FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 1
CA12/17

Lord President
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in the cause

DNO OMAN LTD

Pursuers and Reclaimers

against

GRANT CLOUSTON

Defender and Respondent

Pursuers and Reclaimers: Lord Davidson of Glenclova QC; CMS Cameron McKenna Nabarro Olswang LLP
Defender and Respondent: Currie QC, Ower; DAC Beachcroft Scotland LLP

10 January 2019

Introduction

[1] This is a reclaiming motion against an interlocutor of the commercial judge dated 16 January 2018. The parties had agreed that the law of the United Arab Emirates applied to their dealings. Having heard two experts in UAE law at a preliminary proof, the judge found that the pursuers' averments of fact were insufficient to ground a valid claim under UAE law. In so doing, he held that the defender did not owe any duty to the pursuers in

terms of his contract of employment, which was not with the pursuers. Therefore, the pursuers had no title to sue, the defender had not breached any obligation owed to the pursuers and fell to be assoilzied. The questions are whether the judge correctly understood the nature of the pursuers' claim, whether he erred in his interpretation of the experts' evidence and whether he was justified in preferring what he understood to be the opinion of the defender's expert.

The averments on fact

[2] The pursuers sue the defender for three separate sums: $491,900; $123,548 and $570,212 in respect of his alleged actings whilst he was employed by the pursuers' associated companies, namely RAK Petroleum Technical Services Ltd ("RAK Petroleum"), later called DNO Technical Services Ltd ("DNO Technical"), and DNO Middle East, from 2008 to 2012. They aver that the defender, whilst employed by these companies, was engaged to source sub-contractors on the pursuers' behalf and to procure and manage for them drilling equipment and supplies.

[3] The pursuers aver (article 3) that, along with a co-employee, namely Anwar Hamdani, the defender incorporated Land & Sea Energy Services Ltd ("LSES"). He did not advise the pursuers or their associated companies that they had done this. He used LSES as a "front company" to conceal his "initiation of and participation in transactions on behalf of the pursuer[s]". The defender contracted with SFM Corporate Services SA ("SFM") to conceal his involvement with LSES. LSES used SFM, "to further conceal his initiation and participation". One of SFM's employees was held out to be the finance director of LSES, which was falsely said to be unconnected with the defender. The defender:

> "caused the pursuer to enter into arrangements for the provision of contractors to the pursuer by LSES. LSES invoiced the pursuer for the provision of said contractors and consequently was paid by the pursuer. LSES applied substantial mark-ups, between 50% and 150% to the rates said contractors charged. Thereby the defender through the use of LSES, made secret profits to the pursuer's loss".

A specific example is given. The total loss as a result of this activity is estimated at the first of the three sums sought.

[4] The pursuers aver (article 4) that the defender also set up NTM Energy FZC ("NTM"), which he operated along with Mr Hamdani. Again, his connection with this company was not disclosed to the pursuers. The defender:

> "caused the pursuer to enter into arrangements with NTM for the purpose of making a secret profit for his benefit".

A specific example is given of a purchase order for casings and tubings at a price of $309,558, when these items had been bought for only $183,442 and the defender, through NTM, had retained the balance of "at least" $123,548 (*sic*), which is the second of the three sums.

[5] The pursuers aver (article 5) that the defender:

> "procured the sale of certain of the pursuer's pipe/casing stock, either at an undervalue to NTM, or to third parties directly, with the proceeds going to NTM and not the pursuer. He did so without the pursuer's knowledge or consent to sell on said stock for further secret profits".

The loss is the third of the three sums.

[6] The defender admits to being employed by RAK Petroleum, later DNO Technical, and DNO Middle East, who were engaged to provide procurement and contract management services to the pursuers. He maintains that he owed no duty to the pursuers and that "it follows" that the pursuers have no title to sue. He admits setting up LSES along with Mr Hamdani, but maintains that LSES was controlled by Mr Hamdani and was engaged in legitimate consultancy work for the pursuers at rates below those previously

paid by them. The defender also admits setting up NTM, but maintains that this too was a legitimate venture and it had made what was the only successful bid for the contract to supply the items concerned. The defender avers that it was Mr Hamdani who sold the stock, which was scrap, on the pursuers' instructions.

The averments of foreign law

[7] The pursuers plead their case under the law of the United Arab Emirates. In particular, they aver (with punctuation amended at the bar) that:

> "The defender was obliged by the UAE Civil Code, pursuant to Articles 282 and 283, not to commit acts harmful to the pursuer causing financial loss; pursuant to Article 285, not to commit acts designed to deceive the pursuer and causing financial loss; and pursuant to Articles 246, 264 and 265 to act in good faith, loyally and honestly as an employee of the pursuer's entities and in particular in making contracts on the pursuer's behalf. The defender breached said obligations by his actings aforesaid (to put it another way the defender's said actings are characterised as harmful acts that bring into play the relevant Articles of the UAE civil code)."

[8] The Articles of the UAE Civil Code (UAE Law of Civil Transactions), which are founded on by the pursuer in relation to financial harm, as translated by the pursuers' expert (*infra*), read as follows:

> "282 Any harm done to another shall render the doer thereof, even though not a person of discretion, liable to make good the harm.
>
> 283(1) Harm may be direct or by causation.
>
> (2) If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongdoing or deliberate act or the act must have led to the harm.
>
> ...
>
> 285 If a person deceives another he shall be liable to make good the harm resulting from that deception."

[9] The Articles referred to in relation to contracts are as follows:

> 246(1) The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith.
>
> (2) The contract shall not be restricted to an obligation on the contracting party to do that which is [expressly] contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the disposition.
>
> ...
>
> 264 That which is known between merchants shall have the effect of [express] conditions made between them.
>
> 265(1) If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.
>
> (2) If there is scope for interpretation of the contract, an enquiry shall be made as to the mutual intentions of the parties without stopping at the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in dealings."

As will be seen, the relevance of these contractual provisions is marginal.

[10] In response to the defences, the pursuers state specifically that the pursuers do not claim to have been the defender's employers. They aver that their claim does not proceed as one of breach of contract. The defences maintain that Articles 282, 283 and 285 all relate to claims under the law of tort, whereas the pursuers' case is based on breach of contract. Articles 246 and 264 relate to the performance of contracts in good faith and in accordance with commercial custom, but they do not apply because the defender did not have a contract with the pursuers. Article 265 relates to the interpretation of contracts.

[11] The pursuers' plea-in-law is in the following, almost meaningless, vague terms:

> "The pursuer[s] having sustained loss and damage as a result of the defender's breach of his obligations owed to the pursuer[s], decree should be pronounced as concluded for".

The defender sought, *inter alia*, dismissal of the action on the basis of "no title to sue" or absolvitor on the basis that the defender had not breached any obligation owed to the pursuers.

Procedure

[12] The parties are agreed that UAE law applied to the circumstances. UAE law had been pled, although it was not said that, in this field, UAE law differs from Scots law or, if it does, how it does. In due course, parties lodged their notes of proposals for further procedure. The defender had tabulated a number of key issues requiring determination. These included: (i) whether the pursuers have a title to sue; and (ii) whether the defender owed any obligation to the pursuers. They also encompassed whether there had been a breach of any obligation, and if so with what consequences. The defender had requested a debate solely on title to sue. The pursuers' note said:

> "As both title to sue and whether the defender owed any obligation to the pursuer (defender's issues (i) and (ii)) are matters of UAE law standing the terms of the expert legal opinions…, these issues fall to be treated as matters of fact. Accordingly debate is inappropriate for further procedure. It follows proof is required either by way of preliminary proof on UAE law or by way of full proof. In the circumstances preliminary proof… is the best use of court time in that were the defender's expert's position to be correct no further procedure would be required".

[13] The commercial judge's interlocutor of 22 June 2017 allowed a preliminary proof "on the issues referred to in the pursuer[s]' note of proposals". This appears to have been taken to mean that the proof would be about what the law of the UAE was in relation to the defender's issues (i) and (ii), in the context of the pursuers accepting that, if the defender's expert UAE lawyer was correct, the action would fail. As will be seen, after the proof, the judge did not make any findings on what that law was, other than to state that he had:

> "…no basis to make the necessary findings in fact that the defender's alleged conduct constitutes a tort under Article 282 or deception under Article 285. …if the case as averred were proved this would not amount to a breach of Article 282 or 285…".

The judge appears to have been led into a position whereby he was effectively listening to a debate on the application of UAE law to the averments, rather than declaring UAE law as a

matter of fact. The problem, which this unusual situation created, was that he was applying UAE law without knowing what the facts were beyond the relatively skeletal averments and the amorphous plea-in-law quoted above. Ultimately, the judge sustained the defender's plea of no title to sue, and that relative to the defender not having breached any obligation, and granted decree of absolvitor.

The reports

[14] Both parties produced reports from their legal experts, which were treated as part of their examinations-in-chief. The status of each expert was not ultimately an issue after proof. It is convenient to deal with the reports in chronological order since this explains their rather didactic structure. The first is from the defender's expert.

Faisal Attia

[15] Mr Attia produced a report dated 30 May 2017. This was a response to the pursuers' averments (*supra*). Mr Attia first considered the pursuers' *locus standi* to claim damages from the defender. He emphasised that the defender had not been employed by the pursuers, who were a separate company from his employers. Citing Articles 250 and 251 of the UAE Civil Code, he said that contracts affected only the contracting parties. A contract could not impose an obligation on a third party. On this basis, he concluded:

> "25. Therefore and as a matter of UAE law, … the Pursuer did not establish *locus standi* to claim damages from the Defender in connection with the latter's performance of the Employment Contract".

It was inconsistent for the pursuers to rely on parts of the Civil Code relating to both tort and contract. The action was brought in connection with the defender's performance of the employment contract, yet the pursuers relied on the rules of tort.

[16] Mr Attia said that Article 282 provided the basis for tort claims. He continued:

> "30. ... Given that the action was brought in connection with the Defender's performance of the Employment Contract, the Pursuer's reliance upon Article 282 is misplaced."

The same applied to the pursuers' reliance on Articles 283 and 285 (paras 33 and 36).

[17] Turning to the contractual provisions, Mr Attia explained that, in terms of Article 246, the defender and his employers, namely DNO Technical, were under an obligation to perform the contract in good faith. However, the pursuers were not a party to this contract and they could not invoke this principle. The pursuers had not specified the way in which Article 246 applied. Article 264 did not apply to employment contracts and the pursuers had not said how it was engaged. Similar considerations applied in relation to Article 265. There was no issue raised about the interpretation of the employment contract.

James Whelan

[18] Mr Whelan produced a report of 26 June 2017, having been instructed to respond to Mr Attia's opinion. He commenced (para 2.2) by stating his understanding that, contrary to Mr Attia's thinking, the pursuers' claim was made "in tort and not in contract". The pursuers were not the defender's employers at any time and they did not contend that the defender owed the pursuers any contractual duty. The starting point (para 5.2) was the ancient Islamic sharia (law): "No harm [must be done] and no harm [done] in return". It was this that led to Article 282. The victim of wrongful conduct had a right of action for a "harmful act" or "act causing harm". An unjustified act causing financial loss to another was a "harmful act", whether it was theft of money or unauthorised arrangements and whether or not by an employee, whereby another suffers financial detriment.

[19] Article 283 dealt with the nature of the act causing the harm. If a person performed an act which he had no right to perform, and harm resulted, he would require to make good the harm, whether or not he intended to cause it. If a person was entitled to do the act, he was liable only if harm was intended. If the defender did not have the right to perform the acts complained of, and they resulted in loss, he was liable to make good the loss. Upon demonstration that: (a) harmful acts were performed by the defender; (b) loss resulted to the pursuer; and (c) there was a causal link, the defender would be liable (para 5.9).

[20] The facts as described in articles 3 to 5 (*supra*):

> "5.10 ... appear on their face to show a deception practised by the defender on the pursuer as to the *bona fides* of the contractual arrangements entered into by the pursuer and the correctness of the excessive invoices paid by [them]. On my understanding of the facts, the pursuer was by a deception induced to enter into those arrangements and to pay the related invoices, to its financial loss."

This would constitute an actionable harmful act, involving a deception under article 285. The deception was ongoing, in that a pretence was maintained that the contracts had been correctly made and that the excessive payments were properly due. Liability would result under the general principles of UAE tort law, without the need to rely on Article 285. The deception in 285 was a sub-set of the general prohibition against causing harm and did not provide a separate cause of action.

[21] Mr Whelan provided (section 6) an overview of the UAE law of contract, even although that had not been founded upon by the pursuers. He did so on the basis that one material element in the determination of whether an act was an actionable tort was whether or not the person had a right to do the act complained of. An argument could be presented (although it never was) whereby, if a person had a right under a contract, there would be no actionable tort if a third party suffered loss. Such an argument would be a bad one, but Mr Whelan spent some time considering it. A UAE judge would find that the defender's job

title of "Contracts, Procurement and Logistics manager" involved a duty to his employer to act with loyalty and honesty in making contracts on his employer's behalf. There was no difference between the UAE and the United Kingdom in this area. A contracts and procurements manager, who entered into the kind of transactions complained of, would be regarded as crooked in both countries and "will be liable to an action under the contract by the employer, and in tort (or 'harmful act') by the victim" (para 6.9).

[22] Mr Attia's first report was in error as it was written on the basis that the pursuers had claimed to be the defender's employer. It sought to refute an allegation which had not been made. His sections on employment and contract law were irrelevant. Mr Attia had not challenged the pursuers' case based on tort, other than to say that reliance on the articles relating to tort was misplaced in a case based upon contract.

Secondary Exchanges

[23] There then followed an exchange of, somewhat repetitive and occasionally rhetorical, salvos from each expert. Mr Attia's second report was dated 16 July 2017. He noted that the pursuers were claiming only in tort, in which case Articles 246, 264 and 265 were no longer relevant. In tort, there was a tripartite test: (a) a breach of legal duty (harmful act); (b) damages; and (c) causal link (para 12). The pursuers required to establish that the defender had committed a harmful act; meaning a breach of a legal, as opposed to a contractual, duty. If the defender had set up corporate entities and conducted business as the pursuers had averred, that would not amount to a harmful act. "Doing business" was not a breach of a legal duty. Conducting business secretly might breach a contractual term, but it would not give rise to a liability in tort. Since the pursuers had no contract with the defender, they had no title to sue him. The pursuers had not satisfied the tripartite test.

[24] Mr Whelan's retort came in a second report of 12 September 2017. This contained an initial observation that there was no divergence between the two experts on the essential issues. Mr Attia had not sought to argue that the defender's acts were justified and would not be regarded as harmful. The essence of the pursuers' case was that:

> "4 ... the Defender dishonestly and deceitfully abused the position that he held with his employers in order to induce the Pursuer into paying amounts of money substantially greater than it should have paid under contracts arranged by the Defender. Essentially, the factual case is that the Defender was a crooked manager who cheated his employers' customer, the Pursuer, which was also an affiliated company of the Defender's employer, for his own financial gain. I have expressed the opinion of law - entirely uncontroversial… - that this amounts to the equivalent of a tort under UAE law, warranting compensation."

Most of Mr Attia's second report was irrelevant because it assumed that the case was based upon a breach of contract.

[25] Mr Whelan explained that, although the contractual connections did not form part of the cause of action, they did form part of the background setting in which the harmful acts were committed. They explained how the acts came to be committed and how the pursuers were deceived. Looking at each of the three claims, first (article 3), a UAE court would consider that the pursuers would have been entitled to rely on the defender acting in accordance with his contract with their associated company; including the duty to act in good faith (Article 246). The defender had deceived the pursuers into believing that the transactions which they were entering were *bona fide* and the invoices were correct, when they were inflated. This would be treated as an actionable wrong; consisting of deception and concealment, whereby the defender caused the pursuers to pay excessive amounts.

[26] The second claim (article 4) involved the making of a secret profit as a result of the deception involving NTM, whereby the pursuers issued a purchase order for an inflated amount. There was again a wrongful act (the deceit), harm suffered (payment of an

excessive amount) and a causal connection. The third claim (article 5) was a sale of stock to NTM at undervalue. This amounted to obtaining money by deception, notably the concealment of the defender's interest in NTM. The sale of the pursuers' goods without their consent, and retaining the proceeds, was a tortious act warranting compensation under UAE law. In deciding whether the defender had committed a tortious act, a UAE judge would look at the factual context, notably the contracts (para 5.27), including the employment contract. Mr Whelan concluded by repeating that there was no disagreement on any point of substance between him and Mr Attia (para 6.1).

[27] Mr Attia responded in his third report of 19 September 2017. He said that there was no dispute that deception was a harmful act which triggered liability in tort. The act of deception was a breach of legal duty; the basis being Article 285. The Dubai Court of Cassation had explained that there were two types of deception: verbal, which was telling lies; and physical, which was the commission of fraud. Setting up LSES and NTM, without telling the pursuers, was not a harmful act. Concealment was a breach of a disclosure obligation, but the defender was under no such obligation. The failure of an employee to act in good faith did not provide third parties with a title to sue. The defender's employer would have a title to sue, but, if Mr Whelan were correct, the defender would be liable to pay damages twice for the same act. Mr Attia produced a series of judgments in Arabic as examples of the principle of good faith being applied in the context of contractual claims only. Mr Attia repeated his view that the pursuers' case "is of a contractual nature" despite the attempt to describe it as one in tort.

[28] The final shot was fired by Mr Whelan in his third report, which is dated 26 September 2017. He repeated that he did not see that there was any substantial difference on the relevant issues of UAE law. The essence of Mr Attia's challenge was based on a

misunderstanding about what the case was about; not on any disagreement on UAE law. The misunderstanding was the view that the pursuers' case was based on contract when it was based on tort, albeit that the contracts formed part of the background giving rise to legal duty. The setting up of LSES and NTM was to create a situation in which the defender would be able to deceive the pursuers and thereby extract money from them, which the pursuers were not obliged to pay. The wrongful act was the taking of the money; not setting up the companies.

[29] It was not disputed that any obligation to disclose existed only in the contractual relationship, but this was a red herring. If a person used the existence of a contract as part of a background of deception, whereby he took money from his victim, the victim claims in tort based on the harmful act. "The contract forms part of the deception, not part of the cause of action". Mr Whelan provided an interesting analogy of a dishonest employee of Halfords, wearing a Halfords' uniform, selling a customer stolen goods and pocketing the price. The customer would be entitled to make a claim against the employee in tort. Part of the background is the customer's assumption that the employee works for Halfords and is behaving honestly and faithfully and playing his part in concluding a valid contract on behalf of his employers. The claim is not under the employee's contract of employment, but is based on his deceit. The pursuers were entitled to expect that their affiliates' employees would discharge their obligations in good faith and honestly.

The Testimony

Mr Whelan

[30] Mr Whelan gave evidence first. He encapsulated his view as boiling down to one single issue; whether this claim was properly to be characterised as a "claim in contract or a

claim in ... tort". He expressed puzzlement that Mr Attia had considered that, because the defender's acts had been done whilst he was engaged under a contract with his employers, the pursuers' complaint was based on, and arose out of, a breach of contract when this was simply not so. A UAE court would ask first of all whether there was an unauthorised act. Was the reason why the defender did not have a right to do the act purely because he was in breach of contract, or was the act one which he was not entitled to do anyway, irrespective of what the contract said? If so, it was an action in tort. The harmful act was the extraction of money from the pursuers under what were effectively fraudulently generated invoices. Thus, an invoice for $10,000 would go through the companies established by the defender and generate an invoice for $25,000 to be paid by the pursuers. As a matter of UAE law, that would be held by the courts to be a deception, a harmful act, a tort. Money had been extracted wrongfully.

[31] Mr Whelan accepted what Mr Attia had said about privity of contract. His fundamental disagreement was that, to Mr Whelan, the relevance of the contract was as part of the background. It was because of the contract that the defender was able to establish a system whereby he took the money. Mr Attia had confused that background with a claim in breach of contract.

[32] Mr Whelan had posed certain questions upon which he sought Mr Attia's answers. The first was (transcript p 15):

> "Is it agreed that under UAE law the *locus standi* of a civil claimant is established by a proof of harm suffered by the claimant resulting from an unlawful act of the defendant?"

Mr Attia agreed. The second question was:

> "Is it agreed that the act complained of may be unlawful either (a) because it is tort/delict or (b) because it's in breach of contract?"

Mr Attia disagreed with this. He said that an unlawful act would give rise to liability in tort and a breach of contract would give rise to a liability in contract. Mr Whelan regarded the issue as being a disagreement on terminology; his reference to unlawful being to cover both contract and tort. The third question was (p 17):

> "Is it agreed (a) that it's a matter for the Dubai Court to decide whether the act is correctly characterised by tort or a breach of contract and (b) that if a claimant mischaracterises his claim, such mischaracterisation will not of itself adversely affect his claim and that the Dubai Court will apply the correct legal characterisation to the facts as proved on the evidence?"

Mr Attia agreed, but this was irrelevant. The fourth question was (p 21):

> "In the case of a claim correctly characterised as arising out of a tort is it agreed that the opinions expressed by Mr Whelan on the UAE law of torts are correct?"

Mr Attia had already agreed that the tripartite test had to be satisfied. He had added that the pursuers' claim had not done so.

[33] In cross-examination, it was put to Mr Whelan (p 42) that he had shifted his position from saying that the contract of employment was part of the background to one involving entitlement on the part of the pursuers to rely on the defender acting in accordance with a duty of good faith. Mr Whelan did not accept that this was a shift of position.

[34] When asked (p 50) about what he meant by "secret profits", Mr Whelan said that this was not a reference to the term of art used in fiduciary relationships. It was an allegation that the defender was making a secret profit in that he did not tell anybody about what he had been doing and was enriching himself at the pursuers' expense. The circumstances here involved the issuing of an invoice at an inflated sum. A UAE court would be likely to interpret this as a fraud; even if that was not a word which was used in the pleadings. It was put to Mr Whelan (p 62) that his description of the case being that the defender was a "crooked manager who cheated his employer's customers" was Mr Whelan "tendentiously

glossing the pursuers' averments". He responded that this is how a UAE court would look at the transaction. A similar proposition was put to Mr Whelan in relation to the defender "dishonestly and deceitfully" abusing his position, but Mr Whelan again disagreed that this was a gloss. It was just how the facts struck him.

[35] It was put to Mr Whelan (p 65) that he had misrepresented Mr Attia's position on whether the acts of the defender would have been classified as harmful, thus warranting compensation. Mr Whelan considered that Mr Attia had not actually analysed the pleaded facts at all. On being asked how it was possible to characterise the conduct of the defender towards the pursuers as unjustified, or such that he had no right to perform it, Mr Whelan replied (pp 70-71) that it was agreed that the defender was under a contract where there was a general duty of honest actings. By means of front companies he had succeeded in abstracting excessive sums from the pursuers. The pursuers were entitled to rely not on the terms of the defender's contract but on the appearance created by it.

[36] In relation to his description of the defender's actings as being dishonest in relation to the purchase order, Mr Whelan had relied (p 78) on the words of the summons, whereby it was the defender who had caused the pursuers to enter into the arrangements with NTM. There was an element of the tail wagging the dog (p 81). What was happening at the preliminary proof was the wrong way round. In a UAE court, the facts would be examined first and then the law would be applied to them. Here the court was looking at what the law was without first having conducted a full inquiry into the facts. Mr Whelan agreed (p 82) that if all that had been said to a UAE judge was what was contained in the summons, with the use of words like "cause" or "via the defender", the judge would say that this was not good enough. He would have to know specifically what act or deed the defender did. The

point was that, after an analysis of the facts, the court would come to a conclusion whether there had been a wrongful act. If there had, then the law of tort would apply to it.

Faisal Attia

[37] In answer to a somewhat leading question, Mr Attia began (p 96) by commenting that there had been nothing in Mr Whelan's first report about what would amount to a harmful act, but in his second report he had relied upon the principle of good faith in Article 246. In his third report, he had shifted his position more into the notion of deception, but that was not before the third report. The making of a secret profit did not amount to an actionable tort (p 105). As between someone else's employee and a third party, there was no tort of making secret profits. Mr Whelan had not disclosed the basis upon which it could be said that the defender did not have the right to perform the acts complained of. It was only in his third report that Mr Whelan had moved towards the notion of deception (p 114). There were two requirements for deception under UAE law. The first one was the commitment of a fraudulent act and the second was that the act must cause the innocent party to enter into the agreement. The defender did not have any obligation to disclose his interests in LSES or NTM to the pursuers (p 119). It was extremely important, for the purpose of applying Article 285, to know how the defender caused the pursuers to do the particular things, or how those things were being done "via the defender"(pp 120-1). Without that, it was not possible to discern any deception.

[38] In cross-examination, Mr Attia was asked whether it was acceptable in UAE law for the defender to use LSES as a front company to conceal his initiation of and participation in transactions on behalf of the pursuers. He replied (p 129):

> "… the court will have to ... see there is harmful act was committed ... if the harmful act committed and cause loss then it's a tort claim, it's a very tort claim".

The fact that a company had been incorporated and concealed was not enough to amount to deception. If the front company had been concealed from the person's employers and used to initiate contracts; this could be entirely lawful or it could be deception (pp 130-1). There was no obligation to disclose, other than to the employer. Mr Attia failed to see why the defender had to disclose any information about his own companies. However, he accepted (p 134) that, where a person had a contract, he was still under an obligation not to commit a harmful act. If a person committed a harmful act by deception, that fell within Article 285. On being pointed to that part of the pleadings in which it was alleged that the defender had set up SFM to conceal the true principals behind LSES, Mr Attia said that, if that had caused the pursuers to enter into an agreement that they would not have entered into otherwise, this "could justify the requirement for deception". In relation to the use of the LSES employee "to further conceal" participation in the transaction, Mr Attia said (p 137):

> "… if that was set up to the part of the whole plan, to cause the pursuer to enter into transaction that he wouldn't otherwise enter into, that would be, yeah, first part of deception act".

He nevertheless maintained that there was no explanation as to how the defender caused the pursuers to enter into the transaction. However, on being asked if it was accepted that the defender had caused the pursuers to enter into these arrangements, he said (p 138):

> "Yeah of course. If he personally communicated ... the deception and caused the … pursuer to enter into transactions, certainly, yeah".

[39] The question of the inflated invoices was difficult for Mr Attia to determine in the absence of an explanation of how they came to be issued. He would need to examine how the pursuers had agreed to enter into the transaction with LSES and how they agreed on the price. He continued (p 141):

> "No, I mean, if during the formation of these agreements, the consent of the pursuer was defective as a result of deception then, of course, they can recover whatever loss they suffered, yep".

If the contract was created as a result of deception, then the pursuers could recover the losses from the shareholder behind the company and by the person who did the harmful act. That was by using Article 285, which "could be a basis for a tort claim, for sure"(p 142).

[40] In relation to the use of NTM, the inflated purchase order and alleged secret profit, there would be a claim in tort if there was "a complete deception" (p 144) carried out and involving the two requirements. But there were still missing facts, notably how the defender caused the pursuers to enter into the transaction. The following exchange (p 145) then occurred:

> "… if one fills out the background with certain facts, one can get to a claim by ... the pursuers against the defender at tort under Article 285? – Yes".

[41] If the wrong consisted in a deception and concealment, whereby the defender caused the pursuers to pay excessive amounts, then an Article 285 tort would be in play (p 157). The pursuers would have a claim in tort under the heading of deception if they had had a lot of money removed as a result. Mr Attia agreed (p 170) that there was no dispute that deception was a harmful act that would trigger liability and tort under UAE law.

[42] The defender was under an obligation to act in good faith (p 183), but the pursuers were not entitled to expect that affiliate employees would discharge their obligations to their employer, and through their employer to the pursuers, in good faith and honestly. Acting in good faith was a moral obligation only (p 135). A legal obligation would be owed only to the other side of the contract.

The commercial judge's reasoning ([2018] CSOH 2)

[43] The commercial judge was of the view (para [10]) that neither of the parties' experts had departed to any material extent from what they had said in their reports. It was his view that their testimony added nothing of materiality to what had been said in their reports. He considered that there was a degree of common ground between the experts. In order to establish liability in tort the tripartite test required to be satisfied; that is to say: (a) a harmful act; (b) damages; and (c) a causal link. There was also an agreement that deception was a harmful act which would trigger liability in tort. That is to say the act of deception was a breach of a legal duty in terms of Article 285. The judge identified (para [18]) the dispute as whether the claim advanced by the pursuers sounded in terms of tort in UAE law. This turned on a narrow question, which he identified as the relevance of the defender's contract of employment in respect of breaches of Articles 282 and 285. The question (para [79]) was whether there was a basis on the evidence of the two experts to make the necessary findings-in-fact that the conduct of the defender constituted a tort under Articles 282 or 285 of the UAE Civil Code.

[44] According to the commercial judge (para [81]), Mr Whelan's starting point had been directed towards a defence which had not been advanced by the defender, namely that the contract of employment entitled him to act as averred by the pursuers. When considering Articles 282 and 285, Mr Whelan had not referred to the contract of employment as being relevant to what amounted to a breach of these articles. He gave no basis for his statements that the defender did not have the right to perform the acts complained of or that he could plausibly argue that he had. In his second report he had considered the relevance of the contract of employment as part of the background story and had gone on to say that the pursuers would have been entitled to rely on the defender acting in accordance with his

contract. Mr Whelan's statements that the contract was relevant as part of a background story and then that the pursuers could rely on the defender acting in accordance with the contract, were "materially different" (para [86]) from each other. Mr Whelan was saying (para [87]) that the duty to act in good faith, which was owed by an employee to an employer, was, by a roundabout route, owed to a third party. There was no basis cited by him for that assertion. The obligation in Article 246 was owed by one contracting party to the other. It did not give any right to a third party. This showed that Mr Whelan's position was misconceived. Mr Whelan was in effect saying (para [89]) that a third party had the same right as one to a contract; that the third party had a right to expect that the party to the contract would act in good faith. The Lord Ordinary continued:

> "[90] I consider that Mr Whelan cannot have it both ways; he cannot on the one hand accept that a third party does not obtain any rights from a contract and simultaneously say that nevertheless the pursuer was entitled to expect the defender, because of his contract of employment, to act in good faith".

[45] The commercial judge considered that Mr Whelan had changed his position in his third report by referring to the contract of employment as forming part of the background. He continued:

> "[93] These material changes of position in the way that Mr Whelan deals with the issue of the relevance of the contract of employment and the inconsistent positions which he adopts tends strongly to show that reliance cannot be placed on his evidence as regards this central issue. I am persuaded, that on a fair reading of his reports as a whole Mr Whelan is asserting, as a fundamental part of his argument, that the pursuer has a right in the circumstances of this case to rely on the defender having performed his employment contract consistently with the duty of good faith owed to his employer for the purpose of establishing liability under Articles 282 and 285 of the Code. That I believe is an unsound argument as such a right in terms of UAE law arises only as between contracting parties.
>
> [94] Mr Whelan cites no authority of the UAE courts which supports his position. In addition ... at various points in his report, he appears to accept that the duty of good faith is only owed between contracting parties and thus undermines his own fundamental argument. His position is wholly lacking in clarity."

[46] On the other hand, the commercial judge regarded (para [99]) the analysis of Mr Attia to be clear and compelling. It was fully argued and supported by case law and reference to the Code. He had maintained a consistent position throughout. He had no difficulty in preferring his evidence on the central issue. He continued:

> "[99] … On a fair reading of the pursuer's cases, with respect both to breaches of Articles 282 and 285, the failure of the defender to act in good faith and in particular in terms of that obligation to disclose to the pursuer the setting up of the companies and his role therein is central to the pursuer's position.
>
> [100] That this is the central plank in its case, can be seen by the averment that as a result of his actings the pursuer made 'secret profits' ... The phrase 'secret profits' is one which would properly be understood in UAE law, as in other systems of law, as deriving from an employment or fiduciary duty. No such employment of fiduciary duty exists between the pursuer and defender which would be commonly understood and understood in terms of the law of the UAE in the context of a breach of a contractual duty of good faith.
>
> ...
>
> [102] Overall I conclude the pursuer is seeking to rely on a contractual duty owed by the defender to his employer but not to it as a third party in order to found its case in tort.
>
> Further confirmation that that is the case is found in the following: the lack of averments of false representations made by the defender, which induced the pursuer to transact. There are no averments as to how the defender … induced or caused the pursuer to enter into the transactions From the lack of such averments it is clear that the heart of the pursuer's case is the failure to disclose the setting up of the other companies, his role therein, and his thus deriving a secret profit. On looking to the evidence of the two experts I believe that in terms of UAE law it is clear that no such duty of disclosure exists in the absence of a contractual relation between the parties."

[47] The commercial judge considered (para [103]) that the tripartite test had not been made out. Mr Whelan had been seeking to identify a breach of a legal duty in the context of a failure to act in accordance with the defender's contract of employment. He had said that the averments showed a deception practised by the defender, but no such deception had been averred (para [108]). There were no averments (para [108]) as to the *bona fides* of the

contracts or the correctness of the invoices. A striking feature of the averments "is the almost complete absence of any averments of misrepresentation"(para [109]). There was no basis for the assertion that the defender had a duty to disclose his beneficial interest in NTM to anyone other than his employer.

[48] By the time of his third report, Mr Whelan's characterisation of the deception had gone well beyond the setting up of the companies and the non-disclosure of his interests. He had now characterised the deception as "a larger scheme of deception" or a "web of deception" (para [112]). There were no averments of such a larger scheme or web of deception. There were no averments of conscious dishonesty or fraud. There were no averments that the defender took money from the pursuers. There were no specific averments amounting to deception within the meaning of Article 285. The averments as to how the defender deceived the pursuers were limited to the setting up of the company and a failure to disclose his position, which was a duty he did not owe to the pursuers.

[49] Although the commercial judge preferred the evidence of Mr Attia on the essential issues, and regarded Mr Whelan's argument as to the relevance of the contract as unsound, he did not accept (para [117]) the defender's contention that Mr Whelan had adopted the position of advocate on behalf of the pursuers or (para [118]) that he had indulged in tendentious glosses on the averments. If he had gone beyond what had been averred, this was because he had erred in his understanding of the written pleadings.

[50] For all of these reasons, as already indicated, the commercial judge held (para [119]) that he had no basis upon which to make the necessary findings in fact that the defender's conduct constituted a tort under Article 282 or deception under Article 285. If the cases averred were proved, this would not amount to a breach of either article.

Submissions

Pursuers

[51] The pursuers contended that the scope for a successful appellate review of findings relating to foreign law was wider than that which applied to other findings in fact (*Kolbin & Sons* v *Kinnear & Co* 1930 SC 724 at 737-8, 748 and 753; *King* v *Brandywine Insurance Co* [2005] 1 Lloyd's Rep 655 at para 66). The function of the expert was: to inform the court of the relevant content of the foreign law, notably any authorities and their status. Where there was no authority, the role was to assist the judge in making a finding as to what the foreign court's decision would be (*MCC Proceeds* v *Bishopsgate Investment Trust* [1999] CLC 417, Evans LJ at para 23).

[52] The preliminary proof had been about whether or not the conduct of the defender could amount to an actionable tort or the equivalent under UAE law. Contrary to the commercial judge's view, the evidence of Mr Whelan, in both his reports and his testimony, supported the view that the defender owed non-contractual duties to the pursuers. In cross-examination Mr Attia had made a number of concessions which had not been reflected in the commercial judge's opinion, but which on analysis supported the position of the pursuers. The judge had not discussed or analysed the testimony of either expert and had erred in not so doing. Where the reports were in conflict, the responses of the experts under cross-examination were highly relevant. In cross-examination, Mr Attia had been required to examine the pursuers' pleadings in detail in a way which his reports had not reflected. The absence of such a discussion or analysis had led the judge into error in considering that Mr Attia's evidence was "clear and compelling".

[53] The commercial judge had erred in criticising Mr Whelan for regarding the averments as showing a deception practised by the defender on the pursuers in relation to

the *bona fides* of the contractual arrangements entered into by the pursuers and the accuracy of the excessive invoices paid by them. Mr Whelan had regarded the averments as setting out deception in UAE law. When questioned about the absence of the use of the words fraud and dishonesty in the averments, he had said that, nevertheless, that is how the averments would strike a UAE court. The same point arose when he was accused of tendentiously glossing the pursuers' averments. He had replied that he was explaining how a UAE court would approach the averments. The test was what the UAE court would make of them and not how their relevance would be approached by a Scottish judge. In any event, analysis of the averments in the third, fourth and fifth articles of condescendence, would normally be taken as implying deception causing harm.

[54] To the extent that the commercial judge had thought to apply a technical meaning to "secret profits", he had ignored Mr Attia's acceptance in cross-examination that, using ordinary language, profits made in secret would found a tort claim under Article 285. He had ignored Mr Whelan's evidence in cross-examination that he was not using the term in the context of employment or a fiduciary duty, but in the way it had been referred to in the pleadings. As he said, when an invoice purporting to be the correct charge would produce a secret profit it was a wrongful act. Regardless of the label placed on the conduct, Mr Whelan's evidence was that there would be an actionable tort under UAE law on the facts presented.

[55] The commercial judge had failed to understand Mr Whelan's evidence that there was a general principle, which did not arise out of any contractual or fiduciary relationship, in UAE law to act lawfully and honestly which founded an action in tort. This was clear from Article 282. The evidence was such as to show that there was a sound basis for the court to hold that the defender owed obligations to the pursuers pursuant to Articles 282 and 285,

wholly distinct from any contractual relationship. On a sound analysis of all the evidence, and applying that to the case as averred, the judge should have held that there was a relevant case in UAE law and that pronouncing absolvitor was an error.

Defender

[56] The commercial judge had approached his task because of the way in which Mr Whelan had proceeded. He had been interpreting the pleadings and stating whether a case was available under Articles 282 or 285. It was accepted that this was an unusual approach; having findings-in-law before the findings-in-fact. It was not open to this court now to allow a proof before answer or one which excluded averments of UAE law. All that could be done was either to refuse the reclaiming motion or to make findings-in-fact of what the UAE law was, thus providing tools for the judge to apply in due course.

[57] Articles 282 and 285 were not self-explanatory. The court should not interfere with the commercial judge's well-reasoned conclusions on what the law of the UAE was. The judge had found that the essence of the pursuers' case had failed because of their reliance on the underlying employment contract and the concept of secret profits. The judge held that the pursuers' expert had not addressed himself to the case contained in the pleadings. The commercial judge was hearing a proof, but he had not been provided with the precise facts. The court was not in a position to lay down findings on whether what the defender had done brought him within Articles 282 or 285.

[58] Proof of UAE law was a matter of fact and the court should not interfere with the judge's findings on that (*Kolbin & Sons* v *Kinnear & Co* (*supra*)). It was not open to the court to apply hybrid law. There was no general principle that it was easier to interfere with a first instance judge's findings on foreign law (*King* v *Brandywine Insurance Co* (*supra*) at

paras 66-68; *MCC Proceeds* v *Bishopsgate Investment Trust* (*supra*) at para 23.) It was the expert's role to provide the tools for the court to decide the case.

[59] The averment that the defender was employed by an associated company was denied. There was no averment as to why that mattered. Mr Attia had said that it did not. The concept of secret profits was at the heart of the pursuers' case, but its relevance was disputed by Mr Attia as it had no part to play in the law of tort. There was no mention in the pleadings about the pursuers having been deceived or how that had been done or what had been achieved. There was no mention of fraud, breach of a fiduciary duty, theft, removing money or misrepresentation. The pursuers' averments lacked specification. They did not meet the appropriate standard for averments of fraud. This could be illustrated by reference to the purchase order which had not been signed by the defender.

[60] Much of the debate had been taken up in identifying what was a legal duty. The contention was that the pursuer was entitled to expect that the defender would perform his employment contract. There was a sharp disagreement about this. Mr Whelan had turned full circle on this, as the commercial judge had held, from his first report to his third.

[61] It was clear that making secret profits had not been a tortious act. Mr Attia had addressed the question of deception. There had been no averments of taking money from the pursuers or the existence of a web of deception or a fraudulent scheme. Mr Attia had not conceded that there had been deception or a breach of a legal duty. The commercial judge's opinion had not been vitiated by any failure to have regard to the oral testimony. There had been a sharp dispute between the experts and Mr Whelan was found to have been self-contradictory. He had interpreted the pleadings in a manner which they could not bear.

Decision

[62] Foreign law must be proved as a matter of fact. This often means that parties will adduce experts in the foreign law to explain the relevant rules and principles. The task of ascertaining foreign law remains that of the court. It will seldom be a question of simply preferring one expert as more reliable than another as if he was an eye witness speaking to events which he had observed. Especially when the foreign law is in codified form, the court will have to look at the written materials and decide for itself, if necessary with the assistance of experts, what the law has been proved to be (*Kolbin & Sons* v *Kinnear & Co* 1930 SC 724, LJC (Alness) at 737-8, Lord Ormidale at 748-9; Lord Anderson at 753). As it was put in *Parkasho* v *Singh* [1968] P 233 (Cairns J at 250, cited in *King* v *Brandywine Insurance Co* [2005] 1 Lloyd's Rep 655, Waller LJ at para 66) "the question of foreign law, although a question of fact, is a question of fact of a peculiar kind". The same considerations as apply to a review of fact, and the advantages which a first instance judge has from having heard and seen the witnesses testify, do not apply with quite the same force. In this case, in any event, the commercial judge does not appear to have taken account of the testimony of the experts, other than to say erroneously that neither had departed from the content of his reports. The judge relied exclusively upon an analysis of the expert reports. The appellate court is at no disadvantage in carrying out the same exercise to see if the judge has correctly understood their import. As will be seen, not only does the court disagree with the judge's analysis, and considers that he has misinterpreted what Mr Whelan reported, it is also of the view in particular that he was in error in failing to have any regard to important concessions made by Mr Attia in cross-examination.

[63] Much of the confusion appears to have stemmed from the averments of the pursuers, which cite certain Articles of the UAE Civil Code (246, 264 and 265) which are part of the

law of contract and have little, if any, relevance to the pursuers' case which, as Mr Whelan was at pains to point out, is based on delictual liability and not breach of contract. Articles 246(2), 264 and 265 have nothing to do with this case. Article 246(i) is at best of peripheral relevance and reference to it could usefully have been omitted. The confusion might have been avoided had the pleader taken the trouble to frame proper pleas-in-law which set out the basis of the action in clear terms. It is nevertheless reasonably apparent, at least having had the advantage of hearing the parties, that that basis is the equivalent in UAE law of a delictual action (akin to fraud) based on the application of Articles 282 and 285.

[64] In his first report, Mr Attia's proposition (para 25) had been that, because the defender was not employed by the pursuers, the pursuers had no "*locus standi*" to claim damages "in connection with the [defender's] performance of [his] employment contract". The pursuers could not rely on Articles 282 or 285. Contrary to the commercial judge's opinion, Mr Attia accepted in cross-examination that the fact that the defender was not an employee of the pursuers did not prevent the pursuers from relying on either of these two articles; ie to proceed with a claim in tort. He accepted that, if the setting up of LSES was to conceal the defender's participation in the pursuers' transactions and constituted a deception (a harmful act) then, if it also caused loss, a "tort claim" would be available under Article 285. The same applied to the use of SFM. A contract induced by deception could form the basis of a tort claim allowing the deceived to recover losses from the deceiver. Again, with NTM, if the invoices involved deception whereby the pursuers paid excessive amounts then there could be a claim. Although these material concessions in cross-examination may not amount to a clear contradiction of Mr Attia's views as expressed in his reports, they amount to a significant addition to these views. Ultimately, as Mr Whelan

said, Mr Attia's views did not differ from Mr Whelan's on the substantive law of the UAE. The judge has not taken these concession into account and has reached an erroneous conclusion as a result.

[65] The commercial judge was in error in stating that Mr Whelan's starting point had been directed towards a contractual defence which was never advanced. This was not his starting point but a commentary (albeit ultimately a pointless one), late on in his report, on the relevance of a contract to whether the defender had a right to do what he did.

Mr Whelan's central proposition in his first report and thereafter was that the case was based on Article 282, which is the UAE equivalent of the delictual duty not to harm others. The starting point was the ancient Islamic sharia which instructed Article 282. A victim of wrongful conduct had a right to action. This included unjustified acts causing financial loss to others, whether or not the person harmed was an employer. He correctly interpreted the averments in the summons as a deception practised by the defender on the pursuers about the *bona fides* (genuineness) of the contractual arrangements entered into by the pursuers and of the excessive invoices. He stated very clearly (1st rep para 5.10 *supra*) that this would constitute a harmful act under Article 282, even without the specific deception provision in Article 285. As Mr Whelan later put it, a person in the defender's position, and doing what he did, would be regarded as crooked in the UAE as he would in the UK. He would be liable in contract to his employer and in tort to the victim. It is clear from his first report that Mr Whelan was stating that an employee of one entity could be liable for wrongful acts which caused another entity harm. On this being rejected by Mr Attia, as not meeting the tripartite test, because setting up companies and "doing business" in secret was not a breach of a legal duty, Mr Whelan, perhaps with increasing exasperation, pointed out (again) in his second report, that the nature of the pursuers' case was dishonesty and deceit; "a crooked

manager who cheated his employers' customer ... an affiliated company for his own financial gain".

[66] It is not a valid criticism, as the commercial judge thought, that Mr Whelan did not initially refer to the contract of employment as being relevant to the Article 282 claim, when all that he was saying was that it was the employment that provided the context for the delictual acts. In his second report he expanded on this by spelling out that the contractual arrangements were part of the background context, in that the pursuers would be working on the assumption that an affiliate's employee would be doing his job in good faith as his contract required (Article 246). After Mr Attia had stuck firmly to his guns, in repeating in his third report that setting up companies and concealment were not harmful acts, Mr Whelan repeated his fundamental point in his third report; that it was not the setting up of the companies in secret that grounded the action but their use in a deception designed to cause the pursuers loss, and which did so.

[67] The commercial judge was in error in criticising Mr Whelan for giving no basis for his statement that the defender did not have the right to perform the acts complained of. On the understanding that deception is actionable under Articles 282 and 285 as a harmful act (if it causes damage), there is no need to provide a basis for stating that a person has no right to deceive others where that is designed, as the pursuers aver, to fool them into paying more than they ought to have paid because of that deception. Even more clearly, it hardly requires a basis to say that a person has no right to sell off another person's assets at undervalue without telling them and thus achieving personal gain (article 5).

[68] It is not correct, as the commercial judge said, that it is inconsistent to say that the contract of employment was relevant as background and at the same time that the pursuers could rely on the defender acting in accordance with the contract. It is that reliance, or

assumption, that the defender is acting honestly as an employee of their affiliate, that forms part of the background which results in the success of the scheme. It is nothing to the point that an employee does not owe a contractual duty of good faith to his employers' affiliate. As Mr Whelan repeatedly said, it is not that which forms the cause of action, but the deception perpetrated in a manner which caused the pursuers' loss and the defender's gain. Again, contrary to the judge's view, Mr Whelan's position was not at all misconceived. He was not, and did not at any point, assert that a third party had the same right as a contracting party to expect that an employee would act in good faith.

[69] The commercial judge has misunderstood Mr Whelan's position which has been both clear and consistent throughout. This is a claim under the UAE law of delict, as set out in Articles 282 and 285. A UAE judge would regard the actions as averred on record as harmful acts because they amount to deliberate deception of the pursuers by the defender in order to produce a personal benefit to the defender and loss to the pursuers. The facts would have to be proved and flesh put on the bones of the averments, but part of the background, and what perhaps causes, at least to some degree, the pursuers to pay the invoices or allow their property to be sold, is the defender's position as an employee of the pursuers' affiliates, acting as the pursuers' procurement and recruitment officer. The terms of his employment are not founded upon as the cause of action, but the defender's position is highly relevant to how the deception and related activities operated. His duty to act in good faith is not "a fundamental part of [Mr Whelan's] argument". The actionable deception could have been engineered by someone with no contract with the pursuers' group of companies. However, the defender's position made the deception far more likely to work. The judge's interpretation of what the case is about falls into the same error as Mr Attia did in his first report. The pursuers are not, again contrary to the judge's opinion,

seeking to rely on the defender's contractual duty to found their delictual action. As Mr Whelan said many times, the contract is background, but it is relevant to the success of the deception.

[70] "Secret profit" is a term of art in Scots law, but the case is not pled in Scots law. The meaning of the phrase in the pleadings is quite clear in its context. It is referring to the personal gain of the defender from the deceptions which he perpetrated. Equally, the fact that there is no duty of disclosure owed to the pursuers does not detract from the averred fact that the concealment of the defender's position with the intermediate companies formed part of what can, on the averments made, reasonably be described as a web of deception or a fraudulent scheme.

[71] The tripartite test, which both experts agree to be appropriate in a delictual claim, will be passed if the pursuers prove: (i) deception; (ii) loss; and (iii) causation. This was accepted by Mr Attia in cross-examination. It is not accurate to say that there are no averments of deception or misrepresentations concerning the *bona fides* of the contracts. The averments in Articles 3 and 4 of condescendence make it clear that the pursuers set out to prove that the defender set up various companies with a view to using them as a vehicle to inflate what would otherwise be the true costs payable. This necessarily implies that the defender is pretending, fraudulently, that the invoices which he caused to be sent to the pursuers were genuine (ie that they arose from genuine commercial dealings), when in reality they were a device which involved the defender, through his companies, rewriting invoices having done nothing to merit any payment at all. The scheme or web of deception is patent from the averments, as is conscious dishonesty and fraud. That is of the essence of the case, as Mr Whelan repeatedly attempted to explain. The averments in Article 5, which the commercial judge did not fully address, are even more clear in setting out a delictual

claim of a harmful act causing the pursuers loss by selling off their assets at an undervalue, and in any event retaining the profits, all without the pursuers' knowledge.

[72] The court must determine what the applicable UAE law is. The decision is based on the evidence of the experts, who have pointed to the relevant Articles and principles. As Mr Whelan said, there is no substantial difference in what the experts said the law was. It is that delictual acts are covered by the general principle contained in Article 282 of the Civil Code, *viz*:

> "Any harm done to another shall render the doer thereof ... liable to make good the harm."

As a subset of this principle, in relation to deception, Article 285 provides

> "If a person deceives another he shall be liable to make good the harm resulting from that deception."

In order to succeed, a tripartite test must be passed. First, there requires to be a "harmful act". Another description of that act is "wrongful". An act of deception is a harmful act. Secondly, there must be a loss or damage to the person deceived. Thirdly, the deception must have caused that loss. In the performance of a contract, including an employment contract, the contracting parties must, in terms of Article 246(1) act in good faith. Although that is not a ground of action, the fact that the defender was tasked by his employers to be the pursuers' procurement and recruitment officer may be relevant to the proof of deception and causation.

[73] If the pursuers pass the tripartite test in relation to the averments in each of the third, fourth or fifth articles of condescendence, the defender will be liable to pay damages to them under UAE law. Accordingly, the court will allow the reclaiming motion and recall the commercial judge's interlocutor of 16 January 2018. It will repel the defender's third plea-in-law and allow the parties a proof before answer in respect of their averments of fact; the

applicable law of the UAE having been found as fact in this opinion. The cause will be remitted to the commercial court to determine further procedure in advance of that proof in accordance with this decision.