THE HIGH COURT
COMMERCIAL

[2021] IEHC 376
[2017 No. 6277 P.]

BETWEEN
HKR MIDDLE EAST ARCHITECTS ENGINEERING LLC, JEREMIAH RYAN AND PATRICK STAFFORD

PLAINTIFFS

AND
BARRY ENGLISH

DEFENDANT

JUDGMENT (No. 3) of Mr. Justice Denis McDonald delivered on 31st May, 2021

Introduction

1. On 10th May, 2019, I delivered judgment (neutral citation [2019] IEHC 306) in these proceedings ("*my principal judgment*") on issues of liability. The proceedings had been at hearing before me over the course of 24 days commencing on 8th November, 2018 and concluding on 15th January, 2019. In my principal judgment, I dismissed all of the claims made by each of the plaintiffs, save for one of the claims made by the first named plaintiff ("*HKRME*") namely its claim that the defendant, Mr. English, had been unjustly enriched by payments which had been made by HKRME to a BVI entity under the defendant's control. These payments were made by HKRME with the cooperation and at the direction of the first named plaintiff ("*Mr. Ryan*") who was the beneficial but not the legal owner of HKRME at the relevant time. At the time of the payments, Mr. Ryan's shares in HKRME had been transferred to the defendant but, as explained in the principal judgment, at that time, the defendant was holding Mr. Ryan's shares in HKRME as "*caretaker*" for Mr. Ryan. The latter had arranged that the shares should be transferred to the defendant as part of a number of steps which were taken by him in order to hide assets from his creditors.

2. As outlined in the principal judgment, I came to the conclusion that the HKRME claim in respect of unjust enrichment was limited to the amount of its unpaid and lawful liabilities and I directed that an account should be taken of those liabilities. HKRME contends that I made a significant error in my principal judgment in my finding that its claim was confined in that way. In those circumstances, HKRME has applied to me to revisit the principal judgment in order to correct that alleged error and to permit HKRME to pursue a claim against the defendant in respect of the entire of the monies transferred to him (with the cooperation of Mr. Ryan). Were I to correct this alleged "*error*", this would have a significant impact on the value of the HKRME claim against the defendant. Between April, 2012 and March, 2013, a total of US$8,094,873 was transferred by HKRME to the BVI entity controlled by the defendant. The amount required to discharge the liabilities of HKRME is substantially smaller. According to a schedule attached to the plaintiff's response to a request for particulars raised prior to the trial, the amount due in respect of the unpaid liabilities of HKRME was stated to be AED8,483,686.28 which equates to approximately €2,061,536. For completeness, it should be noted that, subsequent to the principal judgment, further particulars have been provided of what are alleged to be the unpaid liabilities of HKRME and the amount now claimed equates to approximately €3,291,550. It will be necessary, in due course, to consider the reasons why I came to

the conclusion that the HKRME claim was limited to its unpaid liabilities. It is sufficient, at this point, to record that the claims made on behalf of HKRME in these proceedings were made in parallel with claims made by the first and second named plaintiffs, Mr. Ryan and Mr. Stafford, that the monies transferred from HKRME to the BVI entity were held on trust for the children of Mr. Ryan under a trust known as the Ryan Children's Trust ("*the RCT*"). For reasons which are explained in the principal judgment, I came to the conclusion that, at least insofar as it purported to relate to the monies transferred to the BVI entity, the alleged trust was a sham and that the intended beneficiary of the transfers (subject to the unpaid liabilities of HKRME) was not any such trust but was instead Mr. Ryan himself who had put the relevant arrangements in place with a view to concealing assets from his creditors. One of the extraordinary features of these proceedings is that Mr. Ryan, who was the principal witness for the plaintiffs, actively made the case that many of the arrangements which he had put in place were shams and were designed to create a false picture in the event of a "*look back*" by his creditors. I found that the creation of the RCT fell into the same category.

3. Before addressing the facts, it may be helpful, at this point, to identify the relevant legal principles which apply to an application of this kind – namely where the court is asked, prior to the perfection of the court order, to correct what one or more of the parties characterises as an error in its judgment. I should make clear that, as of now, no order has been perfected on foot of the principal judgment. This has arisen in circumstances where the proceedings have not yet been concluded. The issue in relation to the quantification of the unpaid and lawful liabilities of HKRME has yet to be heard and the perfection of the order has been deferred until the determination of that issue.

The applicable legal principles

4. As the authors of *Delany & McGrath on Civil Procedure,* 4th Ed., 2018, at para. 25.53 note, it has long been accepted that, following the delivery of judgment by a judge, the judge has jurisdiction to revise or alter the decision at any time up to the point when the order to be made on foot of that judgment has been perfected. *Delany & McGrath* cite, in this context, the decision of the Court of Appeal of England & Wales in *Re Suffield & Watts* (1888) 20 QBD 693 where Fry L.J. said at p. 697:-

> *"In Re St. Nazaire Co shews that, when an order or judgment of the High Court has once been perfected, the Court has no jurisdiction to alter it. So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."*

5. However, in the same paragraph, *Delany & McGrath* explain that, while this jurisdiction can be used to correct an error in a judgment or to clarify a finding in the judgment, there is a relatively high bar that must be surmounted by an applicant before a court will intervene. In short, where a court is asked to reverse its conclusion or substantially change the judgment, strong reasons will have to be identified by an applicant seeking the correction of an alleged error. This is reflected in the modern case law (addressed

below). In contrast, there is greater scope for a judge, after judgment has been delivered but before perfection of the order, to amplify the reasons for a decision.

6. The relevant principles are discussed in *Re McInerney Homes Ltd* [2011] IEHC 25. In that case, Clarke J. (as he then was) quoted a lengthy passage from the judgment of Wilson L.J. in the Court of Appeal of England & Wales in *Paulin v. Paulin* [2010] 1 W.L.R. 1057 at para. 30 and held that the passage in question correctly represents the law in Ireland. For the purposes of this judgment, it is unnecessary to set out the entire of the passage in question. The relevant principles can be summarised as follows:-

   (a) A reversal by a judge of a decision is to be distinguished from an amplification of the reasons given for that decision. Where the reasons are allegedly inadequate, a party should invite the court to consider whether to amplify them before complaining about their inadequacy on appeal. Wilson L.J. stressed that a judge has "*an untrammelled jurisdiction to amplify*" the reasons for a decision at any time prior to the perfection of the order to be made on foot of a judgment;

   (b) The same cannot be said to apply where a party seeks to persuade a court to correct an error in its decision at least where the "*correction*" would involve a reversal of the decision. Whatever may have been the position before *Re Barrell Enterprise*s [1973] 1 W.L.R. 19, the decision of the Court of Appeal of England and Wales in that case narrowed the circumstances in which it is considered proper for a court to be asked to reverse its decision prior to perfection of the order. In that case, it was held that, save in "*most exceptional circumstances*", the successful party ought to be entitled to assume that the judgment given is a valid and effective one.

   (c) Notwithstanding the requirement of exceptional circumstances, Wilson L.J. approved an observation made by Rix L.J. (sitting as a first instance judge) in *Compagnie Noga D'Importation v. Abacha* [2001] 3 All ER 513 at paras. 42-43 that "*exceptional circumstances*" is not a statutory definition and should not be *"turned into a straitjacket at the expense of the interests of justice*" and that a formula of "*strong reasons*" was an acceptable alternative to that of "*exceptional circumstances".*

7. In para. 3.7 of his judgment in McInerney Homes, Clarke J. expressly stated that he agreed with the formulation suggested by Rix L.J. that "*strong reasons*" is a more appropriate description of the relevant test. Subsequently, in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63, Finlay Geoghegan J. (albeit in the context of an application to correct an error in an appeal court judgment) suggested that it was open to question whether there is, as yet, a "clea*r determination in this jurisdiction as to whether the High Court if asked to revisit an issue already decided in a written judgment but before the relevant order is perfected must be satisfied that there are 'exceptional circumstances' or 'strong reasons' which warrant it doing so"*. However, she added *"It may be that nothing turns on either phraseology*". Later, in para. 33 of her judgment in that case, Finlay Geoghegan J., having considered the judgment of the Supreme Court in

Nash v. Director of Public Prosecutions [2017] IESC 51, observed that it is only exceptionally that courts make orders setting aside judgments already given. At para. 33, she said:-

> *"33. … the cases demonstrate that the courts only exceptionally make orders setting aside judgments already given. An application to do so runs directly counter to the important value of the administration of justice that there should be finality to litigation."*

8. Similar considerations were identified by Hogan J. in *SZ (Pakistan) v. Minister for Justice and Law Reform* [2013] IEHC 95. Having referred to the observations of O'Donnell J. in the Supreme Court in *Re McInerney Homes* [2011] IESC 31 (where O'Donnell J. emphasised that the reopening of an issue should be an exceptional situation), Hogan J. continued as follows at paras. 40-41 of his judgment:-

> *"40. … it is … clear that any question of re-opening a judgment following its delivery requires compelling and unusual circumstances. Thus, it is plain from McInerney Homes that where the court proceeds on critical factual assumptions which have not been dispelled by the parties, any subsequent judgment may be re-opened if its transpires that these factual assumptions are simply wrong and are critical to the decision in question.*
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> *41. Unusual cases of this kind aside, however, McInerney Homes is in fact an authority for the proposition that the Court cannot lightly and without grave reason re-open a final judgment…"*

9. The factors which weigh against applications of this kind being too readily entertained are identified in the judgment of O'Donnell J. in *Nash v. Director of Public Prosecutions* at paras. 6-7 (albeit in the particular context of a Supreme Court judgment) where he said:-

> *"6.…What… is to be done when a party (normally the losing party) considers that a judgment contains errors of fact? …In my view, the first thing that must be done is that the party … should make a careful assessment of the nature of the alleged error. If an error is identified, in principle it may be one which is trivial or inconsequential, or it may be of some significance either as a matter of simple accuracy, or because of its potential effect on the legitimate interests of the parties… Exceptionally, an error may be capable of being so fundamental and central that it should lead to the setting aside of a judgment including perhaps resulting in the reversal of the decision itself… it is important to emphasise the responsibility that lies upon the party and his or her advisors in making this analysis, and if appropriate advising upon it.*
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> *7. This responsibility flows from the significance of an application to court in respect of a judgment delivered. It is sometimes thought that such applications are not welcomed or encouraged because of the potential embarrassment of an error being publicly identified. As Baroness Hale observed in Re L and B [2013] UKSC 8, while*

judicial tergiversation is not to be encouraged, it takes courage and intellectual honesty to admit one's mistake. But those are features required at all stages. The obligation to do justice fairly, and without fear or favour… should extend to a willingness to acknowledge error if justice should require it. History has shown in any event, that courts have entertained applications and exceptionally made orders setting aside judgments already given. ***Courts are, however, reluctant to entertain such applications for different and good reasons****. First, the revisiting of old ground inevitably adds to the costs incurred by and the stress imposed upon all the parties involved. It also requires the allocation of scarce time and resources which are therefore necessarily denied to litigants who have not yet had their case heard or considered on appeal. For example, this application has occupied considerable time both in and outside court. More importantly again, such an application in principle runs directly counter to an important value which the law, and it should be added justice accords to finality…" (emphasis added)*

10. In the context of a court of first instance, the judgment of Rix L.J. in *Compagnie Noga* identifies very similar considerations. As noted in para. 5(c) above, Rix L.J. explained, at para. 43 of his judgment, that "*strong reasons*" is an acceptable alternative to "*exceptional circumstances*". He nonetheless added that it will necessarily *"… be in an exceptional case that strong reasons are shown for reconsideration.*" At paras. 44 to 47 of his judgment, he explained why this is so in the following terms:-

"44. "In the present case Noga asks the court to reconsider its judgment because of the submission that it has got the answer wrong. In every case where an appeal is allowed, the court below has, by definition, got it wrong. The solution is to appeal. What is special, what is exceptional about this case? What are the strong reasons? It is not the case of an ex tempore oral judgment. The judgment here, whatever its defects, has been reserved and is the product of substantial reflection…

45. …It is a case where it is said that the judge has got it wrong, on points which have been argued. The very issue for reconsideration is in dispute…

46. …

47. … it is in the nature of the legal process that, once judgment has been rendered, analysis thereafter becomes clarified and refined… But that is the function of the appeal process. In my judgment, to grant this application… would subvert the appeal process itself. In doing so, it would not answer the interests of justice, but would be the antithesis of justice according to law. There are of course cases where an error of fact or law may be too clear for argument… In such a case, it is better that the error is corrected without imposing on the parties the need for an appeal. But no parallel to Noga's application has been cited to me. It is in my judgment wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances, a judge would be tempted to open up reconsideration of his judgment, an appeal would not be avoided, it will be made inevitable. Every case would become subject to an unending process of

reconsideration, followed by appeal, both on the issue of reconsideration and on the merits."

11. In the course of the hearing of the present application, counsel for the defendant strongly argued that these observations of Rix L.J. applied with particular force in the present case and he submitted that the submissions made on behalf of HKRME in respect of the alleged error in the principal judgment should, more properly, be made, in due course, to the Court of Appeal. I believe that there is considerable force in counsel's submission but, at this point, I will confine myself to an identification of the relevant principles and postpone to later in this judgment my consideration of the arguments. In my view, the rationale underlying the observations of Rix L.J. quoted above is consistent with that subtending the judgment of O'Donnell J. in *Nash*. While the latter was concerned with the position in relation to a Supreme Court judgment, the observations of Rix L.J. are concerned with the approach to be taken in respect of a judgment of a court of first instance. In my opinion, the considerations identified by Rix J. in *Compagnie Noga* apply with equal force in this jurisdiction.

12. Having regard to the principles outlined above, it is clear that an application of this kind will only be entertained where strong reasons can be shown that the interests of justice require the court to revisit an error. The authorities suggest that such an application will be the exception rather than the rule. In most cases, the appropriate route to address errors in judgments of courts of first instance is to appeal. Nonetheless, there are circumstances where an error on the part of the court can, quite properly, be drawn to the court's attention before any order is drawn up on foot of a judgment. This arises, most frequently, in the case of undisputed errors or in circumstances where, notwithstanding a dispute between the parties as to whether an error was made, the error is nonetheless obvious to the court. In *Compagnie Noga*, Rix L.J. referred to a clear example of this which occurred in *Spice Girls Ltd v. Aprilia World Service BV* (The Times, 12th September, 2000). In that case, after a judgment had been delivered by Arden J. (as she then was), application was made to her for leave to appeal because her judgment was said to be inconsistent with a concession of fact that had been made during the course of the hearing. While it was disputed by the other side that any such concession was made, Arden J. found, after a further hearing, that the concession had been made in circumstances where it could not now be withdrawn. In those particular circumstances, she came to the conclusion that she was obliged to reconsider her judgment in light of the concession which had been overlooked. At p. 527 of the report in *Compagnie Noga,* Rix L.J. quoted Arden J. in the following terms:-

> *"In my judgment, an appeal is not the appropriate course where there are errors in judgments which can be corrected by the court which conducted the trial. To leave such matters to an appeal means further delay, uncertainty and costs, which is not in the interests of litigants. The trial judge is in a strong position to consider the effect of the error in the context of the entire case."*

13. A somewhat similar issue arose in a case which I heard in 2018 in proceedings under s. 117 of the Succession Act, 1965, namely K v. K [2018] IEHC 615, [2019] 2 ILRM 23 albeit that, there, the parties were in agreement that an error had been made. My judgment in that case was delivered on 7th November, 2018. Two days later, counsel for both parties attended before me to draw my attention to an error in para. 50 of that judgment. In that paragraph, I determined that I could not have regard to certain hearsay evidence that had been heard by me on a *de bene esse* basis in circumstances where counsel for the defendant (at the time the evidence was given) said that submissions would subsequently be made to me as to the admissibility of this evidence but where, when it came to the closing submissions, I was informed that I would not be addressed on the issue. When counsel asked me on 9th November, 2018 to revisit this aspect of my judgment, it was explained that counsel had prepared submissions on the basis that the evidence could be admitted in reliance on the res gestae exception to the hearsay rule but that it was ultimately not necessary to make those submissions in circumstances where, on the final day of the hearing, counsel for the plaintiff accepted that the evidence could be admitted, for what it was worth. Regrettably, I did not have a note of that concession by counsel for the plaintiff in my court book and had overlooked it in writing para. 50 of my judgment. I took the view (as recorded in para. 6 of my addendum judgment of 23rd November, 2018: [2018] IEHC 658) that, in the circumstances, there were strong reasons for revisiting para. 50 of the judgment. I said that it would be:-

> *"…wholly unjust to the parties… and in particular to the defendant… if I were to leave untouched para. 50 of my first judgment. It is quite clear, based on what I have been told by counsel, that I was incorrect in what I said in para. 50 in suggesting that the evidence could not be admitted in circumstances where I had heard no submissions in relation to it. The true position is that it was not necessary for those submissions to be made in light of the very helpful attitude adopted by counsel for the plaintiff. In my view, the circumstances of this case clearly demonstrate that there are strong reasons for me to revisit my first judgment to the extent that I excluded this element of… evidence from my consideration of the issue…"*

14. In fact, I was very grateful to the parties in that case for bringing this error to my attention so that it could be corrected. Although the authorities emphasise that an application of this kind is exceptional and should only be pursued where strong reasons can be advanced, the potential embarrassment of an error being publicly identified should not be a consideration discouraging the making of such an application. As O'Donnell J. made clear in para. 7 of his judgment in *Nash*, the obligation to do justice fairly, and without fear or favour must extend to a willingness to acknowledge error if justice should require it. As Rix L.J. observed in the *Compagnie Noga* case, where an error is very clear, it is better that the error is corrected without imposing on the parties the need for an appeal. That said, the Irish authorities demonstrate that, save in such clear cases, the court should be slow to entertain an application of this kind. To paraphrase Hogan J. *in SZ (Pakistan),* the court cannot lightly and without grave reason re-open a final judgment.

15. In contrast to *K v. K,* the present application does not relate to an undisputed error in a judgment. The suggestion made by the plaintiffs that I was in error in my judgment insofar as the claim of HKRME is concerned is vigorously contested by the defendant. The defendant contends that there was no error of the kind suggested by HKRME. In the alternative, the defendant argues that any error is a matter for appeal and is to be addressed together with all of the other appeal points that arise on foot of the principal judgment. In this context, it should be noted that this is a case where, having regard to the findings which have been made in the principal judgment, appeals are likely on both sides once these proceedings have reached a conclusion in the High Court. It should also be noted that the defendant has called into question whether an application of this kind can be made so long after the principal judgment was delivered and the defendant has drawn attention, in this context, to the extensive exchanges and hearings which have taken place in the intervening period in which he has pursued (at significant cost to him) particulars of the unpaid liabilities of HKRME. It may accordingly be necessary to consider whether HKRME is estopped from pursuing this application or otherwise precluded from doing so by reason of its delay.

The alleged errors

16. HKRME contends that I fell into error in paras. 400 and 401 of the principal judgment in finding that the only unjust enrichment claim made in these proceedings by HKRME on foot of the transfers to the BVI entity was in respect of its unpaid liabilities. In those paragraphs of my judgment, I said:-

> *"400. …it seems to me that this is a classic case in which the remedy of unjust enrichment applies and accordingly I find that HKRME (as opposed to Mr. Ryan or Mr. Stafford) is entitled to a remedy against Mr. English arising out of the transfers in question. However, given the way in which the case has been pleaded in the statement of claim and has been run, it is clear that the only claim which is made by HKRME in this regard is in respect of its unpaid liabilities which are alleged to amount to AED 8.7 million.*
>
> *401. It is also clear from the statement of claim and from the evidence given by Mr. Ryan that HKRME has not made a claim, in these proceedings, for the return of the entire of the monies paid to Sunvit. In these circumstances, the only relief which I can grant is in relation to the liabilities of HKRME…"*

17. I should explain that Sunvit is the relevant BVI entity controlled by Mr. English, the defendant, and that it was to Sunvit that the payments were made from the bank accounts of HKRME. HKRME maintains that I was in error in suggesting that no claim was made in the statement of claim by HKRME for the return of the entire of the monies paid to Sunvit. HKRME also alleges that I am in error in suggesting that a similar conclusion can be reached by reference to the way in which the case was run or by reference to the evidence given by Mr. Ryan.

18. In support of the case that the judgment contains the alleged errors, HKRME, in the course of moving the present application, has drawn attention to the terms of the

statement of claim which it maintains disclosed a claim by HKRME, based on unjust enrichment, for the return of the entire of the monies transferred to Sunvit. In so far as a claim was also made on behalf of the RCT on a similar basis, HKRME submits that the plaintiffs were fully entitled to pursue alternative claims and it relies on Supreme Court and High Court authority to that effect (which are discussed in para. 53 below). HKRME has also drawn attention to the opening and closing submissions delivered on behalf of the plaintiffs and to one aspect of the evidence given by Mr. Ryan (the principal witness called on behalf of the plaintiffs whose evidence extended over a period of eight days running from the early afternoon of Day 2 to the first part of the morning on Day 10). It will be necessary, in due course, to consider certain aspects of the pleadings and the submissions and also the evidence given by Mr. Ryan both in the witness box and in his witness statement (which he confirmed could be treated as part of his evidence for the purposes of the hearing). Before doing so, however, it may be helpful to identify a number of important aspects of the principal judgment and of the case made by the plaintiffs (as reflected in the judgment).

Relevant aspects of the judgment and of the case made by the plaintiffs

19. As outlined in para. 12 of the judgment, Mr. Ryan is a well-known architect. Prior to the events, the subject matter of these proceedings, he was the principal in Horan Keogan Ryan Ltd (which I referred to, in the principal judgment, as HKR Dublin). Mr. Stafford, the third named plaintiff, is a long-standing friend of Mr. Ryan. He was joined to these proceedings (several months after they had been commenced) in his capacity as settlor and trustee of what was described in the evidence of Mr. Ryan and Mr. Stafford as the Ryan Childrens' Trust ("*RCT*") which Mr. Ryan claimed was established in November, 2009 for the benefit of his children. The third named plaintiff, HRKME, is a company organised and existing under the laws of the United Arab Emirates ("*UAE*"). It was established at the end of 2009 in circumstances where, in the wake of the financial crisis, the business of HKR Dublin was in substantial decline. As Mr. Ryan explained in para. 25 of his witness statement, he was in full control of HKRME and its business. HKRME secured a very valuable design contract in relation to the construction of the Abu Dhabi Plaza in Astana, Kazakhstan. The initial design fee was AED 126.4 million (which Mr. Ryan, in his evidence, said equated to approximately €34 million).

Mr. Ryan's attempts to insulate his interest in HKRME from the effects of his insolvency

20. As explained in Mr. Ryan's evidence, and as noted in para. 20 of the principal judgment, the financial crisis experienced in 2008 and following years had a huge impact on Mr. Ryan who, with the assistance of loan finance, had made investments in property both in Ireland and elsewhere. As the value of those investments fell, Mr. Ryan found himself with significant personal liabilities to lenders. Against that backdrop, as set out in the principal judgment, Mr. Ryan purported to establish the RCT for the benefit of his children. Although Mr. Ryan sought advice from a wide variety of professional advisors at that time with a view to protecting his assets from his creditors, Mr. Ryan did not disclose the creation of the RCT to any of his advisors. As outlined in paras. 30-42 of the principal judgment, Mr. Ryan was acutely concerned about the impact which a bankruptcy was likely to have on his assets. He was particularly concerned to ensure that the hugely

valuable business of HKRME (which Mr. Ryan regarded as his future) would be insulated from the effects of any bankruptcy process. In addition to consulting a range of different advisors, he discussed a number of options with some close friends including Mr. Stafford, the second named plaintiff, as to how a structure might be put in place to ensure that his interest in HKRME would not fall into the hands of his creditors in a bankruptcy. As claimed in para. 22 of his witness statement, the RCT was set up on 15th November, 2009 for the benefit of each of Mr. Ryan's daughters. Mr. Ryan also claimed in the same paragraph of his witness statement that, while no funds were immediately transferred to the RCT, the intention was that "*it could be used for future earnings of the Middle Eastern venture".* HKRME was established very soon thereafter on 9th December, 2009 and was granted a commercial licence in the UAE to commence business on 11th March, 2010, Mr. Ryan further described in para. 26 of his witness statement that, on 16th March, 2010, he executed a declaration of trust which provided that his shares in HKRME would be held on trust for the RCT.

21. As part of his efforts to ensure that his interest in HKRME would not fall into the hands of his creditors or a trustee in bankruptcy, Mr. Ryan approached the defendant, Mr. English, with a view to the latter acting as "*caretaker*" of his shares in HKRME for the duration of any voluntary arrangement or bankruptcy into which Mr. Ryan might enter. Mr. English was a business acquaintance of Mr. Ryan (although Mr. Ryan clearly regarded him as more than that). This involved the transfer of the legal interest in HKRME to Mr. English. The transfer was a crucial element of Mr. Ryan's plan to conceal his ongoing interest in HKRME. In order to ensure that his plan would work, Mr. Ryan arranged for the transfer of his shares in HKRME to Mr. English at an artificially deflated price. This price was arrived at against the backdrop of the creation of fictitious invoices by an entity called Green Cube purporting to show that HKRME had significant liabilities to it. In the event that the transaction was later investigated by a bankruptcy trustee, these fictitious invoices were designed to ostensibly justify the deflated price. In his evidence at the trial, Mr. Ryan freely acknowledged that the Green Cube invoices were fictitious. He made a similar case in relation to the sale transaction itself. Although the transaction was structured as a straightforward sale of the shares in HKRME to Mr. English, the case made by the plaintiffs in these proceedings was that the shares in HKRME were to be held by Mr. English, in the first instance, on trust for the obligations of HKRME with the balance being held on trust for the benefit of RCT. Mr. Ryan contended that the documents (to which he was a party) evidencing the sale of the shares to Mr. English were a "*sham*". In my principal judgment, I found that those documents were executed in August, 2011 and backdated to 31st May, 2011 with a view to ensuring that the "*sale*" had the appearance of having been completed before any voluntary arrangement or bankruptcy was triggered. In addition, I formed the view (although this was contested by Mr. English) that it was clear from the evidence that Mr. English did not provide his own funds for the acquisition of the HKRME shares. Instead, Mr. Ryan arranged with Mr. English to channel funds from HKRME to the latter in order to enable Mr. English to acquire the HKRME shares at no cost.

22. As a consequence of this arrangement, Mr. English became the legal owner of the shares in HKRME. However, the business of HKRME continued to be run by Mr. Ryan or at his direction. These facts were concealed from Mr. Ryan's creditors. Instead, Mr. Ryan sought to convey the impression that he had disposed of his interest in HKRME for a modest consideration and that he no longer had any involvement in it. Thus, as outlined in para. 156 of the principal judgment, Mr. Ryan signed a proposal for an English individual voluntary arrangement in October, 2011 (which is broadly equivalent to a personal insolvency arrangement in Ireland) in which he stated that his interest in an architectural business in Abu Dhabi had "*recently been sold*". Attached to the proposal was an estimated statement of affairs in which Mr. Ryan purported to certify that he had made a complete disclosure of his assets and liabilities and in which he stated that he had sold his interest in the UAE architectural business in the estimated amount of €77,000. As summarised above, this was a deliberately deflated price which was pitched at that level so as not to excite the interest of Mr. Ryan's creditors. Moreover, Mr. Ryan had not wholly disposed of his interest in HKRME albeit that anyone looking at the relevant documents would have understood that he had. The statement of affairs was very consciously and deliberately designed to mislead. That said, it should be noted that Mr. Ryan did not ultimately pursue the individual voluntary arrangement route. Instead, over a year later, he filed for bankruptcy in London in November, 2012. At that time, there was a significant benefit to filing for bankruptcy in London rather than in Dublin in that the usual duration of bankruptcy in England & Wales was one year whereas it was, at that time, considerably longer in Ireland. For the purposes of those bankruptcy proceedings, Mr. Ryan made a new statement of affairs on 23rd November, 2012 in which he was asked whether he had undertaken any transfers of assets for less than their true value. Mr. Ryan answered "*no*" to that question. Having regard to the evidence put forward by him in support of the case made in these proceedings, that answer was plainly false. Mr. Ryan's untruths in his statement of affairs were subsequently compounded by lies which he told to his bankruptcy trustee. These are addressed in paragraphs 162 and following paragraphs of the principal judgment. In answer to questions raised by the bankruptcy trustee, Mr. Ryan stated that he "*believed*" that the "*office in the Middle* East" was "*being wound down at the moment"* and that it had not "*gone particularly well*". He also falsely told his bankruptcy trustee that the business had been sold and that he was no longer involved and that he had not been involved "*for quite a while*". As observed in para. 164 of the principal judgment, all of these answers were patently untrue. Mr. Ryan continued to have an active involvement in HKRME. Moreover, HKRME had, at that time, been in receipt of very substantial returns earned from the Abu Dhabi Plaza project in Astana. It was, largely, from the monies earned on that contract that the very substantial payments to Sunvit, the BVI entity, were made. These were actively concealed from Mr. Ryan's bankruptcy trustee.

Mr. Ryan was centrally involved in the transfers to Sunvit

23. For present purposes, it is particularly important to bear in mind that, notwithstanding the transfer of Mr. Ryan's shares in HKRME to Mr. English, Mr. Ryan continued to treat HKRME as his own asset. As noted on p. 33 of the transcript of Day 1, it was always the plaintiffs' case that Mr. Ryan was "*still running the show*" after the transfer of his legal interest in

the HKRME shares to Mr. English. Notably, as recorded on p. 39 of the same transcript, the plaintiffs made the case that the documentation clearly showed that "*Mr. Ryan regarded this as his money and that Mr. English was doing this for his benefit*…". Very significantly for present purposes, Mr. Ryan was centrally involved, after the transfer of shares to Mr. English, in the extraction of funds from HKRME ostensibly to discharge fees due to Sunvit. These transfers were effected at Mr. Ryan's direction but were "*papered*" (to use one of Mr. Ryan's terms) by an elaborate series of fictitious transactions (described in the principal judgment) purporting to reflect the discharge of invoices for services rendered to HKRME. In truth, no such services were rendered and, similar to the fictitious Green Cube invoices previously created, the Sunvit invoices were generated to create a paper trail for "*look back*" purposes in order to hide the true reason for the transfers.

The evidence of Mr. Ryan

24. In this context, there are a number of aspects of the evidence given by Mr. Ryan which are important to keep in mind. In particular, it is necessary to recall that, in the course of his evidence, Mr. Ryan made very clear that the transfers to Sunvit were done at his behest. This was also confirmed by the evidence given by Ms. Dolly Sockett who was the office manager of HKRME in the period from September, 2011 until June, 2013. On Day 4, Mr. Ryan gave evidence that, before any of the funds were released to Sunvit, Ms. Sockett would email or text him and say "*is it ok now to release the funds*" and he would answer "*yes*". The evidence of Ms. Sockett on Day 10 of the hearing supports this. On Day 10, Ms. Sockett gave evidence (as recorded on p. 50 of the transcript) that, following the transfer of shares to Mr. English, Mr. Ryan continued to be in control of HKRME. Later at pp. 70-72 of the transcript on the same day, Ms. Sockett gave detailed evidence about her interactions with Mr. Ryan in advance of the making of the transfers to Sunvit's account in Guernsey. Ms. Sockett described that, in light of the sheer scale of the first transfer which amounted to AED 18,550,000 (equating to US$5,044,873), she initially responded to Mr. Ryan's request with the words "*that much*?" to which he answered *"yes. Do as I say*". Ms. Sockett explained that her question to Mr. Ryan was framed in circumstances where "*it's like you're taking out all the money from the company*". In each case, the release of funds to Sunvit was purportedly in payment of an invoice presented by Sunvit which Mr. Ryan knew to be a fiction.

The true reason for the transfers to Sunvit

25. The timing of these payments is also relevant. Most of the payments were made prior to November, 2012 when Mr. Ryan filed for bankruptcy in London. As noted in para. 180 of the judgment, Mr. Ryan sought to suggest that the transfers took place because there was a concern about the ease with which monies held in the UAE could be attacked by the employer under the Astana contract or by local creditors in the UAE. However, Mr. Ryan was unable to give any specific evidence in support of this contention and I rejected this element of his evidence. In para. 180 of the principal judgment, I came to the following conclusion as to the true reason for the transfers:-

> *"180. In my view, there is a more obvious and probable reason why funds were transferred in this way. To my mind, the intention was clear; Mr. Ryan's intention*

was to salt away money in a manner that would make it very difficult for any trustee in bankruptcy to follow the trail. Thus, these elaborate arrangements were put in place. It is quite clear that Mr. Ryan considered the moneys to be his own. This is evident from [the email of 21st April, 2012 described in para. 29 below]."

26. It is clear from the evidence of Mr. Ryan (and from the findings made by me in the principal judgment) that, subject to the discharge of HKRME's liabilities, these monies were intended by Mr. Ryan to be held for the benefit of himself and to be hidden away well under the radar of any enquiries by a bankruptcy trustee. I came to the conclusion that the monies were not held for the benefit of the RCT. However, although I concluded that Mr. Ryan was the intended beneficiary, Mr. Ryan's evidence was clear that the monies so transferred were, nonetheless, to be available at all times to be repatriated to the UAE to the extent necessary to meet the obligations of HKRME. This is important in the context of my finding that HKRME was entitled to pursue a claim for the return of the monies to that extent.

27. The evidence given by Mr. Ryan in paras. 80 to 82 of his witness statement encapsulates the case which he made in relation to the Sunvit monies. In para. 80, he stated that he and Mr. English had agreed that the latter would hold the money on trust and when the Astana project was completed and all the obligations of HKRME were met, that "*whatever was left in the account … would be for the benefit of the* [RCT]… ". He continued as follows in paras. 81 and 82:-

"81. The agreement at all times was that while the money may be resting offshore it was to be available at all times to be repatriated to the UAE to meet the obligations of HKRME. In other words, as required, money would be brought back to HKRME to meet commitments to sub consultants, suppliers and staff. Any surplus cash was to be retained offshore by the BVI company…

82. In summary, the agreement between BE & I was that:

(i) The money transferred from the account of HKRME would be held on trust for HKRME and the [RCT];

(ii) The money transferred in this way would be available at all times to be repatriated to the UAE to meet the obligations of HKRME, to include payments to consultants, suppliers and staff;

(iii) When the HKRME project in Astana was completed and all amounts owed by the HKRME had been paid, the remainder of the monies that had been transferred from HKRME would be held for the benefit of the [RCT]; and

(iv) Either the name of the beneficiary … would be changed in due course from BE to the [RCT]/my daughters or the proceeds will be distributed to [the RCT]/my daughters." (emphasis added).

28. It is clear from these paragraphs of Mr. Ryan's witness statement that the only circumstance in which money was to be returned to HKRME was to meet its liabilities. Otherwise, the monies transferred were to be retained "*offshore*" by Sunvit. The case made in para. 82 of Mr. Ryan's witness statement reflected the allegation made in para. 30 of the amended statement of claim and specific attention was drawn to it in para. 12 of the opening legal submissions delivered on behalf of the plaintiffs in advance of the trial of these proceedings. This is also consistent with the way in which the plaintiffs answered the question raised in para. 22 of the defendant's request for particulars dated 4th September, 2017. In para. 22 of that request, the defendants asked the plaintiffs to clarify who the plaintiffs alleged held the legal and/or beneficial interest in the monies transferred to Sunvit and on what basis such parties were entitled to that interest. In response, the plaintiffs stated in clear terms:-

> *"…the monies were being held on behalf of HKRME and the [RCT]. As pleaded at paragraph 29 of the Statement of Claim, the Defendant had agreed and was at all times aware that the Transferred Monies were to be available at all times to HKRME and that subject to its liabilities being met, the remainder of the monies was for the benefit of the [RCT]…"*

The reference to para. 29 of the statement of claim is significant. It is replicated in para. 30 of the amended statement of claim which, as outlined above, is entirely consistent with paras. 81 and 82 of Mr. Ryan's witness statement.

29. For the reasons explained in more detail in the principal judgment, I did not accept that the monies transferred to Sunvit were to be held for the benefit of the RCT. On the contrary, I found that they were clearly intended to be transferred for Mr. Ryan's own benefit and, in particular, with a view to hiding assets from his creditors and his bankruptcy trustee. The transfers in question commenced on 23rd April, 2012 just days after Mr. Ryan, in advance of a business trip to Kabul in Afghanistan, sent an email to Mr. English in terms which are quoted in para. 180 of the principal judgment and which I repeat here for convenience:-

> *"Barry. Sorry to be paranoid. Just in case anything goes wrong in Kabul over the next few days will you make sure money from company gets to Veronica in an efficient way. Set aside 10 per cent for Liz. In relation to company here wind it down just to complete the ADP and take cash out as above…"*

As outlined in the principal judgment, that email was clearly written at a time when Mr. Ryan was concerned about his own safety as he headed for Afghanistan. If ever Mr. Ryan was likely to reveal his true intentions, this was it. The email was, in essence, a direction to Mr. English as to how to deal with, *inter alia*, the Sunvit monies in the event of his death while in Afghanistan. The email is utterly inconsistent with the suggestion made in these proceedings that the money was to be held for the benefit of the RCT. The email does not even mention the RCT or any beneficiary of that trust. The reference to Veronica is a reference to Mr. Ryan's wife. She was not a beneficiary of the RCT. Similarly, the reference to Liz is a reference to Mr. Ryan's partner. Likewise, she was not a beneficiary

of the RCT. The email clearly shows that Mr. Ryan regarded the monies transferred as held for his own benefit.

30. This is one of a series of emails which contain a contemporaneous account of what was in Mr. Ryan's mind in orchestrating these transfers. For example, at a later point, after bills began to be unpaid by HKRME to its *creditors, Mr. Ryan sent an email to Mr. English on 12th February, 2015 in which he said "I was too greedy with the amount taken off the table at the design stage and I need to get cash back into the business and quick…".* Again, this email is inconsistent with the case made in these proceedings that the transfers were for the benefit of the RCT. It forms part of the evidence which led me to find that Mr. Ryan clearly regarded the monies transferred to Sunvit as held for his own benefit rather than for the benefit of the RCT.

The significance of the finding as to Mr. Ryan's true intention in directing the transfers to Sunvit

31. This is a significant element of the judgment which, in my view, the plaintiffs have overlooked in the present application. Although Mr. Ryan was a plaintiff in the proceedings, he made no claim himself to be the owner of any part of the moneys transferred to Sunvit. Instead, he chose to make a claim on behalf of the RCT. At para. 2 of the amended statement of claim, it was specifically pleaded that Mr. Ryan brought the proceedings in his capacity as "*delegate*" of the RCT. The present application made on behalf of the plaintiffs is predicated on the assumption that, the claim on behalf of the RCT having failed, it must follow that the claim of HKRME must succeed in relation to the entire of the monies transferred to Sunvit. In my view, that assumption is misplaced having regard to the evidence given by Mr. Ryan from which it is clear that, in orchestrating the transfers to Sunvit, his intention was that, while the liabilities of HKRME would have to be met, the balance of the monies were not intended to be held for HKRME. Had he not relied on the false artifice of the sham RCT trust, and had he been honest and upfront as to his true intention, it may have been possible for Mr. Ryan to succeed in a claim in respect of the Sunvit monies subject to any defence that might have been open to Mr. English based on illegality or on more general considerations of public policy (arising from the attempts made by Mr. Ryan to place assets out of the reach of his creditors in bankruptcy). Mr. Ryan did not, however, take that course. He chose to put forward a claim based on the RCT. It may well have been the case that Mr. Ryan considered that his claim might be more presentable if formulated on the basis that the Sunvit monies (subject to payment of the liabilities of HKRME) were intended to be held for the benefit of a trust for his children. Mr. Ryan may also have had concerns that, were he to sue in his own name, the court might take the view that his claim was tainted by the attempts made by him to hide the existence of his interest in HKME and the extent of the drawings made by him from HKRME from the eyes of his creditors or any bankruptcy trustee. The lies told by Mr. Ryan to his bankruptcy trustee in the course of the interview on 27th November, 2013 (as described in paras. 162 to 169 of the principal judgment) corroborate the extent to which Mr. Ryan sought to hide these assets.

32. Based on the evidence which I heard and on the documents which were adduced in the course of that evidence, I reached the following finding of fact in para. 330 of the judgment:-

> *"330. The interview between Mr. Ryan and the representatives of his bankruptcy trustee has already been described in paras. 160-169 above. As described in those paragraphs, Mr. Ryan very consciously and deliberately told lies to the representatives of his bankruptcy trustee… In answer to a question from me, he accepted that he was not honest… Lying to a trustee in bankruptcy is… a very serious matter and one which I believe cannot be excused**. The gravity of Mr. Ryan's misconduct is accentuated by the extent of the transfers that were made to Sunvit in the period between April 2012 and March 2013. All of these transfers took place before the interview with the representatives of the trustee in bankruptcy in September 2013. As the emails of 21 April, 2012, and 12 February, 2015 make clear, Mr. Ryan clearly regarded the Sunvit monies as held for his own benefit. In facilitating these transfers, Mr. Ryan was attempting to salt away very substantial assets for his own benefit and to conceal his interest in these monies from his bankruptcy trustee."***
>
> *(emphasis added)*

33. It is true that Mr. Ryan, in the course of his oral evidence, sought, at times, to pitch his case in a way which placed more emphasis on the fact that the monies transferred to Sunvit were company monies of HKRME. However, that is entirely inconsistent with his obvious intention at the time the payments were made to retain the payments for himself (subject to the discharge of HKRME's liabilities) and to ensure that they would not be accessible (or known to) his trustee in bankruptcy or his creditors. For example, for the purposes of the present application, the plaintiffs have referred to the evidence given by Mr. Ryan on Day 3 of the hearing which is quoted in para. 371 of the principal judgment where he said:-

> *"Well, put simply, as and when needed this money that is held offshore is and can be returned to the company.* ***So it is the company's*** *and while Mr. English may have offered to swap beneficiaries in relation to the cash, it is the company's and it must and should be returned when needed to the company… ultimately the company can decide to make a dispersement to the beneficiaries. But the money is wholly owned by the company." (emphasis added)*

However, while there are examples of Mr. Ryan putting his case in that way, when it came to the principal judgment, I had to consider the evidence as a whole. When I speak of evidence in this context, I refer not only to the oral evidence given by the witnesses but also the underlying materials that were put in evidence. By way of amplification of what I said in the judgment, I should also say that, in any event, it seemed to me that, when Mr. Ryan gave this evidence on Day 3 (quoted above), he was attempting to re-calibrate his case in light of a number of issues raised by me in the course of the opening

of the case on Day 1 of the trial. For example, on p. 57 of the transcript on that day, I queried with counsel for the plaintiffs as to how the court was to deal with the contention made by the plaintiffs that many of the transactions entered into were, by the plaintiffs' own admission, shams and were intended to deliberately disguise the true nature of what was going on. Against that background, I made the observation (as recorded on p. 58 of the transcript) that these concerns *"may not apply with the same force or the same emphasis in the case of the claim by the company, because the company may have a more straightforward claim in relation to the return of some or part of the money which doesn't have to rely on any sham transactions…".* These observations may have given Mr. Ryan the impression that, if he were to emphasise the HKRME claim over and above the claims of the RCT, that might provide a clearer route to recovery in the proceedings. It is nonetheless important to stress that these observations were made before I had heard the evidence in the case and could not be taken as the indication of any final view on my part.

The significance of the failure of the HKRME claim based on UAE law

34. It is also very important to keep in mind that the claim made by HKRME in these proceedings was advanced on a number of grounds. The sole ground on which it succeeded was the unjust enrichment claim albeit only to the extent of its unpaid liabilities. Significantly, it did not succeed in its claim based on UAE law (principally UAE Company Law). This had a very important consequence in that it meant that there was no basis on which to find that Mr. Ryan was not entitled to direct the withdrawal of monies from HKRME for his own benefit.

35. It might be thought that, by analogy to a company law claim available under Irish law, it would be a straightforward matter for HKRME to seek the return of monies improperly transferred at the behest of its controller on foot of sham invoices for services which were never provided and never intended to be provided. However, it is essential to have regard to the way in which this element of HKRME's case was run. In the course of the hearing in 2018 and 2019, HKRME attempted to lead evidence through a UAE law expert, Mr. Adrian Cole, that was designed to establish that the payments that were made to Sunvit by HKRME (at the behest of Mr. Ryan) were in breach of UAE law. One of the principal bases put forward by Mr. Cole was that there had been a breach of Article 82 of the UAE Company Law 2015 which makes a "*partner*" in a limited liability company liable to account to the company for any property of the company held by such "*partner*". That article was not in force at the time of the transfers but Mr. Cole suggested that Article 82 would nonetheless apply in so far as there was a continuing failure to account. As noted above, that claim failed. Mr. Cole's evidence was largely based on the assumed facts which were set out in his witness statement. For the reasons explained in the principal judgment, my conclusions on the facts were different to the assumed facts on which Mr. Cole had relied. It is particularly relevant to note that, as recorded in para. 285 of the judgment, Mr. Cole did not suggest that, independently of the assumed facts, there was any breach of Article 82 in the way in which the profits or other monies were extracted from HKRME. His evidence in relation to this element of the HKRME claim was exclusively

based on the facts which he had been instructed to assume for the purposes of his opinion.

36. In paras. 286 to 291 of the principal judgment, I addressed the balance of Mr. Cole's evidence including his evidence in relation to Article 30 of the UAE Company Law 2015. As noted in para. 291 of the principal judgment, Article 30 was the only provision of UAE law addressed by Mr. Cole which might have provided an independent basis (in the sense of independent of the assumed facts) for HKRME's claim to recover the amounts transferred to Sunvit on foot of the fictitious invoices. The problem for HKRME was that Article 30 was not invoked in the amended statement of claim and no application was made to further amend it to include such a claim. Thus, I came to the conclusion at paras. 380 to 381 that, even if Article 30 of the 2015 Law could be invoked in respect of transactions which predated its enactment, there was no case that could be advanced on foot of Article 30.

37. Furthermore, for the reasons explained in paras. 384 to 386, I concluded that Irish company law principles could not be relied upon to support the HKRME company law claim. There was, accordingly, no basis for the court to conclude that the withdrawals taken by Mr. Ryan for his own benefit from HKRME (by means of the transfers to Sunvit) were unlawful as a matter of UAE law or were in excess of what would be permissible for a beneficial owner to draw down or distribute by way of profits. In turn, this had significant consequences in terms of the ability of HKRME to maintain a claim against Mr. English in respect of the monies transferred at the direction of Mr. Ryan. The court could not make a finding in favour of HKRME that Mr. Ryan had not been entitled to arrange to extract monies for his own benefit.

38. The position might be quite different had the plaintiffs successfully advanced a claim, by reference to UAE law in force at the time they were effected, that the transfers made to Sunvit on the direction of Mr. Ryan were unlawful as a matter of UAE Company Law. In such circumstances, HKRME might well have been in a position to contend that all of the monies remained its property and thus there might have been a sound basis on which to hold that the payments made to Sunvit had been made at HKRME's expense such as to make it possible to advance a case of unjust enrichment against Mr. English as the person in possession of the funds transferred.

The arguments advanced in support of HKRME's case that there is an error in the principal judgment

39. A number of arguments have been advanced on behalf of HKRME in support of its contention that there are errors in the principal judgment that require to be corrected in accordance with the principles set out in *McInerney Homes* and related authorities. These arguments are addressed in paras. 40 *et seq*. below.

The argument that the unjust enrichment claim was not based on the agreement alleged between Mr. Ryan and Mr. English

40. One of the principal bases on which HKRME moves the present application is that it suggests that the limitation placed by the court on the unjust enrichment claim (i.e. limiting it to the amount of HKRME's liabilities) was derived from the agreement alleged by Mr. Ryan to exist between him and Mr. English. As outlined in para. 27 above, Mr.

Ryan gave evidence that the defendant had expressly agreed with him to hold the money on trust for HKRME (to the extent necessary to meet its liabilities) with the balance being held on trust for the RCT. The plaintiffs highlight that, in the principal judgment, I found that there was insufficient evidence to substantiate the existence of an agreement to that effect. They, accordingly, argue that there was no basis on which to impose a limit on the claim of HKRME by reference to an agreement which was not found to exist. In para. 19 of the written submissions delivered in support of the present application, it is submitted that:-

> *"This was an error, because the claim which it ultimately succeeded was not based on any agreement but based on the sham invoices, the transfer of monies and the matters set out in the amended statement of claim in particular in paragraphs 35, 40 and 49-51. The claim succeeded without reference to any alleged agreement and the Court held that the claim which succeeded was "not based on the alleged agreement between Mr. Ryan and Mr. English" (paragraph 388). That being so, there was no basis for any alleged agreement to restrict the claim, either in the pleadings, the submissions or the evidence."*

41. While I acknowledge that this argument may appear at first sight to have a logical basis, I reject it. It is true that (as set out in para. 372 of the principal judgment) there was no credible evidence to support a case that HKRME was to be entitled to any part of the Sunvit monies on the basis of the agreement alleged by Mr. Ryan. It is also true that the only basis upon which I found that HKRME had any sustainable basis for the return of the monies was on the ground of unjust enrichment. HKRME had made the transfers to Sunvit in respect of entirely fictitious services which were never rendered by that entity. However, as explained above, the monies that were extracted from HKRME at the direction of Mr. Ryan and paid to Sunvit were monies that were treated by Mr. Ryan as his own and there was no proof that the extraction of the monies in that way was contrary to UAE Company Law. Subject to the acknowledgement made by Mr. Ryan in his evidence that the monies were always to be available to meet the liabilities of HKRME, there was, accordingly, no basis on which to find that HKRME had any claim to make in respect of monies extracted from it at the direction of its own controller. In short, there was nothing to demonstrate that Mr. Ryan was not entitled, *qua* controller or beneficial owner of HKRME, to withdraw the monies and transfer them where he wished. Thus, subject, again, to the acknowledgement made by Mr. Ryan that the monies were to be available to meet the liabilities of HKRME, any claim for unjust enrichment would have to be advanced by Mr. Ryan. Paragraphs 180, 330 and 367 of the principal judgment are very relevant in this context.

42. On the other hand, in circumstances where Mr. Ryan had always acknowledged, in his evidence, that the transfers were subject to the discharge of the liabilities of HKRME, there was, in my view, nothing to prevent HKRME from maintaining an unjust enrichment claim for the return of that element of the monies. It seemed to me that, having regard to the evidence of Mr. Ryan and the case made by him at trial, HKRME could properly contend that this element of the monies transferred remained its property and that,

accordingly, the transfers had, to that extent, been made at its expense on foot of the fictitious invoices.

43. As outlined above, the position might have been different if HKRME had succeeded in demonstrating that the payments made to Sunvit were in breach of UAE Company Law. I have already drawn attention to the fact that a breach of Article 30 of the 2015 Law had not been pleaded. I should add that I do not know if it may have been open to HKRME to rely on any pre-existing provision of UAE law to similar effect. In any event, no such claim was pleaded either by reference to the 2015 Law or any earlier law. Had such a claim been pleaded and successfully made, HKRME would have been entitled to assert that it was the beneficial owner of all of the monies transferred to Sunvit and to claim that, accordingly, the monies had been transferred at its expense. However, in circumstances where no case was successfully advanced to that effect, the proper plaintiff to pursue a claim in respect of any element of the monies transferred which exceeded the liabilities of HKRME was Mr. Ryan himself. As explained above, he chose not to pursue a claim himself but, instead, sought to make a case on behalf of the RCT. For the reasons outlined in the principal judgment I found that the RCT was a sham.

Alleged inconsistency in the principal judgment

44. In the course of the hearing of the present application, counsel for the plaintiffs placed some emphasis upon the way in which, in para. 387 of the principal judgment, I addressed the unjust enrichment claim made by HKRME and observed, for example, at para. 387 (c) that:-

> *"Mr. English well knew that the money concerned was the money of HKRME. In light of the findings which I have already made, there can be no doubt but that this allegation is entirely correct. Mr. English was well aware that he had provided no introductory services to HKRME and that accordingly the money that was paid over to Sunvit… was, in truth, the money of HKRME."*

Read on its own, that passage might suggest that I had in mind that the whole of the money transferred to Sunvit was the property of HKRME. However, this observation must be read in light of what I said earlier in para. 379 of the principal judgment where I made clear that I was confining my consideration of the HKRME case to the claim made by it for the return of AED 8.7 million (i.e. the amount claimed at that time in respect of the HKRME liabilities). I confirm that everything which is said in para. 387 should be read in light of that fact and in light of the judgment as a whole including the findings made by me in relation to Mr. Ryan's true intentions in relation to the transfers and the findings made by me in relation to the claim made by HKRME under UAE law.

The pleadings

45. The extent to which the HKRME claim was pleaded was the subject of extensive debate in the course of the closing submissions made by both sides on the final day (Day 24) of the hearing in January, 2019. Counsel for the defendant strongly argued that, when the amended statement of claim is properly construed, it did not disclose a claim by HKRME for the return of the entire of the monies transferred to Sunvit. Having highlighted the

case made in para. 30 of the statement of claim, counsel argued that *"what has been done … is to pin the Plaintiffs' colours to the mast of saying that the monies are held on trust to discharge the liabilities of HKRME and to the extent that … there are excess monies, that the excess should be held on trust for the [RCT]. The Plaintiff is stuck with that and any attempt to seek to have a transfer of all of the monies back to the company in the absence of some remedy under UAE law cannot succeed"*. Significantly, when counsel for the plaintiffs came to reply, he opened paras. 49 to 51 of the amended statement of claim and argued that it was not right to say that HKRME's claim was limited either to UAE law or "*solely to the debts of the company*". In contrast to para. 30, he argued that these paras. showed that the claim as "*pleaded thereafter doesn't make a distinction in terms of the monies; it is pleaded in the alternative between the company and the trust".* However, that submission overlooked the way in which the plaintiffs' case had been clarified and explained in para. 22 of the response given to a request for particulars raised by the defendant. As previously described in para. 28 above, in that request, with reference to para. 48 of the original statement of claim (now para. 49 of the amended statement of claim), the defendant's solicitors asked the plaintiffs to clarify who the beneficial owners of the transferred monies were alleged to be. Tellingly, in their response, the plaintiffs referred back to para. 29 of the original statement of claim (now para. 30 of the amended statement of claim) and expressly pleaded that the transferred monies "*were to be available at all times to HKRME and that* ***subject to its liabilities being met, the remainder of the monies was for the benefit of [the RCT]"*** (emphasis added). In the circumstances, I cannot accept that I made an error in my judgment in so far as my interpretation of the pleadings is concerned.

46. I appreciate that, as has been stressed by counsel for HKRME in the present application, there are elements of the case made in the statement of claim which might suggest that HKRME was pursuing a claim in respect of the entire of the sums paid to Sunvit. Thus, for example, at para. 7 of the prayer for relief, a declaration is sought that the defendant is liable to account to HKRME for all of the transferred monies. Similarly, in para. 8 of the prayer, an order is sought directing the defendant to return all of the monies to HKRME. However, as para. 50 of the defendant's opening submissions suggested, that has to be read in conjunction with the facts pleaded as a whole. It must also be read in the context of the pleading as a whole. Moreover, such a prayer was necessary to deal with the alternative case made by HKRME based on alleged breaches of UAE law which, had it been successful, would have entitled HKRME to the return of all of the monies transferred.

47. I also appreciate that, in para. 48 (and several other paras.) of the statement of claim, it is pleaded that the monies transferred were for the benefit of HKRME "*and/or*" the RCT. However, that case must be read in the light of the statement of claim as a whole. Thus, as already noted, paras. 29 and 30 of the amended statement of claim, consistent with paras 81 and 82 of Mr. Ryan's witness statement (quoted in para. 27 above), expressly plead that anything above the amount needed to meet the obligations of HKRME "*was to be retained offshore by the BVI company*" and was to be held for the benefit of the RCT. While paras. 49 to 51 and 67 plead that the monies were held for the benefit of "*HKRME and/or the Ryan Children's Trust*" and para. (1) of the particulars to para. 66 plead that

the defendant wrongfully failed to return the transferred monies to "*HKRME and/or the Ryans Children's Trust*", I read those pleas consistently with the allegations previously made in paras. 29 and 30 and not as making a claim that HKRME was contending that all of the monies transferred were held for its benefit. This is consistent with para. 63 which refers to the importance placed by Mr. Ryan in the course of a conversation with Mr. English in February, 2015 on the need to transfer money back to HKRME "*so that it could meet its obligations …".* Importantly, it is also consistent with the clarification given in para. 22 of the plaintiff's response to the request for particulars raised by the defendant (as described in para. 43 above). In contrast, in para. 68 of the amended statement of claim, a quite distinct alternative claim on the basis of alleged breaches of UAE Company Law was made on behalf of HKRME for the return of the entire monies transferred. Paragraphs 7 and 8 of the prayer for relief should be read in this light. Similarly, in paras. 59-60, a distinct claim is made on behalf of HKRME in respect of the loss of the Astana contract. These claims failed.

48. If I am wrong in my understanding of the case pleaded by HKRME in the statement of claim, that is a matter that can be addressed in due course as part of the plaintiffs' appeal to the Court of Appeal.

The way in which the case was run

49. For the reasons outlined in paras. 45 to 47 above, I do not believe that I was in error in my principal judgment in so far as my reading of the amended statement of claim is concerned. Moreover, even if I did err in relation to my understanding of the case made in the statement of claim, this was not the only basis on which I reached my decision that HKRME's unjust enrichment claim should be limited to the amount of its unpaid liabilities. I reached that conclusion not merely on the basis of the pleadings but on the basis of the case which was run before me and in the context of the other findings made by me in my judgment. The case made by the plaintiffs proceeded on the basis of the evidence given by Mr. Ryan. As noted above, the case made by him is encapsulated in paras. 81 to 82 of his witness statement. For the reasons previously explained, those paras. very clearly showed that the claim of HKRME was solely in respect of any sums required to meet its obligations. According to Mr. Ryan, the balance was always to be held for the benefit of the RCT. I rejected that claim and found that those monies were in fact extracted from HKRME with a view to benefitting Mr. Ryan personally who, as described in the principal judgment, was attempting to hide the existence of the monies from his creditors.

50. It is equally important to keep in mind the nature of the case run on behalf of HKRME in relation to alleged breaches of UAE law. As explained in paras. 35 and 36 above, no independent basis was put forward that would have enabled a determination to be made that the extraction of the monies from HKRME at Mr. Ryan's direction constituted an unlawful distribution of company assets. That meant that, apart from his own acknowledgement that the monies were to be available to meet HKRME's liabilities, there was nothing to suggest that, as between himself and HKRME, Mr. Ryan was not entitled to extract the monies for his own benefit and to pay them to whomever he pleased. He clearly did not intend that they would be retained by Mr. English for the latter's benefit

but, since he did not bring any claim in these proceedings on his own behalf, there was no relief that could be granted in these proceedings in respect of any element of the sums extracted other than the amount of HKRME's unpaid liabilities.

Submissions made in the course of the trial

51. I fully appreciate that, on a number of occasions during the course of both the opening and closing submissions made on behalf of the plaintiffs at the trial, counsel submitted that HKRME was advancing a claim for the return of the entire of the monies paid to Sunvit and was doing so independently of the agreement alleged between Mr. Ryan and Mr. English. I acknowledge that such arguments were made. However, in my view, that does not alter the position. HKRME was only entitled to pursue such a claim to the extent that it was consistent with the pleadings and also to the extent that it was consistent with the evidence accepted by the court and with the facts as found by the court. For the reasons explained above, the only element of the HKRME claim which is consistent with the facts as found by me is the claim (based on unjust enrichment) for the return of so much of the monies transferred to Sunvit as will be sufficient to meet its liabilities (as pleaded in para. 61 of the amended statement of claim).

The application proceeds on the basis of a misapprehension

52. HKRME's application appears to me to proceed on a misapprehension. The plaintiffs appear to be under the impression that HKRME was entitled to step up to the plate, so to speak, once the claim made on behalf of the RCT by Mr. Ryan and Mr. Stafford failed. However, as I have sought to explain, the plaintiffs have overlooked the way in which they framed their case on the pleadings and particulars and they have also overlooked the crucial finding in my judgment that, in facilitating the transfers of money from the accounts of HKRME to Sunvit, Mr. Ryan was attempting to salt away very substantial assets for his own benefit and to conceal his interest in these monies from his bankruptcy trustee. In circumstances where HKRME failed in its claim based on UAE Company Law, there was no basis to suggest that Mr. Ryan was not entitled to extract the monies and arrange to pay them to Sunvit in the way that he did. While I held that there was no substance to the case made by him on behalf of the RCT, I accepted that Mr. Ryan could have sought to make a case on his own behalf for the return of the monies (subject to any difficulties that might lie in his path as a consequence of his attempt to hide the existence of these monies from his creditors and from his bankruptcy trustee). Thus, if anyone was to step up to the plate, in the event that the claim in respect of the RCT failed, it was not HKRME but Mr. Ryan (or his trustee in bankruptcy) who might do so. As noted in the principal judgment, no such claim was advanced by him or, at that time, by his bankruptcy trustee.

Making alternative cases

53. For completeness, I should record that I completely accept that it is permissible for alternative pleas to be made by a party in his or her pleadings in High Court proceedings. This is clear from the authorities cited by the plaintiffs in their written submissions in support of this application, namely the decision of the Supreme Court in *Phonographic Performance Ireland Ltd v. Cody* [1998] 4 I.R. 504 and the decision of Kelly J. (as he then was) in *IBB Internet Services Ltd v. Motorola Ltd* [2011] 2 ILRM 321. However, as counsel

for the defendant argued, Mr. Ryan was the principal witness on behalf of all of the plaintiffs including HKRME. As counsel submitted, there is no difficulty in pleading alternative facts or alternative claims. However, Mr. Ryan could not give evidence to the court on the basis of alternative facts. He could only give evidence as to a single version of events. Leaving aside the supporting evidence given by Ms. Sockett and some other employees of HKRME, the only evidence that the court heard at the trial in relation to the entitlement of HKRME was the evidence given by Mr. Ryan which must, of course, be read in conjunction with the underlying contemporaneous documents. For all of the reasons outlined in the principal judgment, I did not believe everything that Mr. Ryan said to me. However, it was clear from his evidence and from the documents which he placed in evidence that, in extracting the funds from HKRME, he proceeded on the basis that he was the beneficial owner of the monies transferred to Sunvit (save to the extent that, as already noted, it might be necessary to return so much of those monies to HKRME as would be sufficient to meet its liabilities). Thus, the evidence of Mr. Ryan could not support a case made by HKRME for the return of all of the monies. The only witness who gave evidence to that effect was Mr. Cole and, for the reasons explained in the principal judgment, his evidence was not sufficient to sustain a claim on behalf of HKRME on that ground.

The proceedings commenced by the trustee in bankruptcy

54. I note that, subsequent to the delivery of the principal judgment, Mr. Ryan's trustee in bankruptcy, Mr. Nicholas Stewart Wood, has brought proceedings against Mr. English (2020 No. 3857 P) in which he seeks a declaration that the monies transferred by or at the direction of Mr. Ryan to Mr. English during 2012 and 2013 form part of the bankruptcy estate of Mr. Ryan. While Mr. Stewart Wood will obviously have to prove his case against Mr. English and to address all of the issues raised by Mr. English in his defence to the claim made in those proceedings, it seems to me that, in light of the findings which I have made in the principal judgment as to the reason for making the transfers and in light of the lack of any evidence of any breach of UAE Company Law in making the transfers, if there is any basis for a claim, the trustee would appear to be a more appropriate claimant. The profits obtained by Mr. Ryan and the funds drawn down by Mr. Ryan from HKRME for his own benefit should, subject to discharge of his ordinary living expenses, have been brought into account in his bankruptcy and applied for the benefit of his creditors.

The application must be refused

55. For all of the reasons outlined above, I am not persuaded that there is an error in my principal judgment in limiting the unjust enrichment claim of HKRME to the amount of its liabilities. No sufficient basis has been advanced to show that the application falls within the narrow categories of case where it may be appropriate for a court, prior to the perfection of its order, to revisit a finding made in its judgment. In all of the circumstances, I must refuse the present application. If I am in error in the manner in which I addressed the claim of HKRME in these proceedings, it seems to me that the appropriate manner to address that error is, in due course, to appeal the findings made by me to that effect in the principal judgment.

56. In the circumstances, it is unnecessary to consider whether, having regard to the passage of time and the steps taken in the proceedings since the principal judgment was given, the application made by the plaintiffs should be refused on grounds of delay or estoppel.

Costs

57. Insofar as costs are concerned, my provisional view is that, having wholly failed in its application, HKRME, as the moving party, must be liable for the costs of the defendant in relation to the present application subject, in accordance with the usual practice of the Commercial Court, to a stay on the order for costs pending the ultimate determination of these proceedings. Should either side wish to seek a different order, a short written submission should be submitted by email to the Registrar not later than fourteen days from the date of electronic delivery of this judgment following which I will give further directions by email as to how the issue of costs should be addressed. The parties should be aware that, should it be necessary to direct a hearing of any application in relation to costs, any such hearing may have its own costs consequences.

High Court practice direction HC 101

58. In accordance with the above practice direction, I will direct both sides to file their written submissions (subject to any redactions that may be required or permitted under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.