**OUTER HOUSE, COURT OF SESSION**

**[2018] CSOH 51**

**CA46/16**

OPINION OF LORD BANNATYNE

In the cause

TED JACOB ENGINEERING GROUP INC

Pursuer

against

(FIRST) ALEXANDER PETER MORRISON and
(SECOND) DECLAN THOMPSON

Defenders

**Pursuer: Currie QC, D Thomson QC; Burness Paull LLP**
**Defender: Sandison QC, O'Brien; Gilson Gray LLP**

22 May 2018

**Introduction**

[1] This matter came before me in the Commercial Court for a preliminary proof before answer on the issue of the applicable law of Dubai, being the substantive law of the United Arab Emirates as applied in the Emirate of Dubai.

**Background**

[2] The pursuer is a consulting engineering firm. Robert Matthew, Johnson-Marshall and Partners ("RMJM") was a Scottish partnership. RMJM had a business providing both architectural and engineering services in Dubai.

[3] On 20 September 2011 the pursuer, RMJM, and BSR 2013 Limited entered into a Sale and Purchase Agreement (the "SPA") in terms of which the pursuer purchased RMJM's engineering business in Dubai.

[4] The partners of RMJM at the time of the SPA were: (i) RMJM Middle East Limited, a company incorporated in Cyprus and having its registered office in Cyprus; and (ii) RMJM Overseas Limited, a company incorporated in Cyprus and having its registered office in Cyprus (collectively "RMJM's partners"). The defenders were the directors of RMJM's partners.

[5] As at the date the SPA was entered into, the pursuer did not have the necessary licences to operate in Dubai.

[6] After conclusion of the SPA, disputes arose between the pursuer and RMJM concerning the allocation of payments relating to "the sub-contracts" as defined in the SPA. Following these disputes the pursuer and RMJM entered into an agreement dated 16 August 2012, amending the SPA ("the Closing Agreement").

[7] Thereafter further disputes arose between the pursuer and RMJM relative to the operation of the above agreements and these disputes gave rise to the present action seeking reparation from the defenders for loss and damage allegedly sustained by the pursuer as a result of fraud affected by the defenders through the medium of RMJM and RMJM partners, et separatim as a result of the wrongful conduct of RMJM as further detailed by the pursuer on record, for which the defenders are under the law of the United Arab Emirates allegedly personally liable.

**Evidence**

[8] The only evidence led at the preliminary proof was expert evidence regarding the applicability of the law of the United Arab Emirates. Mr Hanna gave evidence on behalf of

the pursuer and Dr Arab gave evidence on behalf of the defenders. Mr Hanna had produced two reports 3.1 and 3.2 in the Joint Bundle ("JB") and Dr Arab had produced one report JB 3.3. Each witness spoke to the terms of his report.

**Preliminary issues**

[9] Before turning to the substantive issues there are certain preliminary matters which it is necessary to deal with at this point.

[10] First, an issue arose regarding the status of Mr Hanna to give expert evidence on the law of the United Arab Emirates. His status was challenged by Mr Sandison insofar as he suggested this: Dr Arab's expertise was objectively confirmed by his being the joint head of litigation in the second largest law firm in the Gulf Cooperation Council area, and he brings external positive approval in the form of Chambers and Legal 500 reviews of his team and himself. On the other hand Mr Hanna adduced no external appraisal of his skills and knowledge.

[11] He also contrasted the size of the firm of which Mr Hanna was a partner: it was a relatively small firm with Dr Arab's position as above described.

[12] Moreover, Mr Sandison founded on Dr Arab being licensed to appear in the Federal Court of the United Arab Emirates whereas Mr Hanna was not.

[13] He submitted that given the foregoing circumstances, where the experts disagreed and the court had no further material apt to form a proper basis for its determinations as to the content of foreign law which it requires to make, it should respect the objectively vouched expertise of Dr Arab over that of Mr Hanna.

[14] Mr Currie in reply submitted that Mr Hanna was clearly well qualified to speak as an expert on the issue of the applicable law of the UAE. He referred in support of this to the section of Mr Hanna's report headed Professional Background/Education Background.

[15] I without difficulty reject the submission of Mr Sandison regarding Mr Hanna.

[16] The correct approach to consideration of the issue of whether a person can properly give expert evidence is as set out in Anton, *Private International Law*, 3rd Ed, 2011, paragraph 27.185, where the following is said:

> "The English cases are conflicting but seem to establish that while the expert called need not necessarily be a barrister or even a practising lawyer, he must have some claim to expertise in the domain of law in question. Rigid rules as to qualification would be undesirable and for this reason it is submitted that each of the decided cases must be regarded as turning on its own particular facts."

[17] It is apparent from the curriculum vitae of Mr Hanna that he is a very experienced practitioner in regard to the law of the UAE. He has practised in Dubai for 42 years. Although presently not licenced to appear in the Federal Court in Dubai (he is now aged 72), he had been licensed for some 30 years, until fairly recently, namely: 2012.

[18] I do not think the size of firm in which Mr Hanna has practised is a relevant consideration. The question is did he have the relevant knowledge and experience to give expert evidence. I believe his professional curriculum vitae quite clearly showed that he had the relevant knowledge and experience to give expert evidence regarding the issue before the court.

[19] I also had the very considerable advantage of seeing and hearing Mr Hanna giving evidence. It was quite clear from the way in which he gave his evidence that he was eminently qualified to give evidence on the issue of the law of the UAE.

[20] Overall, he is not a witness whose evidence I am prepared to reject on the basis asserted by Mr Sandison.

[21] The next preliminary issue is this: during the course of the proof a number of objections were taken by Mr Currie to questions and lines of questioning sought to be pursued by Mr Sandison, in particular in the course of cross-examination of Mr Hanna.

[22] At the time I dealt with a number of these objections. However, I allowed certain questions and lines of questioning to take place under reservation of all questions of competency and relevancy.

[23] In the course of his closing submissions Mr Currie insisted upon all of the objections he had made and I accordingly require to deal with this issue.

[24] The common theme in the objections made by Mr Currie was this: there was no notice given in the pleadings or in the report of Dr Arab that Mr Hanna's views in respect to certain issues would be challenged on certain bases.

[25] Mr Sandison's position relative to these objections was this: the position being advanced on behalf of the pursuer in taking these objections was to say: it was not open to the defenders to challenge anything said by the pursuer's expert witness, unless that proposition was specifically addressed in the expert report for the defender. Mr Sandison's position was a straightforward one: there is no such rule. In expansion of this argument he went on to say that the logic of the pursuer's argument would apply equally to factual and expert witnesses. Yet, even when a defender leads no evidence at all, factual or legal, he is still entitled to challenge a pursuer's witnesses and to support that challenge by pointing out internal inconsistencies and logical failings, and to put it to an expert witness that his position is not supported by the material which is adduced in support of it. Obviously, then, a failure to lead contradictory evidence is not an admission.

[26] On the pursuer's approach an expert witness would require to set out a reasoned rebuttal to every proposition advanced by the opposing expert, even if on his own analysis the proposition is irrelevant, in order to preserve the right to cross-examine the opposing expert on the quality of his reasoning and the coherence of his thought. He simply said that cannot be correct.

[27] In reply Mr Currie submitted that the defenders make no attempt to explain or justify their failure to plead, or adduce expert evidence, to support the substantive points of foreign law which they sought to take up with Mr Hanna in cross-examination.

[28] The pursuer's objection was not as understood by Mr Sandison. Rather, the pursuer's position is simply that the purpose of the pleadings and expert reports were to give fair notice to the parties, and to the court, of the issues which were to be in dispute concerning the factual dispute in relation to law of the UAE. The pursuit of lines of cross-examination of which no such notice had been given is plainly illegitimate. The defenders' position was that they were entitled to challenge Mr Hanna by pointing to internal inconsistencies and logical failings and to suggest that his position was not supported by materials which were adduced in support of it. That in cross-examination such lines could be followed he did not dispute. However, when the lines of cross-examination to which objection were taken were looked at they revealed that the defenders were seeking to do no such thing, rather, they were seeking to take up positive, material and substantive lines of argument with Mr Hanna about which no notice had been given in their pleadings or expert report.

[29] As I have earlier set out the theme which ran through the objections advanced by Mr Currie was this: no fair notice had been given in the pleadings or in the report of Dr Arab of the line of questioning which Mr Sandison was seeking at various points to advance.

[30] A fair notice objection is based on an assertion that the party making it is prejudiced by matters not having been properly brought to its notice by the other side.

[31] In the circumstances of the present case prejudice would I believe only have been present if questions put in cross-examination by Mr Sandison to Mr Hanna were unable to be answered by Mr Hanna, because he had no notice of the points and he believed that he required to further research the law of the UAE in order to properly advance his position in relation to the question asked to which objection was taken.

[32] At no point was that the position of Mr Hanna. He was able to answer all of the questions which were put to him without recourse to any further research regarding the law of the UAE. So far as I can identify he did not alter his position in any way as a result of questions to which objection were taken. He maintained a consistent position, as he had set out in his report and supplementary report. He was able to fully answer all of the questions to which objection was taken.

[33] Moreover, it is apparent from the submissions advanced on behalf of the pursuer that no prejudice resulted from this questioning. At no point in the submissions made on behalf of the pursuer was I directed to any material prejudice of the type which I have identified.

[34] In that I can identify no prejudice to the pursuer, arising from the lines of questioning advanced in cross-examination by Mr Sandison, to which objection was taken by Mr Currie, I, with the exception of one matter, repel the objections made on behalf of the pursuer.

[35] The one matter upon which I uphold the objection of Mr Currie is this: Mr Currie took objection to a line of questioning which he submitted sought to found an argument that clause 10.3 of the SPA could not be read as creating an agency relationship between the pursuer and RMJM.

[36] The above was the only objection which was referred to in detail in the submissions of each party.

[37] Insofar as any questioning by Mr Sandison tended to develop such a line I hold it was not admissible. I uphold this argument for this reason: any such suggestion was not reflected in the pleadings of the defenders. Nor was it the position of Dr Arab whose express views in his report at JB page 293 paragraph 7 was to a contrary effect. Mr Sandison, both at the time the objection was made and in his submissions, denied that he was seeking to develop such a line. Nevertheless, for reasons I will detail later when considering the issue of the proper construction of the SPA I believe it appropriate to deal with this objection.

[38] The third preliminary question is this: what is the proper scope of the evidence of an expert witness in respect of foreign law.

[39] On behalf of the pursuer an argument was advanced that: in the event of a difference between expert witnesses on questions of foreign law, the court is required to weigh the evidence as a whole, as it would do with any disputed issue of fact. More specifically the following guidance should be followed:

> "I think the sound view is that the court must construe foreign written law with the assistance of the expert evidence adduced. The court is not entitled to construe that law for itself without any assistance at all. The law might, as [counsel] truly said, have been repealed or otherwise overruled, and the court therefore must be advised as to its applicability. Lord Brougham, in the Sussex Peerage Case (11 CL and Fin, at p115) used words which have been frequently quoted when he said: 'the House has not organs to know and to deal with the text of that law (ie foreign law) and therefore requires the assistance of a lawyer who knows how to interpret it.' With that assistance however, I think the court may look at the law for itself, as part of the evidence, and reach a conclusion upon it. I do not apprehend that, merely because the expert evidence is conflicting – as is not quite unknown in practice – the court must necessarily throw up its hands in despair, and refuse to attempt to solve the problem submitted to it.
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> [Counsel] argued that, if foreign lawyers disagree in the evidence which they give, that is an end to the matter, and that the court cannot look at and construe foreign documents for itself. That proposition seems to me to be entirely at variance with recent authority… These authorities seem to me to document the proposition that, in the last resort, the court may, and on occasion must, look at the foreign written law for itself, and with such assistance as may be afforded by the evidence of the expert witnesses adduced, determine its true construction." (See *AS Kolbin & Sons* v *William Kinnear & Co* 1930 SC 725 at 737-738 per the Lord Justice Clerk (Alness)).

[40] The defenders' position in response was this: the proper role of an expert, on foreign law is to inform the court as to the relevant rules of law. As explained in Dicey, Morris and Collins, 15th Edition, paragraphs 9-019 in relation to legislation, that involves identifying relevant provisions and explaining their meaning; but where the issue is the construction of a document governed by a foreign law, the role of the expert is limited to explaining the applicable rules of construction, unless it is suggested that a term of art has been used (see, example, *King* v *Brandywine Reinsurance Co (UK) Limited* [2005] EWCA Civ 235 at para 68.

The foregoing rule is because the meaning of a legislative provision is itself a rule of foreign law; the meaning of a contractual provision is not.

[41] In light of the foregoing Mr Sandison submitted that Dr Arab's report properly reflects the ambit of expert evidence, and its limits: he sets out the principles which the court should apply in construing the SPA and he sets out the consequences that would flow from different possible constructions. On the other hand, Mr Hanna, has presumed to step outside these limits and answer the question which only the court can answer. That answer he submitted carries no weight: cf *Kennedy* v *Cordia Services LLP* [2016] UKSC 6 at para 49.

[42] In reply to that submission Mr Currie argued: the authority upon which the defender relies, in so far as relevant to the question of foreign law, actually concerns specifically the scope of any review by an appellate court of findings in fact made by the court at first instance in relation to foreign law. Accordingly, the observation at paragraph 68 upon which the defender seeks to rely is only obiter.

[43] More fundamentally, the proposition upon which the defender founds is not supported in the Scottish authorities. The leading authority, which is binding upon this court, namely: *AS Kolbin & Sons* v *William Kinnear & Co* provides no warrant at all for the proposition that evidence from an expert on the proper construction of a document as a matter of foreign law is inadmissible. It likewise follows that suggestions that Mr Hanna has gone outwith the limits of his role as an expert and that thus his evidence and the interpretation of the SPA carries no weight are on examination unfounded. Mr Currie drew to the court's attention that no objection was taken to the evidence in question, whether before or during the diet of proof, the evidence in question was not only admissible but was in fact admitted without objection.

[44] Mr Currie went on to refer to Anton, *Private International Law*, 3rd Ed, 2011, paragraph 27.186 where the following is said:

> "If the evidence of foreign law is clear and unambiguous, the Scottish court will treat it as being conclusive of the tenor of that law and will not consider for itself the effect of foreign statutes, cases or textbooks. Lord Cockburn has remarked:
>
> > 'After this (the evidence of foreign counsel), I can pay no attention to other authorities in that law. I am not entitled to understand them, and I really do not. You must take the foreign law as a fact; upon the evidence which we have got of it.'"

[45] I first turn to consider the observations of Lord Justice Clerk Alness in *AS Koblin & Sons* v *William Kinnear & Co*. They relate to the issue of the approach which the court should take where experts on foreign law conflict as to the effect of foreign sources of law. In these circumstances the court must decide between the conflicting evidence. However, these observations do not assist in the issue before this court of the role of the expert on foreign law where the issue is the proper construction of a contract. That was not the issue before the court in *AS Koblin & Sons*. The issue there was the construction of "Soviet legislation" (see: page 737). Therefore the context of the observations in *AS Koblin* was not where the issue of the proper construction of a contract was being considered. I therefore believe that the remarks in *AS Koblin & Sons* v *William Kinnear & Co* do not run counter to the position being advanced by Mr Sandison. I consider that what can properly be taken from this decision is: that where expert evidence on foreign law is conflicting it is for the court to seek to consider if it can decide which of the conflicting experts it prefers and not simply to say that the existence of a conflict means the court can take the matter no further.

[46] Nor do I find any assistance in relation to the issue before this court in the reference to Anton at para 27.186. Again the remarks made there are in the context of foreign statutes, cases or textbooks and once more the issue of the proper approach of the court to the sound construction of a contract governed by foreign law is not being commented upon.

[47] I was referred to no Scottish authority or textbook in which the specific issue before this court has been considered. For the reasons I have given I do not believe the authority and textbooks referred to by the pursuer advances its position.

[48] Accordingly, turning to the case relied on by Mr Sandison I accept that what is said there is obiter. However, in considering the role of the expert on foreign law I do find it persuasive. The decision appears to be based on a well-established line of authority in England. I note that as long ago as 1949 Lord Greene MR set out the rule in *Bouyer Guillet et Compagnie* v *Rouyer Guillet & Co Ltd* 1949 1 AER 244 at 244:

> "As I understand the law of England, evidence as to the meaning of the statute is to be obtained from the evidence of expert French witnesses and the decisions of the French court. On a matter of French law the decision of a French court would be more persuasive. On the other hand, evidence on the construction of a private document, such as articles of association, is admissible so far as it deals with French rules of construction or French rules of law or the explanation of French technical terms but evidence as to its meaning after these aids have been taken into account is not admissible. It is for the court to construe the document, having fortified itself with permissible evidence."

[49] There is thus a well-established rule of English law and I can see no reason in principle why Scots law should not follow this rule. Moreover it appears to me that Mr Sandison is correct when he identifies the underlying reason for the difference of approach by the court to foreign legislation and to contracts governed by foreign law, namely: because the meaning of a legislative provision is itself a rule of foreign law, the meaning of a contractual provision is not. Accordingly in respect of this matter I prefer the position of Mr Sandison and reject Mr Currie's argument. Thus I consider the function of the experts as regards the construction of a contract governed by foreign law is to give evidence as to the rules and principles regarding the law of construction of contracts as a matter of foreign law and it is thereafter for this court applying these rules and principles to construe the disputed terms in the contract.

[50] As Mr Currie noted no objection was taken at the time by Mr Sandison to evidence given by Mr Hanna as to his view on the proper construction of the disputed provision. No explanation was proffered for this lack of objection at that stage. Although I am of the view that objection should have been taken when the evidence was sought to be led, I am not

prepared to rule that Mr Sandison's argument relative to the correct approach to this issue cannot be taken in the course of submissions. I believe the court has to be able to consider the correct approach to this issue. In any event I expect, given the way this case developed, I would have allowed the evidence under reservation, in the same way that I dealt with the other objections.

**Areas of agreement in the evidence of the experts**

[51] There was a certain amount of common ground in the evidence of the experts and I believe it convenient to set out these points of agreement before turning to the substantive issues in the case.

[52] There appeared in the evidence of the experts to be broad agreement in respect to the issue of the applicable law of the UAE regarding the approach to construction of a contract.

[53] Mr Hanna refers in section 3.4 of his initial report at page 273 of the JB to article 265 of The Code of Civil Transactions (the "Code"). Dr Arab, in his report at paragraph 5 on pages 292 and 293 of the JB refers to articles 258, 259, 265 and 266. In Mr Hanna's supplementary report he indicates his agreement to the relevance of the articles of the code identified by Dr Arab.

[54] Secondly, if the effect of SPA was to create a relationship of principal and agent between the pursuer and RMJM there appears to be no real dispute between the experts as to the consequences which would flow in a question between the pursuer and RMJM.

[55] This agreement can be set out as follows: in particular, Dr Arab accepts Mr Hanna's proposition that, where the relationship is one of principal and agent that any money held by RMJM as agent would be held by way of "bailment" or "deposit", and that article 937 of the Code would apply.

[56] There appears to be general agreement to as to the proper translation of article 937 of the Code. Thus, Mr Hanna's translation is:

> "Monies received by an agent on behalf of his principal shall be deemed to be [in the nature of] a deposit so if it is damaged without infringement or default on his part then he shall not guarantee it."

While Dr Arab's version is:

> "Money collected by an agent on account of the principal shall be deemed to be bailment, and if it perishes while in his possession without any infringement or default on his part, then he shall be [strictly] liable for it."

[57] Dr Arab agrees, moreover, that the obligations of a bailee include those provided for in articles 966, 967, 968, 969, 970, 971, 972 and 973. Dr Arab summarises his position on the obligations which are owed by a bailee as follows:

> "10.1.1 the restoration of property that perishes in his hands as a result of his wrongful act or error (Articles 966 and 974);
>
> 10.1.2 safe keeping property to the standard of the reasonable man (Article 967);
>
> 10.1.3 not dealing or disposing of the property without the consent of the bailor (Article 968 to 971);
>
> 10.1.4 returning the property to the bailor on demand (Article 972); and
>
> 10.1.5 returning profits from the property (such as interest on money) (Article 973)."

[58] There is no material difference in the foregoing passage with the views expressed by Mr Hanna at paragraphs 2.4, 2.5 and 3.2 of his initial report.

[59] The next matter in regard to which there appears to be a measure of agreement is this: the circumstances in which a claim will lie in tort, as a matter of UAE law notwithstanding the existence of a contractual relationship between the parties.

[60] At paragraph 20 of his report, page 296 of the JB, Dr Arab states inter alia:

> "20. Where the source of an obligation is a contract, a party may not bring a claim in tort for breach of that obligation unless that breach also:

20.1.1 amounts to a crime. In order for a crime to be established a mere allegation or complaint is insufficient and a party would need to be formally convicted of a crime under the laws of the UAE;

20.1.2 amounts to fraud. The evidentiary threshold for fraud is high. In order for fraud to be established, it must be evidenced that a party intentionally deceived another. Acting carelessly, recklessly or with indifference is insufficient to establish fraud and the intention to deceive must be proven; or

20.1.3 is the result of gross mistake. The following matters would be considered in determining whether gross mistake exists in any particular case:

20.1.3.1 the seriousness of the breach or default;

20.1.3.2 the degree of skill of the person committing the breach or default, in that persons deploying some professional skill and knowledge in connection with the breach of obligation in question are more likely to be held accountable for gross mistakes; and

20.1.3.3 the extent of the harm caused as a result of the breach or default."

[61] Mr Hanna in his supplementary opinion generally agrees with Dr Arab's view, set out above, (See: JB page 287 at question III paragraph 1).

[62] The next area of agreement related to the issue of the defenders' status as directors of a Cypriot corporate partner of RMJM. The experts' agreement can be summarised as follows:

> "The experts are also agreed that the particular nature of the corporate structure which was in place in respect of RMJM (in short, that the Defenders were directors of Cypriot companies which, in turn, were the partners of RMJM) makes no difference to the application of the principles by which the Defenders might be held personally liable for the wrongs of RMJM." (See: paragraph 6.4 of Mr Hanna's original report (page 280 of the JB) and Dr Arab's report at page 297 of the JB).

[63] Lastly as regards prescription/time bar the experts are agreed, first, that the applicable limitation periods for contractual and tortious claims are, respectively, generally, 15 and 3 years (see: paragraph 7.1 and 7.2 of Mr Hanna's initial report at pages 281-283 of the JB and paragraph 41 of Dr Arab's report at page 300 of the JB).

**The substantive issues in the case**

***The pursuer's case***

[64] It is perhaps appropriate at this stage in order properly to set out the context of the disputes between the parties regarding the applicability of the UAE law to in brief set out the pursuer's case.

[65] As earlier set out the pursuer's case arises out of the contractual arrangements between it, RMJM and RMJM Group and in particular from the terms of the SPA and the Closing Agreement. It is argued by the pursuer that the material provision of the SPA for the purposes of this action is clause 10.3 which provides inter alia:

> "10.3 Any sum received by the Vendor or any member of the Vendor's Group to the extent that it relates to the Sub-Contract Services or services otherwise rendered or to be rendered by the Purchaser or any other member of the Purchaser's Group in respect of any of the Multi-Disciplinary Customer Contracts, Engineering Contracts or Interim Business Instructions after the Deemed Transfer Date, shall be received by the Vendor or relevant member of the Vendor's Group for and on behalf of the Purchaser and shall be accounted for and paid by the Vendor to the Purchaser in full within 20 Business Days of receipt."

[66] Thereafter the pursuer argued that the material provision of the Closing Agreement is clause 9 which provides inter alia:

> "(i) Not later than Completion, the Vendor shall convert an unused special purpose bank account in the name of the Vendor which shall be used exclusively for the receipt and remittance of payments relating to Multi-Disciplinary Customer Contracts, Engineering Contracts or Interim Business Instructions in which the Vendor and the Purchaser has entered into a Sub-Contract (the '**Joint Account**') with the HSBC branch in Dubai. (Account Name: .....; Account Number: .....).
>
> (ii) Pursuant to each of the Sub-Contracts, the principal employer under the Multi-Disciplinary Customer Contracts, Engineering Contracts or Interim Business Instructions to which the Sub-Contract relates will be directed (by notice to be issued within 5 Business Days of Completion) to send any and all payments for services rendered and to be rendered after the Deemed Transfer Date to the Joint Account.

(iii) If, notwithstanding the payment instructions to be given as described in clause (ii) above, any collections are received by the Vendor other than to the Joint Account (relating to the contracts described in sub-clause (ii) above and whether on account of any Engineering Contract, Multi-Disciplinary Customer Contract or Interim Business Instruction) after Completion in respect of services that were (or will be) performed after the Deemed Transfer Date under a contract with the Vendor entered into prior to Completion, the Vendor shall, not later than two (2) business days after the end of the month in which the payment was received by the Vendor, transfer such collections to the Joint Account."

[67] The pursuer's case against that contractual background in short is this: the pursuer offers to prove that RMJM failed to pay to the pursuer substantial sums of money which were due to it in terms of those contractual arrangements; that it instead made use of such money for its own end; and that it concealed its activities in these respects from the pursuer.

[68] Turning to the issue of UAE law the pursuer offers to prove, as a matter of UAE law, the defenders are personally liable to the pursuer for the foregoing wrongful acts of RMJM.

[69] The pursuer's position in this respect in summary is this:

> on a proper construction of the SPA, a relationship of principal and agent was created between the pursuer and RMJM in respect of the monies belonging to the pursuer to which clause 10.3 of the SPA applied;
>
> by virtue of that relationship of principal and agent, RMJM (as agent) held the monies to which clause 10.3 of the SPA applied on deposit for the pursuer;
>
> RMJM thus owed to the pursuer the duties of a depositary or trustee, which included, in short, the duties to keep the property deposited safe; to return the property to the principal on demand; to return any profits to the principal; and to restore any property that perishes in its hands as a result of wrongful act or error;
>
> RMJM breached all of those duties – in short, it appropriated for its own purposes monies which it held on deposit for the pursuer;
>
> the Defenders were the natural persons responsible for determining that RMJM should so conduct itself in breach of the duties which it owed to the pursuer;
>
> the Defenders are personally liable to the pursuer in respect of the loss of the monies which had been held on deposit;
>
> the most direct route by which the Defenders incur such personal liability is in terms of Articles 304 and 305 of the Code which provide, in short, that where a person takes what belongs to another he must return it to the owner in its original condition. The

> Defenders are so personally liable because the pursuer offers to prove that it was the Defenders personally who controlled what happened to the monies, belonging to the pursuer, which were being held on deposit by RMJM. The pursuer's case, moreover, is that the Defenders' conduct was fraudulent, which permits a claim to be advanced against the Defenders in tort, notwithstanding the existence of contracts between the pursuer and RMJM; and
>
> an alternative, but equally valid route by which the Defenders may be seen to be personally liable to the pursuer for its losses is in terms of the Company law of the UAE, which imposes personal liability on directors such as the Defenders. Although RMJM was a Scottish partnership, whose partners were Cypriot registered companies (of which the Defenders, in turn, were directors), UAE company law applies with equal force to those arrangements as it would to indigenous corporations.
>
> It is the pursuer's submission that its case succeeds, as a matter of UAE law, on either analysis.

**Pursuer's submissions**

[70] The first issue Mr Currie discussed was the proper construction of the SPA.

[71] He began by reminding the court that Dr Arab had offered no view as to the proper construction of the SPA. Against that background it was his position that critically for the purposes of this issue there was no evidence proffered on behalf of the defenders of a contrary view to that expressed by Mr Hanna.

[72] Mr Hanna clearly expressed his view that clause 10.3 of the SPA created an agency relationship between the pursuer (the principal) and RMJM (the agent).

[73] Mr Currie reminded the court that the view of Dr Arab, insofar as he expressed such, was that it was entirely possible that such a relationship had been created in terms of the SPA. In his report he said this: at paragraph 7:

> "… In my view, it is possible that a court in Dubai would construe clause 10.3 of the SPA as in effect creating an agent/principal relationship."

Thereafter at paragraph 8 he said:

> "… then an agency relationship would be regarded as existing between the parties for the limited scope of clause 10.3" (See: page 293 of the JB).

[74] Mr Currie analysed the evidence of Mr Hanna and Dr Arab regarding this issue as follows:

[75] As Mr Hanna points out, clause 10.3 of the SPA is "solely concerned with monies which are due to TJEG" – that is plainly correct. That being so, his opinion as to the meaning and effect of clause 10.3, in particular that it created a relationship of agency, appears necessarily to follow: that is to say, in this respect, the critical point is that the clause is concerned with the status of monies which have already been received by RMJM. On such receipt, they are to be held "for and on behalf of" the pursuer. The Defenders' argument about the relationship of contractor and sub-contractor between RMJM and the pursuer (which is not disputed) is not the whole picture and is just not relevant to the relationship which is created by clause 10.3 of the SPA. In short, one would not sensibly say that when a main contractor receives payments from a customer that it does so "for and on behalf of" its sub-contractor. The fact that the parties to the SPA used the concept of receipt "for and on behalf of" the pursuer, viewed in the whole circumstances of this case, is, as Mr Hanna explained, only sensibly to be understood as having created a relationship of principal (the pursuer) and agent (RMJM) in respect of those monies so received. Were there any robust argument to the contrary, one would expect it to have been identified by the experts, in order to assist the Court. No such contrary construction was positively spoken to in evidence by either expert. In fact both Mr Hanna *and* Dr Arab supported the conclusion that an agency relationship was established. Mr Hanna gave positive evidence to that effect and Dr Arab supported that conclusion via his evidence that it was possible a UAE court would reach such a conclusion.

[76] In light of that analysis he submitted that Mr Hanna's evidence that clause 10.3 of the SPA created a relationship of agency ought to be accepted.

[77] In addition Mr Currie advanced an alternative position to this effect: that it was Mr Hanna's position (see: 4.1.2 to 4.2.4 of his supplementary report, pages 285 to 286 of the JB) that even if the monies were received on the basis of a "mutual agreement" (as Dr Arab hypothesises might be the case) the effect of such an agreement in UAE law would still be to create a relationship of agency. He submitted that the reasoning advanced by Mr Hanna in this respect was wholly consistent with the experts' discussion of the substantive requirements of the relationship of principal and agent as a matter of UAE law.

[78] In any event if I held the limit of the admissible evidence on the issue of construction was in respect to the applicable principles of construction of UAE law he submitted that nevertheless the plain meaning of "for and on behalf" in the context of the SPA and Closing Agreement as a whole created the agency relationship. He reminded the court it would not normally be understood that a main contractor would receive money "for and on behalf of" its sub-contractor. Viewed in the circumstances of the present case it made sense to create an agency relationship where in respect of the moneys received the pursuer was entitled to these. Thus "for and behalf" was used to give effect to that clear intention.

[79] In conclusion he submitted that the court ought to find in fact that the effect of clause 10.3 of the SPA as a matter of UAE law, was to create a relationship of principal and agent between the pursuer and RMJM.

[80] The second issue Mr Currie dealt with related to fraudulent conversion. Dr Arab's position in his report regarding this matter was a short one: this concept, "is not known to UAE law" (see: page 295 JB).

[81] Mr Hanna's position on the other hand regarding this concept was set out at para 2.7 of his report (page 271 JB). He stated:

> "By breaching clause 10 of the SPA, the depositary (in this case RMJM) has certainly breached an obligation imposed in it by contract and by statute. However, in my opinion, the breach is not simply a breach of contract, as the act of diverting the funds

> to one's own possession and ownership is an act of conversion or fraudulent conversion. As a result, the party which was entrusted with keeping and delivering the funds, which appropriates the funds entrusted to it, has to indemnify the depositor and compensate him for all loss and damage sustained."

[82] Mr Currie's submission was that though on the face of it there was a stark difference between the experts in respect of this matter, that when properly analysed the difference was no more than one of semantics or terminology.

[83] He analysed the positions put forward by the two experts in the following way:

[84] He began by looking at the view expressed by Mr Hanna as above set out and submitted that this involved the following propositions:

[85] If an agent appropriates funds/property entrusted to it, that is conversion; if the agent does so dishonestly, that is fraudulent conversion; in either case, the agent will be liable to indemnify the depositor for the loss and damage sustained.

[86] Mr Hanna explained in his evidence that he used the term "fraudulent conversion" as he thought that that term was an appropriate translation so far as a Western legal system would be concerned. He was not, therefore, suggesting that the term is actually one which is in use in UAE law.

[87] Apart from the terminological issue, however, it is quite clear that Dr Arab agrees with the basic proposition that an agent is obliged to keep safe the property entrusted to him and to return it (together with fruits/profits) on demand.

[88] Dr Arab further accepts that where the agent fails to do so he will be liable in damages to the principal. In this respect, although Dr Arab refers to Article 389 of the Code, which he explains requires the court to focus "on the actual loss suffered by a party and provides the court with a broad discretion to determine an appropriate amount equivalent to the harm in fact suffered at the time of the occurrence thereof", given his own explanation that the basic obligation is to return the thing deposited together with the profits thereon,

given the facts of this case, it is not surprising that Dr Arab does not suggest that the pursuer's loss would be anything other than the sums of money which were deposited with RMJM but not paid to the pursuer (plus interest).

[89] Dr Arab further accepts that the failure to return the thing deposited could also be actionable as a tort, inter alia where the agent has acted fraudulently.

[90] Whether the failure to return the thing deposited is regarded as a breach of the contractual duties owed by the agent, or as tortious (fraudulent) act (involving the wrongful retention of the thing deposited) it is clear that Dr Arab accepts that in each such case the agent has acted wrongfully and is prima facie liable to return the thing which was deposited (in this case the monies which ought to have been paid to TJEG).

[91] It follows from this analysis, therefore, that Dr Arab's concern is in truth with the use of the labels "conversion" and "fraudulent conversion" rather than with any of the substantive reasoning of Mr Hanna.

[92] In this respect, the basis of Mr Hanna's use of the terms has already been explained. He expands upon his evidence regarding the concept of "fraudulent conversion" at "Question II", paragraphs 1 to 4 of his supplementary report. The explanation which Mr Hanna gives, to the effect that fraudulent conversion is "an aspect of fraud under Dubai law where an agent/depositary retains/appropriates a deposit/bailment… for his own benefit or use, when, as agent/depositary he is required ultimately to return the object of trust to its true owner" hardly appears to be a surprising proposition. In his oral testimony, Mr Hanna stated that the term "fraudulent conversion" is the equivalent of "embezzlement". He submitted that the court should accept Mr Hanna's evidence on this point, particularly given that it is in any event plain that there is in truth no dispute as to the substance of the point being made by Mr Hanna.

[93] The third issue identified by Mr Currie was this: do the defenders incur personal liability in terms of Articles 304 and 305 of the Code. Mr Currie commenced his submissions under this head by reminding the court that the experts were in general agreement as to the requirements of fraud as a tort in terms of UAE law.

[94] He then submitted that in respect to this issue the critical point made by Mr Hanna is this:

> "Taking another party's property unlawfully in the absence of a contractual relationship constitutes an act of theft, embezzlement or fraud and would fall in the domain of criminal law; if it was done as a result of or in the course of a contractual relationship (such as agency, trust, bailment, fiduciary…), it would amount to fraud and may be considered of a criminal nature depending on the circumstances… In all events appropriating another person's property without a legal transaction amounts to fraud." (See: page 287 of the JB).

[95] Mr Hanna then turns in that light to consider Articles 304 and 305 of the Code. In particular, taking the pursuer's case, in short, to be that the defenders caused RMJM to keep property, which it held on deposit for the pursuer, for its own purposes, Mr Hanna explains:

> "6.4 On the civil side, this act would fall under Art. 305 that related to taking what belongs to others unlawfully (without their consent or by an aggressive act or trespass).
>
> Art 304(2)… states 'Anyone who [takes what belongs to others without their consent] shall have to give it back in its original condition and at the place where it was taken'. Any benefits or increments will have to returned as well (Art 304.3)…
>
> Note: in my opinion, the Defenders – being the individuals with power over the bank account – were responsible for compliance with the terms of the SPA, particularly its 'for and on behalf of' commitment. It follows that their misappropriation and disposition of TJEG's funds was a breach of RMJM's contractual undertaking to preserve and return these funds to their rightful owner. RMJM, as a corporate entity, is run and represented by individual natural persons, who are the Defenders directly or through their directorships of the partner companies. They should bear the consequences of their fraudulent and unlawful actions and their breaches of the contractual undertakings of the corporate body which they represent or act for."

[96] Looking to the above analysis of Mr Hanna, Mr Currie argued that there is no answer to it. He went on to submit that it is striking that Dr Arab does not even mention articles 304

or 305 in his own report. Thus on the facts which the pursuer offers to prove, he submitted that it is clearly the case that defenders bear personal liability in terms of the foregoing articles of the Code.

[97] It was his position that Mr Hanna's analysis at paragraph 6.4 of his initial report and at paragraphs 1 to 6 of "Question I" in his supplementary report should be accepted (see: page 280 and pages 287-288 of the JB).

[98] Ultimately he submitted that Mr Hanna gave clear evidence to the effect that, if the allegations made by the pursuer against the defenders are true, those facts would suffice to impose personal liability on the defenders in terms of UAE law. That conclusion he argued is entirely consistent with the evidence not just of Mr Hanna but with those, very substantial, parts of Dr Arab's evidence which coincide with that of Mr Hanna. In the absence of any contrary evidence from Dr Arab, Mr Hanna's evidence on what he described as this crucial issue, ought to be accepted.

[99] The next area of dispute between the experts identified by Mr Currie is this: personal liability of the defenders under the company law of the UAE.

[100] He reminded the court that the parties' experts agreed that RMJM was a branch of a foreign company. In any event the status of RMJM as such is vouched, as a matter of fact, by the professional licences relating to them.

[101] The difference between the experts he described in this way: whether the various company law provisions identified by Mr Hanna in his initial report (pages 276 to 279 of the JB) apply to RMJM as a foreign company?

[102] In respect to that issue he referred to Dr Arab's conclusion as set out in his report at paragraph 40 (page 300 JB): other than articles 327-332,

> "all other articles of the law are excluded from applying to branches of foreign companies."

He submitted that this opinion is clearly wrong. In support of this he referred to what Mr Hanna explained at "Question IV" paragraphs 3 and 4 of his supplementary report which are in the following terms:

> "3. If we go along with the reasoning of the Arab Report, we find that the more suitable applicable provision is that of Art 327 (referred to under item 9.34 of the Arab Report) which subjects 'foreign companies that conduct their activities in the State of or their place of management is based in the state' to the provisions of the Commercial Companies Act, except for provisions relating to incorporation.'
>
> 4. This text, which is cited by Dr Arab himself, contradicts his conclusion (in the following paragraph 40) that 'it is clear that all other articles of the law are excluded from applying to branches of foreign companies'. Just to the contrary, branches of foreign companies are governed by the same statutory provisions as other legal entities except for the procedures of formation and registration, as a branch (i) does not enjoy a separate legal entity from its parent entity which remains liable for the financial and legal undertakings of the branch; and (ii) does not need a local partner, just a 'sponsor' with no legal liabilities. And this applied to the RMJM branch office in Dubai in which had a local sponsor whose name appeared on the Professional Licence itself."

[103] Mr Currie then dealt with the issue of which Companies Act was in force in the UAE at the relevant time as there was a difference regarding this in the expert's reports.

[104] In his initial report, Mr Hanna sets out in some detail the provisions of the Law on Commercial Companies (Federal Statute No 8 (1984)) (the "1984 Company Law") which apply to the position of the defenders. Mr Hanna explained that the 1984 Company Law was in force until June 2015 when it was replaced by the Federal Law No 2/2015 (which contains article 327 discussed in the quoted passage, above). Mr Hanna also explained that the provisions from the 1984 Company Law on which he founds have "remained intact in the new law".

[105] Similarly, the terms of article 327, which Mr Hanna explains have effect so as to apply the substantive provisions of the UAE company law to entities such as RMJM, were also to

be found in substantively the same terms in the law which governs the facts of the present case, namely, the 1984 Company Law. Thus, Article 313 of the 1984 Company Law provides:

> "Without prejudice to special agreements concluded between the federal government or one of the local governments and some companies, the provisions of this law shall apply to foreign companies which practice their main activity in the State or have their main office therein with the exception of the provisions relating to the incorporation of companies."

[106] It follows that Mr Hanna's reasoning, set forth at "Question IV", paragraphs 3 and 4 of his supplementary report, applies with equal force to the 1984 Company Law, with the result that the substantive provisions of the 1984 Company Law, founded upon by Mr Hanna, do indeed apply to RMJM and thus to the position of the defenders.

[107] Mr Currie then looked at a particular line of cross-examination which was pursued with Mr Hanna in cross-examination, this was to the effect: that article 313 of the 1984 Company Law only had effect so as to apply to foreign companies those parts of the 1984 Company Law which specifically applied to foreign companies (namely: articles 313-316) and what were described as "general provisions" (which was said to be articles 1-22).

[108] Mr Hanna robustly (and with obvious justification) explained that that is not what article 313 of the 1984 Company Law says. It must also be remembered that the structure of RMJM (involving as it did a partnership which had non-natural partners) was one which would not arise in UAE law; necessarily, therefore, UAE law, in permitting RMJM to operate as a foreign branch, would require to apply its company law to that unusual corporate structure. Mr Hanna explained that in Arabic there is only one word for "company", which word would encompass a partnership like RMJM. Taking all of these factors together, he submitted that Mr Hanna was well-founded in his opinion that the whole of the 1984 Company Law would fall to be applied to RMJM, with the result that the defenders were subject to the various articles identified by Mr Hanna as giving rise to personal liability. When dealing with an alien corporate structure, one would very much expect the policy of the law to

be to tend towards the imposition of personal liability on the natural persons responsible for the conduct of business by a foreign branch.

[109] Moreover, when Dr Arab came to give evidence, he singularly failed to support the line of cross-examination which had been put to Mr Hanna. He said that articles 1-22 were concerned with incorporation (and so did not apply to foreign companies) rather than "general provisions". On his evidence, therefore, the only articles within the 1984 Company Law which apply to foreign companies are articles 313-316. One only has to consider the terms of those articles, however, to see that that is a nonsense.

[110] Moreover, the "logic" of Dr Arab's position appeared to be that while directors of a UAE registered company could well incur personal liability under the various articles of the 1984 Company Law (and, now, the 2015 law) directors of foreign companies would in fact incur no such corresponding liability as a matter of UAE company law, thereby, apparently, placing foreign directors in a better position than UAE nationals. In the absence of clear evidence supporting such a view (of which there was none) that could not be correct.

[111] Again, therefore, he submitted that Mr Hanna's evidence on this issue should be accepted and that of Dr Arab rejected.

[112] The final matter which was identified by Mr Currie as being one in which there is a difference between the experts was this: the applicable periods of prescription/limitation as a matter of UAE law.

[113] In the first instance, Mr Hanna notes that, at least on one view of his report, Dr Arab seems to contemplate a time bar period of 10 years.

[114] Having regard to the evidence which is before the court in respect of UAE company law, he submitted that the court ought to conclude the liability of the defenders, qua directors of the partners in RMJM, that is to say, their liability under UAE company law (which is a

liability which does not depend upon tort) is indeed subject, at worst, to the 10 year limitation period.

[115] That the liability of the defenders in terms of UAE company law was contractual was spoken to by Mr Hanna, who described it as a "joint" or "dual" liability along with that of the company. He said this matter was not dealt with by Dr Arab in his report, however, in cross-examination he conceded:

- If a Dubai company exceeded its authority as agent, its directors would be personal liable therefor under the 1984 Act.
- Such liability would be regarded as arising from, and being in the nature of, a breach of contract rather than as being tortious.
- Accordingly the applicable limitation period would be 15 years (if a civil matter) and 10 years (if a commercial matter) rather than 3 years (the applicable period for a tortious claim).

Thus he submitted there was no contrary evidence before the court to that advanced by Mr Hanna.

[116] It follows from this that the court ought to conclude that the pursuer's claim, so far as based upon UAE company law, cannot be time-barred since, on any view, the 10 year period had not elapsed before the present action was commenced.

[117] Even if, however, the court finds that the 10 year limitation period is the applicable time bar period under the Commercial Code in a question between the pursuer and RMJM, Mr Hanna's evidence that a 15 year period of limitation should apply is to be preferred. That is because the pursuer and RMJM, as professional entities, would be considered "civil" rather than "commercial". Dr Arab offers no explanation at all to refute Mr Hanna's opinion on that point.

[118] Beyond that, however, the experts appear to be agreed, as noted above, that so far as liability in tort is concerned, a three year time bar period applies to the pursuer's claims against the defenders, that time period to begin to run once the victim is aware of the tort which has been committed and of the identity of the person who has committed it.

[119] Mr Hanna additionally observes that it is for the person resisting the claim to prove that the claim is time barred. That must be right.

[120] Mr Currie concluded that for the foregoing reasons the evidence of Mr Hanna should be preferred to that of Dr Arab in respect of what he described as the very limited areas of disagreement which exist between them.

[121] The following flowed from the above submissions: that the pursuer has proved that its claim against the defenders (a) is a sound claim as a matter of UAE law; and (b) is not time-barred in terms of UAE law.

[122] On the foregoing basis, further enquiry will be necessary in relation to the remaining factual issues which are in dispute.

**Reply on behalf of the defenders**

[123] In general terms the issues as identified by Mr Currie broadly corresponded to the issues as identified by Mr Sandison, although the language in which the issues was posed to an extent differed.

[124] The first issue raised by Mr Sandison was the proper construction of the SPA. Mr Sandison posed the question in this way: did the SPA and/or the Closing Agreement bring about a relationship of principal and agent between RMJM and the pursuer in respect of any sums of money collected by RMJM and which ought to have been paid by RMJM to the pursuer in terms of the SPA and/or the Closing Agreement (as the pursuer contends) or was

the relationship between RMJM and the pursuer contractual in nature only, as the defenders contend?

[125] Mr Sandison began by making certain submissions as to the approach to construction of the SPA and Closing Agreement in terms of UAE law.

[126] If the contractual wording is plain, then that will without more determine the meaning of the contract: Dr Arab, para 3; UAE Civil Code, art 258(2), 265(1). However, where the wording is unclear or ambiguous, the court will interpret the contract according to the principles and criteria provided by the Civil Code: Dr Arab, para 4. Mr Hanna accepted this proposition in cross-examination.

[127] Once the exercise of interpretation is properly embarked upon, the emphasis is on intention rather than form: art 258(1). The court is to enquire "into the mutual intention of the parties without stopping at the literal meaning of the words": art 258(2). In doing so, the court can have regard to the nature of the transaction, and the trust and confidence which could be expected to exist between the parties according to normal commercial custom: ibid. Again, Mr Hanna accepted these principles in cross-examination.

[128] In respect to the pursuer's approach to construction it concentrated on the terms of clause 10.3 and in particular the words "for and on behalf of". However, he emphasised that there is no explicit reference to agency, and Mr Hanna accepted that this clause must be read in the context of the document as a whole.

[129] He conceded that an agent/principal relationship is a possible reading of those words, the question ultimately depends on how the clause is to be read in the context of the contract as a whole: Dr Arab, para 7. In particular, if the contract amounts to an agreement that RMJM would receive sums as the party entitled to them in its own right, and then hold or transfer sums to or for the pursuer in accordance with the contract, then no agency would arise; but if

the contract amounts to an agreement that RMJM would receive sums simply to hold them for the pursuer, then an agency relationship would exist.

[130] He submitted that Mr Hanna's analysis of clause 10.3 did not withstand cross-examination. He maintains in his supplementary report that clause 10.3 could not be interpreted other than as giving rise to an agency relationship, but he did not seriously defend that extreme position. He accepted that his agency interpretation was based on the premise that RMJM was ingathering money which was owed to the pursuer, and which the pursuer would have been entitled to ingather itself (but for the procedural impediment that it initially lacked a business licence).

[131] But that is not the structure of the SPA. The pursuer accepts that the SPA involved the sale of *part* of RMJM's business, while RMJM retained the other half; and that the SPA created a contractor/subcontractor relationship between RMHM and the pursuer: Cond 5. There is no suggestion that the pursuer, as a subcontractor, ever had a cause of action directly against the end customers. Clause 10.3 itself refers to "Sub-Contract Services". Thus, the underlying premise of Mr Hanna's approach is wrong.

[132] He submitted that the court should either conclude that the SPA provides for a relationship of contractor and subcontractor and that this indicates that a relationship of agency was not intended in clause 10.3; or, failing that, consider that further evidence of the factual matrix would be required in order to interpret the clause and to determine which interpretation is correct.

[133] Mr Sandison further responded to the argument advanced on behalf of the pursuer in this way:

[134] The pursuer now appears to acknowledge that the RMJM/pursuer relationship was one of contractor and subcontractor, and accepts that any agency could have arisen only after

RMJM received the money: paras 32.2, 35.1 of its principal submissions. But that was not Mr Hanna's approach:

(i) In his first report, at para 2.1, he says: "Under the SPA TJEG authorised RMJM to bill clients on its behalf, to receive the amounts collected, and to hold such amounts "for and on behalf" of TJEG. In my opinion this created a principal/agent relationship."

(ii) At para 2.2, he says: "The initial agency relationship (ie the original appointment) between the parties was contractual, whereby TJEG consented to RMJM billing and collecting on its behalf."

(iii) At para 2.3, he founds on Civil Code Article 937, which applies to "[m]onies received by an agent on behalf of his principal". He says that "this provision applies to the situation at hand as monies (professional fees) rightfully belonging to TJEG entered a bank account (or accounts) managed and operated [by RMJM]".

[135] Mr Hanna plainly proceeded on the basis that the alleged agency (and consequent depositary relationship) arose out an imagined right on the part of the pursuer to bill and collect money "belonging" to them in the hands of customers. Apart from the content of his reports, he acknowledged the same in chief at 10.38 on day 1. The pursuer now acknowledges that position to be untenable, and seeks to focus solely on the position after the receipt of the money.

[136] But Mr Hanna's position in cross-examination was unambiguous: at 12.53pm on day 1, he was referred to the passage from para 2.2 of his report, quoted above, and asked whether it was a necessary part of his analysis of the existence of an agency relationship that the pursuer could have billed and collected the sums of money in question. He confirmed that it was a necessary part of his analysis (and repeated that at 14.28 on the same day), subject

only to the qualification that it did not matter for this purpose whether the pursuer had the necessary licence to bill customers direct.

[137] Thus, the pursuer can derive no support from Mr Hanna for the argument it now makes.

[138] Turning next to the issue of fraudulent conversion Mr Sandison's position was a short one. The court should accept the position advanced by Dr Arab that the concept of fraudulent conversion did not exist as a matter of UAE law. That this concept did not exist as a matter of UAE law had been conceded by Mr Hanna both in his report and in his oral evidence.

[139] Beyond that he developed certain submissions in respect to the general concept of fraud as advanced by Mr Hanna.

[140] Mr Sandison's position was that the scope of the concept of fraud according to Mr Hanna was unsustainably wide in that it deprived the concept of fraud of any basis upon which it could be differentiated from any other form of wrongdoing arising out of a contractual relationship, or otherwise. Mr Hanna at one point defined fraud in this way:

> "In all events, appropriating another person's property without a legal transaction amounts to fraud."

In respect to that proposition, Mr Sandison described it as astonishingly wide. Moreover, it was advanced without reference to any authority, whether in the Code or Court of Cassation decisions. It cannot be accepted. As Dr Arab pointed out, the concept of fraud is deceit; to take something belonging to another by way of a false pretence is fraud; to take it by another unlawful means maybe theft or embezzlement but it is not fraud. He submitted generally that a good deal of the pursuer's case turned, on analysis, on the unsustainably wide definition of fraud in the law of the UAE espoused by Mr Hanna and therefore was clearly wrong.

[141] The next matter dealt with by Mr Sandison was the issue of the applicability of articles 304 and 305 of the Code to the circumstances of the pursuer's case. He advanced the following position:

[142] The pursuer suggests that (on the facts which they aver) the defenders would be personally liable in consequence of articles 304 and 305 of the UAE Civil Code.

[143] Articles 304 and 305 are not among the Code provisions dealing with agency or bailment. Rather, they are independent tortious provisions. Moreover, as Mr Hanna volunteered in chief at around 11.00 on day 1, the Arabic word central to those articles which is commonly translated as "tortfeasor" more properly falls to be regarded as narrower in scope, and that its core meaning is to refer to someone "taking by force" the property of another. There is no proper basis in the evidence before the court for regarding those articles as encompassing a situation where A simply fails to return an item belonging to B which was in his lawful possession, as opposed to the situation where A positively and unlawfully takes possession of an item belonging to B. That is a well-recognised distinction in many legal systems, including our own. Articles 304 and 305 occupy the ground in the law of the UAE which in our law is occupied by the concept of spuilzie, neither more nor less.

[144] In any event, both witnesses accepted that the defenders could only be liable for a tort (whether arising out of a breach of articles 304 or 305 or otherwise) which consisted in causing a breach of contract on the part of RMJM where there was also fraud, gross mistake, or a criminal conviction. See Dr Arab at para 20; Mr Hanna accepted this position in his supplementary report at Question III, paragraph 1, and confirmed that view in cross-examination. Any claim in respect of articles 304 or 305 would be a tortious one, subject to the tortious time bar period.

[145] As regards the next issue of personal liability of the defenders under the company law of the UAE Mr Sandison began by outlining the pursuer's contention in respect to this matter: the defenders, as individuals, are liable for RMJM's breach of duty because they

were the directors who exercised control of two Cypriot companies which, in turn, were the partnership of RMJM. This is said to give rise to liability under the provisions of the 1984 Companies Law.

[146] The 1984 Law provides in general terms that "the provisions of this law shall apply to trading companies incorporated in the country or which establish centres in it for their activities": art 2(1). It provides for a number of different forms of body corporate (see art 5) and makes separate provision for each type. It also contains provisions on foreign companies (arts 313-316), and a number of provisions of general application (arts 1-22, 273-312, 317-329).

[147] The pursuer points generally to article 313(1), under which "the provisions of this law shall apply to foreign companies which practice their main activity in the State or have their main office therein, with the exception of the provisions relating to the incorporation of companies". Dr Arab explained that this relates only to the provisions of the Law which are directed towards foreign companies.

[148] However, the pursuer's specific case is based on articles 111-112, and the key question under this heading is whether Mr Hanna is correct to say that those particular articles are incorporated by article 313. If they are not, that is an answer to this line of argument, and it is unnecessary to decide precisely which articles are applied to foreign companies by article 313.

[149] Articles 2(1) and 313 both use the formulation "the provisions of this law shall apply to…". In article 2(1), they are applied to companies incorporated in the UAE; in article 313, to certain foreign companies. But it is common ground that the law contains different provisions for different types of corporate entity. Plainly, then, this formulation does not – indeed, cannot – mean that every provision applies to every entity. The experts agreed, for example, that the provisions in the chapter directed at public joint stock companies apply

only to public joint stock companies, and not to other entities. Articles 111 and 112 (which form part of that chapter) do also apply to limited liability companies, but only because they are expressly applied to such companies by article 237.

[150] It is accepted, then, that the articles on which the pursuer relies apply to only two types of UAE corporation. Yet they are said to apply to all foreign companies, irrespective of their form. That is because, on its approach, Article 313 subjects foreign registered companies to all five mutually-exclusive corporate codes contained within the 1984 Law, even where those codes assume the existence of the constitutional organs which the foreign company may not have. That plainly cannot have been the intent of the Law. Still less can it have been intended that articles 111-112, which are concerned with the liability of directors in a particular corporate structure, should apply by analogy to people who are not directors, in an entity which has no such office.

[151] Indeed, in cross-examination, Mr Hanna was constrained to concede that this was untenable. He accepted that a foreign company could not be subject to all of the provisions of the Law, but would not be drawn on which provisions would or would not apply in any particular case, or by what means the applicability or otherwise of any article could be determined in the present, or any other, case.

[152] It was suggested in cross-examination of Dr Arab that his view of the scope of application of the 1984 Law to foreign companies would result in an arbitrary distinction between the position of directors in a UAE-incorporated corporation, and the position of directors in a foreign registered corporation. But the rule on which TJEG relies does not even apply to all UAE entities. There is nothing remotely surprising in the suggestion that different forms of corporate vehicle should have different rules as to the personal liability of their officers.

[153] In any event, as Dr Arab explained, the directors of a foreign company would not be immune from personal liability; rather, their liability would depend on personal wrongdoing under the general law of tort. He further explained that even where articles 111-112 do apply, they do not provide for strict liability but rather involve a standard of fraud or gross mistake, similar to the standard which would give rise to liability in tort in any event. That further undermines the suggestion of an arbitrary difference of treatment.

[154] Finally regarding prescription the position advanced by Mr Sandison was this:

[155] The general limitation periods under the UAE Civil Code are 15 years for contractual claims (Art 478) and 3 years for tortious claims (Art 298). Dr Arab suggests that the time bar in a claim against RMJM may be 10 years rather than 15, but nothing turns on that distinction for present purposes.

[156] The pursuer points to the fact that its claim ultimately arises from its contract with RMJM, and points to the time bar for contractual claims. But that is misconceived. This is not a claim against RMJM, based on RMJM's contractual obligations. There is no suggestion that the defenders were party to any contract with the pursuers. Rather, the pursuer's case appears to be that the defenders have incurred personal liability by procuring that RMJM committed a breach of contract. Properly analysed, that is a claim in tort. If the pursuer claims that the defenders have alternatively incurred liability other than by procuring a breach of contract, for example on the basis that their conduct constitutes some sort of free-standing fraud, such a claim would plainly be tortious.

[157] The pursuer's analysis confuses two distinct scenarios which can arise where a breach of contract occurs: (i) a contracting party's liability in contract, and (ii) a third party's liability in tort. The pursuer's claim is plainly in category (ii). Although Mr Hanna asserted that the defenders' liability was somehow to be treated as contractual "by extension", no authority or reasoning was produced in support of that proposition, and it should be rejected.

[158] Article 298(2) allows for the three-year period to be extended where criminal proceedings are pending. However, both experts agreed that this applied only where criminal proceedings were actually pending on the date when the three-year period would otherwise have expired. The pursuer does not aver that any criminal proceedings have been brought (nor have they been), and so the article 298(2) extension is irrelevant on the facts of the case.

[159] Thus, the time bar applicable to the pursuer's claim, on any of the grounds of action which they advance, is three years.

**Discussion**

[160] The first issue is this: on a true construction of the SPA was an agency relationship created between the pursuer and RMJM?

[161] In approaching this issue I have, for the reasons earlier detailed, approached the issue in this way: it is for the court to construe the SPA in accordance with and applying the agreed evidence of the experts as to the rules and principles of the law of construction of contracts in the UAE and having regard to the definition of agency as a matter of UAE law.

[162] The material principles and rules of construction in terms of the law of the UAE which must be applied by me in reaching a sound construction are conveniently summarised by Dr Arab in his report at pages 292 and 293 of the JB and are as follows:

> "3. Under the provisions of the UAE Civil Code that deal with the interpretation of contracts, the first task a court faced with the challenge of interpretation must carry out is to address the plain wording of the contract (ie, here, the SPA).
>
> 4. If the court considers that words in the contractual terms are unclear or ambiguous, the court is permitted to interpret the contract using principles and criteria provided by the Civil Code. The court applies these principles and criteria in order to ascertain the joint intention of the parties.
>
> 5. The relevant provisions of contractual interpretation under the Civil Code found under Articles 258, 259, 265 and 266 provide as follows:

> Article 258
>
> (1) The criterion in [the construction of] contracts is intentions and meanings and not words and form.
>
> (2) The basic principle [presumption] is that words have their true meaning and a word may not be construed figuratively unless it is impossible to give its true meaning.
>
> Article 259
>
> (1) The implied shall be disregarded in the face of the express.
>
> Article 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 the interpretation of the contract, an enquiry shall be made into the mutual intentions of the parties without stopping at the literal meaning of the words, and guidance may be sought in doing so 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.
>
> Article 266
>
> (1) A doubt shall be interpreted in favour of the obligor.
>
> (2) Nevertheless it shall not be permissible to construe ambiguous words in contracts of adhesion in a manner detrimental to the interests of the adhering party."

[163] There is one further cannon of construction as a matter of UAE law which was a matter of agreement between the experts: the terms of a clause should be construed in the context of the contract as a whole.

[164] I turn to construe the SPA in accordance with the rules of construction of the UAE I have set out and having regard to the definition of agency in terms of the law of the UAE.

[165] I analyse the issue as follows:

[166] First, there is no express reference in clause 10.3 of the SPA to an agency relationship being created between the pursuer and RMJM. Nevertheless, I consider that on the plain

wording of clause 10.3 read in the context of the SPA as a whole such a relationship is created by the said clause.

[167] The initial question in arriving at a true construction of the clause I believe is this: with what is clause 10.3 concerned?

[168] I am persuaded that looking to clause 10.3, on a plain reading of the clause it is concerned with the position following receipt of the monies by RMJM. The clause provides:

> "Any sum received by the vendor … shall be received by the vendor for and on behalf of the purchaser." (emphasis added)

[169] Given the wording in the clause which I have emphasised it is clearly and unambiguously dealing with the issue of the status of monies which have already been received by RMJM.

[170] Moreover, clause 10.3 on a sound construction is solely concerned with monies which are due to the pursuer. The clause when viewed in the context of the SPA as a whole plainly leads to this conclusion. The purpose of this clause in the context of the SPA is to deal with monies which are due to the pursuer.

[171] These are monies which the pursuer and RMJM have agreed that although they are to be paid to RMJM the pursuer is entitled to them. RMJM in respect to the pursuer had no entitlement to these monies. Any monies which fall within the scope of this clause are monies due to the pursuer. To put matters into the words of Dr Arab: the agreement in terms of the SPA was that "RMJM would receive sums not in its own right, but simply to hold for TJEG". In those circumstances Dr Arab accepted that an agency relationship would be created.

[172] It is clear when regard is had to the SPA as a whole that the correct reading of the clause is that it is concerned with monies due to the pursuer.

[173] Mr Hanna directed the court's attention to two specific parts of the SPA:

[174] First, the third recital at page 1 of the SPA which provides:

> "WHEREAS:
> …
> (c) the Purchaser cannot complete the purchase until it has a branch established in Dubai and the relevant licences to carry on the business but the parties have agreed that on Completion the Purchaser shall take the economic benefit of the Business with effect from 1 April 2011;" (emphasis added).

[175] The deemed transfer date is defined in the SPA as 1 April 2011.

[176] Secondly Mr Hanna referred to clause 2.11 of the SPA which provides, *inter alia*:

> "In consideration of the Purchaser funding the Liabilities, and providing the working capital of the Business pursuant to clauses 2.8 to 2.10 the Vendor agrees that the Purchaser shall be entitled from Completion to the Benefit of any revenue earned in respect of the business from the deemed transfer date…"

[177] I consider that taking clause 10.3 and these provisions together, clause 10.3 can only sensibly be understood as being concerned with moneys received by RMJM which are due to the pursuer and in respect of which RMJM has no entitlement.

[178] Clause 10.3 expressly provides that the monies received by RMJM are to be held "for and on behalf of" the pursuer.

[179] The use of this formulation in the context of the clause and the SPA as a whole and in particular when read in conjunction with the third recital and clause 2.11 can, I believe, only sensibly be understood to bear one meaning, namely: that a relationship of principal and agent between the pursuer and RMJM is created in respect to the monies received by RMJM.

[180] The definition of "agency" in terms of UAE law is set out in article 924 which provides:

> "a contract whereby a principal (or appointer) appoints another in his [place and stead] for a lawful and known act."

Applying that definition to clause 10.3: the pursuer (the principal) has appointed another (RMJM) in its place, to receive monies on its behalf which are in terms of the SPA due to it.

Thus I believe on a proper construction of clause 10.3 an agency relationship is created between the pursuer and RMJM.

[181] As I have said Dr Arab accepts that it is a possible construction of clause 10.3 that it creates such a relationship. However, he puts forward an alternative possible construction which is this:

> "RMJM would receive the sums in question as the party entitled to them in law, but then transfer to, or hold some or all of them for TJEG depending on such right to them as TJEG had under the agreement between the parties, then it would be likely to regard that simply as a contractual arrangement not amounting to an agent/principal relationship."

[182] I firstly observe there is no reasoned explanation advanced by Dr Arab as to why the courts of the UAE would be likely to so regard the matter. In particular he does not explain why RMJM receiving "the money as the party entitled to them in law" causes him to reach the view that no agency relationship would as a matter of UAE law be likely to be held as established. He does not explain his view in light of his earlier acceptance in his opinion that although the SPA is a share purchase agreement it does create other forms of legal relationship. Why then is he saying in these circumstances the clause would not likely be held to create an agent client relationship. Moreover, I observe that Dr Arab does not opine that in those circumstances where RMJM receives the moneys as the party entitled to them an agency relationship could not be created. He only says that the UAE courts "would be likely to regard that as a contractual arrangement" (emphasis added).

[183] It appears to me that applying the definition of agency in UAE law to the scenario advanced by Dr Arab, namely: RMJM receiving the moneys as the party entitled to them, I believe it still falls within agency as a matter of UAE law.

[184] Mr Hanna considers Dr Arab's alternative construction at paragraph 4.1.2 of his supplementary report and says this: such a mutual agreement "would be qualified under UAE law – as an agency constituted between a principal (the rightful owner of the asset) and

an agent entrusted with safekeeping the asset and returning it to the owner on a certain date or upon the occurrence of a specific event."

[185] I consider the foregoing analysis by Mr Hanna is of assistance in this court arriving at its own view of the proper construction of clause 10.3. I believe that: accepting RMJM received the monies as the parties entitled to receive them (as the main contractor), then it is clear in terms of clause 10.3 that the sums on receipt are due to the pursuer and the only right RMJM has to hold them is as the pursuer's agent. I would analyse the matter in this way: the pursuer (the principal) has appointed another (RMJM) in its place to hold monies which are on receipt due to the pursuer. Thus the clause creates an agency relationship as a matter of UAE law. Looking to the scenario put forward by Dr Arab, it seems to me, that the other terms of the SPA to which I have referred and the use of the formulation "for and on behalf of" would in the circumstances advanced by Dr Arab still support the creation of an agency relationship. Dr Arab at no point explains how he sees the phrase "for and behalf of" can be fitted into his alternative analysis.

[186] Accordingly even approaching the matter on the alternative basis suggested by Dr Arab I consider that as a matter of UAE law clause 10.3 creates an agency relationship.

[187] The defenders' primary submission was that: the court should conclude that the SPA provides for a relationship of contractor and sub-contractor and that this indicates that a relationship of agency was not intended in clause 10.3.

[188] A number of relationships are created between the pursuer and RMJM by the SPA. The relationship of contractor and sub-contractor it was accepted by the pursuer is one of these. However, that is not the whole picture. It is not, for the reasons advanced by Mr Currie, relevant to a consideration of the relationship created by clause 10.3. Moreover, all of the factors to which I have referred above are consistent with an interpretation that an

agency relationship is created by clause 10.3 and are entirely inconsistent with the defenders' contended for construction.

[189] Beyond that it is in my view significant in considering the alternative argument advanced by the defenders that it is, as argued by Mr Currie, very difficult sensibly to say that a main contractor receives payments from his employer "for and on behalf of" its sub-contractor. I agree with Mr Currie that the use of this phrase and the context of the SPA as a whole can only be understood as creating the relationship of principal and agent between the pursuer and RMJM.

[190] Lastly in regard to the position of the defenders, I observe that Dr Arab does not expressly refer at any point to the existence of a contractor/sub-contractor relationship between RMJM and the pursuer being of materiality in his views.

[191] The alternative position of the defenders was this: the court should consider that further evidence of the factual matrix would be required in order to interpret the clause and to determine which interpretation was correct.

[192] Given my conclusion as set out above I reject this alternative argument. I do not believe that it is necessary in order to arrive at a true construction of this clause to have evidence regarding the factual matrix. The clear intention of parties in terms of clause 10.3 as viewed in the context of the SPA as a whole was to create an agency relationship.

[193] Earlier in this opinion when dealing with the issue of objections to lines of questioning I said that there was one matter to which I would require to return in relation to that matter. I wish to set out in detail my position regarding certain questioning by Mr Sandison which relates to this issue of whether an agency relationship was created in terms of the SPA.

[194] Certain questions were put to Mr Hanna by Mr Sandison in relation to the proper construction of clause 10.3 which in my view despite his protestations to the contrary, did suggest that an agency relationship could not be created by the terms of clause 10.3.

[195] The premise of these questions appeared to be this: the pursuer as sub-contractor could not bill and collect from the employers the monies which were to be paid to RMJM as the main contractor. The questioning went on to suggest that this rendered an agency relationship impossible, as RMJM was, in billing and collecting from the employer doing something which the pursuer as a matter of law could not do.

[196] This was in my view plainly a matter which ran contrary to the position as set out by Dr Arab in his report which accepted that there were two possibilities in respect to the proper interpretation of clause 10.3, one of which was that it created an agency relationship. At no point in his report did he contend that it was impossible that a court in the UAE could hold that 10.3 created an agency relationship. Even on his alternative construction Dr Arab as I emphasised earlier said that the UAE court "would be likely", not that the court would be bound to hold that no agency relationship was created. It was not Dr Arab's position in terms of his primary or secondary analysis that an agency relationship could not be created. The position being advanced by Mr Sandison appeared to me to run entirely counter to the position of his expert. Moreover, it was a position of which he had given no notice.

[197] Against that background I believe that Mr Sandison was not entitled to put forward this line of questioning to Mr Hanna. I hold this entire line of questioning as inadmissible.

[198] In summary, applying the principles and rules of the law of the UAE in respect to construction, the following factors support the construction advanced on behalf of the pursuer that an agency relationship is created by clause 10.3: (a) such a construction fits into the overall transaction and in particular where it was agreed by parties that the pursuer could not complete until it had the relevant licenses; (b) it is supported by the terms of the

third recital and clause 2.11 and the whole context of the SPA; (c) the clause is concerned with the status of money already received by RMJM; (d) monies falling within the ambit of the clause are monies to which the pursuer was entitled and in terms of the SPA RMJM had no entitlement; and (e) the phrase "for an on behalf of" in the clause only makes sense in the context of an agency relationship. Overall I believe the pursuer's contended for construction fits with the plain wording of the clause when taken in the context of the SPA as a whole. In so far as I have required to consider the intention of the parties it is clear that the intention was to create such a relationship.

[199] If I am wrong in my view earlier set out as to the ambit of expert evidence in this area and accordingly I should have approached the matter as contended for by Mr Currie, then I prefer the evidence of Mr Hanna to the evidence put forward by Dr Arab. His approach has proper regard to the applicable principles and rules of construction of the UAE. His analysis in his original report at page 269 of the JB and as further developed in response to the report of Dr Arab at page 285 of the JB and in particular at paragraph 4.1.1 is fully and persuasively reasoned. It is fully supported where necessary by reference to the Civil Code. Overall I found Mr Hanna to be a very impressive witness. He gave all of his evidence in a clear, careful and straightforward manner. In his reports and in his evidence he sought to give full reasons for the views he reached. He gave proper consideration to all questions and fully and carefully answered them. I did not find Dr Arab's position to be as well reasoned for the reasons I have about set out.

[200] In preferring Mr Hanna's position regarding this matter I believe it is of some significance that Dr Arab accepts at paragraph 7 of his report (page 293 of the JB): "that it is possible that a court in Dubai would construe clause 10.3 of the SPA as in effect creating an agent/principal relationship." Thus he does not outright suggest that Mr Hanna is wrong in his construction. Beyond that Dr Arab does suggest a possible other construction.

However, for reasons I have detailed above he does not go on to support that suggested view in a manner which I find convincing. In the circumstances I accept the evidence of Mr Hanna, based on his primary analysis of this issue.

[201] Further, I accept that even if I am wrong in preferring Mr Hanna's primary analysis of this issue, he at page 285 of the JB from paragraph 4.1.2 puts forward a detailed argument, for the purpose of which, he accepts Dr Arab's possible scenario that what was created by clause 10.3 was that the moneys were received on the basis of a "mutual agreement". On an analysis of that situation he in my view cogently argues that nevertheless in terms of the law of the UAE an agency relationship was created. There is no real response by Dr Arab to this analysis. I am persuaded that Mr Hanna's secondary analysis is correct.

[202] Accordingly, for the foregoing reasons my finding of fact is that the effect of clause 10.3, as a matter of UAE law, was to create a relationship of principal and agent between the pursuer and RMJM.

[203] Having held that such a relationship is created, what flows from that is a matter of agreement between the experts as set out earlier in this opinion, and in short is this: RMJM as agents held the monies to which clause 10.3 applies on deposit. RMJM thus owed to the pursuer the duties of a depositary or trustee, which included, in short, the duties to keep the property deposited safe; to return the property to the principal on demand; to return any profits to the principal; and to restore any property that perishes in its hands as a result of its wrongful act or error.

[204] The next area of dispute appeared to encompass a number of related issues: (1) what is fraud as a matter of UAE law?; (2) Is the concept of fraudulent conversion recognised by UAE law?; (3) If fraudulent conversion is not a term of art in UAE law nevertheless does what is described by Mr Hanna in terms of that concept fall within the definition of fraud as a matter of UAE law?

[205] As I noted earlier there is a measure of agreement between the experts as to the circumstances in which a claim will lie in tort as a matter of UAE law, notwithstanding the existence of a contractual relationship between the parties.

[206] One of these circumstances was fraud. The following was the experts' position as to fraud as a matter of UAE law:

> "The evidentiary threshold for fraud is high. In order for fraud to be established, it must be evidenced that a party intentionally deceived another. Acting carelessly, recklessly or indifferently is insufficient to establish fraud and the intention to deceive must be proven."

So far as the expert evidence went that was the measure of agreement regarding the meaning of fraud as a matter of UAE law.

[207] In respect to the concept of fraudulent conversion Mr Hanna accepted that it was not a term of art in UAE law. He had used the phraseology in order to provide an appropriate translation for a Western Legal System. In his oral evidence he described fraudulent conversion as the equivalent of embezzlement.

[208] The question for the court therefore became, could what he described as fraudulent conversion fall within the definition of fraud as a matter of UAE law?

[209] In his supplementary opinion Mr Hanna sought to explain what he meant by fraudulent conversion and in particular said this:

> "It is an aspect of fraud under Dubai law where an agent/depositary retains/appropriates a deposit/bailment … for his own benefit or use, when, as agent or depositary he is required ultimately to return the object of trust to its true owner."

He goes on to say this:

> "There is no statutory text, precedent or jurisprudence that says the agent/depositary can retain the deposit/bailment, dispose of it, or use it to his own advantage without the owner's consent or permission and get away with it. That would be a fraud – or an act of fraudulent conversion."

[210] Thus it is clear from his explanation that he sees fraudulent conversion as forming a part of the tort of fraud.

[211] In response to that position Dr Arab said this in his report: the legal concept of fraudulent conversion "is not known to UAE law".

[212] He is then asked the specific question: "Can 'fraudulent conversion' amount to the tort of fraud despite arising out of breach of a contractual obligation?"

[213] In answer: he repeats his statement: "the term 'fraudulent conversion' is not a concept under UAE law" and then quotes the provisions of UAE law in respect to where the source of an obligation is a contract when a party may bring an action in tort for breach of that obligation.

[214] However, what he critically fails to do is to consider what I believe is the real question at issue, which is this: can what is described by Mr Hanna as fraudulent conversion amount to a fraud as a matter of UAE law? He offers no analysis of what Mr Hanna in detail has said in respect to fraudulent conversion as a part of the law of fraud. I do not believe that it answers Mr Hanna's point to simply say fraudulent conversion does not exist as a concept in terms of UAE law. Mr Hanna accepts that but nevertheless says: what I am saying is fraudulent conversion falls within the definition in terms of the UAE law of fraud.

[215] When one then turns to the detailed analysis advanced by Mr Currie on what I believe is the real question I consider he is correct in asserting that the disagreement between the experts as regards "fraudulent conversion" is in reality not an argument in substance but rather an argument about semantics. I accept the point made by Mr Currie that when looked at as a whole the evidence of Dr Arab agrees with the propositions which underlie the position advanced by Mr Hanna. At paragraph 22 of his report Dr Arab says:

> "… In order for TJEG to bring a claim against the defenders as the individual actors on behalf of RMJM, TJEG would need to show that the acts of the defenders that are complained of:
> …

> 22.1.2 amount to fraud, in that the relevant party intended to intentionally deceive or defraud TJEG" (emphasis added).

On a proper analysis what Mr Hanna is opining relative to fraudulent conversion falls within that definition. In terms of Mr Hanna's analysis he is saying that the defenders, (through RMJM) having lawful possession as agents of the moneys in terms of clause 10.3, then, with the intention of defrauding the pursuer, converts the money to their own use.

[216] Mr Hanna's definition of fraud, for the purpose of his analysis of this issue is not astonishingly wide, rather it fits within what is said by Dr Arab as set out above. Mr Hanna's position goes no further than this, he says: fraudulent conversion or embezzlement is as a matter of UAE law a species of fraud. That does not seem to me a surprising conclusion. If it was not a species of fraud I would have expected Dr Arab to be able to point to a decision of the Court of Cassation to that effect. Therefore the dispute is really over the use of terminology rather than in respect to the substantive reasoning of Mr Hanna.

[217] In respect of this issue I for the foregoing reasons prefer the evidence of Mr Hanna. I find as a matter of fact that as a matter of UAE law what is described by Mr Hanna amounts to fraud.

[218] The next issue which arises is this: whether (on the facts that the pursuer avers) the defenders bear personal liability in consequence of the terms of articles 304 and 305 of the civil code?

[219] This issue was not a matter which Dr Arab dealt with in his report. Nor did he cover the issue in the course of his evidence. There is thus no expert evidence which counters the position advanced by Mr Hanna.

[220] Against that background the approach of Mr Sandison to the issue was this: Articles 304 and 305 are not among the Code provisions dealing with agency or bailment.

Rather they are independent tortious provisions. Beyond that he pointed to the evidence of Mr Hanna and in particular a concession which Mr Hanna had made that the word "tortfeasor" which forms part of the English translation of the relevant provisions should be given a narrower interpretation having regard to the wording of the provision in Arabic. It was his position that given the narrower interpretation placed upon it by Mr Hanna there was no evidence before the court that these articles encompassed a situation of the type put forward by Mr Hanna under his leading of "fraudulent conversion". Lastly he repeated his point that in any event "fraudulent conversion" was not fraud as a matter of UAE law.

[221] In respect to the points made by Mr Sandison, there is no evidence to support his argument that because Articles 304 and 305 are independent tortious provisions they cannot apply to agency/bailment. Mr Hanna said they did apply. I can identify no reason why I should not accept his evidence on that matter. In particular Dr Arab did not say that they did not apply. I have already held that fraudulent conversion amounts to a fraud as a matter of UAE law, when dealing with the previous issue.

[222] In respect to the concession made by Mr Hanna in his evidence, the issue was, as I have it noted, dealt with at two points in his evidence. In examination in chief, he advised that he was not sure about the use of the word "tortfeasor" in the English translation and said that the Arabic word was not easy to translate. His position in examination in chief was that the word "tortfeasor" should be replaced with "usurper". The matter was returned to in cross-examination and again as I have it noted "usurper" was the word which he said should be used as the English translation. In his initial report he said this:

> "The act would fall under Art 305 that relates to taking what belongs to others unlawfully (without their consent or by an aggressive act or trespass)."

He maintained that what was averred by the pursuer as happening in the present case was covered by articles 304 and 305 even with the change in the English language translation.

That language I believe is clearly capable of covering Mr Hanna's analysis of the defenders' personal liability.

[223] Mr Hanna, subject to the foregoing concession, analysed the defenders' liability in terms of articles 304 and 305 as follows:

> "the defenders – being the individuals with power of the bank account – were responsible for compliance with the terms of the SPA, or particularly its 'for and on behalf of' commitment. It follows that their misappropriation and disposition of TJEG's funds was a breach of RMJM's contractual undertaking to preserve and return these funds to their rightful owner. RMJM, as a corporate entity, is run and represented by individual natural persons, who are the defenders directly or through their directorships of the partner companies. They should bear the consequences of their fraudulent and unlawful actions and their breaches of the contractual undertakings of the corporate body which they represent or act for."

[224] I accept the analysis of Mr Hanna. It appears fully reasoned and there is no positive evidence from Dr Arab to counter it.

[225] Thus I accept Mr Hanna's evidence and his conclusion that in terms of UAE law if the allegations made by the pursuer against the defenders are true, those facts would suffice to impose personal liability on the defenders as a result of the terms of the foregoing articles.

[226] One final matter under this head is that Mr Hanna accepted that a claim in terms of articles 304/305 would be tortious in nature.

[227] The next matter in dispute between the experts related to the question of the personal liability of the defenders under the company law of the UAE.

[228] I would analyse this issue as follows:

[229] The starting point is to observe that parties' experts are in agreement that RMJM was a branch of a foreign company.

[230] The dispute between the parties' experts in respect to the personal liability of the defenders under the company law of the UAE related to this: whether the various company law provisions identified by Mr Hanna in his original report, which he claimed rendered the

defenders responsible as a matter of UAE company law for the actions of RMJM in fact were applicable to RMJM as a foreign company?

[231] Mr Hanna's position was that the following articles applied to the defenders as directors of a branch of a foreign company:

> "5.1.1 Article (111) of the Law on Commercial Companies (Federal Statute No.8 (1984) provided that:
>
> > 'The chairman and members of the Board of Directors shall be liable towards the company, the shareholders and third parties for all acts of fraud and abuse of authority, about all violations of the law or the corporate articles and for any error of management. Any provision to the contrary shall be void.' (exhibit 26)
>
> 5.1.2 Art (112) states that 'The afore-mentioned liability shall apply to all the board members if the resolution was passed by a unanimous vote. If the resolution subject of scrutiny (or accountability) was passed by a majority, those who had opposed the resolution would not be liable if they had recorded their opposition in the minutes of the meeting' (exhibit 27)
>
> 5.1.3 Art 237 of the Law provided that the Manager(s) of a Limited Liability Company shall bear the same responsibilities as the directors of shareholding companies. Any provision to the contrary is null (exhibit 28)."

[232] Dr Arab in his response to Mr Hanna's position referred to the 2015 UAE Company Act. However, it was accepted before me that the 1984 Act was the one which was applicable to the circumstances of the present case. It was to the 1984 Act to which Mr Hanna had referred at all stages. However, nothing of significance turns on Dr Arab's reference to the 2015 Act as the two acts contain nearly identical provisions in respect to the present issue.

[233] Dr Arab's position regarding this issue is summarised in this passage of his report at paragraph 33 at page 299 of the JB:

> "The 2015 Companies Law is clear in Article 3 that only the provisions relating to foreign branches in the law are applicable to foreign branches operating in the UAE. All other provisions within the 2015 Companies Law do not apply to foreign branches operating within the UAE. The articles applicable to foreign branches are articles 327 to 332 of the 2015 Companies Law."

Thereafter at paragraph 40 he goes on to say this:

> "It is clear that all other articles of the law are excluded from applying to branches of foreign companies."

Thus his position was that the articles relied on by Mr Hanna were not applicable.

[234] Mr Hanna's response to the position argued for by Dr Arab was a short one. He refers to article 327 of the 2015 Companies Act which provides as follows:

> "Subject to the special agreements made between the federal government or the local government or any entity or either of them with foreign companies, the provisions of this law, excluding the provisions concerning incorporation, shall apply to the foreign companies that conduct their activities in the state or their place of management is based in the State."

[235] Mr Hanna in his supplementary report at page 288 of the joint bundle went on to say this in detailed response to Dr Arab's position:

> "3. If we go along with the reasoning of the Arab report, we find that the more suitable applicable provision is that of Article 327 (referred to under item 9.34 of the Arab report) which subjects 'foreign companies that conduct their activities in the State or their place of management is based in the State' to the provisions of the Commercial Companies Act, except for provisions relating to incorporation.
>
> 4. This text, which is cited by Dr Arab himself, contradicts his conclusion (in the following paragraph 40) that 'it is clear that all other articles of the law are excluded from applying to branches of foreign companies'. Just to the contrary, branches of foreign companies are governed by the same statutory provisions as other legal entities except for the procedures of formation and registration, as a branch…"

[236] The relevant article for consideration by this court is article 313 of the 1984 Act (being the equivalent provision to article 327 of the 2015 Companies Act) which provides:

> "Without prejudice to specialist agreements concluded between the federal government or one of the local governments and some companies, the provisions of this law shall apply to foreign companies which practice their main activity in the state or have their main office therein, with the exception of the provisions relating to the incorporation of companies." (emphasis added)

[237] Dr Arab's construction is to the effect that only articles 327 to 332 of the 2015 Act and thus the equivalent provisions in the 1984 Act, namely: (313 – 316) are applicable to foreign companies.

[238] For the simple reason advanced by Mr Hanna, namely: that the view of Dr Arab is entirely contradictory to the natural wording of article 313, I am of the view that the position of Mr Hanna must be preferred.

[239] I consider the position advanced by Dr Arab is clearly contradictory to the natural wording of article 313.

[240] His opinion runs counter to the clear meaning of "this law" in the context of this provision. It is clear that this law refers to the 1984 Companies Act as a whole. It cannot sensibly mean anything else. A further consideration which supports this construction is the proviso in the article which provides that "the provision of this law shall apply to foreign companies … with the exception of the provisions relating to the incorporation of companies". This qualification of the application of the law to foreign companies can only sensibly be understood if "this law" applies to the provisions of the 1984 Companies Act as a whole. If the words "this law" did not relate to the whole content of the 1984 Act, there would be no need for the proviso. The construction placed upon this article by Dr Arab does not explain the necessity for the proviso. The proviso simply makes no sense if as contended for by Dr Arab "this law" refers only to the section of the Companies Act headed "foreign law". None of the articles within that section, being articles 313-316 of the 1984 Companies Act, relate to the incorporation of a company.

[241] The intention of the legislator simply cannot have been as asserted by Dr Arab. The natural meaning of the words cannot bear the interpretation placed upon on it by Dr Arab. Nothing advanced by Mr Sandison is of any assistance in countering what is the obvious

natural meaning of article 313. In respect to this issue I prefer the evidence of Mr Hanna. Accordingly, articles 111 and 112 are applicable to the defenders.

[242] The argument with respect to the issue of prescription turned on this question: would the liability of the defenders under UAE Company Law, earlier discussed, fall to be regarded as a tortious or a contractual liability?

[243] Mr Hanna in his report explained why this would be a contractual liability. Mr Currie directed the court's attention to Mr Hanna's evidence where he described the liability of directors' managers as "joint" or "dual" liability along with that of the company. I believe Mr Currie was correct in asserting that Dr Arab did not deal with the issue in the course of his report. Turning to his oral evidence he did deal with the issue and made certain concessions in his cross-examination as detailed by Mr Currie in his submissions.

[244] In light of these concessions I believe it is clear that Mr Hanna's evidence should be preferred in respect of this particular matter. It appeared to me that there was no evidence to counter the position advanced by Mr Hanna on this matter. Thus the claim in terms of the 1984 Company Law is at worst governed by the 10 year limitation period and is accordingly not time barred in terms of UAE law. So far as a claim based on tort the issue of time bar cannot as a matter of UAE law be decided until evidence has been heard in respect to the issue of when the pursuer became aware of the tort and the identity of the person who committed it.

**Conclusion**

[245] For the foregoing reasons I find that the pursuer has proved that its claim against the defenders is first a sound claim as a matter of UAE law and second is not, so far as the claim under the 1984 Company Law is concerned, time barred in terms of UAE law.

**Disposal**

[246] As regards further procedure, it is clear that further enquiry will be necessary. I have thus had the matter put out by order in order to hear further discussion on this issue. I reserve all questions of expenses.

**Addendum**

[247] When this case first came before me, shortly before proof, I sought to focus the issues by having parties submit a joint list of questions. It did not prove possible for parties to agree such a list of questions and each party submitted a separate list of questions, which in the case of the pursuer, was a very lengthy list of questions.

[248] Following proof and in light of the submissions which were made to me I consider that the areas of agreement and the issues in the case are as I have identified in the body of my opinion. These issues broadly matched the defenders' short list of questions. So far as the pursuer's list of questions I believe, in the body of my opinion, I have answered these questions with the exception of the following:

Question 1: Do parties to a contract have to act in bona fide? Does article 265.2 of the Civil code so provide?

Answer: Yes. The obligation to perform in good faith is contained in article 246(1) of the Civil Code. Parties were agreed that the foregoing was the position.

Question 3: Does article 246 of the Civil Code provide that there is imposed on contracting parties an obligation to perform contractual obligations "in a manner consistent with the requirements of good faith"?

Answer: My answer to the above question is yes. Parties were agreed that the answer to this question was yes.

Question 5: What are the nature and scope of the duties which were imposed on RMJM as agent? In particular:

5.1: In general, is the basic implied power of an agent restricted to that of "management and safekeeping" of the thing entrusted to him? Is that basic implied power to be found in article 928 of the Civil Code? Is that basic implied power applicable unless there is contrary provision in the agency agreement/appointment itself? If so, do the terms of the SPA exclude or alter the foregoing basic implied power?

Answer: Parties were agreed that the answer to the above question was yes. The terms of the SPA do not exclude or alter the basic implied power.

5.2: In what circumstances might an agent be permitted to exceed the implied power of management and safekeeping? In particular, is an agent only permitted to exceed the implied power in a manner more beneficial to his principal? Is that exception to be found in article 931 of the Civil Code?

Answer: The parties were agreed that the answer to that question was that an agent is only permitted to exceed the implied power in a manner more beneficial to his principal. That exception is found in article 931 of the Civil Code.

5.3: Does article 937 of the Civil Code provide (in short) that "moneys received by an agent on behalf of his principal shall be deemed to be (in the nature of) a deposit"? Similarly, does article 309 of the Civil Code provide that if a person is holding something in trust and fails to preserve the item held in trust, or deprives its rightful owner of it, he is to indemnify the owner in rem or by value, as the case may be? If so, having regard to the terms of the SPA, was such an obligation imposed

on RMJM in relation to the moneys which it was to collect in terms of clause 10 of the SPA?

Answer: The terms of article 309 were not in dispute. I have answered the matter in respect to clause 10 of the SPA in the body of my opinion.

In respect to article 309 the defenders' position was that it was not accepted that it was relevant in relation to agency. It was submitted that if the SPA created an agency relationship, then the duties alleged would arise, but under the agency provisions of the Civil Code. Given the views that I have expressed at paragraph 221 I am of the view that article 309 is applicable and imposes a duty on RMJM.

Question 8: Is a contract of deposit a contract in terms of which the depositor authorises another person (the depositary) to hold something which he owns and which the depositary commits to preserve and return in kind? Does article 962 of the Civil Code so provide?

Answer: My answer to the above question is yes. Parties were agreed that the answer to this question was yes.

Question 11: Does article 404 of the UAE criminal code provide that a co-owner in joint property, and a person who receives something for the benefit of its owner, will be deemed to be an agent?

Answer: The pursuer answers this question yes. The defenders in their submissions accept that the answer is yes but subject to this proviso that the article is only relevant for criminal purposes and not in respect to the issue of civil liability.

Mr Hanna in his report at paragraph 2.8 refers to this article and says that he finds it of assistance in reaching a view that the perpetrator of such an

offence in terms of this article would as a matter of civil law have to return the object. I did not understand Dr Arab to comment on this matter. I am unable to see any reasons as to why this article, although part of the UAE's criminal law, could not be used as an aid in arriving at a conclusion that as a matter of civil law the perpetrator would be treated as an agent and would be under an obligation to return the object.

Question 12: Does a person who so appropriates or uses money deposited with them on an agency basis commit a criminal offence punishable by law?

Answer: The pursuer answers this question yes. The defender says the answer is fact sensitive. On the evidence of Mr Hanna the answer to this question is yes. There is no evidence countering that.

Question 13: Are the duties of a depositary or trustee to be regarded as the equivalent of fiduciary duties in common law systems?

Answer: I have held that an agency relationship is created in terms of the SPA. The parties' experts are agreed as to what duties, so far as material to the present case, are imposed on an agent in such circumstances.

[249] The evidence regarding the equivalence of such duties to fiduciary duties in a common law system came from Mr Hanna. Mr Hanna accepted that the above duties were a rough equivalent to fiduciary duties in Scots law.

[250] Against that background Mr Sandison submitted that the court should not seek to analyse the rules of the law in the UAE by drawing such loose analogies. Further he submitted these concepts have no part to play in any of the grounds of liability that might apply to the defenders in terms of UAE law.

[251] I am not convinced that the use of this concept will be of assistance. However, the evidence from Mr Hanna is that they are roughly equivalent and I believe I am entitled to hold in these circumstances that they are roughly equivalent.