There is nothing in any of the documents to suggest that, after discussing a 20% interest of some kind for some 10-years, the decision was taken in 2009 to give Mr Lang *two* 20% interests of different kinds. The understanding of those involved in "papering" the transaction on the MMD side (as evidenced by the contemporary communications) was clearly to the contrary effect.

50. Mr Lang postulated (without being able to give evidence) the existence of a further agreement in which he and Mr Potts had each agreed to give up 10% of their entitlement under the Profit-Sharing Agreement to create a bonus pool for other staff, entitling each of them to 40% of those profits which it is said somehow corroborated Mr Lang having a 40% interest in BMMD. There is no evidence to support such an agreement, and I am satisfied that there was no agreement of this kind, and that the alleged agreement was simply an ex post facto attempt to bring some coherence to Mr Lang's case. To illustrate some of the difficulties with the argument:

    i) On Mr Lang's own case, the Profit-Sharing Agreement was *not* linked to the size of his equity interest (he contended it gave him an entitlement to the same distributions as Mr Potts from MMD Asia UK and MMD Asia Pacific even though it is common ground that he had only a 20% shareholding in those companies).

    ii) The conduct relied upon by Mr Lang to evidence the existence of the Profit-Sharing Agreement did not involve Mr Potts and Mr Lang getting 50% each of the profits of MMD Asia UK and MMD Asia Pacific, but getting *the same* distribution, with distributions to other staff and Mrs Potts being effected as well. There was, therefore, no need for Mr Potts and Mr Lang to reduce their entitlements under the Profit-Sharing Agreement to create a pool for bonuses for others.

    iii) The 2009 Agreement did not carry any entitlement to share in the profits arising from BMMD's trading, but only to share in its asset or sale value in certain

circumstances. Those rights, therefore, cannot be added to the 20% shareholding Mr Lang claims to have had to arrive at a 40% profit share.

51. On the evidence, the final version of the 2009 Agreement was provided to Mr Lang on 15 December 2009 and signed by him on that date at a meeting held to discuss various issues relating to MMD. I have seen no evidence to suggest that any pressure was put on Mr Lang to sign the 2009 Agreement at that meeting. I am satisfied, having heard Mr Lang make submissions, and more importantly read his contemporary correspondence, that his English was sufficient to enable him properly to understand the document offered for signature. I also think it likely that he read the document before signing it. While I think it unlikely that Ms Cusimano has a present memory of Mr Lang reading the document at the meeting, I agree it is likely that he did so, just as he had read the 2009 Memorandum of Understanding. The document is only 6 pages long, it was obviously important, and something which Mr Lang had been waiting to see for a very long time.

52. In significant respects – but most importantly, as events have turned out, in the linking of the rights to the performance of the employment contracts – the deal was much less commercially desirable that the proposals which, at earlier points in time, appear to have been under consideration. It was also considerably less advantageous than the interest which Mr Lang would have obtained had BMMD been transferred either to MMD Asia UK or MMD Asia Pacific, as was clearly in contemplation. I can understand why, in these circumstances, Mr Lang may believe that the rights he eventually accepted, in the circumstances as they have now materialised, are less than his due. That sense of grievance may well have been enhanced by the fact that proposals which were far-advanced, which would have given Mr Lang a 20% shareholding in BMMD's holding company, did not complete for reasons arising principally from Mr Potts' desire to avoid paying United Kingdom tax.

53. The differences between what at various stages Mr Lang appeared to be getting, and what he eventually got, and the circumstances in which this came about, have given me some pause for thought. However:

    i) As Mr Cavender QC was right to remind me, the Court has no visibility of what was happening on Mr Lang's side of this negotiation because Mr Lang failed to comply with the Court's order to give disclosure. That material may well have cast a different light on events.

    ii) More substantively, the issue of what was to happen if Mr Lang parted company with the MMD group before one of the conditions for obtaining his 20% share of BMMD's book value arose was not a risk which resulted only from the terms of the 2009 Agreement which Mr Lang saw for the first time and signed on 15 December 2009. It was also built-in to the 2009 Memorandum of Understanding. Mr Cavender QC is right to point out that Mr Lang had ample time to consider the features of the 2009 Memorandum of Understanding before he signed the 2009 Agreement.

    iii) In the final analysis, I am satisfied that Mr Lang either knew or was in a position to know what he was signing up to, that it was something less than an outright 20% share in BMMD and that he entered into the 2009 Agreement nonetheless. It may be that, having waited so long to get a legally formalised offer, he decided his interests were best served by accepting it while it was on offer. He must now live with that choice.

54. I am also satisfied that Mr Lang's signature was not procured by any form of misrepresentation. Not only is there no evidence of this, but it is inherently improbable. It is obvious that the 2009 Agreement included more terms than the 2009 Memorandum of Understanding, and Mr Lang would have wanted to know what they were. Any attempt to mislead him as to its contents would have been hugely dangerous when he had the opportunity to and was well able to read the document before signing it. The internal documents I have seen do not provide any support for the suggestion that Mr Lang's agreement to the 2009 Agreement was to be procured, if necessary, by some form of trickery.

55. There is no evidence before the Court that, when signing the 2009 Agreement, Mr Lang was labouring under a mistake as to the existence or effect of clause 10.6. Further, I am satisfied that, from a commercial perspective, Mr Lang did understand that what was being offered to him by the 2009 Agreement was the complete and final resolution of his requests for an interest in BMMD, not something to which he would be entitled in addition to whatever had been discussed with or offered to him before by way of such an interest. That is the practical effect of clause 10.6. I am also satisfied that neither Mr Potts nor Mr Tedcastle knew or suspected the existence of such a mistake on Mr Lang's part. On the evidence, a short document which Mr Lang was well capable of reading and understanding was given to him to read and sign. There was no reason for Mr Potts or Mr Tedcastle to suppose that Mr Lang was labouring under such a mistake when he signed the 2009 Agreement.

56. Relations between Mr Potts and Mr Lang appear to have deteriorated in the years following the 2009 Agreement, leading to a dispute of a familiar pattern in which MMD UK say that Mr Lang has lost his entitlements under the 2009 Agreement as a result of various alleged misconduct and Mr Lang says that the allegations made by MMD UK are essentially trumped-up complaints put forward in an attempt to deprive him of his entitlement. On 11 November 2015, Mr Lang sent a letter resigning from BMMD and asking to cash in his shares "based on the agreement signed on 15 November between Victor Lang and Mr Alan Potts". This might be read as a reference to the 2009 Memorandum of Understanding (although that was signed on *27* November 2009 and was clearly not legally binding) or the 2009 Agreement (signed on 15 *December* 2009), but it clearly did not involve any appeal to a 20% shareholding conferred prior to and independently of the 2009 arrangements, not least because the letter specifically referred to the four triggering events which feature only in the two 2009 documents. A letter from Mr Lang's Chinese lawyers dated 25 November 2015 refers to Mr Lang having one – but not two – 20% interests in BMMD and it makes no reference to the Profit-Sharing Agreement. As the parties' dispute developed, Mr Lang's position was further developed in correspondence from his solicitors, and in his Defence and Part 20 Claim.

The Profit-Sharing Agreement

57. Before turning to the applications for declaratory relief, it is necessary to say a little more about this issue. A letter from Mr Lang's solicitors, King & Wood Mallesons, of 7 June 2016 stated:

> "As to both MMD Asia [UK] and MMD Asia Pacific, we are advised that the distributions received by Mr Lang (whether as dividends or profits) would equal the distributions received by Mr Potts".

58. Mr Lang's Defence and Part 20 Claim, before it was struck out, pleaded a 1997 agreement (i.e., long before either MMD Asia UK or MMD Asia Pacific came into existence), that

"Mr Potts and Mr Lang would both participate in the decision-making of the new Chinese business and share equally in its net profits." This was defined as the "Profit-Sharing Agreement", and the declarations which the Claimants seek are formulated with reference to this definition. Mr Cavender QC made it clear in his submissions that the declarations which the Claimants were seeking concerned the "Profit-Sharing Agreement" as pleaded, and that the Claimants were not asking the Court to make any wider findings as to the non-existence or termination of some other agreement for equalising profits (while making it clear that, in the event of any attempt by Mr Lang to raise such an argument, it would be their position that this amounted to an abuse of process).

59. In these circumstances, I have confined my findings on the facts to the issue of whether the "Profit-Sharing Agreement" as pleaded by Mr Lang existed. On the evidence before me, I have been persuaded that there was no such Profit-Sharing Agreement.

60. There are a number of documents which are inconsistent with an alleged 1997 agreement to split profits equally. A statement of the cumulative profit of the China business to 28 February 1999 records that 50% of the profit was to go to the UK and 50% to the China office, with the China office share of the profit being further divided, with 60% (and therefore 30% of total profit) going to Mr Lang, and the rest to other staff. The document suggests that this was paid as a discretionary bonus and not pursuant to a prior agreement giving Mr Lang the right to a profit share, the document recording that "in respect of achievements of this period", the sum was to be distributed in the manner set out.

61. A note of a meeting of 26 November 1999 discusses Mr Lang receiving 20% of the net profits of the MMD Chinese entity when formed, without suggesting that there was any entitlement to the same share of profits as Mr Potts received.

62. An email exchange between Mr Lang and Mr Rob Jackson of the MMD group on 29 August 2000 refers to Mr Lang asking for a payment in relation to China profits of $100,000, which was not justified by reference to any amount received by Mr Potts. Instead, Mr Lang informed Mr Jackson, "Alan [Potts] would like you to justify whether $100k is reasonable based on profits we have made over the past three years". Mr Jackson's response is also inconsistent with him, at least, having understood that Mr Lang was entitled to the same split as Mr Potts (for example it refers to Mr Lang being entitled to a 20% share and asks "what % split are you basing your $100k on?").

63. There are other notes which record the decision to pay out profit shares over the following years which are of a similar ilk. A note of 14 April 2001 refers to a meeting between Mr Potts and Mr Lang at which it was agreed that Mr Lang would have a profit share of $30,000 for 2000/2001. There is no reference to Mr Potts' share or an agreement they should be the same, and the note suggests that Mr Potts and Mr Lang had agreed this as a figure at that meeting. This is also the case for a note of a meeting of 22 May 2002, fixing Mr Lang's profit share for 2001/2002 ("it was agreed that Victor Lang should receive US$30,000 again this time for the year 2002/2002").

64. It is right to record that there are documents for the years 2003/2004 which show Mr Potts and Mr Lang receiving the same amount, and, in one case, an undated document of unclear provenance suggesting that Mr Potts as founder and Mr Lang as president should receive the same amount of bonus. An email of 4 January 2004 from Mr Victor Green to Mr Jackson records Mr Potts approving profit distributions to himself and to Mr Lang of $164,000 each for 2003/2004. However, there was no reference to this being by way of implementation of an overarching agreement that they should receive the same amount.

This is also true for the 2004/2005 year, for which Mr Potts and Mr Lang both received a profit share of $155,000. Mr Lang's email concerning this distribution refers to the bonuses being paid "as approved by Alan".

65. These materials might, with the benefit of further evidence and supporting context, have lent some support to the existence of some form of profit-equalisation agreement. But, so far as BMMD is concerned, they stand alone. While Mr Lang pointed to documents which he said showed that he and Mr Potts received distributions in the same amounts from MMD Asia UK and MMD Asia Pacific, and that positive steps were taken to achieve this end on a consistent basis:

   i) If (which I do not have to decide, there being no allegation to this effect), there was some form of equalisation agreement as to payments from MMD Asia UK and MMD Asia Pacific so far as Mr Potts and Mr Lang were concerned, that does not establish the existence of the wider and earlier agreement which Mr Lang advanced in the Defence and Part 20 Claim.

   ii) As I have noted, the initial agreement on profit sharing put forward by Mr Lang's solicitors was limited to MMD Asia UK and MMD Asia Pacific, without any suggestion it extended further.

66. In summary:

   i) I have been shown no document which establishes the existence of the Profit-Sharing Agreement as pleaded.

   ii) There are a number of documents which are inconsistent with such an agreement as set out above.

   iii) The material which is available is sufficient to establish on the balance of probabilities that there was no Profit-Sharing Agreement in the terms pleaded, whatever separate arrangements may or may not have been entered into in relation to MMD Asia UK and MMD Asia Pacific.

The principles applicable to the question of whether the Court should grant declaratory relief

67. There was no dispute as to the principles which govern the Court's exercise of its jurisdiction to grant declaratory relief. The general principles informing the Court's exercise of its discretion, including as regards negative declaratory relief, were recently summarised by Miles J in <u>Brent v Malvern Mews Tenants</u> [2020] EWHC 1024 (Ch), [13]-[14]:

   i) In broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are special reasons why or why not the court should grant a declaration.

   ii) There must in general be a real and present dispute between the parties as to the existence or extent of a legal right, and each party must, in general, be affected by the court's determination of the issues.

   iii) Where the declaration sought is negative, the court needs to consider the fairness of the process, and whether the case involves a "reluctant" defendant who has not actually sought to assert any claim but only been forced to respond to proceedings:

but provided that appropriate caution is exercised and it is useful to do so, "the Court should not be reluctant to grant a negative declaration". The approach is pragmatic and the ultimate touchstone, provided the process is fair to both parties, is whether the negative declaration would be useful.

68. To the extent that there is any reluctance to grant declarations except after a trial, it has been noted that that practice "should not be followed if following it would deny the claimant the fullest justice to which he is entitled": Hayim v Couch [2009] EWHC 1040 (Ch), [17] and Abaidildinov v Amin [2020] 1 WLR 5120, [28], [193].

69. I was also referred to the following passage from the judgment of Neuberger J in FSA v Lukka (unreported, 24 April 1999) as to the approach to be adopted when considering whether to grant a declaration in the absence of a defendant:

> "The Court should in each case first ask itself whether it is satisfied that the legal basis for the declaration is present on the facts and the law, and should then ask itself whether in all the circumstances it is appropriate to grant the declaratory relief sought. I see no reason in principle or practice why the court's jurisdiction should be any more fettered than that."

My decisions on the declaration sought by the Claimants

Declarations (1) and (2)

70. The first declaration sought by the Claimants is as follows:

> "Clause 10.6 of the 2009 Agreement is valid and enforceable according to its terms".

71. The second declaration is:

> "In particular:
>
> (1) The Defendant has no entitlement to rectification of the 2009 Agreement by the deletion of Clause 10.6 on the grounds of unilateral mistake.
>
> (2) The Claimants are not estopped by convention from relying on the true construction and effect of Clause 10.6".

72. I am satisfied on the basis of the findings I have reached that the factual bases for these declarations have been made out, that the issues with which the declarations are concerned are real and live issues between the parties, and that I should grant the declarations sought.

73. So far as declaration (1) is concerned, the only bases for impugning clause 10.6 in an agreement which Mr Lang has otherwise accepted is binding on him (and pursuant to which he has asserted certain entitlements) are the two arguments addressed by declaration (2), parts (1) and (2). So far as declaration (2) part (1) is concerned, I have already set out the reasons why I am satisfied that Mr Lang was not operating under any mistake as to the effect of clause 10.6 in any relevant respect, and that neither Mr Potts or Mr Tedcastle was aware of any such mistake.

74. So far as declaration (2) part (2) is concerned, the matters relied upon as establishing the alleged estoppel were pleaded in paragraph 25 of the Defence and Part 20 Claim. As to these, my findings are as follows:

i) Reference was made to discussions about transferring BMMD's business to a new company, MMD Heavy Machinery (China) Co Ltd ("MMD Heavy Machinery") to be owned by MMD Asia Pacific (in which, it will be remembered, Mr Lang has a 20% interest). However, there was no evidence before me of any such discussions, nor as to how much of BMMD's business the proposed transfer related to. It seems improbable that the entirety of that business would have been so transferred (given that MMD Heavy Machinery appears to have been set up to concentrate on a particular sector of the market, heavy manufacturing in mineral-producing areas). In any event, this fact could not begin to evidence a shared assumption that Mr Lang continued to have some form of 20% interest in BMMD *on top of* those rights given to him by the 2009 Agreement.

ii) It is alleged that Mr Potts continued to discuss with Mr Lang "various ways" to deliver a 20% interest in BMMD to him. However, there is absolutely no documentary support for this assertion, and the suggestion that Mr Potts intended Mr Lang both to enjoy the rights under the 2009 Agreement and a further 20% interest in BMMD is inherently highly commercially implausible for reasons I have already set out. The Claimants' internal documents are wholly inconsistent with MMD UK believing after 15 December 2009 that Mr Lang had two separate and cumulative entitlements to 20% of BMMD in any circumstances.

iii) It is said Mr Lang was paid less than he should have been after 15 December 2009 because of his continuing 20% interest (over and above his rights under the 2009 Agreement). However, there is no evidence that the amounts Mr Lang received were "below market", and even if there were, evidence of that kind could not begin to establish the existence of a common assumption to the effect alleged.

iv) Mr Lang alleged that at salary and bonus discussions with Mr Potts after the 2009 Agreement, the amounts awarded to Mr Lang were agreed on the basis of his alleged interests in BMMD and its net profits. However, there is no evidence to support this assertion. If it is a reference to the distributions made to Mr Lang from MMD Asia Pacific, any agreement as to distributions from that company (about which I make no findings) does not evidence a common assumption as to Mr Lang having a 20% shareholding in BMMD, still less one additional to the right to 20% of its net book value given to him in certain circumstances by the 2009 Agreement. If it is a reference to bonuses paid to Mr Lang from BMMD, the documents make no reference to the alleged shareholding in BMMD as the reason why Mr Lang was being paid the amounts he was paid.

v) Mr Lang alleged that BMMD reinvested its profits, and that this was as a result of Mr Potts seeking Mr Lang's approval to do so. Given Mr Lang's position as general manager, that of itself provides no evidence of Mr Lang having a 20% stake in BMMD which preceded and survived the 2009 Agreement. In any event, the documents do not show that Mr Lang's approval was sought (still less required) for these decisions.

vi) It is said that at a meeting on 21 October 2015, at which he offered his resignation, Mr Potts offered to buy out Mr Lang's interest in BMMD, and that the two then negotiated on the basis that Mr Lang owned 20% of BMMD and had a further right

to 20% of its net profits. However there is no evidence of such a conversation, and it is inconsistent with the terms of Mr Lang's own resignation letter dated 11 November 2015 to which I have referred above.

vii) Mr Lang alleged that, between 2008 and 2016, £5 million in profits from MMD Asia Pacific were "shared equally" between him and Mr Potts. As I have stated, if that did take place pursuant to an agreement between Mr Potts and Mr Lang (about which I make no findings), it would not support the common assumption, being in no way inconsistent with an agreement in which Mr Lang's only entitlement to a share of the value of BMMD's assets was that arising under the 2009 Agreement.

75. In these circumstances, I am satisfied that there is no estoppel by convention which prevents Clause 10.6 taking effect in accordance with its terms. I am also satisfied, given the dispute which has arisen between the parties as to the effect of Clause 10.6, that I should make a declaration to this effect in the terms sought.

Declaration (3)

76. The third declaration the Claimants seek is:

> "Pursuant to Clause 10.6, the Defendant is contractually estopped from asserting against the Claimants that he has any interest in the Second Claimant or its ownership, profits or shares under any agreements, arrangements or understandings that pre-date the 2009 Agreement".

77. This declaration essentially replicates the terms of the 2009 Agreement. Having declared that Clause 10.6 is enforceable according to its terms, it is in my view appropriate to declare that Clause 10.6 precludes the Defendant as a matter of contract from advancing against the Claimants a claim or assertion which is inconsistent with its terms. Accordingly, I have decided it is appropriate to make a declaration in the terms of declaration (3), in order to give effect to declarations (1) and (2) and to remove any scope for dispute as to the contractual status or effect of Clause 10.6.

Declaration (4)

78. The terms of the fourth declaration the Claimants seek are as follows:

> "The Defendant has no entitlement to damages for misrepresentation or any other remedy, arising from the effect of Clause 10.6 of the 2009 Agreement".

79. I have already set out my reasons for concluding that the misrepresentation case which the Defendant at one point advanced against the Claimants in relation to Clause 10.6 fails on the evidence before me, and why I am satisfied that there was no such misrepresentation. In circumstances in which the misrepresentation plea was advanced essentially in an attempt to circumvent the contractual effect of Clause 10.6, I am satisfied that a declaration dealing with this particular contention is appropriate, as an adjunct to declarations (1) to (3).

80. However, the only claim advanced, and which I have considered, was a claim in misrepresentation against *the Claimants* for relief *for misrepresentation*. I am satisfied that the declarations made should track as closely as possible the issues which I was asked to consider. Accordingly, I am satisfied that declaration (4) should be made in these terms (with my additions underlined):

> "The Defendant has no entitlement to damages for misrepresentation or any other remedy for misrepresentation against the Claimants arising from the effect of Clause 10.6 of the 2009 Agreement".

Declaration (5)

81. The fifth declaration sought by the Claimants is in the following terms:

> "Clause 10.6 was effective to extinguish any and all rights of the Defendant in respect of the Second Claimant arising under the alleged Profit-Sharing Agreement and the alleged 20% Agreement (as defined in Schedule 1 to this Order)".

82. It is this proposed declaration which is said to engage the issues of Chinese law raised by paragraph 35 of the Defence and Part 20 Claim, which Mr Lang has been given permission to advance. Paragraph 35 provides:

> "Alternatively, and in any event, the 2009 Agreement did not operate to extinguish Mr Lang's pre-existing rights in BMMD and its net profits under the 20% Agreement and the 2007 Declaration and the Profit-Sharing Agreement as a matter of Chinese law: as set out above, Mr Lang's entitlement to ownership of 20% of BMMD pursuant to the 20% Agreement, recorded in the 2007 Declaration, and to a further 20% of its net profits pursuant to the Profit-Sharing Agreement, being interests in a company incorporated in the PRC, is governed by the law of the PRC, and are Real Right under the law of the PRC. A Real Right cannot be disposed of by its owner save in a way which makes explicit reference to the Real Right being disposed of and sets out what is to happen to it, which the 2009 Agreement does not.

83. A "Real Right" is effectively a proprietary, as opposed to personal right. Many of the legal principles under Chinese law which determine the existence and disposal of a "Real Right" are set out in the Property Law of the People's Republic of China. Article 2 of the Property Law provides:

> "The term `real right' as mentioned in this Law refers to the exclusive right of direct control enjoyed by the holder according to law over a specific property, including ownership right, usufructuary right and real rights for security".

84. Both Professor Chen (the Claimants' expert) and Mr Cao (Mr Lang's expert) agree that a contractual agreement by one party to give another shares in a company which has yet to be incorporated (a pre-incorporation contract) only has the status of a personal, and not a real, right when entered into. The difference between the experts, as became rather clearer in their oral evidence than in Mr Cao's report, is that Mr Cao was of the view that the right accorded by the contract would become a Real Right, or at least a hybrid real/personal right, automatically once the relevant property (in this case the company) came into existence. It was argued on this basis that the alleged 20% Agreement (entered into, on Mr Lang's case, in 2000 in respect of BMMD which was formed in 2002) became a Real Right when BMMD was formed.

85. This is a potentially interesting issue of Chinese law, raising similar issues to those which can arise in relation to agreements for value to hold future property on trust under English law. I am satisfied that Mr Cao's position, although conceptually coherent, does not reflect the current position under Chinese law. In particular it is noteworthy that Chinese law made specific provision for floating charges (under Article 181 of the PRC Property

Law), which would suggest there is no general principle of automatic crystallisation of contracts to create or transfer "Real Rights" in future property when the property comes into existence. Further, Mr Cao was unable to point to any legal source – case law, commentary or statutory – which supported his view. Finally, I found Mr Cao's crystallisation thesis difficult to reconcile with his acceptance that the promise of a share in the future profits of a company does not create a "Real Right" at any point (there being no suggestion that this would crystallise into a Real Right" once the profits had accrued).

86. I am also satisfied that there is a further answer to Mr Cao's analysis. As I have stated, BMMD was a WFOE. The WFOE Law, passed on 12 April 1986, provides at Article 2:

> "The WFOE as referred to in this law are those enterprises established within Chinese territory, in accordance with the relevant Chinese laws, with their capital provided wholly by a foreign investor".

I am satisfied that Article 10 of the WFOE Law and Article 23 of the Implementation Rules of the WFOE Law require registration of share ownership and transfers in a WFOE before they can take effect as "Real Rights" (a view supported by the decisions of the Guangdong High People's Court and People's Supreme Court in *Zhong Xiong v Rank Best Motor Co Ltd* (Decisions of 8 July and 30 November 2020).

87. I accept Professor Chen's evidence that the PRC Law of 12 April 1986 precluded Mr Lang having a shareholding in BMMD under Chinese law, and that his ineligibility to be registered as a shareholder is inconsistent with the suggestion that Mr Lang has a "Real Right" in 20% of the shares of BMMD. The fact that it would have been possible to establish a different form of Chinese corporate entity does not assist with the issue of whether Mr Lang could acquire a shareholding in the only form of company actually established. I am unable to accept Mr Cao's view that it was possible for a Chinese position to hold a shareholding as a "dormant shareholder" in a WFOE, not least because such an argument would fundamentally undermine the terms and obvious purpose of the Law. That view is supported by the decision in *Art 1 of the Supreme People's Court Provisions on Several Issues Concerning the Trial of Disputes Cases in Foreign Invested Enterprises (I) of 2010 (Zhong Xiong v Rank Best Motor)*. Mr Cao's answer to that point relied on Article 15 of this judgment. This addresses a position when one party is a nominal shareholder in the WFOE, and the other party agrees to make the substantial investment. The passage relied upon appears to provide that such a contract is nonetheless valid "provided there is no invalidity as provided for by laws and administrative regulations". However, as I read this extract of the judgment, it is addressing a case in which the foreign party has contracted with the nominal shareholder to provide the relevant funding, and it is concerned only with the effect of the WFOE on contractual rights in this scenario. However, as Professor Chen rightly observed, "even if the contract were valid … by reason of Article 15 of the SPC interpretation, it would not mean that any real/property rights were created, it would just mean that valid contractual rights were created". I can see nothing in this judgment which would permit Mr Lang to hold a beneficial (rather than nominal) shareholding in a WFOE such that he would have some form of Real Right.

88. In these circumstances, even assuming (which I do not decide) that there was a binding agreement reached in 2000 to give Mr Lang a 20% interest in a Chinese company once established, it was, at best for Mr Lang, only a personal and not a Real Right under Chinese law.

89. So far as the alleged Profit-Sharing Agreement is concerned, there is no dispute between Professor Chen and Mr Cao that it is a personal and not a real right.

90. That is sufficient to dispose of the argument raised by paragraph 35 of the Defence and Part 20 Claim. However, there was some debate between the Chinese law experts as to whether, assuming there was a prior right of some kind under Chinese law, Clause 10.6 was sufficient to terminate it. The effect of Clause 10.6 is a matter of English law as the governing law of the 2009 Agreement. In any event, I am satisfied that there is no material difference between Chinese law and English law on the issue of whether a contractual provision is sufficiently clear to replace or terminate a prior right. The expert opinion offered by Mr Cao on this issue took as its starting point the assumption that the issue was whether, by Clause 10.6, Mr Lang gave up a shareholding. Mr Cao expressed the view that shares were "a special form of property" which gave rise to additional requirements before a contract would be held to have disposed of them. For the reasons I have set out, I am satisfied that this is not the appropriate starting premise, and that if Mr Lang had any rights under Chinese law (which I do not decide), they were at best personal rights. I would note, in any event, that I do not accept that there was a mandatory formal content for an agreement disposing of shares under Chinese law, although I accept that a contract would only be held to have effected such a transfer if the intention to do so was sufficiently clearly expressed.

91. I also accept that a party giving up a pre-existing right in a contract would need to manifest that intention with sufficient clarity. That is a principle which is common to many legal systems, English law included (in the rule in Gilbert Nash (Northern) Limited v Modern Engineering Bristol Ltd [1974] AC 689). However, it is clear from the decisions to which Mr Cao referred in this context (*Notice of the Supreme People's Court on Issuing the Twelfth Batch of Guiding Cases*, including *Guiding Case No 57: Bank of Wenzhou Co Ltd, Ningbo Branch v Zhejiang Chuangling Electric Co ltd* (2014) Zhe Yong Shang Zhong Zi No 369 and *Shanghai China Shipbuilding Industry Corporation WANBANG Shipping Co Ltd v Jiangsu Sainty International Group Machinery Import and Export Co Ltd* [2002] Zui Gao Fa Min Shen No 2385) that the requisite clarity may be implicit in the contract, as well as express. As I explain below I am satisfied that Clause 10.9 was sufficiently clear in this regard.

The English law issues

92. Having established the validity of Clause 10.6 of the 2009 Agreement, the issue then arises as to its effect on the alleged Profit-Sharing Agreement and 20% Agreement as defined. By way of a reminder:

    i) The 20% Agreement is an alleged agreement said to have been reached between Mr Potts and Mr Lang "in about 2000" to give Mr Lang a 20% interest in the proposed Chinese company and in a sales company which was to be responsible for the operation of the Chinese company.

    ii) The Profit-Sharing Agreement is an alleged agreement said to have been reached between Mr Potts and Mr Lang on 7 February 1997 and amended "in about 2000" under which Mr Potts and Mr Lang would share equally in the net profits of MMD's Chinese business.

93. By way of a further reminder, Clause 10.6 provides:

> "This Agreement is in substitution for and replaces all and any agreements, arrangements or understandings whether written or oral and howsoever arising relating to any interest which Mr Lang may have, claim or assert in [BMMD] or its ownership, profits or shares. Any such existing agreements, arrangements or understandings are hereby terminated with immediate effect".

94. In my determination, the terms of Clause 10.6 are clear. It is not simply an entire agreement clause, but a clause intended to provide that the rights which it grants are in substitution for and replace any prior rights "whether written or oral and howsoever arising" which "relat[e] to any interest which Mr Lang may have, claim or assert in [BMMD] or its ownership, profits of shares", which the 2009 Agreement terminates.

95. I have no doubt that the effect of Clause 10.6 is that, as between the Claimants and Mr Lang, Mr Lang agreed that the rights acquired under the 2009 Agreement replaced or were in substitution for any other prior rights "relating to any interest" in BMMD, its ownership, profits or shares. The words of Clause 10.6 – "howsoever arising" – are wide enough to include not simply agreements between Mr Lang and the Claimants, but also between Mr Lang and Mr Potts (who was a signatory to the 2009 Agreement, although not in a personal capacity). Not only do the broad words of Clause 10.6 support that conclusion, but so does the commercial purpose of Clause 10.6 (which was clearly to make the rights afforded by the 2009 Agreement the final crystallisation of the long-running debate about Mr Lang's interest in BMMD).

96. I am therefore satisfied that it is appropriate to make a declaration in these terms:

> "<u>As between the Claimants and the Defendant</u>, Clause 10.6 was effective to extinguish any and all rights of the Defendant in respect of the Second Claimant arising under the alleged 20% Agreement (as defined in Schedule 1 to this Order".

97. The underlined words are intended to reflect the fact that Clause 10.6 appears in a contract between the Claimants and Mr Lang, and Clause 10.5 of that Contract provides:

> "The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it (other than, for the avoidance of doubt, the personal representatives of Mr Lang").

98. I am also satisfied that implicit in Clause 10.6 is a promise made by Mr Lang to MMD UK and BMMD not to assert such a claim or interest. Absent such a promise, MMD UK and BMMD would be exposed to the risk that Mr Lang might seek to subvert the obvious commercial purpose of the 2009 Agreement, by asserting such an interest against someone else, in addition to enjoying the rights acquired under the 2009 Agreement. In this regard, I have been assisted by the decision of Flaux J in <u>Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AS</u> [2014] EWHC 2068 (Comm), [70]-[72] and the authorities referred to in those paragraphs. While I accept, as Mr Lang submits, that the factual context of that case differs in certain respects, I am satisfied that Clause 10.6 was intended to effect what Flaux J referred to in that case as a "clean break", and that the "clean break" would be seriously undermined, and the bargain re-written, if Mr Lang was able to claim the rights afforded by the 2009 Agreement and also assert against other parties a further right to an interest in BMMD or its profits which the rights accorded by the 2009 Agreement were intended to replace and be in substitution for.

99. In these circumstances, I propose to make a further declaration (declaration 5A) as follows:

> "By Clause 10.6, Mr Lang impliedly promised the Claimants not to claim or assert any interest in [BMMD], or its ownership, profits or shares under any agreements, arrangements or understandings that pre-date the 2009 Agreement".

100. So far as the other part of declaration (5) is concerned, I have already concluded, on the basis of the evidence before me, that there was no Profit-Sharing Agreement in the form pleaded (whatever arrangements there might have been in relation to the profits of MMD Asia UK and MMD Asia Pacific). An issue might arise as to the effect of any declaration as to the effect of Clause 10.6 on some wider agreement which was not limited (or directly limited) to the profits of BMMD, and in particular, on any agreement relating to profits earned by other companies from business originating with BMMD.

101. In circumstances in which I have found that no Profit-Sharing Agreement in the terms pleaded came into existence (and as I explain below, I am prepared to make a declaration to that effect), and in which issues might arise as to the impact and extent of any declaration as to the effect of Clause 10.6 on any other form of profit-sharing agreement which has not been explored at the trial, I have decided as a matter of discretion that no further declaration is necessary on this part of declaration (5). The relief which I am prepared to grant addresses, in practical terms, the comfort which the Claimants seek in relation to the case advanced by Mr Lang in this action, and does not deprive the Claimants of "the fullest justice to which [they are] entitled", in the language of Hayim v Crouch [2009] EWHC 1040 (Ch), [17].

Declaration (6)

102. The sixth declaration the Claimants seek is as follows:

> "There was no binding agreement between Mr Lang and Mr Potts and/or the First Claimant on the terms of the alleged Profit-Sharing Agreement".

103. I have already given my reasons for concluding why, on the evidence before me, there was no binding agreement on the terms of the Profit-Sharing Agreement as pleaded, whatever other arrangements there may (or may not) have been. I have also explained why I have concluded that a declaration to address this issue is the most satisfactory means of addressing the Claimants' legitimate concerns to resolve the live dispute as to whether it was open to Mr Lang to advance such a claim, particularly following the 2009 Agreement.

104. In these circumstances, I will make a declaration as follows:

> "Mr Potts and/or the First Claimant did not enter into the Profit-Sharing Agreement with Mr Lang".

Declaration (7)

105. That leaves the final declaration sought by the Claimants:

> "There was no binding agreement between Mr Lang and Mr Potts and/or the First Claimant on the terms of the alleged 20% Agreement".

106. I have already confirmed that I will grant declaratory relief as to the effect of Clause 10.6 on any such agreement and/or any attempt by Mr Lang to assert it. I am satisfied that this sufficiently protects the Claimants (and indeed reflects the only relief originally sought by the Claimants on these matters). Determining whether the Claimants, as the parties seeking the negative declaration, had persuaded me that there was never, under any applicable system of law, a binding agreement to give Mr Lang a 20% interest in BMMD would involve an extensive factual and legal enquiry, in circumstances in which (for reasons which are not the fault of the Claimants), the evidence available at this hearing is limited.

107. In reaching my conclusion that no declaration in these terms is necessary and appropriate, I have been assisted by the observations of Hildyard J in Apex Global Management Limited and another v FI Call Limited and ors [2015] EWHC 3269 (Ch), [70], where he addressed the position in which declaratory relief was sought by a claimant in relation to a matter which had been advanced in the defendant's defence, but where the defence had been struck out:

> "Plainly, therefore, it is right for me to consider the ambit of the dispute as it appears from the pleadings, including those served on behalf of the debarred Defendants. It was submitted to me by Counsel for Global Torch that it also followed that I should determine all matters defined in the pleadings, including (for example) allegations made by the Apex Parties, such as the alleged misappropriation of the Al Masoud monies . However, I do not think that does follow. As I read the Court of Appeal's decision, the debarred party's pleadings may and usually should be taken into account for the purposes of defining and confining the ambit of the real dispute; and, for example, admissions may be taken as rendering proof of the admitted matters unnecessary. However, that is not to say that the proceeding party is entitled to seek adjudication of the debarred party's case: only to adjudication of its own case, and only then insofar as the court considers requisite in order to determine whether to grant relief and in what terms."

108. This is not to deprive the Claimants of "the fullest justice" to which they may be entitled. It is frequently the case that a court will not determine some of the issues which arise in a case because it is no longer necessary to do so in the light of the way in which other issues have been determined. In this case, having regard to the relief which the Claimants sought in their Part 8 Claim and Amended Particulars of Claim, the relief which I am willing to grant and the particular form this action has taken, I am satisfied that it is not necessary for me to make a declaration in the terms of proposed declaration (7).