THE SUPREME COURT

[High Court Record No. 6443P/2010]
[Supreme Court Record No. 395/2013]
[Court of Appeal Record No. 969/2014]

O'Donnell J.
MacMenamin J.
Charleton J.

BETWEEN:
HARLEQUIN PROPERTY (SVG) LIMITED AND HARLEQUIN HOTELS AND RESORTS LIMITED (IN LIQUIDATION)
PLAINTIFFS/RESPONDENTS
V.
PADRAIG O'HALLORAN AND DONAL O'HALLORAN
DEFENDANTS/APPELLANTS

Judgment of Mr. Justice John MacMenamin dated the 1st day of November, 2019

Introduction

1. Harlequin Property (SVG) Limited ("HSVG"), the first-named respondent, was incorporated in St. Vincent and the Grenadines ("SVG") as a special purpose vehicle to build a multi-million dollar resort on the Caribbean island of St. Vincent. The company made an agreement with the government of SVG to that end. It acquired properties for the development in the picturesque Buccament Bay area of the island. At its peak, the project had the potential to employ up to 1,000 construction workers for its duration.

2. Harlequin Hotels and Resorts Limited ("HHR"), the second-named respondent, was incorporated by the parent group of both respondents to this appeal to operate hotels and resorts throughout the Caribbean. The company sold villas, hotels and property units to investors.

3. Once it was opened, the Buccament Bay project would have provided significant long-term employment on the island. It is the subject matter of this appeal.

4. Harlequin sought and received large sums of money from investors for the project. There are aspects of these background dealings which were of questionable legality. The project was described in court proceedings in England as having some of the characteristics of a Ponzi scheme (*Harlequin Property (SVG) Ltd. and Anor. v. Wilkins Kennedy* [2016] EWHC 3188; [2016] All E.R. (D) 76, at para. 43).

5. Unfortunately, the first-named respondent is now controlled by a bankruptcy trustee; the second, a company registered in the Cayman Islands, was placed in liquidation by order

of the courts in that jurisdiction on the 11th September, 2018. Part of the background to that unhappy situation is set out in the judgment and order under appeal.

6. On the 23rd July, 2013, McGovern J. granted judgment against the first-named appellant to both respondents (collectively "Harlequin", save where otherwise appears) in the sum of €1,575,500 ([2013] IEHC 362). He held that the first-named appellant ("the appellant"), Padraig O'Halloran, had by fraudulent misrepresentation personally induced Harlequin to part with large sums of money to the value of the award or more. The money was transferred to Irish bank accounts under the appellant's control. McGovern J. held that there was no evidence that Mr. Donal O'Halloran, the first-named appellant's father, had engaged in any unlawful conduct and dismissed the case against him.

7. Mr. Padraig O'Halloran appealed the judgment against him. The matter was subsequently remitted to the Court of Appeal, but thereafter transferred back to this Court on foot of Article 64 of the Constitution.

8. Mr. O'Halloran represented himself in this appeal. At the outset of the appeal therefore, the Court explained the legal and procedural framework within which the case would be considered. The Court drew attention to the legal principles applicable to findings of fact made by a High Court judge. By his fluency, command of detail and understanding of the legal issues, Mr. O'Halloran demonstrated that he was well capable of presenting his case on the appeal.

9. The essence of the High Court judgment can be stated quite briefly. David Ames and Carol Ames were directors of the two Harlequin companies. Mr. Ames was the effective controller of both. Mr. O'Halloran was the director and controller of a group of companies named the "ICE Group". Harlequin originally embarked on the large development on the Buccament Bay site by way of a subcontract to another developer: Ridgeview. After Harlequin discharged Ridgeview in July 2008, the ICE Group was retained to proceed with construction of the project.

10. The sums of money involved in this retainer were very substantial. Some of the detail, in the subsequent hearing before McGovern J., was complex. The case ran for 30 days in the High Court. Yet, despite these features, what is under appeal is essentially a fact-based judgment.

11. McGovern J. made a series of findings of fact regarding misrepresentations which Mr. O'Halloran made, primarily to Mr. Ames of Harlequin. He held that Harlequin relied on these, and that Mr. O'Halloran ignored advices and information available to him which indicated that the project simply could not be completed by the set deadline of the 1st July, 2010. The judge concluded that Mr. O'Halloran induced the two respondent companies to make a series of payments to the ICE Group, and thereafter unlawfully extracted the money from the ICE companies and transferred it to Ireland.

12. The first stage of the project was to be completed and ready to take guests on the 1st July, 2010. Before then, over the period of September 2008 to May 2010, the parties

made a series of agreements for the purposes of constructing the first element of what was to be this resort. The project was to include a marina, a number of restaurants, a diving shop, a reception and a beach bar. The scope of the work, identified in an agreement made on the 20th May, 2009, underwent a number of subsequent iterations. In later meetings on the 23rd and the 24th January, 2010, and the 18th May, 2010, it was altered in scope. By then, the project had been reduced to what was described by the High Court judge as being two restaurants, a swimming pool, 60 cabanas for guests and others to be used for various purposes; an "apartment block 2" to be completed for accommodation, with the hotel staff to reside in cabanas until this was available; some sports facilities; an "apartment block 3" to be completed up to the 5th floor with roof frames fitted; and waterfront and retail villages (para. 18(e) of the High Court judgment). McGovern J. held that Mr. O'Halloran gave undertakings regarding the completion of the project in a series of meetings up to the time ICE was discharged on the 11th June, 2010. During the same period, the judge found that Mr. O'Halloran took funding from ICE and diverted it to his own use.

The Main Legal Considerations

13. Two main legal considerations apply in this appeal. The first relates to the legal status of findings of fact, the second to the nature of the tort of deceit arising from fraudulent misrepresentations. In this case, both are closely interrelated. Much depended on how the judge assessed context, identified what was said and done and analysed the intentions of the parties to the transactions.

First Legal Consideration: The Status of Findings of Fact

14. The first observation must concern findings of fact. The principles governing these findings have been set out in numerous judgments of this Court, including *Northern Bank Finance Corporation Ltd. v. Charlton and Ors.* [1979] 1 I.R. 149, *Hay v. O'Grady* [1992] 1 I.R. 210, *McCaughey v. Irish Bank Resolution Corporation Ltd. and Anor.* [2013] IESC 17, and *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50; [2017] 3 I.R. 707. They are well known and may be dealt with briefly.

15. Such findings can be seen as falling into two categories: those the answers to which give a factual resolution of conflicting oral testimony, and those the answers to which do not resolve conflicts of such testimony, but are an evaluation of facts found or admitted (*Northern Bank*, per Henchy J., at p. 190). Another brief way of describing these two categories is, in the first category, findings of fact, and in the second, inferences from facts. The legal authorities emphasise that an appellate court must proceed on the basis that it did not enjoy the opportunity of seeing and hearing the witnesses as did the trial judge who heard the substance of the evidence, and was able to observe both the manner in which it was given and the demeanour of the witnesses (*Hay v. O'Grady*, per McCarthy J., at p. 217).

16. It follows that, where such findings of a trial judge are supported by credible evidence, an appellate court will generally be bound by them no matter how voluminous and apparently weighty testimony to the contrary might be (*Hay v. O'Grady*, at p. 217). An appellate court will only set aside a finding of fact based on one version of the evidence

when, on taking a conspectus of all the evidence, it appears to that court that, notwithstanding the advantages the tribunal of fact may have had in seeing and hearing the witnesses, the version of the evidence on which the judge acted on could not reasonably be correct (*Northern Bank*, per Henchy J., at p. 191). An appellate court should, therefore, be slow to substitute its own inferences from findings of fact where such inferences depend on oral evidence heard by the trial judge (*Leopardstown Club*, per Denham C.J., at para. 82). It may only do so for a very clear reason. Of particular relevance to this appeal is that a finding as to the credibility of a witness giving evidence is a finding of fact (*Leopardstown Club*, per Denham C.J., at para. 39).

Second Legal Consideration: The Nature of the Tort of Deceit

17. McGovern J. correctly summarised this second legal consideration in the High Court judgment:

> *"81. At law, a misrepresentation is made fraudulently if, when he makes it, the representor knows that the representation is untrue or is reckless as to whether it is true or not.* ***A person who deceives another fraudulently and thereby causes loss is liable in damages for the tort of deceit."*** (Emphasis added)

At para. 118, he concluded on the law:

> *"Applying the law to the facts in this case, I hold that the first named defendant was guilty of fraudulent misrepresentation and deceit and that he is liable to the plaintiffs in damages."*

18. The elements of deceit can be summarised in this way:

(a) that the alleged representation consisted of something said, written, or done, that amounted to a representation;

(b) that the defendant was the person who made the representation;

(c) that the plaintiff was the person to whom the representation was made;

(d) that the representation was both false and fraudulent;

(e) that the representation was a material inducement for the plaintiff to act upon it;

(f) that the plaintiff did, in fact, alter his or her position on foot of the representation; and

(g) that he or she thereby suffered damage.

(see, *Forshall and Fine Arts Collections Ltd. v. Walsh* (Unreported, 18th June, 1997) High Court (Shanley J.), at p. 64; *Ennis v. Butterly* [1996] 1 I.R. 426; *Superwood Holdings plc v. Sun Alliance and London Assurance plc* (Unreported, 27th June, 1995) Supreme Court (Denham J.), at pp. 27-28; and Bryan ME McMahon and William Binchy, *Law of Torts* (5th

edn, Bloomsbury Professional 2013), at para. 35.02). These tests were also applied by this Court in *Northern Bank*.

19. Each one of these elements is essentially factual. The first three, (a), (b) and (c), consist of an identification the parties involved, and the words which amount to a representation as to a particular state of affairs or an issue of fact. The fourth element, (d), is fundamental: the words used must be untrue and uttered or written with dishonest intent, motive, or recklessness. As to (e), it must be shown that the representation was such as to induce the plaintiff to act upon it. To show (f) and (g), a claimant must sustain detriment or damage in reliance on the misrepresentation. If a judge makes such findings on a solid basis of fact, a significant onus rests on an appellant to show an appeal court that a trial judge erred in some very significant way or misdirected himself or herself as to the law.

20. The task of this Court, therefore, is not to look at and consider the evidence for the purposes of deciding whether the judge ought to have accepted the particular evidence which he did. Rather, it is to consider whether there was testimony before the High Court which supports the judge's findings and whether such inferences as he drew were fairly and properly drawn.

21. McGovern J. held that each one of the legal tests as to deceit were satisfied. Looking again at what was set out at para. 13 above, he found that, on numerous occasions, Mr. O'Halloran had represented to Mr. Ames that Phase 1 of the Buccament Bay project would be completed by the 1st July, 2010.

22. It has long been established that the state of a man's mind is "as much a fact as the state of his digestion" (*Edgington v. Fitzmaurice* (1885) 29 Ch. Div 459, per Bowen L.J.). Critically, in the context of (d), that is falsity. McGovern J. was satisfied that Mr. O'Halloran made these representations when he knew they were untrue or was reckless as to their truth (para. 74). He held that, since some time in summer 2009, Mr. O'Halloran was aware that the project could not be completed by the 1st July, 2010 (para. 73).

23. The judge held that, in reliance upon these statements, Harlequin continued to employ the ICE Group and poured ever-increasing sums of money into the project (para. 90). He concluded that the representations were a material inducement to Harlequin to continue making payments on foot of these representations, at a time when Mr. O'Halloran knew, both from his own knowledge and from information which he was receiving, knew that Phase 1 simply could not be delivered by the 1st July, 2010. He found that Mr. O'Halloran persisted in ignoring all warnings which he received from professionals, such as architects, surveyors and others involved in the construction project, and that he continued to press Harlequin for more and more funds (para. 90).

24. The judge heard evidence from expert witnesses called on behalf of Harlequin. This satisfied him that the basic elements of this major construction project had not been put in place in order to enable the works to be completed by the deadline (para. 91). Few, if

any, of the accepted methods for ascertaining costs and compliance were present. Professional witnesses, who entered on the site after Mr. O'Halloran's ICE Group had been dismissed on the 11th June, 2010, found that the site was far from the condition one would have expected if there had been any genuine intention to finish the project on time (para. 91). McGovern J. accepted the evidence which showed that substantial work remained incomplete at a time when the ICE Group was financially insolvent and lacked the capital required to meet its contractual obligations to Harlequin.

25. The judge also concluded that, during the period from summer 2009 to the date of ICE's dismissal on the 11th June, 2010, Mr. O'Halloran continued to divert substantial sums of money paid by Harlequin for the completion of the project to his own purposes, in what McGovern J. described as "bogus" transactions (para. 47). He held that Mr. O'Halloran did so when he must have known that, by his actions, Phase 1 could not be delivered on the agreed date (para. 91).

26. The judge held that "all the evidence" pointed to the conclusion that Mr. O'Halloran misappropriated significant sums paid by the ICE Group for the completion of Phase 1, and that the level of misappropriation increased significantly in the last few months prior to the ICE Group being dismissed from the site (para. 92). He concluded that, while there might be some dispute between the parties as to whether or not Mr. O'Halloran was entitled to draw down some of the monies paid by Harlequin to the ICE Group, whether by way of salary or otherwise, there could be no justification for the size of the very substantial payments diverted from the project to his Irish accounts and to those of Donal O'Halloran. In the latter case, the same were allegedly to repay loans which Donal O'Halloran had made to the appellant (para. 92).

27. McGovern J. made a series of findings of fact. To set aside the judgment and award damages, therefore, Mr. O'Halloran faced the task of showing that the findings either were not based on evidence, or that the judge had not correctly directed himself on the applicable law, or both. The issue in the case is simple. It is, did Mr. O'Halloran deceive Harlequin to pay these large sums of money by fraudulent misrepresentations as to the completion date and then extract the monies for his own benefit?

Were the Findings Based on Evidence?

28. Did the learned trial judge did base his factual findings on evidence? Clearly, on the respondents' side, McGovern J. felt that aspects of Mr. Ames' evidence were not entirely satisfactory. For example, he held that Mr. Ames' evidence on the contract price was less than certain. But on critical issues, such as payments made, withdrawals extracted, and the progress of the work, there was other evidence upon which the judge also relied. McGovern J. made a series of adverse findings in relation to Mr. O'Halloran's evidence on key material issues in dispute.

The Appellant's Submissions

29. The appellant informed this Court that his solicitor had been ill and that he had experienced difficulty in retaining counsel, although he had been fully represented by

senior and junior counsel in the High Court. At the appeal, he made oral submissions to the Court as well as relying on the written submissions prepared by his then counsel.

30. First, he raised a point regarding two emails from a Mr. Simon Taylor, which, he contended, were relevant to the issues and had been claimed as privileged in the respondents' affidavit of discovery. It is clear that he was under a misapprehension on this point. The documents were discovered.

31. This case has a complex jurisdictional background. There have been legal proceedings in three or more jurisdictions, both in the Caribbean and these islands. The appellant made a series of submissions based on a judgment of the High Court of England and Wales. It is necessary to say something more about this case in order to explain his submissions.

32. To understand Mr. O'Halloran's case, one must know that, as mentioned at para. 4 above, there have been associated proceedings in the courts of England and Wales against Wilkins Kennedy ("WK"), a firm of accountants originally retained by Harlequin. Various parties, including Mr. Ames and the accountants who purported to give him advice on the project, were sternly criticised in the judgment. None of the principal parties involved emerge from the affair with their reputations unscathed, or their credibility entirely intact.

33. In the appeal, instead of directly addressing many of McGovern J.'s findings of fact, the appellant adopted a more oblique approach by selecting some passages from the English judgment. That judgment has no specific legal status in this appeal, and no application was made to render it admissible. Nonetheless, the Court was prepared to extend latitude to the appellant and to consider the judgment *de bene esse*.

34. In the proceedings in England, the liquidators of Harlequin claimed negligence against WK. In a very detailed judgment, Coulson J. (as he then was) held that the firm was liable to Harlequin in the sum of US$11,630,970.50 (para. 895). He held that, although Harlequin had been guilty of substantial contributory negligence, the liability for damages nonetheless arose from WK's breach of duty to the company and, in particular, the breach of duty by Mr. Martin MacDonald, whose role in this affair requires some further description.

35. Mr. MacDonald (known as "Mac") was, at one point, a friend of Mrs. Ames. Ultimately, he became both financial advisor and auditor to the Harlequin companies. David and Carol Ames trusted him implicitly. Coulson J.'s judgment describes an evolving situation where, over a period of two years from 2008 to 2010, Mr. MacDonald moved away from being a fiduciary advisor to Harlequin to being a close friend and ally of Mr. O'Halloran and ICE. Rather than acting as a monitor or check on payments made to ICE, he became an advocate on behalf of Mr. O'Halloran's companies.

36. In the judgment under appeal, McGovern J. characterised the same situation as being one where Mr. MacDonald, Mr. Ames' former friend, was ultimately "in league" with Mr. O'Halloran (para. 77). McGovern J. described this as a "serious conflict of interest".

37. McGovern J. held that, throughout this period, Mr. MacDonald did nothing to restrain Mr. Ames from paying monies over to Mr. O'Halloran's companies. In fact, he actively encouraged him to make these payments. This was at a time when, as both McGovern J. and the English judgment independently concluded, there was no possibility that the contract could be fulfilled by the set completion date.

38. In this appeal, Mr. O'Halloran sought to contrast some selected points in the English judgment with evidence and findings in the Irish proceedings. To take some examples, Coulson J. placed a somewhat different value on work done on the cabanas from evidence of the same surveyor witness in the Irish proceedings. Referring to these calculations, Mr. O'Halloran sought to make the case that this difference indicated that the "area had changed". The significance of this point to the issues in this appeal is difficult to follow. If it was meant to convey that more work had been done on the project than was indicated in the evidence before McGovern J., the point does not seem to have any direct relevance to the essence of the case, which concerned representations and the removal of funds. If it had any other meaning, it is difficult to see how it is material to the key issues in this appeal.

39. Counsel for Harlequin explained that any difference between the figures in the Irish and English proceedings arose because in England, the High Court judge had preferred evidence on the value of the cabanas given in the proceedings by and on behalf of WK. But this has little bearing on the sums paid over and then removed during the relevant period from the summer of 2009 to the 11th June, 2010.

40. Mr. O'Halloran submitted that there was an inconsistency between Mr. Ames' testimony as recorded in the English judgment and as conveyed to McGovern J. This concerned whether, in addition to the other payments, Harlequin would also make what is termed a "bullet payment" to ICE of STG£5 million on completion of the works. In fact, there was no such inconsistency. Again, even if there was, it is not relevant to the main issues.

41. Mr. O'Halloran drew attention to the fact that Coulson J. found the evidence of a lawyer acting for Harlequin, Mr Commissiong, to be unreliable. He pointed out that this lawyer had given evidence before McGovern J. But McGovern J. did not place any reliance on his evidence and, in fact, did not refer to that testimony in any significant way.

42. It can be said that when Mr. O'Halloran effectively sought to adopt the English judgment as part of his argument, he deployed a double-edged sword. A number of points emerge from that judgment with considerable clarity. Mr. MacDonald's role is described in great detail. So, too, is the role of another accountant, Mr. Jeremy Newman. The English judgment makes the point that Harlequin did not own all the land upon which it was proposing to build (para. 44). Some of the lands remained in the ownership of third parties.

43. Mr. O'Halloran contended that the trial judge had erred in preferring evidence tendered to the High Court by a surveyor, Mr. Sanjay Amin, to evidence which had been called on his

behalf by a Mr. Rupert Spencer of Tower Consultants Ltd. This issue is dealt with at paras. 72-77 below.

44. Mr. O'Halloran also sought to persuade the Court that the trial judge erred by not identifying the nature of the contract price. Bizarrely, there was never an agreed contract price for the project. Mr. O'Halloran explained the relevance of this point on the basis that, had the trial judge made such a finding, he would also have been required to make findings as to whether or not the contract was, or was not, profitable from the defendant's point of view. McGovern J. held that this was irrelevant. In fact, he found that the sums paid by Harlequin to ICE ought to have been sufficient to complete Stage 1, but would not have produced significant profit to the ICE Group (para. 79(iv)). In my view, the High Court judge was correct in holding that this point was immaterial to what he had to decide.

45. Mr. O'Halloran also sought to submit that the trial judge erred in his identification of the standard of proof necessary in fraudulent misrepresentation. There is no indication that the judge misdirected himself on this issue of law.

46. While not strictly speaking relevant to the issues before this Court, the most striking feature about the two judgments is that, despite the fact that the cases were heard on different evidence, and although WK were the parties to, and defendants in, the English case and Mr. O'Halloran was not, the judgments were in total agreement on 15 out of the 16 factual issues dealt with. On the 16th issue, Coulson J. had available evidence from WK on the bullet payment which was not the case for McGovern J. as WK were not a party to the Irish proceedings. Whether or not there was an agreement between Harlequin and ICE on a bullet payment upon completion is again not relevant to this appeal.

47. Seen as part of a larger canvass, the heart of Mr. O'Halloran's case was set out in the submissions prepared by counsel for this appeal. It was that this Court should prefer evidence proffered on Mr. O'Halloran's side to that adduced on behalf of Harlequin. This proposition was based on a premise that this Court might determine some aspects of the High Court judgment's findings to be unsustainable. A court could only reach such a conclusion if there was no *evidence* to justify the findings. To repeat, the true issue is whether there was evidence before the High Court which would fairly entitle McGovern J. to reach the conclusions which he did (see, *Hay v. O'Grady*, cited at para. 14 above). The points raised in argument by Mr. O'Halloran, and in the written submissions, simply did not sufficiently address this fundamental question.

48. One particular point stands out from the judgment under appeal. Much of the appellant's case depended on his own credibility as a witness. On the key issues, McGovern J. indicated he found the appellant to be less than credible. This evidence is criticised at various points as being vague and general (paras. 46 and 79(vi)). This was an assessment which the judge was entitled to make. He gave reasons for his conclusion in considerable detail. This critical issue was not directly addressed in this appeal either.

Representations

49. The High Court judge carefully examined the nature of the representations which Mr. O'Halloran made. At para. 58, McGovern J. held that the appellant made representations assuring Harlequin of delivery by the 1st July, 2010 on the following dates:

> *"16th-17th May, 2009; 23rd-24th November, 2009; 24th-25th January, 2010; 23rd February, 2010; 25th March, 2010; 29th March, 2010; 29th-30th April, 2010, and 18th May, 2010."*

50. He held these oral assurances were also repeated in many emails, including those dated the 16th February, 2010; 15th, 18th, 25th, 28th March, 2010; 5th, 19th and 30th April, 2010; 5th, 7th and 23rd May, 2010 (para. 59).

51. McGovern J. observed:

> *"To focus on but one of these emails (23rd March, 2010), the first named defendant stated to Mr. David Ames: 'Your resort WILL BE OPEN! On 1st July!'"*

This was clear evidence. The High Court was entitled to conclude that representations to that effect were made by Mr. O'Halloran to David Ames and others in Harlequin.

The Evidence as to Payments

52. McGovern J. held that the appellant's case on the issue of what was actually agreed between the parties shifted ground more than once. The evidence as to payments actually made was critical however.

53. The transactions began with a series of payments made in the year 2008. Beginning on the 4th September, 2008, Harlequin made a payment of US$100,000, followed by payments each week thereafter for 12 weeks of US$125,000 (para. 34)

54. Mr. Ames' testimony before McGovern J. was that Mr. MacDonald told him on the 13th October, 2008, that the ICE Group was doing a very good job, and that, in order to speed up construction, weekly payments should be increased to US$165,000 per week until Christmas 2008 (para. 34). Mr. Ames, on behalf of Harlequin, took Mr. MacDonald's advice. These payments, and the *ad hoc* manner in which they were made, must be seen as the background to the more focused findings relating to further arrangements between 2009 and 2010, the period during which McGovern J. held that the fraudulent misrepresentations causing damage to the respondents were made, and during which time he considered Mr. MacDonald's role as giving rise to the appearance of a conflict of interest.

55. Mr. MacDonald did not give evidence in the Irish proceedings. The judgment nonetheless describes his role in some detail. The extent of his new alliance with Mr. O'Halloran is shown by the fact that he agreed to become Mr. O'Halloran's best man, and participated in a lavish stag weekend at the Monte Carlo Grand Prix, all at a time when the relationship between Harlequin and the ICE Group had begun its final, inevitable collapse (para. 76 of the High Court judgment. See, also, para. 9 of the English judgment).

56. Counsel for Harlequin submitted in this appeal that, in the High Court and elsewhere, Mr. O'Halloran, or those earlier acting in court on his behalf, had posited various versions of the terms of the agreement(s). These included:

(a) a plea in further related court proceedings in SVG and Barbados to the effect that a fixed price contract to complete Phase 1 had been concluded on the 19th May, 2009, for the sum of US$58,634,322 to be paid in 43 weekly instalments of STG£450,000;

(b) an affidavit sworn in the English proceedings where Mr. O'Halloran claimed that, in fact, there was a contract concluded in September 2008 - but this was solely for remedial works—and an agreement in relation to construction works which was not reached until the 19th May, 2009;

(c) the opening submission by the appellant's counsel, where it was suggested that the contract was for a fixed price of US$76,043,396, a figure reflected in answers to interrogations; and

(d) under cross-examination, a statement that a contract was concluded on the 1st September, 2008, to construct the entire Buccament Bay resort for a fixed price of US$119m.

This last version had not been referred to prior to the High Court hearing, and, apparently, was not previously known either to his counsel or his expert witness. Mr. Rupert Spencer, in his testimony on behalf of Mr. O'Halloran, said that he understood a bid for US$119m had been rejected. I add here that, at answer 19 in the sworn answer to the respondents' interrogatories, Mr. O'Halloran deposed that the ICE Group entered into a "fixed price contract" with Harlequin, and as such, the ICE Group was not obliged to apply monies received exclusively toward the Buccament Bay or other authorised projects.

57. In fact, this Court has been told that, in the course of the High Court trial, Mr. O'Halloran made a further contention. This was to the effect that a separate agreement, in September 2008, had been reached for remedial works for an agreed figure of US$4m, on which he expected to make a 25% profit. This Court was further informed that, under cross-examination in the High Court, Mr. O'Halloran said that, by May 2009, 85% of the remedial works undertaken on foot of this 2008 contract had been completed for the agreed figure. But, in written submissions prepared for this appeal, Mr. O'Halloran's legal advisors claimed that a figure of US$9m was actually spent on remedial works which would have resulted in a loss to the ICE Group. This can only be described as an area where the appellant's case did not occupy a fixed point. But it does not provide a firm foundation for the contention that the judge erred by not making findings on cost or pricing.

The Relevant Payments and Agreements

58. There was evidence that in a preliminary agreement, made on the 17th March, 2009, ICE was to be paid STG£400,000 per week. In May 2009 there was a further agreement to complete Phase I in 43 weekly payments of STG£450,000 (para. 35). Faced with these areas of uncertainty as to any fixed price for the entire contract, McGovern J. made the point in his judgment that the case before him was not a building contract where the agreed price would undoubtedly be significant (para. 27). He held that although there might be disputes as to the exact costings of the project, they were not critical to the issues he had to decide. He described the contract price issue variously as "peripheral" and "tangential" to the main issues which he had to decide (para. 27). I respectfully agree.

59. The judge was correct in holding that the contract price was irrelevant. The main issue was not whether there was an agreed contract price; nor was it whether the contract would prove profitable. McGovern J. was sceptical as to whether it would have been profitable, whether priced at figures given in evidence of US$96 per sq. foot or even at US$154 per sq. foot. Instead, the true questions on this aspect were, first, whether the monies paid over by Harlequin were sufficient for completion of the work, and, second, whether the appellant unlawfully misappropriated monies paid to the ICE Group. The fact that the contract price was uncertain, or subject to variation, was not relevant to the ultimate issue to be determined, which was that, no matter how calculated, there was no lawful basis for the monies paid over for the project to be extracted on foot of what Mr. O'Halloran told Harlequin.

60. The consequence of Mr. O'Halloran's submission was that it fixed the focus more squarely on his actions and words during the particular timeframe the judge identified between summer 2009 and June 2010, the representations he made, and transactions he engaged in, during that period. There were a series of agreements, each based on a reduction on the scale of the project, but often with increased rates of payment to ICE.

61. McGovern J.'s critical findings commence with an arrangement made in November 2009. He held at para. 35 that, at a meeting which occurred in that month, Harlequin agreed with ICE to a revised and reduced scope for Phase 1 to be completed by the deadline of the 1st July, 2010, and further agreed that some remaining works would have to be delivered after that date. He held that, by the 28th January, 2010, Harlequin had paid 41 out of the 43 weekly payments on the basis of *ad hoc* arrangements made as far back as May 2009 (para. 35).

62. The trial judge held as a fact that, on the 23rd February, 2010, the parties then agreed to a new payment plan (para. 36). Under this arrangement, Harlequin was to pay the ICE Group STG£600,000 per week, which was to be supplemented by additional *ad hoc* payments as and when required in order to ensure that Phase 1, as by then defined, was delivered on the due date.

63. The judge concluded that Mr. Ames agreed to make these additional and larger payments because he had become increasingly concerned that the set deadline of the 1st July, 2010, would not be met (para. 36). He held that Harlequin continued to make these

weekly payments of STG£600,000 until the 18th May, 2010, and that, a little more than a week earlier, on the 10th May, made a further payment of US$435,000 to the ICE Group (para 36).

64. The judgment records that, on the 18th May, 2010, Mr. O'Halloran met with David Ames, and his wife, Carol Ames, at Harlequin's office at Basildon in England. The Ames testified that by this stage, they were extremely concerned about their perception of the lack of progress with the works (para. 37). McGovern J. accepted Mr. Ames' testimony that he believed that he and his company had been misled, but that in the light of commitments made, and desperate to ensure that the opening could proceed on the agreed date, he nonetheless agreed that the company would make an additional seven payments of US$1m per week to the ICE Group (para. 37). This testimony was borne out by the fact that, on the following day, Harlequin did make a payment of US$1m to the ICE Group. On the 27th May, 2010, Harlequin paid another US$1m. This was the last payment made before the ICE Group was dismissed from the project on the 11th June, 2010.

65. The judge did not, in fact, have to place total reliance on Mr. Ames' evidence. The fact that the payments were made was not only found from the evidence of Mr. Ames, but was corroborated by the evidence of Mr. Paul Jacobs, a consultant forensic accountant with Grant Thornton. With one exception which Mr. Jacobs himself corrected, McGovern J. accepted his expert evidence as to the inflow and outflow of funds as being thorough and comprehensive, especially with regard to Mr. O'Halloran's withdrawal of monies (paras. 28-30). The appropriations by Mr. O'Halloran were set out in a "schedule of misappropriation", which, less this one insignificant feature, the judge held to be accurate. This was not challenged in the appeal.

Falsity of the Representations

66. The evidence relating to the work actually done during the relevant period from summer 2009 up to the date of ICE's dismissal on the 11th June, 2010, is a key factor in the assessment of Mr. O'Halloran's *bona fides*. If in the High Court he could have established as a fact that the work was progressing apace and according to schedule, or even that there was a real chance of the deadline being met, then clearly his assurances to Harlequin would not have been false misrepresentations.

67. But, in fact, the judge found there was significant evidence which pointed the other way. It was to the effect that, on the basis of the work actually done, ICE had no chance of meeting the deadline, and that this should have been clear from summer 2009 onwards (para. 73).

68. Mr. Sanjay Amin, a quantity surveyor, testified on behalf of Harlequin in the High Court. His evidence was that he visited the site on the 11th June, 2010. This was the day ICE had been dismissed, but 20 days prior to the stipulated deadline of the 1st July. He and his team of two other quantity surveyors spent a total of nine days on the site. He was therefore in a position to base his calculations on a thorough assessment of what was completed by that stage.

69. The Court has been told that, as of the 11th June, 2010, Mr. Amin estimated that the cabanas were 69% complete. He considered that Block 1 of the development was 11% complete, Block 2 was 74% complete and Block 3 was 34% complete. He found that the infrastructural works were 12% complete and that what was termed the "back of house" facility was 0% complete. The waterfront village and restaurants were 10% complete, the spa facilities were 0% complete, and the generator and sewage treatment plant was 0% complete. Mr. Amin estimated that the cost to complete Phase 1 as of the date of his inspection would be US$36,060,117 based on the ICE Group rates, or US$70,715,375 based on the likely 2010 market rates.

70. This was extremely telling evidence - unless it could have been rebutted. If accepted, it indicated the sheer scale of the work which remained to be done, even within three weeks of the projected completion date. It, and similar testimony, also was evidence upon which McGovern J. could draw inferences as to the truth or falsity of Mr. O'Halloran's statements that the project would be completed on time.

71. Mr. Amin's evidence went further. It not only indicated that the rate of progress on the project was slow, but that there had been efforts made to conceal this fact. There was evidence that some of the work done was effectively the creation of a 'Potemkin village'; that is, to put on a veneer that work had been completed when it had not (para. 66). Mr. Amin's evidence was that landscaping had been carried out around the cabanas before engaging in essential drainage works. Mr. O'Halloran denied that this is what occurred, but the judge held that there was substantial corroborative evidence to the contrary. He was entitled to draw this conclusion.

72. In this appeal, Mr. O'Halloran invited the Court to prefer the evidence of Mr. Rupert Spencer, a quantity surveyor, over that of Mr. Amin. Mr. Spencer was employed by Tower Consultants Limited, a firm which apparently had previously had a business relationship with Ridgeview, the original contractors, between 2006 and 2007 (para. 72). But there was also evidence before the High Court that Mr. Spencer had had a prior business association with Mr. O'Halloran through connections with another surveyors' firm, Rider Levitt Bucknal ("RLB"). In fact, at one point, Mr. Spencer's company, Tower Consultants, had been a one-third owner of RLB, which, in the past, had been paid US$150,000 by the ICE Group. There was further evidence before the High Court of other close business connections between ICE employees and RLB.

73. Applying the legal principles identified earlier as to findings made by a trial judge, there is no basis for this Court to now conclude that Mr. Spencer's evidence should be preferred over that of Mr. Amin. When it comes to inferences, a court will be slow to draw any other than those drawn by the trial judge. McGovern J. made clear that his findings of fact were based on the evidence.

74. The evidence in the High Court was that Mr. Spencer had limited experience of providing expert reports. He conceded that his membership of the Royal Institute of Quantity Surveyors had lapsed in 2009, and admitted he had not undertaken any quantity survey work between October 2010 and January 2013. Mr. Amin had visited the site shortly after

Harlequin took over in June 2010. Mr. Spencer visited the site seven weeks later after Harlequin's new contractors had undertaken a great deal of work in order to ensure what was by then called Phase 1A was ultimately delivered by a new date of the 13th August, 2010.

75. Before the High Court, Mr. Spencer said he did not enquire into, and was not aware of, the work done since the ICE Group had been dismissed, and apparently had spent less than one day on the site. He testified in the High Court that he worked from measurements found in drawings and could not recall which properties he had personally viewed.

76. Mr. Amin based his calculations on the value of the work done using a rate of US$96 per square foot. On the other hand, Mr. Spencer sought to value the works on the basis that the relationship between Harlequin and the ICE Group had started on the wrong footing and appears to have used his own judgment in determining how to approach what he considered a unique set of circumstances. Mr. Spencer chose not to attach photographs to his report, by contrast to Mr. Amin.

77. There is no basis for now rejecting Mr. Amin's evidence or reversing McGovern J.'s findings of fact based on that evidence, which was corroborated.

78. In addition to Mr. Amin's testimony, two witnesses called on behalf of Harlequin bore out this general account. These were Mr. David Campion, an architect, formerly with Murray O'Laoire Architects, by then working for Harlequin, and Mr. Sean O'Connor, the project manager who took over the site in June 2010 after ICE had been discharged. Mr. Campion graphically described the site at that time as resembling a "graveyard of knackered machinery". Mr. O'Connor said that at that stage the site was an "absolute mess" and that there was a lack of essential supplies (para. 64).

79. The judge rejected Mr. O'Halloran's testimony to the effect that Harlequin had failed to provide him with the required finance to complete the work. He held that adequate payments had, in fact, been made. He also held that the fact that Mr. O'Halloran's evidence was implausible on this issue was demonstrated by the evidence of other witnesses, including Mr. Campion, who testified that, even by the time of meetings on the 23rd and the 24th November, 2009 - at which point Mr. O'Halloran was indicating a 1st July, 2010, deadline completion date - the project was already so far behind that *all* the monies received from Harlequin would have been needed in order to deliver anything meaningful by that date.

80. Seen in hindsight, the judge was entitled to also regard this as very significant evidence. It meant that if the monies paid over were actually extracted from the ICE companies and devoted to other purposes, it would reduce to nothing the chances of any successful completion of the project by the 1st July, 2010.

81. There was yet further evidence as to the rate of progress at a point midway through the relevant period, between summer 2009 and June 2010. Mr. Campion testified that in

January 2010, the then project manager, Mr. Kevin Webster, produced what is called a "Gantt Chart" (para. 63). This is a form of bar chart which is used as a production control tool. It is used in project management to provide an illustration of a schedule that helps to plan, coordinate and track specific tasks in a project. This showed that a more realistic completion date for the project was not July 2010, but rather April 2011. Mr. Gilbert Aquino, an architect, also testified on behalf of Harlequin that he was firmly of the view that Phase 1 could not have been completed by the 1st July, 2010 (para. 64).

82. Mr. O'Halloran invited the High Court to consider a surveyor's report which was dated January 2010. The firm of surveyors, RLB, concluded that the programme, although "ambitious, was achievable", and with continued diligence of the main contractor and design team should achieve a successful outcome. The judge found this was, at best, a "guarded response". A report in February 2010 concluded with the belief that overall, a Phase 1 soft opening date could be achieved at Buccament Bay (para. 68). But both reports raised concerns about the level of coordination required in order to ensure that the resort would be ready in time and identified a number of threats to the achievement of this.

83. McGovern J. considered that a reading of these and later reports indicated that the authors were extremely careful in their phraseology. He observed that, in a final report dated the 21st May, 2010, RLB concluded that having considered the progress on the site by reference to the projected opening date of the 1st July, 2010, completion could not be achieved given what was described as the lack of functional infrastructure and the then current level of works incomplete (para. 70). The report noted that "the levels of resources did not appear to be the same as observed in February". It drew attention to the absence of key materials, labour skills and essential works which led the consultants to conclude that it would not be possible to project a revised date for the opening with any confidence. On this the judge observed that *"[w]hatever hopes might have existed until then about meeting the opening date, they were now well and truly dispelled"* (para. 70).

84. All this is to be seen in the light of Mr. O'Halloran having accepted in cross-examination that, insofar as he did make assurances on the 25th and 26th May, 2010, that the project would be complete by the 1st July, 2010, it would have been wrong of him to do so (para. 71). McGovern J. held that this report was of insufficient weight to offer any comfort to Mr. O'Halloran, or to provide justification for what he held to be the many representations made (para. 73). These were all findings he was entitled to make.

Mr. O'Halloran's State of Mind when the Representations were Made

85. McGovern J. held that the evidence was that Mr. O'Halloran made repeated assurances that the deadline would be met, and that it would be necessary to increase payments to his company to achieve this end. Mr. O'Halloran contended that his companies were starved of funds. The judge held there was no evidence of this assertion.

86. Evidence of a full and candid exchange of information between the two parties to an agreement might potentially rebut a finding of fraudulent conduct. The judge referred to

evidence which, he concluded, showed that Mr. O'Halloran was far from candid with Harlequin.

87. McGovern J. held that from the beginning of the year 2010, not only did Mr. O'Halloran assure Mr. Ames and Harlequin that all was well, but that, despite requests for information, he failed to keep the companies fully informed as to the progress of the building works. He held that Mr. O'Halloran sought to ensure that all information going to Mr. Ames and Harlequin would be directed through him (para. 61). His decision to control this information was to ensure that Harlequin did not ascertain the true position with regards to the works at Buccament Bay (para. 79(ix)). This, too, was a critical finding of fact.

88. From time to time, a piece of evidence will emerge in a case which is itself more eloquent than hours of verbal testimony or mountains of documentary evidence. McGovern J. identified two pieces of evidence which must of course be assessed against the background of the many oral representations which he held were actually made that the project would be completed by 1st July, 2010.

89. First, McGovern J. referred at para. 61 to an email dated the 15th January, 2010. In it, Mr. O'Halloran was communicating to two employees of the ICE Group: Mark Coggle and Kevin Webster. The email was copied to other employees. It stated:

> *"Hi Guys,*
>
> *Please don't give Dave Ames any information, please direct the information through me!..."*

90. In the appeal, Mr. O'Halloran sought to explain this communication on the basis that Mr. Ames was a volatile, unpredictable, "Walter Mitty" type character, who was difficult to handle. With respect, this was utterly unconvincing. What is said in the email must be placed within the context other evidence and the findings based on that evidence. It showed concealment, as the judge concluded.

91. It may also be viewed in the context of the evidence regarding the absence of progress of the project as established in the evidence of Mr. Amin, Mr. Campion and Mr. O'Connor. This is in addition to Mr. Jacob's evidence that, by June 2010, the ICE Group was effectively insolvent and had not brought Phase 1 to anything like completion at a time when the Buccament Bay project constituted 94% of its total turnover (para. 31).

92. Further, McGovern J. heard evidence which established that in the month of February 2010, Mr. O'Halloran met with a firm of consultants, Knowles, in order to discuss whether his companies could disengage from the project (para. 67). He was advised that this would not be possible. Mr. O'Halloran claimed in evidence that he sought this advice because of Harlequin's failure to make payments on schedule. But again there was no evidence that either the ICE Group, or he himself, had complained of failure to make payments. This meeting took place in the same month as the agreement made with

Harlequin for an increase in the payments to be made in pursuance of achieving the 1st July deadline.

93. Evidence of concealment before the High Court did not end with that one email. The second key piece of evidence was that, as McGovern J. found, on the 5th May, 2010, less than two months prior to the deadline date of the 1st July, Mr. Kevin Webster again emailed Mr. O'Halloran asking how to respond to Mr. Ames' request for an update on the progress of the project. It is striking that Mr. Webster felt the need to consult with Mr. O'Halloran regarding information which Mr. Ames was surely entitled to have. Mr. O'Halloran's email reply to Mr. Webster was that the latter's response to Mr. Ames should be *"… nice and simple along the lines that we are working towards the required deadlines,* ***don't spook him"*** (para. 65). (Emphasis added). On this, and referring to Mr. O'Halloran, McGovern J. held that *"[c]learly, the first named defendant did not intend Mr. Ames or the Harlequin companies to become aware of the actual prospects of an opening by 1st July, 2010"* (para. 65). This was a reasonable conclusion.

94. McGovern J. held, at para. 73:

> *"Having considered all the evidence in this case, I am satisfied that from some time in the summer of 2009, it was clear to the first named defendant that it was unlikely that Phase 1 would be completed by 1st July, 2010."*

McGovern J. went on to say:

> *"The position was abundantly clear by November 2009, from which time the first named defendant was making assurances about the delivery date. I do not accept that the RLB report is of sufficient weight to give comfort to the first named defendant because of the information deficit which existed when they prepared the report, and because there are unresolved disputes about the accuracy of that report and the independence of RLB."*

These, too, were findings of fact which the learned trial judge was entitled to reach.

Reliance

95. Turning then to reliance placed by Harlequin on Mr. O'Halloran's representations, McGovern J. held:

> *"74. I have already concluded that the first named defendant made representations concerning the opening date of Phase 1 by 1st July, 2010, and that these representations were made by the first named defendant in circumstances where he knew that the opening date of 1st July, 2010, could not be achieved for Phase 1."*

He went on to find as facts:

> *"Those representations were made knowingly, or at the very least, recklessly, as to their truth. There can be no doubt, on the evidence, that Harlequin placed reliance*

on those representations. The first named defendant was well aware of the fact that Harlequin was under enormous commercial pressure to deliver the Buccament Bay resort by 1st July, 2010. As a result of the representations made by the first named defendant, a number of steps were taken by Harlequin:-

(a) Harlequin purchased a large quantity of furnishings at a cost of approximately US$12.7m which were delivered from China. These were for the fitting out and furnishing of the rooms and facilities in the resort;

(b) Harlequin employed a large number of managers and staff in SVG to prepare for the opening on 1st July, 2010;

(c) Bookings had been made and commitments were made to investors and 397 people were booked to visit the resort in July 2010;

(d) From March 2010, Harlequin took steps to ensure that the hotel would be ready and operational by 1st July, 2010. Recruitment interviews took place and rooms were hired in other local small hotels to establish temporary offices in order to conduct training for new staff to run the resort;

(e) The plaintiffs committed to purchasing all of the food and beverage items necessary for the opening. This required considerable logistical commitment and expense to bring in stores from Miami to SVG in refrigerated containers."

96. These were all findings the judge was entitled to make on the evidence tendered to him. Referring again to the ingredients of the tort of deceit as set out at para. 18 above, Harlequin "altered its position" on foot of the misrepresentations. These steps are also to be seen in light of the increased payments made from the summer of 2009 onwards: a further alteration of position.

97. The judge dealt with the role of two members of the firm of WK. The part played by the first, Mr. Martin MacDonald, has been outlined. Mr. MacDonald was the main contact between WK and the ICE Group. McGovern J. described him as "more than a member of an accountancy firm retained by Harlequin" (para. 75). He had become a "close friend and confidante" of David and Carol Ames. The judgment describes that, as time went by, Mr. Ames relied more and more on his assistance, and that, eventually, Mr. MacDonald became, for all intents and purposes, the Chief Financial Officer of Harlequin.

98. The judgment goes on to describe the role of Mr. Jeremy Newman, who testified. He, too, was an accountant with WK. McGovern J. stated:

"Mr. Jeremy Newman was retained to give tax advice to Harlequin. After some time, he became involved in giving advice to the ICE Group. This was a matter of concern to Mr. Ames, who was reassured that sufficient safeguards were put in place to avoid any conflict of interest on the part of personnel within Wilkins Kennedy. On 23rd November, 2012, Mr. Newman resigned from Wilkins Kennedy

and has now gone into business with Mr. Padraig O'Halloran. Together, they have set up a new construction and civil engineering company in Jordan" (para. 75).

Mr. Newman assisted the appellant as a McKenzie friend in this appeal.

99. The judge observed that Mr. Ames felt very "let down" by Mr. MacDonald, and with some justification (para. 77). By that time, Mr. Newman was also working for the ICE Group.

100. Thus far, this judgment has addressed the circumstances in which monies were paid up to June 2010.

The Extraction of Monies

101. There was evidence before McGovern J. that, during this same period, substantial sums were extracted. The judge set out the evidence of Ms. Shona Quammie, who was employed by the ICE Group on the 22nd June, 2009 (para. 50). She was in charge of all transfers and disbursements of monies within the ICE Group. She remained employed in that capacity until she resigned from that post on the 16th June, 2010, at which time she joined Harlequin in the same position. McGovern J. found her to be a "credible witness" (para. 50).

102. Ms. Quammie testified that there were no cash flow projections in ICE, and that Mr. O'Halloran chose what was paid and not to be paid (para. 51). She testified that by April 2010, she was more and more dealing with pressure and queries from creditors as the deadline for the opening of Phase 1 became closer (para. 52). Her testimony was that, especially from in or about March 2010 until the time the ICE Group was dismissed, she was not permitted to pay invoices or bills without Mr. O'Halloran's approval (para. 52).

103. Ms. Quammie's evidence of the circumstances of Mr. O'Halloran's withdrawal of monies was, the judge felt, clear. She testified that, at the same time as she was fending off creditors, she was being directed to make regular and substantial payments from ICE Group's bank accounts to Mr. O'Halloran's personal bank accounts in Ireland (para. 52). This evidence was supported by contemporaneous emails which she had decided to retain as she was concerned to protect her position (para. 53). McGovern J. found this evidence to be "compelling" (para. 54). The trial judge pointed out that the claim brought in this jurisdiction only related to monies found to have been transferred to this jurisdiction. The evidence went so far as to demonstrate that 26% of all the monies paid by Harlequin during this time was spent on items identified by Mr. Jacobs in a "Misappropriation Schedule" which was provided to the Court (para. 44).

The Nature of the Sums Removed

104. At para. 43, McGovern J. held that the following ever-increasing "Irish payments" were made at Mr. O'Halloran's behest to his own bank accounts:

"January 2009: Transfer to Bank of Ireland Account (the 584 Account) US$110,000

February 2009: Transfer to Bank of Ireland Account (the 584 Account) US$5,000

March 2009: Transfer to Bank of Ireland Account (the 584 Account) US$10,000

April 2009: Transfer to Bank of Ireland Account (the 584 Account) US$60,000

June 2009: Transfer to Bank of Ireland Account (the 584 Account) US$50,000

July 2009: Transfer to Bank of Ireland Account (the 584 Account) US$38,000. Transfer to PTSB (the 479 Account) US$100,000.

October 2009: Transfer to Bank of Ireland Account (the 584 Account) US$150,000. Transfer to PTSB (the 479 Account) US$100,000.

November 2009: Donal O'Halloran (second defendant) US$358,000. Transfer to Bank of Ireland Account (the 584 Account) US$150,000.

Transfer to PTSB (the 779 Account) US$150,000. Weddings by Franc Ltd. US$72,000.

December 2009: Adare Manor US$25,800. Transfer to Bank of Ireland Account (the 584 Account) US$50,000. Transfer to PTSB (the 779 Account) US$50,000. Weddings by Franc Ltd. US$25,800 (to be deducted as same payment in respect of Adare Manor December 2009).

February 2010: Transfer to Bank of Ireland Account (the 584 Account) US$300,000.

March 2010: Weddings by Franc Ltd. US$129,000.

May 2010: Transfer to Bank of Ireland Account (the 584 Account) US$350,000."

Taking all these payments into account, McGovern J. calculated that the total "Irish payments" amounted to US$2,257,800 (para. 43). He attached significance to the extent to which, on and after June 2009, the pattern and size of the payments increased. These could not, by any stretch of the imagination, be seen as "salary payments".

The Judge's Findings on the Payments

105. McGovern J. observed:

"44. In the meantime, the first named defendant was making substantial payments in the Caribbean in respect of other matters which the plaintiffs allege were quite unconnected with the Buccament Bay project. These have been referred to earlier and include such matters as the purchase of a Falcon Jet aircraft, a racecourse in St. Lucia, the Hertz franchise in St. Lucia and a quarry in SVG. There were other items referred to in the course of the evidence. The Schedules appended to the witness statement of Mr. Paul Jacobs and supported in his evidence show that the level of payments for what the plaintiffs claim were matters unrelated to Buccament Bay increased in the latter half of 2009 and the beginning of 2010. While these payments are not part of the Irish proceedings, they are relevant to establish a pattern of behaviour on the part of the first named defendant and high levels of expenditure at a time when more and more money was required to

complete the construction of Phase 1 of the development. In the course of his evidence, Mr. Paul Jacobs referred to a study which he undertook to show in percentage terms what monies paid by Harlequin to the ICE Group were paid out on items which are shown in the 'Misappropriation Schedule' to his report which includes both Irish and Caribbean payments. He noted that there was an increase in the proportion of monies being used for items on the Misappropriation Schedule as time went by, and in particular, he noticed an uplift in relation to the period of October and November 2009. He calculated that approximately 26% of the monies paid to the ICE Group by Harlequin in respect of the Buccament Bay project were paid out on items specified in the Misappropriation Schedule."

106. McGovern J. then went on to hold:

"45. Looking specifically at the purchase by the first named defendant of a house at Shippool, Innishannon, County Cork for €790,000, Mr. Jacobs was able to identify a total of €761,000 which was lodged by four transactions lodged into the account of the solicitor for the first named defendant in the deal. Of that sum of €400,000 was comprised in a bank draft that preceded the Bank of Ireland mortgage loan offer. Mr. Jacobs was satisfied that this sum came from the first named defendant's bank account and that 98% of the lodgements into the bank account came from the ICE Group. Other than that, he was not able to say precisely how the €400,000 was actually funded."

107. McGovern J. found:

"46. A total of US$1,673,000 was sent by the ICE Group to the first named defendant's bank accounts in Ireland to establish what was referred to as "Irish operations". In February 2010, there were three payments US$100,000 sent to the first named defendant's Irish accounts. One was sent on 11th February, 2010, one on 17th February, 2010, and one on 24th February, 2010. ***They were described as management fees****. It was also put to the first named defendant that between October 2009 and February 2010, US$950,000 had been sent to his Irish accounts excluding repayments made to loans alleged to have been made by the second named defendant. The first named defendant said that the funds were sent to set up an operation in Ireland. He stated that the money was ring fenced for expenditure on Harlequin projects. He stated that the ICE Group intended to set up an operation in Ireland which would support the Caribbean operations.* ***When asked how this would do so, his evidence was vague and unclear****. Although he claimed that the monies were ring fenced for that purpose, some of the monies included the substantial sum of US$201,000 to 'Weddings by Franc'.* ***The first named defendant admitted that insofar as some of these payments were stated to be for discharging invoices and some were stated to be for management fees or salary, that they were not in fact for that purpose.*** *While he did give some evidence about negotiating for the lease in respect of offices at Penrose Wharf in Cork, no lease was ever signed and* ***it was difficult to***

understand how his business, which was predominantly in the Caribbean at that stage, was going to be helped by relocating offices to Cork. The first named defendant admitted that an ICE Group company had been incorporated in the UK on 2nd October, 2008. *Therefore, if the Group required a European based company to handle its affairs, one wonders why it could not have been done by the UK company****. In any event, it was clear that at the time when many of these payments were made, the Buccament Bay project was stalling and required substantial injections of cash to meet the opening deadline."*** (Emphasis added)

The emphasised words almost speak for themselves. The evidence was "vague and unclear". The true purpose of the transfers was concealed.

108. McGovern J. concluded:

> *"47. The only conclusion one can come to is that the monies were sent to Ireland under* ***bogus descriptions*** *of "invoices" or "management fees" or "salary" so as to conceal their true purpose. While there was evidence that certain steps had been taken with a view to setting up an Irish office for the ICE Group, there would be no need for such a charade had these funds had been legitimately and properly diverted for this purpose. Furthermore, such an undertaking was entirely unconnected with the Buccament Bay project."* (Emphasis added)

These were findings the judge was entitled to make on the evidence.

Damages

109. The findings on loss and damages were based on the payments made at a particular time, within a particular context. It is true that, theoretically, the judge might have fixed himself with the task of balancing out work done by ICE as compared with the payments extracted by Mr. O'Halloran. To my mind, he was quite correct in refraining from engaging in what would have been a complex and unnecessary exercise which would have involved calculating the damages which were not being sought, as contrasted to those which were.

110. The evidence was that the sums of money which had been paid over by Harlequin were sufficient for the performance of the contract - if performance had been undertaken in good faith. These were common law damages. The respondents limited the quantum of their claim to the timespan and the particular payments made into the Irish accounts. If the claim might have been put on the basis of being proprietary in nature, or a constructive trust, together with knowing receipt, or a *Quistclose* Trust accompanied by tracing, the award could not have been any less.

111. The order made by McGovern J. on the 31st July, 2013, was that the respondents were to recover the sum of US$1,575,500 from Mr. O'Halloran personally. Drawn from the payments, the figures were broken down as follows:

- Payments between the 29th June, 2009, and the 31st May, 2010, 22 in number; that is, US$1,488,000

- Payments made by the ICE Group to Weddings by Franc in respect of a wedding planned by Mr. O'Halloran at Adare Manor with his then fiancée. These amounted to the 6th November, 2009, US$72,000, the 17th December, 2009, €20,000, the 8th March, 2010, €50,000, and the 12th March, 2010, Eastern Caribbean equivalent of €50,000.

The "non-dollar" figures were converted into their dollar equivalents for the purposes of the judgment.

112. It has not been said that any of these calculations were incorrect. The payments to Weddings by Franc are in themselves significant. It is not possible to conceive how these were lawful payments from ICE. This was a transaction which was personal to Mr. O'Halloran. The transfers say much as to his control of the companies. The Weddings by Franc payments set out above, which came to a total of US$72,000, were added the euro sums from the 17th December, 2009, the 8th March, 2010, and the 12th March, 2010, amounting in total to €120,000.

113. The learned trial judge also took into account two payments made directly to Mr. O'Halloran Snr.'s bank account of US$179,000. These were made on the 13th November, 2009, and the 20th November, 2009. He held that Mr. O'Halloran, Jnr. was liable for repayment of these. This amounted to a total sum in US dollars of US$1,918,000 and €120,000, giving rise to the ultimate award.

114. In assessing damages, the judge confined himself to what he referred to as the "Irish payments"; that is, the payments into Mr. O'Halloran's Irish bank accounts. He held that from the summer of 2009, Mr. O'Halloran knew that the ICE Group could not deliver Phase 1 of the project by the 1st July, 2010, and that, therefore, the Irish payments from that time onwards were sums misappropriated from Harlequin. McGovern J. held that these sums could be taken into account in assessing the damages to be awarded for fraudulent misrepresentation giving rise to the tort of deceit. In so doing he ignored all of what he termed the Caribbean and other payments referred to in the course of the trial, save as to their corroborative value and showing a pattern of behaviour of Mr. O'Halloran with regard to the diverting of funds from the Buccament Bay project.

The Law

115. Apart from making submissions regarding the standard of proof, Mr. O'Halloran did not make any other observations on the legal authorities cited.

116. As to the law, McGovern J. correctly observed that the case before him bore certain similarities to the well-established tests for deceit referred to at para. 18 earlier. He also observed that there are similarities to the old case of *Edgington v. Fitzmaurice* (cited at para. 22 above). In *Edgington*, it was held that a prospectus was deceptive when it contained false statements of what the company intended to do with the investor's money once they received it. Monies were advanced by the plaintiff for a specific purpose, and the company subsequently became insolvent. The English Chancery Court held that the

representations as to the purpose for which the monies would be applied were capable as operating as a material misstatement of fact, capable of giving rise to an action in tort.

117. In *Standard Chartered Bank v. Pakistan National Shipping Corporation* [2002] 3 W.L.R. 1547, Lord Hoffman observed that no one could escape liability for fraud by saying that he or she wished to make it clear that he or she was committing a fraud on behalf of someone else and that he or she was not to be held personally liable.

118. McGovern J. correctly applied *dicta* to be found in *Shinkwin v. Quin-Con Ltd.* [2001] 1 I.R. 514, where this Court (Fennelly J.) indicated that a separate personal duty could be imposed on a company director arising from his or her close proximity to a tortious act. McGovern J. held that the facts of this case, and the extent of Mr. O'Halloran's control, demonstrated that this principle was applicable.

119. The judge also correctly directed himself that the standard of proof was that enunciated by this Court in *Banco Ambrosiano S.P.A. v. Ansbacher Company Ltd.* [1987] I.L.R.M. 669. There, Henchy J. observed that he was unable to discern in principle or in practice any rational or cogent reason why fraud in civil cases should require a higher degree of proof than that required for the proof of other issues in a civil claim. McGovern J. correctly directed himself on the relevant legal principles (para. 89).

120. Given his conclusion on this primary issue on fraudulent misrepresentation giving rise to deceit, the judge did not consider it necessary to consider any alternative claim made on behalf of the respondents that Mr. O'Halloran could be held liable simply by reference to the duty owed to creditors by directors in circumstances where the latter are aware that the company is insolvent, or nearly so (see, *Jones v. Gunn* [1997] 3 I.R. 1; *Re Fredrick Inns* [1991] 1 I.L.R.M. 387; *West Mercia Safetywear v. Dodd* [1988] BCLC 250; *Winkworth v. Edward Baron Development Company* [1987] 1 All E.R. 114. See, also, Deirdre Ahern, *Directors' Duties: Law and Practice* (Round Hall 2009), at p. 185; and *Yukong Lines of Korea v. Rendsburg Investments Corporation and Ors. (No. 2)* [1998] 4 All E.R. 82, at p. 89. But see also, Gavin Lightman, Gabriel S Moss and Ian F Fletcher, *Lightman and Moss on the Law of Administrators and Receivers of Companies* (5th edn., Sweet and Maxwell 2011), at p. 12). For the reasons set out in this judgment, I also do not consider it is necessary to embark on such a consideration.

121. For completeness, I would add that the judge set out his reasons for holding that what occurred in this case did not give rise to what is known as a *Quistclose* trust, or a constructive trust (para. 118). In view of the conclusion I have reached, it is unnecessary to deal with these questions either. The findings render the appellant personally liable for the amount of the award.

122. I mention here one disturbing aspect of the case. What is written now is no reflection on the Irish lawyers who acted entirely correctly in these proceedings. But there is clear evidence that, at some point, a person or persons, so far unidentified, interfered with copy emails said to have been sent by Mr. O'Halloran to a Ms. Trish Young, then an ICE employee. The purported emails contained additions which have been found by expert

independent analysis to be interpolation and not written by Mr. O'Halloran, but which purported to be written by him. These were used in proceedings elsewhere, but were exhibited in an application for interim relief made on behalf of the respondents to the High Court. Fortunately, no Irish court made an order on foot of, or in reliance on, these emails. It is clear that they were provided by others and that the Irish lawyers acted entirely in good faith. These emails have no bearing on the outcome of the main issues in this appeal.

Conclusion

123. Seen with all the clarity of hindsight, this case can be reduced to its bare essentials. It is, of course, true, that there are occasions when those involved in construction projects make assurances to clients as to deadlines which turn out to be over-optimistic.

124. But there are features about the evidence in this case which caused the trial judge to take a less sanguine view and which raised what happened to a different order of seriousness, beyond mere negligent misrepresentation or breach of contract. He was entitled to reach these conclusions.

125. This was, in essence, a "fact case", where the judge was fully entitled to accept the evidence upon which he proceeded to make sustainable findings, and where he correctly directed himself on the relevant law. Even had Mr. O'Halloran been legally represented, it is impossible to conceive how the result would have been any different. I would dismiss the appeal, and hear counsel on the form of the order, and any ancillary orders, which may arise from the efflux of time since the judgment.