UNAPPROVED
THE COURT OF APPEAL
Civil

Neutral Citation Number [2020] IECA 204
Appeal Number: 2019/381

Faherty J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

HEATHERRIDGE ASSOCIATES LIMITED
(IN MEMBERS VOLUNTARY LIQUIDATION)

PLAINTIFF/
APPELLANT

- AND -

HUGH CURRAN, LATTERIDGE LIMITED,
HARDING HOTEL LIMITED, YARTON LIMITED,
THE COACH LIMITED AND APPLEGLADE LIMITED

DEFENDANTS/
RESPONDENTS

Judgment of Ms. Justice Faherty dated the 27th day of July 2020

1. This is the plaintiff's appeal from the judgment (6 June 2019) and Order (28 June 2019) of the High Court (Meenan J.) in which judgment was granted in favour of the plaintiff in the sum of €187,579.92 (€152, 504.00 plus VAT) in circumstances where the plaintiff claims that €1,130, 418 plus VAT and legal costs is the true sum due and owing to them. Specifically, what is appealed is the Order:

i. granting the plaintiff judgment against the first to fifth defendants of only €187,579.92, and costs up to 2 November 2018 but limited to 50% of such costs to be taxed in default of agreement;

ii. the order that the plaintiff pay the defendants' costs as and from 2 November 2018 (the date of the lodgement) to date to be taxed in default of agreement; and

iii. the no order as to costs in respect of proceedings entitled Heatherridge Associates v. Cos. Act 2018/409COS.

2. The defendants have cross-appealed the award to the plaintiff of 50% of its pre-lodgement costs.

Background

3. The plaintiff is an architectural firm. It is a single member company, limited by shares, with a registered office at 63 Rock Road, Blackrock, County Dublin.

4. The first defendant is a company director and at all material times was a director and/or shareholder and/exercised a controlling interest in the second to sixth named defendants. At the outset of the hearing in the High Court, the sixth named defendant was struck out of the proceedings.

5. The plaintiff's claim was to recover the sum of €1,130,418 (plus VAT) from the defendants, said to be the balance of monies due and owing for architectural services provided to the defendants during the years 2000-2009 in respect of a number of projects. As described in the High Court judgment, these projects were the Blanchardstown House, The Europa Hotel, Drogheda, the Ceann Sibeal Hotel, Ballyferriter, the Coachmans Inn, Harding Hotel, the Crawley Apartments, London and Castleknock Apartments. In the alternative, the plaintiff claimed the sum of €1,130,418 (plus VAT) on the basis of a *quantum meruit*.

6. At the outset of his judgment, the trial judge stated that an important feature of the case was that the plaintiff sought to recover the fees claimed after the economic collapse despite the services having been provided during the "boom" years.

7. The trial judge found that the starting point for the plaintiff's claim was a meeting held in May 2009 between the first defendant (hereinafter "Mr. Curran") and Mr. Frank Ennis, a director of the plaintiff company. The trial judge noted that this was "at a point when the economic crisis was seriously impacting the plaintiff". The High Court was furnished with a document entitled "Hugh Curran – Summary of Fees as tabled at client meeting May 2009". This document listed the projects which the plaintiff company had worked on. The total amount sought in relation to same was €552,409, exclusive of VAT. In respect of each of the projects named in the document, there were two headings, namely "RIAI Percentage Recommended" and "Discounted Percentage Offered". The trial judge formed the view that the sum being claimed in the document was in effect an offer made by the plaintiff. The trial judge found that the offer was not accepted by the defendant.

8. As the trial transcripts show, Mr. Ennis' evidence in relation to the meeting in May 2009 was that he wanted the fees due to be paid and that he was offering Mr. Curran a very significant discount to which Mr. Curran "didn't disagree, neither did he agree". Mr. Ennis' understanding of the meeting was that he had given Mr. Curran "a very good deal" and Mr. Curran "seemed if not appreciative of it that he was accepting of it." It is common case that at the May 2009 meeting, Mr. Curran gave Mr. Ennis a cheque for €50,000 plus VAT in respect of which the plaintiff company issued an invoice some months later.

9. On 5 March 2010, Mr. Curran wrote to the Accounts Department of the plaintiff company in connection with certain of the projects upon which the plaintiff had worked, in the following terms:

> "In connection with the fee statement you sent me some months ago…I totally disagree with the [fees], which were never agreed before you carried out the work."

10. The trial judge found that the next significant event occurred when Mr. Ennis and Mr. Curran met again on 8 March 2010. He was satisfied that following the meeting on 8

March 2010, Mr. Ennis and Mr. Curran reached an agreement as to what the outstanding fees were and agreed a schedule for their repayment. As a result of this he found that no claim arose on the basis of a *quantum meruit*. The trial judge found evidence of an agreement having been reached on 8 March 2010 in a letter of 10 March 2010 from the plaintiff to Mr. Curran. The letter reads as follows:

> "Frank Ennis and Associates Outstanding Fees.
>
> Further to your meeting with Frank Ennis on 8th March, I write to confirm the details of the settlement agreement reached. Frank Ennis tabled fee amounts outstanding to the total sum of €552,407 as per the attached schedule.
>
> An Agreement was reached for full and final settlement in the total amount of €265,000 + VAT. We acknowledge with thanks receipt of your initial payment of €25,000 +VAT by cheque on 8th March. It was further agreed that the balance of €240,000 would be paid over 36 months in equal instalments of €6,666 plus VAT, commencing in April 2010 with the final payment in March 2013.
>
> Our preference is that this arrangement be fulfilled by the setting up of a standing order to our account, the details of which are provided below…
>
> I would appreciate if you could arrange the set-up of this standing order as soon as possible, for the total VAT inclusive sum of €8065.86 to arrive in our account on the 15th of each month."

11. As testified to by Mr. Ennis, the €25,000 +VAT cheque was handed to him by Mr. Curran at the meeting on 8 March 2010.

12. It is common case that the letter of 10 March 2010 contained an error as to the amount which had been agreed between Mr. Ennis and Mr. Curran.

13. This was brought to the plaintiff's attention in an email dated 12 April 2010 from Mr. Curran to Ms. Orla Henry who worked in the administration division of the plaintiff's practice. The email reads as follows:

> "I got your letter this morning 12th April, and this agreement is wrong.
>
> We agreed 225,000.00 +V.A.T. as a full and final settlement.
>
> If Frank jogs his memory he will remember that he was looking for 250,000.00 and I was at 200,000.00, and then he said he would "split the difference"
>
> So, the outstanding amount is 200,000.00 as I paid a cheque for 25,000.00+V.A.T. on that date.
>
> I am still waiting for invoices from you for 50,000.00 +V.A.T. from last year, and this 25,000.00 +V.A.T. as well, which I haven't received.
>
> Will you please send these on."

14. On 29 April 2010, in an email addressed to Mr. Curran and Ms. Bernadette Enright, Ms. Henry acknowledged the error in the letter of 10 March 2010 as to the amount agreed and confirmed the €225,000.00 (plus VAT) figure. Ms. Henry also acknowledged receipt of the €25,000 plus VAT in March 2010. She reiterated the terms of the 8 March 2010 Agreement, namely that the balance of the agreed sum was to be paid monthly in equal instalments of €6,666 plus VAT, commencing April 2010. She attached copies of invoices covering the payments previously received in May 2009 and March 2010, together with an invoice for the "current [April 2010] payment". Ms Enright was informed that Ms. Henry would send a courier to collect the April 2010 cheque on that date as agreed. Ms. Henry went on to state that she assumed that Mr. Curran was happy to release the cheque based on the invoice as attached to her email and that she would furnish a hard copy by post.

15. As can be seen from the documentation which was before the High Court, following the communications between the parties of 10 March 2010, 12 April 2010 and 29 April

2010, on 21 May 2010, Ms. Henry on behalf of the plaintiff duly invoiced the defendants. This was the third invoice issued by the plaintiff on foot of the 8 March 2010 Agreement and payment of €6,666 plus VAT was received on foot of same. The same pattern was repeated for June 2010, July 2010, August 2010, September 2010. Email exchanges between Ms. Henry and Ms. Enright during these months show that the defendants advised by email which of the respective companies was to be invoiced by the plaintiff, following which a cheque was sent to the plaintiff.

16. On 13 October 2010, Mr. Curran emailed Ms. Henry requesting that she speak to Mr. Ennis about reducing the monthly payment to €4,000 plus VAT for a period of six months. It was said that this was due to a severe downturn in the defendants' business over the previous months. Mr. Ennis' agreement to the reduction was communicated to Mr. Curran on 26 October 2010, following which Ms. Henry invoiced the defendants on 27 October 2010 in the sum of €4,000 plus VAT. Payment was made by the defendant on 29 October 2010.

17. The High Court heard evidence from Ms. Henry as to the course of dealing between the parties between March 2010 and October 2010. She confirmed that once an invoice was issued by the plaintiff, payment was made by the defendants. This was also confirmed in evidence by Ms. Enright. Thus, the process adopted *vis á vis* the 8 March 2010 Agreement was that a VAT invoice would be issued by the plaintiff company addressed to whichever of the defendant companies was nominated by Mr. Curran to receive same. Following receipt of an invoice the monthly sum of €6,666 plus VAT (or in the case of October 2010, €4000 plus VAT) was discharged.

18. This system whereupon monies were paid by the defendants once in receipt of an invoice from the plaintiff pertained up to November 2010. Before this Court, the

defendants contend that in this time frame, no invoice went unpaid, nor was any cheque issued by the defendants dishonoured.

19. It is common case that the plaintiff's bookkeeper, Ms. Henry. went on maternity leave in November 2010.

20. It is also common case that on 10 December 2010, the plaintiff company went into members voluntary liquidation and a liquidator, Mr. Damien Young, was appointed.

21. Prior to Mr. Young's appointment, on 26 November 2010, Mr. Ennis and Ms Ann Kenny (directors of the plaintiff company) made a Declaration of Solvency pursuant to s. 256(6) of the Companies Acts 1963-2001 (hereinafter "the 1963 Act") stating that they had made a full enquiry into the affairs of the plaintiff company and having done so they had formed the opinion that the company would be able to pay its debts within twelve months. They referred to "a statement of the company's assets and liabilities as at …18th November, 2010" (appended to the Declaration of Solvency) wherein under "Assets" trade debtors were listed at €2,188,817.

22. It is not in dispute that for the first twelve months of Mr. Young's tenure as liquidator, no invoices were issued by the plaintiff to the defendants. Nor were any payments made by the defendants, be it under the regime which had pertained from March to October 2010 or the revised payment schedule as agreed in October 2010.

23. Mr. Young's evidence to the High Court was that he did not become aware of the debt owed by the defendants to the plaintiff until 2011, something the trial judge found difficult to comprehend given the value of the debt and the fact that regular repayments were made by the defendants between April 2010 and October 2010. He found it "extraordinary" that the liquidator did not pursue the matter.

24. In the course of his submissions to this Court, counsel for the defendants described what occurred post-November 2010 until December 2011 as "radio silence" on the part of the plaintiff.

25. Mr. Young testified to having entered into an agreement with the defendants in or about December 2011, evidenced by a letter of 21 December 2011 from the defendants' principal, Mr. Curran, to the liquidator. The letter reads as follows:

> "Further to our recent discussions, I confirm that I hereby offer you a sum of €140K (one hundred and forty thousand) excluding VAT in full and final settlement for all monies owed to Heatheridge Associates Limited by either myself on a personal basis or any of my corporate entities.
>
> The €140K will be discharged as follows:
>
> 1. Forty monthly payments of €3,500 plus VAT on 28th day of each month commencing January 2012.
>
> I confirm that in the event of failure to honour in substance any of the repayment terms outlined above, any forgiveness by way of discount(s) of the original liability shall lapse and be null and void and the originating liability less any payments made shall become due and owing."

26. On 21 December 2011, Mr. Ennis wrote to Mr. Curran, with reference to the latter's letter to Mr. Young, stating:

> "I now confirm that on full settlement of the €140K to Mr. Young, I will relinquish any further claim that I have against any of your Companies or yourself individually for all architectural fees owed to me either on a corporate or personal basis as at this date."

27. A note from Mr. Curran returning the original of the 21 December 2011 Agreement to the liquidator requested that invoices would be sent by the liquidator every month,

following which cheques would issue from whichever of Mr. Curran's companies was nominated to make the payment.

28. Pursuant to this correspondence, Mr. Young duly furnished an invoice in the sum of €3,500 (plus VAT) on 28 January 2012 in respect of which a cheque was sent by the defendants on 8 February 2012.

29. In her evidence to the High Court, Ms. Enright testified that when she had not heard further from Mr. Young by end of February 2012 she telephoned his office but that the telephone rang out. She telephoned again in March 2012 when the same thing happened. She testified that in May 2012, she brought the matter to the attention of Mr. Curran, advising that no invoices were forthcoming from Mr. Young. She was requested by Mr. Curran to email Mr. Young which she did. Accordingly, on 31 May 2012, Ms. Enright emailed Mr. Young requesting that two invoices would be sent and that once received they would be paid by two cheques. No invoices were furnished by Mr. Young.

30. Under cross-examination, Mr. Young accepted that as liquidator of the plaintiff company it was his obligation to pursue the monies which the defendants had agreed to pay to the plaintiff. He explained that the reason for his inactivity was "the non-listing of Hugh Curran in [the liquidator's] debtors listing". He testified that the defendants' debt "slipped below the radar" and that "on the declaration of solvency… Hugh Curran wasn't listed as a debtor". Mr. Young accepted that the fact that the debt had slipped below his radar was not the fault of Mr. Curran. He testified that "with hindsight", he should have written to the defendants and sought payments.

31. He explained his failure to respond to Ms. Enright's email of 31 May 2012 on the basis of matters "slipping over his radar" or that they "slipped below [his] radar". He stated that the first time he saw the email was in discovery process in the within proceedings. Mr. Young also testified that his decision not to pursue the matter post February 2012 was

based on conversations he had with Mr. Ennis. He stated that the matter was not pursued by him because Mr. Ennis had withdrawn the consent he had given to the 21 December 2011 Agreement, which left Mr. Young in an "invidious position". Accordingly, the debt was not pursued from February 2012 until March 2016 when Mr. Young instructed his solicitors to seek the sum of €1,598,382.54 (being €1,130,418 plus VAT). As is clear from his judgment, the trial judge found the non-engagement of the liquidator difficult to understand.

The trial judge's consideration of the claim for €1,130,418 plus VAT

32. The trial judge did not accept that the sum of €1,130,418 (plus VAT) was due and owing by the defendants. As made clear in his judgment, he preferred the evidence of Mr. Curran to that of Mr. Ennis on the issue of what agreement had been reached regarding the discharge of fees by the defendants for architectural work carried out by the plaintiff. He found Mr. Curran's evidence supported by correspondence and that the evidence supported a finding that in March 2010 the parties reached agreement as to what was due and owing to the plaintiff (€225,000 plus VAT). He found that €72,496.00 of that sum had been paid leaving a balance of €152,504 (plus VAT) (i.e. a total of €187,579.92) due and owing by the defendants to the plaintiff.

33. The trial judge rejected the defendants' reliance on the 21 December 2011 Agreement which had reduced the amount due by the defendants to €140,000 (plus VAT), finding that agreement unenforceable by reason of the rule in *Pinnel's* case [1602] 5 Co. Rep. 117a.

34. With regard to the 21 December 2011 Agreement, the case that had been put by the defendants in the court below was that that agreement was supported by consideration in that the Declaration of Solvency filed by the plaintiff on 26 November 2010 had deliberately excluded the debt due by the defendants. The defendants' argument was that

this put in issue whether the plaintiff company was entitled to bring a claim against the defendants at all. Secondly, the defendants submitted that under the agreement, Mr. Curran had become personally liable for the debt and agreed that the other defendants would take on each other's liabilities.

35. The trial judge rejected these submissions. While he found that the debt had been wrongly excluded from the Declaration of Solvency, he was satisfied that this was not a bar to the plaintiff bringing the claim. He also found that the personal involvement of Mr. Curran, and the defendants taking on each other's liabilities, had been a feature of the March 2010 Agreement and that the only new aspect of the 21 December 2011 Agreement was that the amount owed was reduced in return for a repayment schedule. Accordingly, he found the December 2011 Agreement To have been unsupported by consideration and that the rule in *Pinnel's* case applied.

36. It is clear from the judgment that in reaching his decision as to what was the concluded agreement between the parties, the trial judge preferred the evidence of Mr. Curran over that of Mr. Ennis. Moreover, he considered that the evidence of Mr. Ennis had to be treated with "considerable caution" in circumstances where the €1,130, 418 sum being claimed by the plaintiff had not been referred to in the Declaration of Solvency which preceded the voluntary members winding up in November 2010. In this appeal, the plaintiff takes issue with the trial judge's finding, a matter which is discussed more fully elsewhere in this judgment.

37. In his ruling on costs delivered on 28 June 2019, in circumstances where the defendants had made a pre-trial lodgement of 200,000 on 2 November 2018 and the amount awarded to the plaintiff was less than the sum lodged, the defendants were awarded their costs as and from 2 November 2018. For the reasons set out in his ruling, the trial judge determined that the plaintiff was entitled to recover only fifty percent of its pre-

lodgement costs. Again, these matters are considered more fully later in the judgment, as is the trial judge's decision to make no costs order in proceedings entitled Heatherridge Associates v. Companies Act 2018/409 Cos, the costs of which had been reserved by O'Regan J. to the trial of the within proceedings.

The appeal

38. The plaintiff's grounds of appeal are that the trial judge erred in fact and in law:

- in preferring the evidence of Mr. Curran to that of Mr. Ennis in their respective accounts of the meeting of 8 March 2010. On the pleadings and evidence there was no conflict of fact to resolve given the plaintiff's admission that it entered into an agreement with the defendants whereby it agreed to accept €225,000 (plus VAT) in full and final settlement of all outstanding fees;
- in refusing to find that the defendant's conduct, including their plea at para. 15 of the defence, amounted to a repudiation and/or renunciation of the March 2010 Agreement;
- in refusing to find that the agreement between Mr. Curran and the liquidator dated 21 December 2011 amounted to a repudiation and/or renunciation of the March 2010 Agreement;
- in failing to consider expert evidence offered by the plaintiff that it provided professional services to the defendant to the value of €1,130,418 (plus VAT) and that such fees had been agreed between the plaintiff and the defendants;
- in failing to find that the defendant's originating liability to the plaintiff, as referred to in the 21 December 2011 Agreement, was €1,130,418 (plus VAT);

- in placing undue weight on the defendants' letter of 5 March 2010 in circumstances where the letter was composed some ten months after the events to which it referred;
- in determining that the defendants' debt was deliberately excluded from the Declaration of Solvency dated 26 November 2010;
- in awarding the plaintiff only 50% of its costs up to and including 2 November 2018;
- in granting the first to fifth named defendants the costs of the proceedings from 3 November 2018 to date; and
- in making no order as to costs in the proceedings entitled Heatherridge Associates v. Cos. Act 2018/409COS.

Considerations

39. Arising from the parties' submissions, the issues to be considered by the Court are:

(1) When was agreement reached between the parties?

(2) What was the amount for which the defendants were liable?

(3) How was the March 2010 Agreement implemented?

(4) What was the effect of the December 2011 Agreement?

(5) Did the defendants repudiate or refuse to honour the March 2010 Agreement and/or the December 2011 Agreement?

(6) Did the trial judge err in the manner in which costs were dealt with?

(7) Is the plaintiff entitled to interest on the sum awarded?

When was agreement reached between the parties?

40. The plaintiff contends that it provided services to the defendants over a nine-year period from 2000 to 2009 and that there were build costs owing by the defendants for such services to the value of a liquidated sum of €1.4m plus VAT, on the basis of RIAI

guidelines regarding building costs. While the defendants' pleadings denied any such agreement, counsel for the plaintiff pointed to the evidence of the defendants' principal, Mr. Curran who, it is argued, confirmed such agreement.

41. It is submitted that Mr. Curran testified to having agreed a percentage rate for the plaintiff of approximately 4% in respect of the various projects worked on by the plaintiff. Furthermore, he stated that the percentage could run to 6% percent if interior work was carried out. Counsel points to the following exchange which took place between counsel for the plaintiff and Mr. Curran:

> "Q. You see, in the pleadings in this case there is an express denial of agreement in relation to percentages before any of these discounts. Are you aware of that?
>
> A. I – well I am not – will you ask that question again?
>
> Q. In the formal pleadings in this case and in the correspondence, there is an expressed denial that there was any prior agreement of specific percentages by you verbally with Frank Ennis. Are you aware of that?
>
> A. I always had an agreement with Frank Ennis."

Counsel contends that Mr Curran's admissions constituted critical evidence that should have informed the findings of the trial judge that a concluded agreement had been arrived at prior to 8 March 2010. It is also the plaintiff's contention that in fact a liquidated sum of €1.4m (exclusive of payments made up to May 2009) owed by the defendants was discounted to €552,407 (plus VAT) in May 2009. Counsel submits that the May 2009 agreement came about given the financial pressures on both sides due to the economic downturn. It is contended that it was because of the parties' original close business relationship, and in return for prompt payment, that the plaintiff agreed to accept €552,407 (plus VAT) in satisfaction of all debts outstanding, as testified to by Mr. Ennis.

42. While agreeing that the €552,407 sum referred in May 2009 was not a binding agreement and that neither the plaintiff nor the defendants plead that a binding arrangement was reached in May 2009, counsel for the plaintiff nevertheless submits that it was an ascertainable amount based on the parties' business relationship. In those circumstances, he submits that the *quantum meruit* claim should have been viewed by the High Court as a mechanism to value the work done by the plaintiff as opposed to being viewed as a specific *quantum meruit* claim.

43. It is also pointed out that while disputing any concluded agreement in May 2010, Mr. Curran did in fact pay €50,000 plus VAT to Mr. Ennis on the day of the meeting.

44. It is acknowledged by counsel for the plaintiff that the parties entered into an agreement on 8 March 2010, which was formalised in the letter of 10 March 2010.

45. The defendants deny that any concluded agreement existed prior to 8 March 2010 and contend that agreement was reached between the parties on 8 March 2010. It is submitted that no agreement was reached in May 2009, as is clear from Mr. Curran's letter to the plaintiff dated 5 March 2010. Counsel for the defendants describes the meeting in May 2009 as an occasion when Mr. Ennis, in his own words, "sold his case" to Mr. Curran but no agreement was reached, as evidenced by the contents of the 5 March 2010 letter. Counsel submits that the trial judge correctly determined that agreement was reached on 8 March 2010, preferring Mr. Curran's evidence to that of Mr. Ennis.

46. Having regard to the parties' submissions, I am satisfied that the trial judge was correct in finding that there was no concluded agreement between the parties until the March 2010 Agreement. Several factors informed the trial judge's finding in this regard including the fact that no invoices were furnished by the plaintiff to the defendants at the time when the work was carried out on the various projects said to ground the plaintiff's within claim. I am also satisfied that there was a sufficient evidential basis for the trial

judge to find that the €552,407 sum referred to in the document "Hugh Curran – Summary of Fees as tabled at client meeting May 2009" amounted to no more than an offer by Mr. Ennis. The trial judge had Mr. Ennis' own evidence that the €552,407 was his "proposed" discounted rate to Mr. Curran. It was also never pleaded that a concluded agreement was arrived at in May 2009.

47. The trial judge also had Mr. Curran's letter of 5 March 2010 where he expressly refutes the existence of any agreed fee arrangement prior to the plaintiff carrying out work on the various projects. Furthermore, the trial judge had the benefit of Mr. Ennis' testimony that he was aware both from the letter of 5 March and the discussions which he had with Mr. Curran on 8 March 2010 that Mr. Curran disagreed with the level of fees being sought by the plaintiff. Moreover, he testified that it was on that basis that he agreed a specific schedule of payments as of 8 March 2010. Contrary to the plaintiff's submission, I do not find that the trial judge placed undue weight on the 5 March 2010 letter.

48. In the course of his submissions, counsel for the plaintiff placed emphasis on Mr. Curran's evidence that, in respect of each project worked on by the plaintiff, he always had a percentage fee arrangement with Mr. Ennis of the type described earlier in this judgment. This, counsel submits, is supportive of the plaintiff's claim for a liquidated sum of €1.4m. I am not persuaded by this submission. While Mr. Curran certainly alluded to percentage arrangements, it was also his position in evidence that he had disagreed with Mr. Ennis as to the value ascribed by the plaintiff company to the defendants' projects. It was on this basis that Mr. Curran did not agree with the schedule with which he was presented in May 2009. Accordingly, insofar as the trial judge is criticised for not attributing sufficient weight to Mr. Curran's evidence on the issue of percentages, I reject that criticism.

49. More fundamentally in this case, the trial judge had before him contemporaneous evidence of the agreement entered into by the parties in March 2010. The March 2010

Agreement is evidenced by the letter written by the plaintiff on 10 March 2010 and the e-mail correspondence of 12 April 2010 and 29 April 2010. As is clear from the 10 March 2010 letter, what was agreed as due by the defendants to the plaintiff was €225,000 plus VAT. Moreover, the letter set out the payment system which was to operate pursuant to the March 2010 Agreement. The existence of such a payment schedule and the fact that it did operate for a period, underpins the trial judge's finding that agreement was reached between the parties in March 2010. The findings of the trial judge, which this court upholds, put paid to the plaintiff's *quantum meruit* claim.

50. Having regard to all of the foregoing, there is no merit in the contention that the trial judge erred in failing to find that concluded arrangement existed between the parties prior to March 2010.

Was the rule in Pinnel's case applicable to the March 2010 Agreement?

51. The origins of the rule in *Pinnel's* case is helpfully set out in *Harrahill v. Swaine* [2015] IECA 36. Irvine J. describes the application of the rule in the following terms: -

> *"50. The court accepts the submissions of Ms. Moorhead, based the decisions of the court in Truck and Machinery Sales v. Marubeni [1996]1IR12, Re Selectmove Limited [1995] 2 AE R 531 and The Barge Inn Limited v. Quinn Hospitality Ireland Operations 3 Limited [2013] IEHC387 that a promise to pay a sum or part of a sum which the debtor is already bound by law to pay to the promisee cannot afford the consideration necessary to render enforceable an agreement regarding the repayment of that debt.*
>
> *51. The origin of this rule is to be found in Pinnel's case [1602] 5CO REP 177a and its status in this jurisdiction has been considered in significant detail in a number of relatively recent decisions. All of these chart the acceptance of the principle by the Court of Appeal of England and Wales in Re Selectmove*

Limited [1995] 1 WLR474. In that case the Inland Revenue made a statutory demand for payment of certain tax liabilities. It later presented a petition to wind up the debtor company. In response, the company sought to resist the making of the winding up order arguing that it had a bona fide dispute to raise regarding it's liability for the sum claimed. The company sought to contend that the Inland Revenue had accepted an offer which it had made to pay its existing liabilities by way of instalments and thereafter to discharge its future liabilities as they fell due. Having considered the rule in Pinnel's case and the decision of the House of Lords in Foakes v. Beer [1884] 9APP Cas 605, the Court of Appeal concluded that the company's promise to pay its existing liabilities by instalments and its future debts as they fell due could not constitute consideration for the agreement advanced by the company, notwithstanding what the company submitted was the practical advantage to the Inland Revenue of such an agreement, given that it was likely to recover more from the company by adopting this approach than by putting the company into liquidation. Accordingly, even if the company's offer had been accepted, the agreement was unenforceable for want of consideration."

52. As is clear from the High Court judgment, the trial judge agreed with the plaintiff's contention that the December 2011 Agreement was unenforceable by reason of the rule in *Pinnel's* case. Indeed, it is now accepted by the defendants that the 21 December 2011 Agreement was unenforceable and they have not sought to appeal that finding.

53. It is the plaintiff's contention, before this Court that the trial judge erred in failing to apply the rule in *Pinnel's* case to the March 2010 Agreement. Counsel argues that what transpired in March 2010 amounted to no more than an agreement by the plaintiff to accept a lesser sum than the amount lawful due which in the words of Longmore L.J. in *Collier v. P & MMJ Wright (Holdings) Ltd.* [2008] 1 W.L.R. 643 (at p. 659)*"cannot be a binding*

agreement in law since it has no consideration to support it." It is thus submitted the trial judge erred in not finding that the March 2010 Agreement was defective for want of consideration, in like manner as he rejected the December 2011 Agreement, applying the rule in *Pinnel's* case.

54. It is thus contended that in circumstances where the plaintiff's case is that the March 2010 Agreement is not binding for the same reason as the trial judge found the December 2011 Agreement not binding, the plaintiff is therefore entitled to maintain its claim for fees of €1.4m, less any payments already made, or, alternatively, that the plaintiff is entitled to claim the sum of €552,407 plus VAT as agreed in May 2009, again less any payments already made by the defendants. Counsel's submission to this Court is that the sum of €552,407 plus VAT, albeit a discounted figure, may be a more reasonable figure for the plaintiff to fall back on if the March 2010 Agreement is found to be without efficacy, as the figure of €552,407 was arrived at in recognition of the relationship which had built up between the plaintiff and the defendants.

55. The first thing to be observed is that the argument that the March 2010 Agreement is unenforceable by reason of the rule in *Pinnel's* case was not pleaded or argued in the High Court. It ill-behoves the plaintiff to now canvass this argument in the within appeal. In any event, there is no merit in the proposition advanced by counsel for the plaintiff before this Court. Counsel's submission is predicated on there being in existence prior to March 2010 a liquidated debt owed by the defendants to the plaintiff company. If there was in existence such a debt, absent consideration the March 2010 Agreement would not be enforceable by reason of the same logic as applied to the December 2011 Agreement. However, as set out above, this Court has concluded that the trial judge did not err in finding that there was no undisputed liquidated debt lawfully due to the plaintiff prior to March 2010. We have upheld his finding that agreement was reached on the issue of a liquidated debt in March

2010. Accordingly, the consequence of the finding by the High Court that the rule in *Pinnel's* case applied to the December 2011 Agreement is that the March 2010 Agreement remained in place. Thus, the suggestion put to this Court that the trial judge's finding of the unenforceability of the December 2011 Agreement had the effect of allowing some other liability other than the March 2010 Agreement to come into force is without merit. For the reasons already set out, the March 2010 Agreement was the originating negotiated agreement between the parties.

Did the March 2010 Agreement amount to a renunciation or repudiation of an existing agreement between the parties?

56. The plaintiff contends that the trial judge failed to consider whether the March 2010 Agreement amounted to a renunciation or repudiation of an existing agreement between the parties as to what was owed by the defendants. This argument is easily disposed of given that this Court has found no basis to interfere with the trial judge's finding that the first concluded agreement between the parties relating to outstanding fees for historic work was on 8 March 2010. Therefore, there was no renunciation or repudiation of an existing agreement.

Alleged renunciation/repudiation by the defendants of the March 2010 Agreement

57. The plaintiff also argues that the trial judge erred in failing to find that the March 2010 Agreement was repudiated and/or renounced by the defendants. In this regard, counsel points to the defendants' plea, at para. 15 of their defence, that the March 2010 Agreement was superseded by the agreement made between the parties in December 2011. In aid of his submission, counsel relies on Chitty on *Contracts,* (32nd Ed. (Sweet and Maxwell) at [24-018]: -

> "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to

> perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged…"

58. It is contended that given the defendants' plea that the March 2010 Agreement was superseded by a contract in December 2011, any reasonable person would conclude that the defendants did not intend to fulfil their obligations under the March 2010 Agreement.

59. The defendants object to the plaintiff's argument on the basis that it was never argued in the court below that the December 2011 Agreement amounted to a "renouncement" of the March 2010 Agreement.

60. I agree with counsel for the defendants that the plaintiff is not entitled to pursue this argument in the absence of that issue having been argued in the court below. Moreover, as pointed out in the defendants' written submissions, the position now being adopted by the plaintiff is intrinsically inconsistent with the finding of the High Court that the December 2011 Agreement was unenforceable by virtue of the rule in *Pinnel's* case, a finding which neither party has appealed, and which indeed the plaintiff advocated in the court below. As the December 2011 agreement has no force, it could not be said to have discharged or renounced an earlier agreement between the parties. Even if that were not the position, for the reasons set out below, I am satisfied that the evidence adduced before the trial judge was contra-indicative of the plaintiff's contention that the December 2011 Agreement amounted to a renunciation of the March 2010 Agreement.

61. The plaintiff's principal contention is that the defendants' cessation of monthly payments after October 2010 amounted to a repudiation of the March 2010 Agreement and that this cessation went to *"the root of the contract"* in the sense articulated by Sachs LJ in *Decro-Wool International v. Practitioners in Marketing* [1971] 1 WLR 361 at 374.

62. Counsel contends that the above threshold was met in the within case given the defendants' failure to make the agreed payments post October 2010. Counsel relies on *Valilas v. Januzaj* [2015] 1 All ER (Comm) 1047 as authority for the proposition that where the only obligation imposed on a party is to pay a sum of money, the failure to comply with that obligation is repudiatory. It is submitted that the only obligation imposed on the defendants by the March 2010 agreement was to make monthly repayments of €6,666.00 (plus VAT). As the defendants only made payments of €68,996 (plus VAT) of the €225,000 (plus VAT) due (in other words performed only 30% of their contractual obligations), it is argued that this failure amounted to a repudiatory breach of contract. It is contended that as the defendants' repudiatory breach brought the March 2010 Agreement to an end the plaintiff was discharged from its obligations to give discounts in respect of historical fees. In this regard, reliance is placed on *Haymans v. Darwins Limited* [1942] AC 356 and *O'Dwyer v. Boyd* [2008] IESC 6.

63. Counsel for the defendants submits that contrary to the plaintiff's submissions, the defendants did not renounce or repudiate the March 2010 Agreement, nor indeed the December 2011 Agreement.

64. I am not persuaded by the plaintiff's submission that the trial judge erred in failing to find that there was a renunciation or repudiation of the March 2010 Agreement by the defendants. As the evidence before the trial judge demonstrates, there was little to support the suggestion that there had been a repudiation and, instead, there was evidence to the contrary. First, in accordance with the terms of the March 2010 Agreement, the defendants commenced paying the plaintiff company the agreed monthly sum upon provision of an invoice and continued doing so from that date to October 2010. It is common case that the plaintiff's bookkeeper, Ms. Henry, who normally dealt with the defendants' payments, went on maternity leave in November 2010. Before dealing with what transpired

thereafter, I wish to address an argument put forward by the plaintiff's counsel in support of the repudiation claim. Counsel submits that the letter of 10 March 2010 is seminal correspondence in that it gainsays the defendants' contention that the provision of invoices was a prerequisite to payment of the monthly sums agreed on 8 March 2010. It is argued that, in fact, the March 2010 Agreement required that payments be made by standing order which the defendants failed to put in place. I am not convinced by this argument. While it is clear from the letter of 10 March 2010 that this was the plaintiff's preference, there is no suggestion that the setting up of a standing order was a term of the March 2010 Agreement. In any event, between April and October 2010, the parties appear to have quite happily operated under a system where the defendants' cheques were collected by the plaintiff's courier.

65. Secondly, turning to the timeframe post October 2010. While it is certainly the case that there was a hiatus between November 2010 and December 2011 when no invoices were issued by the plaintiff, equally, during this period, the defendants neither requested invoices, nor made payments with a request for an invoice to follow (as had occurred on at least two occasions previously, including in regard to one tranche of money covered by the March 2010 Agreement). It is the case, however, that throughout the whole of 2011 Mr. Young was operating as liquidator of the plaintiff company. Based on the parties' dealings between March and October 2010, there is no reason to assume that had Mr. Young, upon his commencement as liquidator in December 2010, sought the outstanding November 2010 instalment (then being €4,500 plus VAT, as per the revised payment schedule agreed in October 2010) that that sum (and further monthly payments) would not have been forthcoming. Moreover, the evidence shows that following the negotiated agreement between the liquidator and the plaintiff in December 2011, the defendants paid the agreed

monthly sum of €3,500 plus VAT on 8 February 2012, following receipt of an invoice from the liquidator dated 28 January 2012.

66. As the evidence in the case demonstrates, thereafter, in the absence of any further invoice issuing from the liquidator, in May 2011, the defendants sought two invoices in writing and offered to pay on receipt of same. Furthermore, as is clear from the evidence of Ms. Enright, the defendants had earlier sought to contact the liquidator by telephone with a view to making payments. All of this lends credence to the defendants' counsel's submission to this Court that Mr. Curran's testimony in the court below that he never reneged on an invoice, and that payments ceased because invoices were not furnished, was not challenged by the plaintiff. Moreover, Mr. Curran gave direct testimony that he had instructed Ms. Enright at the end of February 2012 to request invoices from the liquidator.

67. I have already referred, at paras. 27 and 28 of this judgment, to the evidence given by Mr. Young as to why the defendants' debt was not pursued by him when he took up his position as liquidator, and as to why when ultimately the debt was pursued by him in December 2011, that pursuit did not continue beyond February 2012. I need not rehearse this evidence again, or the view taken by the trial judge of the liquidator's inactivity. In all the circumstances, albeit somewhat overstated I am constrained to agree with the defendants' counsel's submission that the evidence of the defendants' willingness to perform the March 2010 Agreement was all one-way. In those circumstances, I am not satisfied that the factual matrix which pertained in this case meets the threshold for repudiatory conduct as set by Finnegan J. in *Berber v. Dunnes Stores Limited* [2009] IESC 10: -

> *"As to whether conduct amounts to a repudiation of the contract the ordinary law of contract applies: the cumulative effect of the acts complained of must be such as*

to indicate that a party, in this case the employer, had repudiated its contract." (at p.16).

68. The threshold for repudiation is high. There was no evidence in this case of persistent refusal to perform the March 2010 Agreement. Nor was there evidence that the defendants were refusing to perform the March 2010 Agreement unless the plaintiff accepted additional onerous terms inconsistent with the contract or that they refused to perform in the mistaken belief that there was never an enforceable contract, all of which, as stated by Arnold J. in *Kumar v. Station Properties Ltd.* [2015] NZSC 34 (at para. 63), might well sustain a finding of repudiation.

69. I find that there was no error committed by the trial judge in failing to find that the March 2010 Agreement had been repudiated by the defendants.

Did the High Court err in the manner in which it dealt with the Declaration of Solvency?

70. Counsel for the plaintiff submits that the trial judge wrongly interpreted s. 256(6) of the 1963 Act when he concluded that the debt owed by the defendants to the plaintiff should have been referred to in the Declaration of Solvency sworn by the plaintiff's directors, Mr. Ennis and Ms. Kenny, on 26 November 2010 as a prelude to the members voluntary winding up.

71. Section 256(6) of the 1963 Act provides:

> "(1) Where it is proposed to wind up a company voluntarily, the directors of the company, or in the case of a company having two or more directors, the majority of the directors may, at a meeting of the directors, make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company, and that having done so, they have formed the opinion that the company will be able to pay

its debts in full within such period not exceeding 12 months from the commencement of the winding up as may be specified in the declaration …"

72. In the course of his testimony to the High Court, Mr. Ennis acknowledged that the defendant's debt, the subject matter of the within proceedings, had been omitted from the debtors list compiled by the company prior to the liquidation process. In considering this issue, the trial judge stated:

"For reasons which are not entirely clear, the debt owed by the defendants was deliberately excluded from the declaration notwithstanding the fact that the declaration has the status of being a sworn document. Though the declaration was false and misleading, I do not find that such precludes the plaintiff from maintaining a claim for recovery of the debt in question. It does, however, follow that the Court should treat the evidence given by Mr. Ennis, principal of the plaintiff, with considerable caution."

73. Counsel for the plaintiff contends that the trial judge erred in finding that the defendants' debt had been deliberately excluded by Mr. Ennis from the Declaration of Solvency. It is submitted that there was no breach of s.256 of the Companies Act and that the Declaration of Solvency was completed in accordance with the provisions of the Act. He submits that the trial judge failed to make the necessary distinction between:

(i) A Declaration of Solvency,

(ii) A statement of assets and liabilities and

(iii) A debtors list.

74. It is contended that the debtors list is not a requisite part of the Declaration of Solvency in that there is no requirement to list individual debtors in any such declaration. Counsel submits that the trial judge was given the impression that a debtors list was required to be attended to in the Declaration of Solvency, which is not the case. It is,

however, accepted by counsel that the debtors list prepared by the plaintiff company in advance of the appointment of the liquidator did not include the defendants' debt, as it ought to have. Counsel contends that neither Mr. Ennis nor the plaintiff company benefited from its omission. He points to the fact that the defendants' debt was brought to the attention of the Revenue Commissioners by the plaintiff prior to the making of the Declaration of Solvency. Counsel points to the fact that the Declaration of Solvency had attached thereto a report of L'Estrange & Co., registered Auditors, who opined that the statement of assets and liabilities as at 18 November 2010 was reasonable and that the directors' opinion that the company would be in a position to pay its debts within twelve months was reasonable. This, counsel submits, was what is required by s.256, *i.e.* that the net asset position be set out. Moreover, the statement of assets and liabilities expressly stated that the company's assets as at 18 November 2010 were "estimated reasonable values". It is further submitted that the declaration made by the directors was in fact the case as all but one creditor (Mr. Ennis himself) have been paid in full. There is no suggestion of the directors swearing a false Declaration of Solvency. Counsel submits that the issue was whether the debt owed by the debtors as a whole to the plaintiff was recoverable. The figure given by the plaintiff company in the statement of Assets and Liabilities (€2,188,817) was a composite figure and was sufficient in all regards.

75. It is also contended that there was no question of the debt having been excluded from the trade debtors figure (€2,188,817)) as set out in the statement of assets and liabilities which attached to the Declaration of Solvency since at that juncture the defendants' debt had been set at nil in circumstances where the defendants had ceased making payments, and where any prudent accountant would have noted that fact, and the likely legal and other costs required to recover the debt.

76. In all of the above circumstances, the plaintiff's submission is that the inferences drawn by the trial judge from the fact that the defendant's debt was not listed in the statement of assets and liabilities was wrong. It is argued that the trial judge's erroneous inferences tainted his assessment of the issues before him.

77. Counsel for the defendants submits that a declaration of solvency is only effective if it includes a statement of all a company's assets and liabilities and that in the absence of a full picture in this regard in the Declaration sworn by the plaintiff's directors, the High Court was correct to find that the Declaration of Solvency was wrong and known to be wrong.

78. As can be seen, it is not in dispute that the debt owed by the defendants to the plaintiff was omitted from the statement of assets and liabilities which was attached to the Declaration of Solvency. In my view, contrary to the plaintiff's counsel's submissions, the question is not so much whether the trial judge wrongly interpreted s. 256 of the 1963 Act. Rather, the question which arises is whether his view that the evidence of Mr. Ennis had to be approached with considerable caution was a finding reasonably open to him on the evidence before him. In my view the conclusion of the trial judge had a clear evidential foundation. In the first instance, the trial judge had the liquidator's (Mr. Young's) evidence that the Declaration of Insolvency "may have been insufficient". Under cross-examination, the liquidator acknowledged that it was necessary for a declaration of solvency to set out the total amount of a company's assets and liabilities at the time the declaration of solvency is made. He acknowledged that the sum for debtors included in the statement of assets and liabilities did not include any figure in respect of the defendants' debt. That was in circumstances where the claim being maintained by the plaintiff in the within proceedings was for €1.4m (inclusive of VAT) and if that was in fact the case, the plaintiff's "Trade Debtors" figure of €2.1m as appeared in the statement of assets and

liabilities should have reflected the debt said to have been owed by the defendants. He further agreed with the proposition put by counsel for the defendants that the omission of the defendants' debt from the Declaration of Solvency meant that either the Declaration was wrong or that there was no claim.

79. Mr. Ennis himself testified that he was aware that the debt being claimed against the defendants in the within proceedings was not listed in the list of debtors but was "advised that the list of debtors didn't need to be exhausted", that it was simply a document sufficient to validate that the actual assets or the debtors outweighed the creditors". He further stated that the document he swore under oath was a lie "only insofar as it didn't include two substantial debtors that I was asked to leave off the list".

80. In effect, Mr. Ennis gave evidence that in 2010 he was prepared to leave a substantial debt (€1.4m) said by the plaintiff to be owed by the defendants off the debtors list. The consequence was that that debt would not be part of the figure for debtors in the statement of assets and liabilities which attached to the Declaration of Solvency. To my mind, given the evidence adduced in the case, implicit in the trial judge's overall findings is not so much the question of whether the omission of the debt from the debtors list, with the consequent impact on the true state of the company's net asset position as at 26 November 2010 as set out in the Declaration of Solvency, breached the provisions of the 1963 Act, but rather that, as of 2019, Mr. Ennis was in the witness box maintaining a claim for a €1.4m debt in respect of which, to put it mildly, an extremely cavalier attitude appears to have been taken in November 2010. In my view, based on the evidence before him, the finding made, and inferences drawn by the trial judge were open to him to draw.

81. Even if it could be said that the trial judge placed undue reliance on the Declaration of Solvency issue, or otherwise overstated its relevance to the issues before him (which I do not believe to be the case), insofar as the plaintiff maintains that the erroneous reliance

tainted the trial judge's findings as to when agreement was reached between the parties I reject that submission.

82. This is so in circumstances where the trial judge had Mr. Curran's correspondence of 5 March 2010 rejecting any suggestion of a prior agreed fee arrangement. He also the 10 March 2010 letter (and the emails of 12 April 2010 and 29 April 2019) which recite the agreement reached on 8 March 2010. Moreover, he had oral and documentary evidence of the payment history from March 2010 to October 2010 of foot of the March 2010 Agreement. To my mind, all of this allowed the trial judge to prefer the evidence of Mr. Curran over that of Mr. Ennis. Similarly, the matters to which I have just referred, and what occurred post December 2011 to February 2012, together with the trial judge's findings regarding the liquidator's inactivity from 2012 until 2016, negate the plaintiff's assertion before this Court that the trial judge should have found that the defendants had repudiated the March 2010 Agreement. Accordingly, insofar as any suggestion has been made that the trial judge's emphasis on the Declaration of Solvency led him to overlook the plaintiff's repudiation argument, that argument is also rejected.

Costs

83. As already referred to, the trial judge delivered his ruling on costs on 28 June 2019. It is common case that the defendants made a lodgement into court on 2 November 2018. The trial judge found that that raised two issues, the first being the costs to the date of lodgement and the secondly costs since the date of lodgement. Before addressing the trial judge's ruling, it is apposite at this juncture to refer to O.22, r. 6 of the Rules of the Superior Courts (RSC) which provides:

> "If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made , the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part

thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:

(1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.

(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.

(3) The defendant shall be entitled to the costs of the action up to the time when such payment into Court was made other than such issues or issue as aforesaid."

The post lodgement costs

84. Having concluded that the agreement made between the parties was for payment by the defendants to the plaintiff of €225.000 plus VAT, the trial judge, after giving credit for payments already made, found that what was due and owing to the plaintiff as of the date of hearing was €187,579.92 (inclusive of VAT). Having regard to the fact that a lodgement of €200,000 had been made on 2 November 2018, Meenan J. adopted the traditional rule on lodgements as set out by O'Donnell J. in *Reaney v. Interlink* [2018] IESC 13, noting that the present case was particularly suited to a lodgement and that albeit the plaintiffs had only failed to beat the lodgement by a small amount, this was "consistent…with having failed on the major and substantial issue in the case". Accordingly, as the plaintiffs failed to beat the lodgement, he awarded the defendants their costs since the lodgement.

85. In respect of the post lodgement costs, in their written submissions the defendants argue that there was no "special cause" for the trial judge to depart from O. 22, r.6. RSC.

They submit that while the High Court has discretion to take a more graduated approach to the issues of costs where there was a failure to beat the lodgement the exercise of that discretion did not come into play in the within case in circumstances where the plaintiff had sought €1,130,418 plus VAT and was awarded only a fraction of that claim. Counsel submits that the within case falls within the class of case in respect of which O'Donnell J. in *Reaney v. Interlink* [2018] IESC 13 opined:

> *"There may indeed be cases where the issues in a claim are so clear cut, and the monetary amounts so clearly fixed, that it can be said that failing to beat a lodgment by even a small amount is consistent only with having failed on the major and substantial issue in the case."*

86. Insofar as counsel for the defendants advances the above argument, he is essentially pushing an open door. Given that the sum awarded to the plaintiff is less than the lodgement, there is no basis to impugn the trial judge's post lodgement costs order. Indeed, in his oral submissions counsel for the plaintiff did not seek to do so, save to advance the submission that he would be entitled the post-lodgement costs if this Court found that the trial judge erred in failing to find that the sum lawfully due to the plaintiff was of €1.4m, or alternatively €552,407 plus VAT since in those circumstances the award to the plaintiff would exceed the lodgement. As is by now clear, this Court has upheld the High Court's finding that the sum due to the plaintiff is €187,579.92 (inclusive of VAT).

The pre-lodgement costs

87. As regards the plaintiff's entitlement to its pre-lodgement costs, the trial judge's ruling was in the following terms:

> "…the plaintiff would normally be entitled to this amount. However, in this case, the plaintiff claimed a sum in the order of €1.13 million, or, in the alternative, a claim on a quantum meruit. This claim considerably expanded the plaintiff's claim

> and undoubtedly added to the expense of defending it, and the quantum meruit aspect of the claim took up a considerable amount of court time unnecessarily as it turned out. I would adopt the reasoning in [*Veoila Water UK plc v. Fingal County Council* [2007] 2 IR 81] which is authority that success or failure in discrete issues may give rise to different costs orders. Now as against that, the defendants sought to rely on an agreement of December 2011 which I held to be unenforceable. Therefore, balancing one off against the other, I find that the plaintiff is entitled [to] costs up to the 2nd November 2018 but limited to 50% of such costs when taxed in default of agreement."

88. It is contended by the plaintiff that the High Court erred in not awarding full costs up to 2 November 2018. Counsel for the plaintiff argues that the trial judge's award of only 50% costs was in direct contravention of O.22 r.6 RSC. Counsel asserts that pursuant to O.22, r.6, the plaintiff was entitled to the costs of the action up to the time of the payment of the €200,000 into court. It is further submitted that the failure to award full costs up to 2 November 2018 was grossly unfair in circumstances where:

(a) the plaintiff had been put on full proof of its claim in that the Defence pleaded the Statute of Limitations;

(b) the defendants in the Defence admitted that a sum of €140,000 (plus VAT) was due and owing yet failed to pay this sum when called upon to do so by the plaintiff's legal representatives by letter dated 3 August 2017;

(c) The plaintiff served a Notice to Admit Facts on the defendants on 14 May 2018 calling on them to admit that architectural services to the value of €1.4m (plus VAT) had been provided to the defendants. A cover letter sought to confine the trial to the validity of the purported settlement agreements. The plaintiff received no response to this letter; and,

(d) The lodgement was made considerably late in the proceedings and over a year after the matter was set down for trial.

89. Counsel for the defendants contends that the trial judge was correct to find that due to its unmeritorious conduct in the progression of its case the plaintiff was disentitled to a portion of the costs accrued prior to 2 November 2018. It is submitted, however, that the trial judge erred in his calculation of the quantum of those costs. The defendants' position is that the plaintiff should not have been awarded even 50% of those costs given its pursuit of a *quantum meruit* claim and its general "conduct". It is submitted that in circumstances where the *quantum meruit* claim failed completely, and against a background where in letters dated 7 April 2016 and 20 April 2016 the defendants were at all times ready and willing (upon receipt of invoices, which the plaintiff refused to provide) to pay the plaintiff the contractual sum (€140,000 (plus VAT)) they believed was owed, there is no good reason, applying the principles set out in *Veolia Water U.K. plc v. Fingal County Council* [2007] 2 I.R. 81 why the costs of the *quantum meruit* claim should not be awarded to the defendants. It is thus contended that the appropriate order with regard to the pre-2 November 2018 costs should be no order as to costs on either side.

90. Overall, I am satisfied that there is no basis for this Court to interfere with the trial judge's ruling on the pre-lodgement costs. To my mind, the trial judge is the person best placed to adjudicate on whether there should be a departure from the default costs provisions set out in O.22, r.6 RSC. He clearly found that there was reason for such departure. It is not in dispute that this case was the subject of extensive case management in the non-jury list because of the €1.13m claim and the raising by the plaintiff of the alternative *quantum meruit* claim. The plaintiff's claims required investigation by experts on both sides of eight building projects, the compiling of reports, the meeting of experts and the giving of evidence in court by both experts. It is common case, however, that

neither the €1.13m claim nor the *quantum meruit* was accepted by the High Court. The trial judge effectively adjusted the default costs provisions of O.22, r.6 in the face of the plaintiff's manifest non-success in recovering €1.13m or establishing its entitlement to damages based on a *quantum meruit* which as observed by the trial judge took up a considerable amount of court time. These were matters which the trial judge was entitled to take into account in deciding the question of the pre-lodgement costs. The trial judge thus applied the *Veolia* principles in circumstances where, clearly, discrete issues were raised by the plaintiff in respect of which, albeit otherwise successful in the litigation, it was unsuccessful. The trial judge found that the raising of these issues affected the duration and overall costs of the litigation. I am satisfied that his finding in this regard comes within the range of cases where it is appropriate to reduce the costs that would otherwise be granted to a successful party. In other words, the raising of such issues affected the overall costs of the litigation *"to a material extent",* to quote Clarke J. in *Veolia* (at para.18). For the foregoing reasons, I perceive no basis upon which to interfere with the trial judge's decision on the pre-lodgement costs. Accordingly, the appeal on this issue fails. As I am satisfied that the trial judge has a proper basis for his decision on the pre-lodgement costs, it follows that the defendants' cross appeal on this issue also fails.

Heatherridge Associates v. Companies Act 2018/409

91. The proceedings entitled Heatherridge Associates v. Companies Act 2018/409 Cos came about in circumstances where the defendants sought to counterclaim against the plaintiff for professional negligence. As the plaintiff was in members voluntary liquidation, the leave of the High Court was required, which led to the defendants making an application on 12 November 2018 pursuant to s.678 of the Companies Act 2014 for leave to issue the said proceedings. That application was heard by the High Court (O' Regan J.) on 3 December 2018. Leave to issue proceedings was refused on the basis that

such claim was statute-barred. The costs associated with failed leave application were reserved to the within proceedings.

92. In his ruling on the costs of the defendants' s.678 application, Meenan J. was of the view that the application was a "proportionate" response to the plaintiffs' €1,130, 418 claim and/or their *quantum meriut* claim and so on that basis concluded that there should be no order as to costs in respect of the application.

93. It is contended by the plaintiff that the trial judge erred in making no order as to costs in the Companies Act proceedings. It is submitted that costs should have followed the event. Counsel argues that this is in circumstances where the defendants had made serious accusations of professional negligence against the plaintiff some fourteen years after the event and some eighteen months after the within proceedings issued.

94. The defendants' position is that the trial judge was correct to make no order in respect of the defendants' motion pursuant to s. 678(1) of the 1963 Act. It is contended that this motion was entirely a by-product of the plaintiff's doomed *quantum meruit* claim. Counsel relies on the fact that albeit leave to issue proceedings was refused by O'Regan J., she nevertheless left the issue of costs to the trial of the within proceedings.

95. Clearly, the adjudication on the costs of the Companies Act litigation was left by O' Regan J. to the trial judge in the knowledge that he would have the benefit of an overall view of the within proceedings. I am satisfied that in making his order, the trial judge had a full view of all the relevant facts and documents and had the benefit of hearing the parties give evidence. In my view, the order made by the trial judge was well within his discretion and no error of principle has been identified by the plaintiff.

Interest

96. The plaintiff contends that it should be entitled to interest in circumstances where it has been deprived of money due to it from May 2009 and in circumstances where it is

asserted that the defendants repudiated agreements reached in March 2010 and December 2011. It also points to the fact that the defendants acknowledged that a sum of €140,000 (plus VAT) was owed to the plaintiff but that the defendants repeatedly failed to discharge that sum. It is submitted that the applicable interest rate should be 8% from 1 June 2009 to 31 December 2016 and that a rate of 2% should apply from 1 January 2017 to the date of judgment.

97. The defendants' position is that it would be wholly unjust to award interest in circumstances where the defendants were willing and able to pay but where the plaintiff itself decided not to pursue payment. In this regard, counsel points to the liquidator's inactivity in pursuing the debt for almost four years. Reliance is also placed on the defendants' letters of 7 April 2016 and 20 April 2016 as indicative of the defendants' willingness to pay on foot of the agreement which had been negotiated between them and the liquidator in December 2011.

98. As emphasised in the *dictum* of Finlay-Geoghegan J. in *Reaney v. Interlink Ltd.* [2016] IECA 328, an award of interest pursuant to s.22 of the Courts Act 1981 is discretionary. As to how the discretion is to be exercised, she opined:

> *"…it is intended to compensate a person for being out of the money awarded from the time he ought to have received it to the date of judgment, provided however, other facts make it just between the parties to make such an award".*

99. To my mind, nothing put forward by counsel for the plaintiff persuades me that the present case is one which merits the award of Courts Act interest. This is so, given, first, the findings of the trial judge as to when agreement was reached between the parties, namely 8 March 2010, which led to his (properly) rejecting the *quantum meriut* claim. While the defendants, likewise, were not successful in their claim that their indebtedness only arose on foot of the December 2011 Agreement, the differential between what the

defendants claimed was due to the plaintiff and the sum ultimately found by the trial judge to be due of foot of the March 2010 Agreement was not substantial. In my view, this is a factor to be taken account of. Secondly, and perhaps more fundamentally, the delay on the part of the plaintiff in pursuing the matter militates against the exercise of the requisite discretion under s. 22 of the 1981 Act.

Summary

100. For all the reasons set out in the judgment I would dismiss the appeal and the cross appeal.

101. Both Ní Raifeartaigh J. and Power J. are in agreement with this judgment and with the Order I propose. That is an Order dismissing the appeal and the cross appeal. Costs will normally follow the event. It is the intention of the Court to so order fourteen days from the date of this judgment unless either party applies within that time to request that the Court should otherwise order. If so applying, the plaintiff must first notify the office in writing of its intention to object within the fourteen-day period and should file short written submissions within one week of notifying the Court. The defendants will then have a further week to file their submissions.