FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 22
CA46/16

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT
delivered by LORD DRUMMOND YOUNG

in the Reclaiming Motion

in the cause

TED JACOB ENGINEERING GROUP INC

Pursuer and Respondent

against

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

Defenders and Reclaimers

Pursuer and Respondent: Currie QC, Thomson QC; Burness Paull LLP
Defenders and Reclaimers: Sandison QC, O'Brien; Gilson Gray LLP

5 April 2019

The background to the parties' dispute

[1] The pursuer is a company incorporated in California. It carries on business as a consulting engineering firm, and has its headquarters in Oakland, California. On 20 September 2011 it entered into a Sale and Purchase Agreement with Robert Matthew, Johnson-Marshall and Partners (generally referred to as "RMJM"), a Scottish partnership. RMJM had extensive business interests as architects and consulting engineers. In particular,

part of their business consisted of providing architectural and engineering services in Dubai, in the United Arab Emirates. Under the Sale and Purchase Agreement, the pursuer purchased RMJM's engineering business in Dubai. The Sale and Purchase Agreement was subject to the law of the United Arab Emirates as in force in Dubai.

[2] In order to operate in Dubai, however, a foreign entity required to hold licences granted by the local authorities. At the time when the Sale and Purchase Agreement was concluded, the pursuer did not have any such licence. Consequently the Sale and Purchase Agreement contemplated that RMJM would remain as the contracting party on existing projects, but that the pursuer would perform the engineering services on those projects until such time as the necessary licences have been obtained. Because RMJM remained the contracting party, the Agreement made express provision for sums paid by clients to the pursuer during the period before licences were obtained.

[3] Following the concluding of the Sale and Purchase Agreement, disputes arose between the pursuer and RMJM as to the allocation between the parties of certain payments received from clients. Those disputes were resolved through a further agreement between RMJM and the pursuer, referred to as the Closing Agreement, dated 16 August 2012. Like the Sale and Purchase Agreement, the Closing Agreement was subject to the law of the United Arab Emirates as in force in Dubai. The dispute between the parties turns initially on the interpretation of the Sale and Purchase Agreement and the Closing Agreement and the application of the provisions of those agreements to the payments received by RMJM from clients, but for present purposes the critical question is the liability of the defenders to the pursuer to account for the sums so received. These issues require consideration of the law of agency and deposit in the UAE and the applicability of certain provisions in the

principal statute of the UAE governing companies and partnerships, the Companies Law 1984. All of the foregoing are mattes governed by UAE law.

[4] The pursuer contends that RMJM collected substantial sums which were ultimately due to the pursuer under the contractual arrangements but failed to remit those sums to the pursuer as required by the foregoing provisions. Instead, it is said, RMJM made use of the amounts collected for its own purposes, and concealed its activities from the pursuer. In those circumstances, the pursuer avers that, as a matter of UAE law, when RMJM collected sums from clients that fell within the foregoing contractual arrangements it acted as an agent for the pursuer, and that in consequence RMJM held the monies so collected as a depositary on behalf of the pursuer. When it appropriated those monies for its own purposes, RMJM became liable to restore the amount so taken to the pursuer.

[5] At the time when the Sale and Purchase Agreement was concluded, the partners of RMJM were two companies, both incorporated in Cyprus: first, RMJM Middle East Ltd, and secondly, RMJM Overseas Ltd. The defenders were the directors of each of those companies. The pursuer avers that as a consequence of those arrangements the defenders were the natural persons responsible for the wrongful acts of RMJM when it acted in breach of its obligations as a depositary, once again as a matter of UAE law. Consequently it is alleged that the defenders are liable to make payment to the pursuer of the sums wrongfully appropriated by RMJM. The present action has been brought in order to enforce that claim. The pursuer seeks payment of £7,752,078.32, with interest, which is said to be the amount of money wrongfully appropriated in breach of RMJM's obligations as depositary.

[6] The action proceeded to a preliminary proof on the applicable law of Dubai, an expression which obviously signifies the law of the United Arab Emirates in force in the Emirate of Dubai. That is the system of law that governed both the original sale of RMJM's

engineering business in Dubai to the pursuer, in accordance with the Sale and Purchase Agreement, and the subsequent arrangements concluded between RMJM and the pursuer, including the Closing Agreement. It is also the system of law that governs the possible liability of the defenders described in the preceding paragraph, namely that they were the natural persons who were responsible for RMJM's breach of its obligations as a depositary under the contractual arrangements in force between RMJM and the pursuer. The precise issue at the preliminary proof is not wholly clear from the interlocutors of the commercial court or the opinion of the commercial judge. It appears, however, that the purpose of the exercise was to determine the provisions of UAE law that were applicable to the case disclosed on record by the pursuer's averments, and in so doing to decide whether on the proper application of UAE law those averments disclose a relevant case, on the assumption that the averments on the merits (as against on UAE law) are established by evidence.

[7] At the preliminary proof evidence was led from two expert witnesses on the law in force in Dubai, Mr Elias Wadih Hanna for the pursuer and Dr Hassan Arab for the defenders. At the proof Mr Hanna's status as an expert was challenged by counsel for the defenders, but that challenge was rejected by the commercial judge, and his decision on this matter is not now disputed. The commercial judge noted that Mr Hanna was a very experienced practitioner in the law of the UAE, having practised in Dubai for 42 years. He also observed that, on seeing and hearing Mr Hanna giving evidence, the fact that he was eminently qualified to give expert evidence was quite clear. We would add that we have found Mr Hanna's opinion of the law, as disclosed in two expert reports and the transcript of his evidence, to be clear and coherent, in a manner that we discuss subsequently.

[8] Following that proof, the commercial judge issued a lengthy opinion in which he answered the various questions about UAE law that had been raised by the parties. His

answers were generally in accordance with the case put forward by the pursuer, although obviously the application of the UAE law as so found must await a proof on the merits, in the absence of any alternative disposal. The defenders have now reclaimed against the commercial judge's decision on two specific grounds. First, it is contended that under UAE law the defenders would not be treated as directors of RMJM, and therefore could not be personally liable under UAE law for any wrongs committed by RMJM. Secondly, it is contended that the commercial judge erred in finding that articles 111 and 112 of the 1984 UAE Companies Law applied to RMJM by virtue of article 113 of that law; the defenders state that the commercial judge misunderstood the overall scheme of the 1984 Law, and ought accordingly to have held that articles 111 and 112 did not apply to RMJM.

[9] We propose to set out the basis of the pursuer's case against the defenders, and thereafter to summarize the evidence that was led before the commercial judge and the commercial judge's decision on that evidence. Before doing so, however, it is necessary to say something about the powers of an appellate court in dealing with questions of expert evidence, and the proper approach which a court should take in relation to evidence of foreign law.

Powers of an appellate court in relation to expert evidence

[10] The pursuer's written argument referred to the familiar decisions in *McGraddie* v *McGraddie,* 2014 SC (UKSC) 12; 2015 SLT 69; [2013] UK SC 58, *Henderson* v *Foxworth Investments Ltd*, 2014 SC (UKSC) 203; 2014 SLT 775; [2014] UKSC 41, and *Carlyle* v *Royal Bank of Scotland PLC*, 2015 SLT 206; [2014] UKSC 13. On the basis of those cases, it was said that the Inner House should not interfere with the commercial judge's findings on the law of the UAE. Those cases, however, are essentially concerned with the first instance judge's

findings as to credibility, reliability and the primary facts: what the persons involved in the case actually did or said, or what happened to them. Findings of primary facts should be contrasted with inferences drawn from such findings. In relation to inferences, it is well established that an appellate court can assess the evidence effectively, on the basis of the written record of such evidence, and should not hesitate from doing so: see *Benmax* v *Austin Motor Co Ltd*, [1955] AC 370, and more recently *AW* v *Greater Glasgow Health Board*, [2017] CSIH 58, at paragraphs [44]-[45]. Expert evidence is not evidence of primary facts, but is rather an expression of opinion about the analysis of those facts according to the specialist knowledge and skill of the expert; as such, it should be treated as inferential in nature, and an appellate court is fully entitled to assess such evidence and if so advised to come to a different conclusion from the judge at first instance: *AW* v *Greater Glasgow Health Board*, at paragraphs [55]-[57].

[11] That case dealt with medical evidence in the context of alleged negligence. Evidence of foreign law was dealt with more recently in *DNO Oman Ltd* v *Clouston*, [2019] CSIH 1, where the Lord President, giving the opinion of the Court, stated the law as follows (at paragraph [62]):

> "Foreign law must be proved as a matter of fact. This often means that parties will adduce experts in the foreign law to explain the relevant rules and principles. The task of ascertaining foreign law remains that of the court. It will seldom be a question of simply preferring one expert as more reliable than another as if he were an eyewitness speaking to events which he had observed. Especially when the foreign law is in codified form, the court will have to look at the written materials and decide for itself, if necessary with the assistance of experts, what the law has been proved to be (*Kolbin & Sons* v *Kinnear & Co*, 1930 SC 724, LJC (Alness) at 737-8, Lord Ormidale at 748-9; Lord Anderson and 753). As it was put in *Paraksho* v *Singh*, [1968] P 233 (Cairns J at 250, cited in *King* v *Brandywine Insurance Co*, [2005] 1 Lloyd's Rep 655, Waller LJ at para 66) 'the question of foreign law, although a question of fact, is a question of fact of a peculiar kind'. The same considerations as apply to a review of fact, and the advantages which a first instance judge has from having heard and seen the witnesses testify, do not apply with quite the same force. In this case, in any event, the commercial judge does not appear to have taken account of

> the testimony of the experts, other than to say erroneously that neither had departed from the content of his reports. The judge relied exclusively upon an analysis of the expert reports. The appellate court is at no disadvantage in carrying out the same exercise to see if the judge has correctly understood their import."

[12] Although the commercial judge in the present case did take account of the testimony of the two expert witnesses, we consider that a similar approach should be taken on appeal. The question is what the relevant foreign law is, and that is an issue that must ultimately be decided by the court, not the experts. In the words of LJC Alness in *Kolbin & Sons* v *Kinnear & Co*, *supra*, at 737:

> "I think the same 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.… With that assistance, however, I think the Court may look at the law itself, as part of the evidence, and reach a conclusion upon it. I do not apprehend that, merely because the expert evidence is conflicting… the Court must necessarily throw up its hands in despair, and refuse to attempt to solve the problem submitted to it".

This recognizes that the function of the experts is not to decide the foreign law but to assist the court in the exercise of its function of deciding the case before it. If there is no conflict between the experts, at least in the absence of a manifest absurdity, the court will normally follow the expert opinion. If the experts conflict, however, or if there is a point of dubiety or uncertainty in their evidence, the court must examine the experts' views and come to a conclusion as to what the foreign law is. That applies not merely to foreign law in the abstract, but also to the correct application of the principles of foreign law to the facts of the case under consideration.

What a court does when it determines and applies foreign law

[13] As the cases cited in the last two paragraphs make clear, the fundamental task for the court is determining the relevant principles of foreign law and their application to the facts

of the case. In doing so the court requires to consider the expert evidence that has been led, in the form of reports from the parties' experts and oral evidence. The Court may obviously have regard to the primary sources of foreign law that are made available to it. This is particularly important in cases where foreign legislative texts are founded on, whether in the form of a code covering a wide area of law or a statute covering a more specific area. Such material will typically form an important part of the evidence of foreign law. This is particularly true of a legal system that has been codified generally, as with the French and German legal systems, which are the source of the most influential codes found today. In the present case, the evidence disclosed that the legal system of the UAE is based in large measure on the Egyptian codes, which are in turn based on the French codes. Consequently codified provisions of the law of the UAE must be examined and applied by a Scottish court with the assistance of the expert evidence that has been led.

[14] In some cases, even in the absence of general codification, a particular area of the law is codified; an example of this is found in the company law of the United Kingdom, where successive Companies Acts have taken the form of a legislative code governing the formation, operation and winding up of companies. Even in such a case, of course, elements of common law are important. For example, the notion of separate legal personality is a product of the common law, and many of the other fundamental principles are derived from the common law rather than the Companies Acts themselves. In the present case, much of the evidence on the law of the UAE was founded on Federal Law 8 of 1984, the Companies Law as dealing with Commercial Companies, and the parties' submissions founded largely on the terms of that Law. The construction of the Law and its application to the facts of the case are matters for the court.

[15] The construction of legislation is obviously one of the most important tasks performed by any court. That involves determining the meaning of a text, and the wording used is obviously of fundamental importance. Nevertheless, it is difficult to understand how the task of construing a text could be performed in any jurisdiction without having regard to the underlying objectives of the legislation – its primary objectives rather than niceties of detailed wording. The statutory wording must be construed so as to give effect to the main purposes of the legislation and to ensure that so far as possible those purposes are achieved. That will normally involve having regard to the wider structure of the statute in question, or to the structure of the part of a legislative code that is in issue. Likewise, it is difficult to understand how the task of construing a statute or provision of the code can be achieved in any legal system without regard to the context in which legislation was enacted and in which it operates. In almost any field of intellectual inquiry – for example history or science – context is regarded as an essential tool for a proper understanding of what is being said. Law is no different in this respect; the context of legislation, or indeed any legal text, is critical to its proper interpretation. One of the important functions of expert evidence is to explain the context in which a legislative text operates. A purposive and contextual approach to construction will accordingly be appropriate in any case, at least in the absence of evidence that a particular legal system refuses to follow in such an approach. It should be added that a similar approach will normally be appropriate to the construction of contracts and other legal text created by the parties themselves.

[16] Case law will also frequently be an important aspect of foreign law, even in a codified system. The Scottish court is likely to depend on expert witnesses to make it aware of any relevant cases, and to provide a commentary on those cases and their potential implications for the problem under consideration. The task of the Scottish court is to

determine how a foreign court would be likely to decide the issues of law that are relevant to the particular facts of the case before it. Scottish judges will be familiar with general principles of legal reasoning, and it can be assumed that these will apply to any legal system. Judges will likewise be familiar with the general structures of the law: the tasks that it performs, and the functions of typical institutions and rules. Especially in the commercial field, these do not vary greatly from one legal system to another. In the modern world, the basic forms of contract and business organisation are fairly standard. A Scots lawyer can understand the structures and function of a company based in France or Delaware, or a contract concluded under the law of Germany or the UAE. Even English law and the systems based on English law are relatively easy to understand in the commercial field, notwithstanding the significance of factors such as the division between law and equity and the reluctance to recognize the importance of good faith in commercial dealings.

[17] The present case concerns the law of the UAE as applied in the Emirate of Dubai. The legal system applied in that jurisdiction is largely codified. The relevant codes are derived from the codes in force in Kuwait and Jordan, which in turn are based on the Egyptian codes. The Egyptian codes are based on the French codes, including the *Code civile* and *Code commercial*. Thus the law of the UAE is civilian in nature. It is not difficult for a Scots lawyer to understand the legal concepts and rules of another civilian system. Expert evidence is obviously important in directing the court to the existing state of the law, and in particular any relevant case law. Interpreting the law, however, and most importantly determining how the law applies to a particular factual situation, are not matters that a Scottish court should find difficult. In this connection it may be important to have regard to the functional equivalence of institutions in different legal systems. Legal concepts can be given different names, and rules will obviously be differently expressed, but if they function

in essentially the same way, to achieve the same underlying purposes, they can be treated as equivalent and interpreted and applied accordingly. This may be an important tool. For example, in the present case the use of the contract of deposit and principles of good faith in the law of the UAE are functionally equivalent to the use of fiduciary duties and implied trusts in Scots law; in both systems, those institutions ensure that if a fund is paid to a person such as an agent to be used for the benefit of another person, such as the agent's principal, the fund is effectively used for the benefit of that person. The importance of that result for a properly functioning system of commercial law is perhaps self-evident.

The pursuer's case against the defenders

[18] The pursuer's case against the defenders proceeds against the background of the sale of RMJM's engineering business in Dubai to the pursuer and the requirement of Dubai law that any person carrying on such a business must be duly licensed by the Dubai regulatory authority. Under the agreement the pursuer and RMJM, the business, in the sense of the work to be performed under both existing and new contracts, was to be transferred to the pursuer immediately. Because of the requirement of a licence, however, it was impossible for the pursuer to become a contracting party until such time as it obtained a licence from the Dubai regulatory authority. Consequently, so far as clients and the regulatory authority were concerned the business continued to be carried on by RMJM, and all payments due by clients for work performed under existing contracts or contracts concluded during a transitional period required to be made to RMJM as the contracting party, and not to the pursuer. Because the work under those contracts was performed by the pursuer, however, RMJM required to pay the pursuer the remuneration for that work; that was the manner in

which the immediate benefit of the contract for the sale of the business was passed from the seller to the purchaser who actually carried out the work.

[19] The sums received by RMJM or any associated entity from clients were dealt with by clause 10.3 of the Sale and Purchase Agreement. This provides as follows:

> "Any sum received by the Vendor [RMJM] or any member of the Vendor's Group to the extent that it relates to [certain specified services rendered by the petitioners] shall be received by the Vendor or relevant member of the Vendor's Group for and on behalf of the Purchaser [the pursuer] and shall be accounted for and paid by the Vendor to the Purchaser in full within 20 Business Days of receipt".

The important feature of that wording is that payments made to RMJM or associated entities from clients should be received "for and on behalf of" the pursuer and should be "accounted for and paid to" the pursuer.

[20] As already noted, following the concluding of the Sale and Purchase Agreement disputes arose between the pursuer and RMJM as to the allocation between them of certain of the payments received from clients. Efforts were made to resolve the dispute, and in consequence the pursuer and RMJM entered into a further agreement, the Closing Agreement, dated 16 August 2012. Like the Sale and Purchase Agreement, the Closing Agreement was subject to the law of the United Arab Emirates as in force in Dubai. This agreement made provision for payments made by clients in clause 9, which was in the following terms:

> "(i) Not later than Completion, the Vendor [RMJM] 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 which the Vendor and the Purchaser [the pursuer] has entered into a Sub- Contract (the 'Joint Account') with the HSBC branch in Dubai.…
>
> (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…) 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".

At a general level, the foregoing provisions oblige RMJM to transfer payments received by it for certain contracts where the work was carried out by the pursuer into a specially designated bank account. The use of a special purpose bank account is, of course, a device that is used to ring-fence funds that are held for the benefit of another party. There is no difficulty in understanding the concept involved, which is very familiar in Scottish commercial practice.

[21] The pursuer's case as pled on record is that RMJM received substantial sums of money under contracts with clients that fell within the foregoing provisions of the Sale and Purchase Agreement and the Completion Agreement. RMJM failed to pay sums so received to the pursuer, as it was obliged to under those agreements, but instead made use of the funds received for its own purposes. It is further averred that RMJM concealed those activities from the pursuer.

[22] The arrangements governing the funds received by RMJM from clients were subject to UAE law. The pursuer avers that, on a proper construction of the Sale and Purchase Agreement, a relationship of principal and agent was created between the pursuer and RMJM in respect of monies received by RMJM to which clause 10.3 applied. The result of that was that RMJM as agent held the monies to which clause 10.3 applied on deposit for the pursuer. It accordingly owed the pursuer the duties of a depositary under UAE law, which

were analogous to the duties of a trustee in Scots law. These included keeping the deposited property safe, returning it to the principal on demand, accounting for any profits to the principal and restoring to the principal any property that perished in its hands as a result of wrongful act or error. The pursuer avers that RMJM breached all of the foregoing duties by appropriating for its own purposes monies held on deposit for the pursuer.

[23] So far as the defenders are concerned, the pursuer avers that they were the natural persons responsible for determining the conduct of RMJM, and that they were accordingly responsible for determining that RMJM should act in breach of the duties which it owed to the pursuer as a depositary. The consequence, it is said, is that the defenders are personally liable to the pursuer for the loss of monies that had been held on deposit for the pursuer by RMJM. That gave rise to personal liability in terms of articles 304 and 305 of the UAE Code of Civil Transactions, which provide that when a person takes what belongs to another person he must return it to the owner in its original condition. Personal liability would arise under articles 304 and 305 because the pursuer averred and offered to prove that it was the defenders personally who controlled what happened to the monies belonging to the pursuer that were held by RMJM as a depositary. Such liability is essentially contractual in nature. In addition, the pursuer averred a case that the defenders' conduct was fraudulent, which permitted a claim against the defenders in delict or tort rather than contract.

[24] An alternative route to personal liability on the part of the defenders was averred, based on the companies legislation in force in the UAE. Under the Companies Law of the UAE, personal liability was imposed on directors of a company such as the defenders. Although RMJM was a Scottish partnership whose partners were Cypriot companies, the pursuer averred that UAE company law applied with equal force to such arrangements as it would to indigenous corporations. This turned on the detailed construction of certain

provisions of the Companies Law, in particular article 313, taken together with articles 111 and 112.

The commercial judge's decision

[25] Following that proof, the commercial judge issued a lengthy opinion in which he answered the various questions about UAE law that had been raised by the parties. His answers were generally in accordance with the case put forward by the pursuer, although obviously the application of the UAE law as so found to the facts must await a proof on the merits, in the absence of any alternative disposal. His conclusion was that that the pursuer had proved that its claim against the defenders was sound as a matter of UAE law and that, so far as the claim was made under the Companies Law of 1984, it was not time-barred in terms of UAE law.

[26] In summary, the commercial judge's findings were as follows. The contract between RMJM and the pursuer required to be construed in terms of the Civil Code, and in particular the principles of construction found in articles 258, 259, 265 and 266. The rules of construction stated in those articles are not greatly different from those in use in Scotland. The criterion for construction of contracts is "intentions and meanings and not words and form". The exercise of construction goes beyond the literal meaning of words, and in construing a transaction guidance may be sought "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". The terms of a clause in a contract should be construed in the context of the contract as a whole. On the foregoing basis, clause 10.3 was plainly intended to create an agency relationship, notwithstanding the absence of any express provision to that effect. Consequently sums received by RMJM falling within clause 10.3 were only held by RMJM

as the pursuer's agent. The fact that RMJM and the pursuer also acted as contractor and sub-contractor under the Sale and Purchase Agreement (in relation to work done for clients) was irrelevant to the relationship created by that clause. In reaching this conclusion the commercial judge considered the meaning of clause 10.3 in the context of the Sale and Purchase Agreement, read as a whole, and in the context of the parties' commercial dealings. In particular, monies falling within the ambit of clause 10.3 were monies to which the pursuer was ultimately entitled under the Agreement, and to which RMJM was not entitled. Furthermore, the phrase "for and behalf of" only made sense in the context of an agency relationship.

[27] Once it was established that an agency relationship had been created, the consequences were a matter of agreement between the experts. RMJM acting as an agent held the monies to which clause 10.3 applied on deposit. It thus owed the pursuer the duties of a depositary, broadly similar to those of a trustee; those included 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 perished in its hands as a result of its wrongful act or error.

[28] The commercial judge further considered arguments presented by the pursuer to the effect that the actings of RMJM and the defenders amounted to fraudulent conversion as a matter of UAE law. This matter is not directly relevant to the reclaiming motion. The commercial judge held, however, that "fraudulent conversion", although not a term of art under the law of the UAE, indicated embezzlement or appropriation of sums deposited. This amounted to what under UAE law is considered fraud. To the extent that Dr Arab, the defenders' expert, had contended that the term "fraudulent conversion" was not found in

UAE law, that was essentially a semantic point; what Mr Hanna understood by the term was reasonably clear, and amounted to fraud.

[29] The commercial judge held that the defenders bore personal liability for the wrongdoing of RMJM under articles 304 and 305 of the Civil Code of the UAE, in the manner described in the preceding paragraph. These covered taking what belong to others unlawfully, without the consent of those others, or by an aggressive act or trespass. The defenders had power over the bank account containing the funds collected from customers by RMJM, and were accordingly responsible for compliance with the terms of the Sale and Purchase Agreement, and in particular the terms of clause 13.5 in respect of the funds collected. RMJM was a corporate entity, and was accordingly run and represented by individual natural persons, in the form of the defenders. Thus if the pursuer's averments of fact were established the defenders had to bear the consequences of their fraudulent and unlawful actions and their breaches of the contractual undertakings of the corporate body which they represented or acted for. We observe that this area of dispute is based on actions that are delictual or tortious in nature: the misuse of funds held by RMJM as agents to be applied for specified purposes. Nevertheless, acts of this nature can also amount to a breach of contract.

[30] The next matter of dispute was whether the defenders were personally liable for the actings of RMJM under the company law of the UAE. For the purposes of UAE company law RMJM were a branch of a foreign company. The dispute between the parties' experts related to whether provisions of the Companies Law of 1984 (articles 111, 112 and 237) which the pursuer claimed rendered the defenders responsible for the actions of RMJM in fact applied to RMJM as a foreign company. The parties' experts disagreed on this matter; Dr Arab asserted that the only provisions of the Companies Law that were applicable to

RMJM were those relating to foreign branches within the UAE; these comprised articles 327-332 of the Companies Law 2015, corresponding to articles 313-316 of the Companies Law 1984, and did not include articles 111, 112 and 237, the provisions founded on by Mr Hanna. In response, Mr Hanna stated that article 313 of the 1984 Law (article 327 of the 2015 Law) was contrary to Dr Arab's position; article 313 provided that "the provisions of this law apply to foreign companies which practise their main activity in the State or have their main office therein, with the exception of the provisions relating to the incorporation of companies". That governed the present case.

[31] The commercial judge preferred the views of Mr Hanna, on the basis that Dr Arab's position was contrary to their natural meaning of article 313. The expression "this law" referred to the Companies Law 1984 as a whole; it could not sensibly mean anything else. The exception for the provisions relating to the incorporation of companies could only sensibly be understood if the expression "this law" applied to the whole Companies Law; otherwise there was no point in the proviso.

[32] So far as prescription was concerned, the commercial judge held that the application of the principle depended on whether the liability of the defenders should be regarded as a tortious or a contractual liability. Mr Hanna had given evidence that it would be regarded as a contractual liability. Dr Arab had not considered this matter in his report. The commercial judge accordingly preferred the views of Mr Hanna on prescription. This had the effect that any claim under the Companies Law 1984 was subject to a 10-year prescriptive period and was therefore not time-barred in terms of UAE law.

The issues in the reclaiming motion

[33] The defenders have now reclaimed against the commercial judge's decision on two

specific grounds, which are more restricted than the arguments considered in the commercial court. To some extent the two grounds are related. The issues raised by these grounds are important to the pursuer's case against the defenders; if the defenders are successful on either of them the pursuer will be unable to rely on articles 111 and 112 of the Companies Law 1984 in the manner outlined at paragraphs [30]-[31] above. This has consequences for the law of prescription, in the manner indicated in paragraph [32].

[34] The grounds of appeal are as follows. First, it is contended that under UAE law the defenders would not be treated as directors of RMJM, and therefore could not be personally liable under UAE law for any wrongs committed by RMJM. The defenders were directors of Cypriot companies which were the partners of RMJM, a Scottish partnership. Although they might incur personal liability under the law of the UAE if they personally committed a wrongful act, they would not be treated as directors of RMJM for the purposes of the rules of UAE law which were said by the pursuer to impose personal liability on the directors of corporations. Secondly, the defenders contend that the commercial judge erred in finding that articles 111 and 112 of the 1984 UAE Companies Law applied to RMJM by virtue of article 313 of that Law; the commercial judge misunderstood the overall scheme of the 1984 Law, and ought accordingly to have held that articles 111 and 112 did not apply to RMJM. We propose to deal with those two questions separately.

Personal liability of the defenders for wrongs committed by RMJM: relevance of the defenders' status as directors of Cypriot companies

The evidence of UAE law

[35] The commercial judge states (at paragraph [62] of his opinion) that certain aspects of UAE law had been agreed between the parties' experts. One of those related to the

defenders' status as directors of a Cypriot company that was a partner of RMJM. The commercial judge summarized what he considered to be the experts' agreement in the following terms:

> "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".

Reference was made to passages in the experts' reports: paragraph 6.4 of Mr Hanna's first report and, although the reference is not wholly clear, part (8) of Dr Arab's report, in particular at paragraph 29. Counsel for the defenders challenged the proposition that any such agreement had been reached. We think that that is strictly speaking correct on a proper analysis of part (8) of Dr Arab's report, which contains paragraph 29. That part of his report is concerned not with the position of the defenders as directors of the Cypriot companies but rather with the question of how UAE law would categorize RMJM for the purposes of the application of the law dealing with responsibility for the acts of business organisations. In other words, Dr Arab was dealing with the status of RMJM in UAE law, rather than the responsibility of the defenders. Despite this, however, we are of opinion that, when the relevant evidence is properly considered, the statement of law expressed by the commercial judge is correct. This applies in particular to the evidence of Mr Hanna, which is generally clear and coherent, and was moreover found reliable by the commercial judge.

The evidence of Mr Hanna

[36] Mr Hanna's evidence on this matter is found at paragraphs 6-6.4 of his first report. Before setting out that evidence, however, we should note the legal background described in earlier parts of that report. First, in part 2 of the report Mr Hanna deals with the significance

of clause 10.3 of the Sale and Purchase Agreement, and in particular the use of the words "for and on behalf of" in that clause. He considered that the clause, and in particular the words "for and on behalf of", created a relationship of principal and agent, as the relationship fitted the definition of "agency" in article 924 of the UAE Code of Commercial Transactions: "a contract whereby a principal (or appointer) appoints another in his [place and stead] for a lawful and known act". We note that such a concept of agency is not greatly different from that in use in Scotland, although Scots law perhaps gives greater scope to implied agency relationships. Thereafter, RMJM had defaulted on its obligation to open a joint bank account and to put arrangements into place whereby sums in the account were paid to the pursuer. RMJM's own account was controlled directly or indirectly by the defenders. Instead of safe-keeping the amounts received from clients and paying them to the pursuer, "RMJM appropriated the funds unlawfully by converting them to other accounts in settlement of debts it owed to other parties or transmitting them to other accounts of RMJM or its subsidiaries". Furthermore, disbursements were not made in the manner specified in clause 9 of the Closing Agreement.

[37] Article 937 of the UAE Code of Commercial Transactions provided that monies received by an agent on behalf of his principal should be deemed to be in the nature of a deposit. Mr Hanna was of opinion that that provision applied to the present case as monies, in the form of professional fees rightfully belonging to the pursuer, entered bank accounts managed and operated by the directors of RMJM's partner entities, or by otherwise authorized signatories of RMJM. Those monies came to be under the control and in the possession of RMJM. The law of the UAE governing deposit or custody was therefore applicable. Deposit was dealt with in articles 962-996 of the Code of Commercial Transactions. Under a contract of deposit, the depository is liable for the safe-keeping of the

deposit and for compensation if it is lost (article 966). The depository is obliged to return the deposit to the depositor on demand, together with benefits and fruits accrued thereon (articles 972-973). Once again, we observe that these provisions, at least in their practical effect, are not significantly different from the corresponding legal institutions in Scots law. In Scotland, when an agent receives sums due to his principal, the standard practice is to use a trust to hold those funds, generally through an appropriately designated bank account: recent discussion of such cases is found in an essay, "Trust, agency and *Lehman Brothers*", contained in "Nothing so Practical as a Good Theory", a collection of essays to mark the retirement of Professor George Gretton, ed Steven, Anderson and MacLeod (2017). Functionally, the Scottish trust, whether express or implied, operates in broadly the same way as deposit appears to operate in the law of the UAE according to Mr Hanna's evidence.

[38] Mr Hanna indicated that RMJM's actings with the funds deposited did not amount simply to a breach of contract but rather to conversion or fraudulent conversion. The result of that was that the party entrusted with keeping and delivering funds has to indemnify the depositor and compensate him for all loss and damage sustained (report, paragraph 2.7). Furthermore, under UAE law, in all matters relating to the performance of the parties' contract, a contracting party is obliged to act bona fide and to display "the honesty and trust which should prevail between the contracting parties according to the established custom in dealings": Code of Commercial Transactions, article 265.1; report, paragraph 3.2. The result is that a depositary becomes obliged to return the deposit on demand. That is vouched by decisions of the Dubai Supreme Court which are cited by Mr Hanna in his report.

[39] For present purposes, of course, the critical issue is the personal liability of the defenders for the acts of RMJM in the light of their position as directors of the Cypriot

companies which were the partners in RMJM. This matter was considered by Mr Hanna in part 6 of his report. The question to be answered is stated in the following terms:

> "It has been raised that the Defenders are not technically Directors of RMJM but rather Directors of its two owning legal entities. Does this reflect on their liability?"

Mr Hanna's answer begins as follows

> "6.1 If Mr Thompson and Mr Morrison were not acting in their capacity as Directors, they would have simply acted on the force of having full control over the RMJM bank account. It would be them – jointly or individually – who operated the accounts, received the TJEG funds and forwarded them either to settle RMJM payables to company creditors or to other bank accounts of RMJM or one or more of its subsidiaries.
>
> 6.2 In the premises, I would say that the Defenders, jointly or severally, had abused their powers and disposed of monies which were supposed to be entrusted and preserved in RMJM's account to the advantage of RMJM and/or its subsidiaries".

[40] The conclusion was expressed in the following terms:

> "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' commitment. It follows that the 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".

[41] In our opinion this account of the law of the UAE is strongly persuasive. Two general propositions emerge. First, if a person receives funds to hold and apply them for a specified purpose, the funds must be held and applied for that purpose, and should not be used to benefit the holder of the funds. This appears to us to be a matter of elementary good faith. Secondly, an artificial legal person such as a company or partnership has no mind of its own. Its knowledge of events and its intentions as to its actions must be those of the individuals in control of it. In our opinion it is obvious that any legal system that has regard

to commercial practicalities must be capable in appropriate circumstances of holding those individuals responsible for the acts of the artificial person. Otherwise dishonesty can be left without any sanction. This is not to suggest that the so-called corporate veil – the separate personality of the artificial legal person – should be disregarded on a general or undiscriminating basis. Nevertheless, adequate sanctions must be available to deal with acts of dishonesty – acts which are designed to deprive a person truly entitled to an asset of that asset or its proceeds. This principle is recognized in the company law of the United Kingdom. For example, where in the course of insolvency proceedings it is discovered that the business of a company has been carried on with intent to defraud creditors, the shareholders and directors will be personally liable for the creditors' loss: Insolvency Act 1986, section 213. Wrongful trading, in the sense of continuing to trade when a director knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, is covered by section 214 of the same Act. Misfeasance by directors attracts the sanctions found in section 212 of the Act. It would be remarkable if other legal systems did not adopt a similar approach, to prevent corporate structures from being used to deprive persons of what is rightfully theirs. What is at issue is not the detailed provisions of a statute or code, but fundamental principles of ethical behaviour which must be recognized by every legal system. It is accordingly not surprising that the individuals who are ultimately in control of a legal person, albeit qua directors of a company that is a partner in a partnership, should be liable for the misuse of funds by that legal person. That is the essential basis for Mr Hanna's evidence.

[42] In his evidence before the commercial judge, Mr Hanna commented on the foregoing parts of his report (at pages 326-329 of the appendix). He was asked to comment on the fact that the defenders were not technically directors of RMJM but rather directors of the Cypriot

companies that were partners in RMJM; in particular, he was asked whether, on that basis, provisions of UAE company law relating to directors would apply to the defenders. Mr Hanna replied that the trading operation in Dubai that had been carried on by RMJM was registered as a branch of a foreign company, the mother company being a Scottish partnership. The word used for "company" in Arabic covered not merely companies in the strict sense but partnerships, limited partnerships and other forms of corporation. The Dubai branch had no independent existence, and the Scottish company or partnership did business in Dubai through the branch. The partners were two Cypriot companies, but the corporate body itself, RMJM, was nevertheless run, managed and operated by the directors of the Cypriot companies. Those directors must therefore assume liability for their fault or their violation of the law. Thus in the present case it was necessary to pierce the veil of the Scottish partnership to discover who was actually running the operation. Those persons were the two directors of each of the Cypriot companies, the defenders. Those were the people who controlled the bank account where the misappropriation of funds took place. The defenders ran the account and gave instructions as to what was to be done with the money in the account and where it was to be sent. Consequently, Mr Hanna's position was that the directors of the Cypriot companies which were the partners and owners of the Scottish partnership should bear liability in UAE law for RMJM's misuse of the funds held on deposit.

The evidence of Dr Arab

[43] In his report, Dr Arab considered whether the defenders, as the natural persons alleged to have controlled RMJM, could be liable for breaches of contractual or agency duties owed by RMJM (question (7); paragraphs 21-23). He stated that a claim under a

contract of agency or deposit is contractual in nature and can only be brought against the contracting party; it therefore could not be made against the defenders unless what they personally did amounted to a tort (delict). In order for a claim to count as tortious in nature, it must be based on a crime or fraud or be the result of a "gross mistake". The status of the defenders as directors of the Cypriot companies did not alter the applicability of those principles. We note that this part of the report is confined to actings that can be considered tortious rather than contractual. Nevertheless, the misappropriation of funds held on deposit is clearly a serious matter; it is the equivalent of a dishonest breach of trust in Scots law. Conduct of that nature is normally criminal in nature, and is in any event likely to be fraudulent or at best the result of a "gross mistake". For this reason we cannot hold that this part of Dr Arab's report exonerates the defenders of responsibility for the misuse of funds held on deposit.

[44] Question (7), and in particular paragraph 23, of Dr Arab's report appears to be the passage relied on by the commercial judge in support of the proposition that we have set out at paragraph [34] above, to the effect that the experts were agreed that RMJM's corporate structure, including the defenders as directors of the Cypriot companies, made no difference to the defenders' personal liability for the wrongs of RMJM. When the narrative preceding paragraph 23 is considered, however, it is apparent that Dr Arab was concerned only with liability for conduct that was criminal in nature, or amounted to a fraud, or to a "gross mistake". Exactly what those amounted to in practice is not clear from the terms of his report. In particular, he did not address the question of whether the misappropriation of funds held on deposit amounts to fraud, or what might amount to "gross mistake". This lack of clarity, especially in relation to the application of the rules of UAE law to the facts of

the case, stands in marked contrast to the report and evidence of Mr Hanna, which is clearer in nearly every respect.

[45] In question (8) of his report, Dr Arab considered the manner in which UAE law would categorise RMJM, as a Scottish partnership with two Cypriot limited liability partners, for the purposes of the law of the UAE dealing with responsibility for the acts of business organisations (paragraphs 24-29). He expressed the view that the 1984 Companies Law only recognized partnerships formed of nationals of the UAE, but some Emirates including Dubai recognized business structures owned by non-UAE nationals. RMJM was registered in Dubai as a branch of a foreign company, and was licensed in accordance with provisions of the Companies Law 1984 applicable to such branches. It would therefore be treated as such a branch for the purposes of the UAE law applicable to business entities. Once again the report is not wholly clear as to how the law would apply to the facts of the present case. Nevertheless, Dr Arab appears to recognize that RMJM would be recognized for the purposes of UAE company law.

[46] Dr Arab's evidence did not go into the foregoing questions in any detail. The reason for this is that the defenders' pleadings did not advance the proposition now relied on, that they would not be treated as directors of RMJM for the purposes of the rules of UAE law relied upon by the pursuer which were said to impose personal liability on the directors of corporations. In Dr Arab's examination-in-chief he was asked (pages 585 *et seq* of the appendix) about section (7) of his report. He stated that he did not think that a UAE court would search for who were the directors of the company owning the Scottish company (partnership) which controlled the branch in Dubai. At this point counsel for the pursuer objected to the line of evidence, on the ground that it went well beyond anything found in Dr Arab's report, and had not been put to Mr Hanna. The commercial judge upheld the

objection, and consequently the line of evidence was not developed. Consequently there is nothing in Dr Arab's oral evidence that goes beyond the somewhat cryptic statements found in sections (7) and (8) of his report. Perhaps more importantly, this means that the fundamental issue raised by the first ground of appeal was not properly dealt with in the evidence for the defenders. On that basis alone, it is impossible to hold that Dr Arab's evidence supports the first ground of appeal. Apart from that, however, as we have indicated we find the evidence of Mr Hanna on this matter to be of a higher quality than that of Dr Arab.

Conclusion on the defenders' personal liability under Dubai law in the light of RMJM's structure

[47] Overall, we find that the evidence of Mr Hanna gives a clear and coherent account of the manner in which Dubai law would treat RMJM's structure, including the existence of two Cypriot companies as partners and the position of the two defenders as directors of each of the Cypriot companies. In particular, we consider that Dr Arab did not give a satisfactory account of how the defenders, as the individuals who ultimately controlled RMJM, would be regarded for the purposes of Dubai law. Dr Arab conceded that, to the extent that there had been fraud or "gross mistake", the defenders would be liable for the acts of RMJM, but he did not go on to consider how that might apply to the facts of the present case as pled by the pursuer on record. In view of the fact that the pursuer's averments amount to the misappropriation of funds held on deposit, it appears to us to be at least arguable that fraud was involved. The same goes for the concept of "gross mistake", an expression that was not fully elucidated. Finally, as we have already explained, Dr Arab's evidence did not take in the proposition now advanced as the first ground of

appeal, that the defenders would not be treated as directors of RMJM for the purposes of rules of law that were said to impose personal liability on the directors of corporations.

[48] The foregoing stands in sharp contrast with the evidence of Mr Hanna, both in his reports and in his oral evidence. In our opinion Mr Hanna gave a coherent account of the law and its application to the facts which conformed to the commercial and ethical standards that one would expect of a modern legal system. In our opinion it is permissible for a Scottish court in applying foreign law to consider such standards. They form part of the essential commercial context in which the law operates in every jurisdiction. The same is true of the analysis of the contract of deposit, which as we have observed corresponds functionally at least to the use of an express or implied trust in the Scots law of agency. It is to be expected that any such institution will protect the funds deposited for the benefit of the person entitled to them. Equally, the willingness of UAE law to impose personal liability on the individuals ultimately responsible for the misappropriation of funds held by an agent is a feature found in Scots law and other civilian legal systems, as well as those based on the English common law. These features are exactly as would be expected in a modern system of commercial law. For all the foregoing reasons, we prefer the evidence of Mr Hanna on the matters raised in the first ground of appeal.

[49] Finally, on the first ground of appeal, we should note the practical consequences if the defenders' argument were correct. It is apparent that the law of the UAE, like every other developed legal system, imposes liability for the misuse of funds that are held on deposit for the benefit of another person. (In Scots law the same result can also be achieved through a trust of the funds, and the principles that apply are analogous). It would be anomalous, to say the least, if liability for misuse of funds held on deposit could be avoided by setting up a structure such as that used by RMJM, whereby the partners of a firm are

corporations and the individuals who are in fact in charge of the firm and its activities exercise their powers as directors of those corporations. Permitting individuals to avoid responsibility for the misuse of funds in this way would entirely subvert the purposes of the law of deposit, or corresponding institutions such as the trust in Scots law. Furthermore, if the defenders' argument were correct, the provisions of the Companies Law 1984 applicable to foreign companies could easily be evaded by using a comparable structure, with activities in the UAE carried on by a foreign partnership whose sole partners were foreign companies. Once again, that appears to run contrary to the purposes of those parts of the Companies Law. In our opinion this is a powerful reason for preferring Dr Hanna's approach to the applicability of the law of Dubai to the defenders.

[50] For the foregoing reasons we are of opinion that the first ground of appeal should be refused. The commercial judge was correct to hold that the fact that the defenders were directors of Cypriot companies which were in turn the partners of a Scottish partnership, RMJM, carrying on business in Dubai made no difference to the application of the principles of UAE law which made the defenders personally liable for the wrongs of RMJM.

The application of articles 111 and 112 of the Companies Law 1984 to RMJM

[51] The second ground of appeal relates to the application of articles 111 and 112 of Federal Law 8 of 1984, the Companies Law as dealing with Commercial Companies, generally referred to as the Companies Law 1984, to RMJM, which was of course a foreign partnership. We begin by setting out the terms of the relevant legislation, the commercial judge's decision on this matter and the defenders' ground of appeal. Thereafter we consider the evidence of Mr Hanna and Dr Arab on this matter, and finally express our conclusion.

The relevant legislation

[52] We should note at the outset that the UAE Companies Law 1984 applies to entities other than companies, in the strict sense; the entities to which it applies include partnerships and limited partnerships. The provisions of the Law that are material to the present case are in two parts. The first three provisions, articles 110-112, are each headed

> "Public Joint Stock Company
>
> Company Management
>
> Board of Directors".

The three articles are as follows:

> "ARTICLE 110
>
> The company shall be bound by the actions of the board of directors performed within its competence. The company shall also be liable for compensation in respect of losses caused by unlawful actions performed by the members of the board in the course of managing the company.
>
> ARTICLE 111
>
> 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, abuse of power, violation of the law or the company articles, in addition to mismanagement. Any provision to the contrary shall be considered void.
>
> ARTICLE 112
>
> All board members shall be held liable for any of the actions provided in the preceding article if the fault occurred as a result of a resolution adopted unanimously. However, if the majority adopted the resolution causing a liability, the dissenting directors shall not be held liable if they had entered their objections in the minutes of the meeting.
>
> The absence of a director from the meeting in which the decision was adopted will not absolve the director from liability unless it is proven that he was not aware of the resolution or that he was aware of it but was unable to object to it".

[53] The second set of provisions that are material to the parties' dispute is found in articles 313-316. These are each headed "Foreign Companies". They provide as follows:

> "ARTICLE 313
>
> 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 practise their main activity in the State or have their main office therein, with the exception of the provisions relating to the incorporation of companies
>
> ARTICLE 314
>
> With the exception of foreign companies licensed to practice activities in the free zones of the State, foreign companies may not practise their main activity or establish offices or branches except after obtaining a licence issued by the Ministry upon acquiring the approval of the Competent Authority in the Emirate concerned. The licence shall specify the activity which the company is permitted to practise. As a prerequisite to granting the said licence, the company must engage a national of the State as its Agent. If the Agent is a company, it must be a UAE national company and all its partners must be UAE nationals.…
>
> ARTICLE 315
>
> Foreign companies, their offices or branches stipulated in the preceding Article may not commence their activities in the State except after their registration in the commercial register.
>
> They must have a separate balance sheet, a separate profit and loss account and must have an auditor.
>
> ARTICLE 316
>
> If a foreign company or its office or branch thereto practises activities in the State before applying the formalities stipulated in the preceding article, all the persons who performed this activity shall be personally and jointly liable for their actions".

[54] The commercial judge held that articles 111 and 112 applied to RMJM, notwithstanding that it was a foreign partnership, with the result that the defenders were bound by the provisions of the Companies Law relating to the actions of directors. On this matter, he preferred the evidence of Mr Hanna to that of Dr Arab, and held in particular that the natural meaning of article 313 of the Companies Law 1984 was that the provisions of that Law in general applied to RMJM and its partners and their directors. If that were not so, he thought that there was no point in the exception in article 313 for the provisions of the Law relating to the incorporation of companies: see paragraphs [30]-[31] above.

[55] The pursuer's case relies particularly on articles 111 and 112 of the Companies Law 1984. These are directed primarily towards companies with boards of directors, as is

apparent from their wording. The pursuer avers, however, that the provisions are of general application and apply to other forms of business organisation than ordinary joint stock companies. That would include a foreign partnership such as RMJM. For this purpose, the pursuer relies in particular on article 313, as explained in the evidence of Mr Hanna. In summary, the pursuer's case is that the word "company" used in the Law of 1984 is wide enough to encompass partnerships, including foreign partnerships, and the references to "directors" are wide enough to encompass those in charge of a partnership – the partners, or if the partners are corporate entities those in charge of those entities.

The defenders' arguments on the second ground of appeal

[56] The defenders' second ground of appeal is that the commercial judge erred in holding that articles 111 and 112 of the Companies Law 1984 applied to RMJM by virtue of article 313 of the Law. The commercial judge had relied on what he considered to be the natural meaning of the words used in the latter article. Nevertheless, it was clear from the terms of the 1984 Law that it applied to a variety of different forms of body corporate, seven in total: these were general partnerships, simple limited partnerships, joint ventures, public and separately private joint stock companies, limited liability companies, and partnerships limited by shares. Articles 111 and 112 appeared in the chapter of the Law dealing with public joint stock companies, although they were also applied to private joint stock companies and limited liability companies. They did not, however, apply to all forms of corporate body found in Dubai. If the commercial judge were correct, and the Law applied to entities such as RMJM, foreign corporations or partnerships would be subject simultaneously to seven distinct legislative regimes, which were not consistent with one another. In addition, the commercial judge had relied on the evidence of Mr Hanna, but

Mr Hanna had accepted in his oral evidence that foreign companies were not subject to all of the various provisions of the 1984 Law. Finally, articles 111 and 112 assumed the existence of "directors", which RMJM did not have.

The evidence of Mr Hanna

[57] Mr Hanna dealt with articles 111 and 112 of the Companies Law 1984 in paragraphs 5 *et seq* of his first opinion. The question that he addressed is whether the breach of obligations imposed on a corporate agent or trustee or depositary could apply to the directors or managers of such a person. Mr Hanna responded in the affirmative. He referred to the terms of articles 111 and 112. The terms of those articles were a clear indication that company directors are personally liable for acts that they commit in the course of exercising their powers and duties or by taking advantage of their prerogatives and corporate posts. In this part of his report Mr Hanna made reference to criminal provisions that corresponded to the relevant civil provisions of the 1984 Law, in particular article 65 of the Penal Code (paragraph 5.1.6). Article 65 made it clear that a penalty inflicted on the legal entity did not exempt the perpetrator (the director or agent who acted for the entity) from being punished personally. In relation to the present case, Mr Hanna thought that the defenders would be personally liable "if (i) they acted on their own initiative without any instruction or corporate Resolution; (ii) if they transferred the funds to their own personal account; or (iii) if they had consented to Board Resolutions of RMJM to convert the funds to RMJM's property" (paragraph 5.1.7). It should perhaps be noted that in the civilian systems based on the French and German Codes a breach of the Criminal Code will normally give rise to civil liability, without the complicated analysis that is generally required in Scots and English law in such cases.

[58] Although the foregoing part of Mr Hanna's report refers principally to companies, the reference in paragraph 5.1.6 to article 65 of the Penal Code makes it clear that not only directors but agents may be liable for acts carried out in the name of a legal entity. That would extend to the partners or other representatives of a partnership to the extent that they represented the underlying legal entity or made decisions on behalf of the entity; partners who act on behalf of a partnership, or other agents acting on behalf of the partnership, are inevitably acting as agents for the underlying entity. We are accordingly of opinion that this part of Mr Hanna's report is reasonably clear, to the effect that, if the individuals in charge of an artificial legal person use their powers in relation to that person to transfer funds to their own personal accounts, or to convert funds held by the artificial person for the fiduciary purposes (which would include holding those funds as a depositary), they will be subject to personal liability under articles 111 and 112.

[59] Such a view is further supported by paragraph 5.2.1 of Dr Hanna's report, and also by his oral evidence, which we consider subsequently. Article 5.2.1 deals with authoritative legal writings and case law on the foregoing matters. These indicate in relation to a company that, so far as external matters (those not relating to the internal affairs of the corporation) are concerned, the board of directors is considered the agent of the company according to the Companies Law. Board members could be liable to third parties for tortious acts carried out by them in the name of the company. Dr Hanna continued:

> "In my opinion,… an unlawful act by a director which deprives the company's creditor of his funds deposited with the company (such as the misappropriation of this creditor's funds and converting them to the account of the company) leads to the joint liability of the company and the director(s) to compensate the third party creditor by returning the funds…".

[60] Counsel for the defenders criticized Dr Hanna's evidence on the basis, previously adverted to, that if articles 111 and 112 of the Companies Law applied to RMJM, the partnership would be subject to seven inconsistent legal regimes, dealing with different types of legal entity. On a proper consideration of Dr Hanna's evidence, however, it is clear that he considered that the effect of article 313 of the Companies Law was merely that the provisions of the Law (excluding those relating to the incorporation of companies) should apply to RMJM and other foreign partnerships where the provision in question was relevant to the partnership. In other words, the Law should not be applied in a general and indiscriminate manner but should rather be applied having regard to its purposes and in the context of the particular legal entity and transaction in question. That is the standard technique used when legislative provisions are applied, in Scotland and in other jurisdictions, and it has a clear rational basis. We accordingly consider that it is the obvious way in which a court in the UAE would apply the Companies Law to an entity such as RMJM and its partners.

[61] In his oral evidence, Mr Hanna was asked (appendix, page 320) whether the UAE Companies Law 1984 applied to RMJM. He referred to the relevant provisions of the Law, articles 111, 112 and 313, and to the corresponding sections of his first report. It was then put to him that the defenders were not technically directors of RMJM but rather directors of its two partners, and he was asked whether in that situation the provisions of UAE company law relating to directors related to the defenders. We have already noted his response, at paragraph [42] above. His conclusion was that the directors of the Cypriot companies should be liable in UAE law for the misuse of funds held on deposit by RMJM:

> "[T]he directors of the Cypriot companies which are the only partners and owners of the Scottish partnership are to bear liability from my point of view from UAE law" (appendix, page 329).

Thus Mr Hanna is quite clear to the effect that, although they were not directors in the strict sense, the defenders bore analogous responsibilities and were liable under the Companies Law for misuse of funds in the same way as directors.

[62] In cross-examination, Mr Hanna maintained his earlier position. It was put to him that article 313 of the Companies Law applied to branches of foreign companies in the UAE only the specific articles dealing with foreign companies, namely articles 313-316, and the parts of the Law that were of general application (appendix, page 522). Mr Hanna disagreed with that proposition; he stated that the text of the Companies Law did not allow such an interpretation. He also disagreed with the proposition that everything in the Companies Law 1984 applied to branches of foreign companies. The text of article 313 referred to "the provisions of this law" and not to any specific parts of the Law. It did not follow, however, that every provision of the Law applied to foreign companies. Only relevant provisions would apply, depending on the context.

The evidence of Dr Arab

[63] In his report Dr Arab considered the application of the Companies Law to foreign corporate entities. He relied principally on the version of the Law enacted in 2015, but it is a matter of agreement that that does not apply to the transactions under consideration. Consequently his report as such is of little utility in relation to the present case. In oral evidence, however, he commented on the Companies Law 1984 (appendix, pages 591 *et seq*). He agreed with Mr Hanna that the Companies Law 1984 would be applicable to RMJM as a branch of a foreign company. He disagreed, however, that articles 111 and 112 would be applied to the directors of the company because he considered that those articles have nothing to do with the branches of foreign companies. The provisions dealing with foreign

companies were found in articles 313-316 (quoted above at paragraph [53]). Beyond those articles, the provisions of the Law would not apply to the branch of a foreign company. This was subject to a possible exception for the general provisions in the first 22 articles of the Law, although on that matter Dr Arab's evidence appeared ultimately to be uncertain. Consequently Dr Arab thought that the only basis on which the defenders could be liable was in tort (delict) under the Civil Code, with no contractual liability and no liability under the Companies Law.

[64] In relation to Mr Hanna's view that article 111 would apply to the defenders as the directors of the Cypriot companies that were the partners in RMJM, Dr Arab stated that Mr Hanna's view had never been tested before the courts in the UAE. He thought, however, that judges in the UAE would not go beyond the view that the defenders were merely to be treated as directors of entities outside the UAE and were therefore beyond the scope of article 111. In cross examination it was suggested that Dr Arab's view would produce a strange result, in that persons in charge of a partnership carrying on business in the UAE would escape the provisions of the Companies Law simply because of the interposition of Cypriot companies as the partners. Dr Arab replied that matters would still be governed by the Civil Code. (We should observe that the Civil Code only imposes delictual liability directly on an individual, and does not impose duties on directors or partners as such).

Conclusion on the application of articles 111-112 of the Companies Law to RMJM

[65] On the application of articles 111-112 of the Companies Law, the commercial judge preferred the evidence of Mr Hanna to that of Dr Arab, on the basis that we have summarized at paragraph [54] above. On consideration of the evidence as a whole, we agree with that conclusion. As with the first ground of appeal, we find the evidence of

Mr Hanna to be clear and coherent. Furthermore, it appears to us to accord with common sense and the practical considerations that should regulate the conduct of those in charge of corporate entities, whether those are companies or partnerships.

[66] Articles 111 and 112 are relatively far reaching in their effects. Under article 111, the directors of a company are liable towards the company, the shareholders and third parties for fraud, abuse of power, violation of the law and mismanagement. It is impossible to contract out of those provisions. Article 112 enacts the general rule that the directors are jointly and severally liable for acts falling under article 111. We observe that there would be no difficulty in applying those provisions to partnerships, substituting references to partners for the existing references to directors. The partners are self-evidently the persons in charge of the partnership, and function as the agents of the partnership. Their duties towards the partnership and its creditors are comparable to those of company directors. In Scotland and elsewhere in the United Kingdom, both partners and company directors are subject to fiduciary duties owed to the company and, through the company, to its creditors. While the law of the UAE does not make use of the concept of the fiduciary duty, in relation to the funds held on deposit it is obvious that similar principles apply. Those funds must be held and managed for the benefit of the person ultimately entitled to them, and must not be used in such a way as to benefit the directors or partners of the entity that holds or administers the funds. The evidence of Mr Hanna, which we have set out at paragraphs [36]-[42] above, was to that effect.

[67] Mr Hanna's evidence was that article 313 of the Companies Law 1984 applies the provisions of the law to foreign companies practising within Dubai so far as those provisions are relevant to the particular body in question. On this basis he considered that the law was quite capable of applying to a partnership such as RMJM. We find that

evidence persuasive. Especially in relation to the contract of deposit or its equivalents, exactly the same considerations apply to a partnership as to a company. It is the persons in charge of the partnership that should be responsible for the safe keeping of deposited funds, in exactly the same way as company directors in the case of an incorporated company. If the law were otherwise, funds that should be held on deposit and administered for the benefit of the person ultimately entitled to them could be used to benefit the depository, or to pay its debts. That would entirely subvert the purpose of the contract of deposit.

[68] Article 313 refers to "foreign companies", but Mr Hanna explained that the Arabic word represented by "company" covers a range of entities, including partnerships. On that basis, article 313 applies directly to a foreign partnership practising in Dubai. The result, Mr Hanna indicated, was that the relevant parts of the Law would apply to an entity such as RMJM and its partners. The commercial judge held that the expression "this law" in article 313 must include the Companies Law 1984 as a whole. If that were not so, the exception found at the end of article 313, for the provisions relating to the incorporation of companies, would have no meaning. We agree with that view. Perhaps more important, however, is the fact that if the relevant parts of the Law as a whole did not apply the affairs of foreign entities, whether companies or partnerships, would not be subjected to the detailed regulation to which similar entities registered in the UAE are subject. In our opinion that cannot have been intended, as a matter of common sense.

[69] It was argued for the defenders that, if Mr Hanna's interpretation of article 313 were correct, a foreign entity such as RMJM would potentially be liable to seven different types of legal regime, covering a range of companies, partnerships and joint ventures and other entities. These were inconsistent with one another, and the result of the general application of the Law to foreign entities would be chaotic. In our opinion this argument must be

rejected. It is clear from the evidence of Mr Hanna that only relevant parts of the Law should be applied to any particular entity; a discriminating approach should be adopted. The defenders' argument was that article 313 only applied the provisions expressly headed "foreign companies" (articles 313-316) to foreign entities, together with possibly the general provisions found in the first 22 articles of the Law; the remaining articles were said to be inapplicable. The problem with that approach is that it leaves the individuals in control of foreign entities, whether as directors or partners or, as in the present case, directors of partners, outside the system of control imposed by the Companies Law. If that were so, it would be relatively easy to avoid the system of control found in the Law by making use of foreign entities. It is perhaps unnecessary to describe the adverse consequences that would result from such an interpretation. We have no hesitation in rejecting it.

[70] For the foregoing reasons we are of opinion that the second ground of appeal should be refused, and that the commercial judge reached the correct conclusion on this matter. Like the commercial judge, we accept the evidence of Mr Hanna that articles 111 and 112 of the Companies Law 1984 applied to RMJM by virtue of article 313 of that Law.

Conclusion

[71] We are accordingly of opinion that both grounds of appeal should be refused. That concludes the issues raised in the course of the preliminary proof on foreign law. It is still necessary, of course, to determine the facts of the dispute between the parties, and thereafter to consider how the evidence of foreign law applies to the facts found by the court. On that basis, we well remit the action to the Commercial Court to proceed as accords.