OUTER HOUSE, COURT OF SESSION

[2018] CSOH 2

CA12/17

OPINION OF LORD BANNATYNE

In the cause

DNO OMAN LIMITED

Pursuer

against

GRANT CLOUSTON

Defender

Pursuer: Lord Davidson of Glen Clova QC; CMS Cameron McKenna Nabarro Olswang LLP
Defender: Currie QC, Ower; DAC Beachcroft Scotland LLP

16 January 2018

Introduction

[1] This matter came before me on the commercial roll for a Preliminary Proof. In the action the pursuer sought to recover loss and damage from the defender which it alleged resulted from breach of obligations owed by the defender to the pursuer.

The Issues

[2] It was a matter of agreement between parties' experts that the issues of (1) title to sue and (2) whether the defender owed any obligations to the pursuer are matters of UAE law

and not matters of Scots Law. They accordingly fall to be treated as matters of fact. The court heard expert evidence on these issues at the Preliminary Proof.

Background

[3] In the present action the pursuer avers that the defender is in breach of Articles 282 and 285 of the UAE Civil Code. Article 282 provides as follows:

> "Any harm done to another shall render the doer thereof, even though not a person of discretion, liable to make good the harm."

[4] Article 285 provides as follows:

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

[5] The pursuer was thus relying on foreign law in a Scottish litigation.

The Factual Background

[6] The factual averments upon which the pursuer averred breach of the above provisions were as follows:

> "2. The pursuer is the associated company of entities that employed the defender from about November 2008 until May 2012 in respect of procurement duties for the pursuer. The defender's duties included the employment of contractors on behalf of the pursuer and the procurement and management of drilling equipment and supplies.
>
> …
>
> 3. While employed by entities owned and controlled by the group of companies of which the pursuer formed part the defender together with another employee … incorporated Land & Sea Energy Services Limited (hereinafter 'LSES') in the Republic of Seychelles. Said incorporation was done without the pursuer's or any of the employing entities' knowledge. The defender used LSES as a front company to conceal his initiation of and participation in transactions on behalf of the pursuer. The defender contracted the services of an offshore corporate services company, SFM Corporate Services SA, to conceal the true principals behind LSES. LSES used M.C., an employee of a SFM Corporate Services SA, to

further conceal his initiation and participation in transactions with the pursuer. She was held out as being the finance director of a company, viz LSES, unconnected with the defender, contrary to the truth. The defender caused the pursuer to enter into arrangements for the provision of contractors to the pursuer by LSES. LSES invoiced the pursuer for the provision of said contractors and consequently was paid by the pursuer. LSES applied substantial mark-ups, between 50% and 150%, to the rates said contractors charged. Thereby the defender through the use of LSES, made secret profits to the pursuer's loss.

…

4. Separately the defender incorporated without the knowledge of the pursuer or the defender's employing entities NTM Energy FZC (hereinafter 'NTM'). NTM was under the control of the defender. Again he operated NTM in 2009 and other dates with …. The defender caused the pursuer to enter into arrangements with NTM for the purpose of making a secret profit for his benefit.

…

5. Furthermore between July 2009 and mid-2010 the defender procured the sale of certain of the pursuer's pipe/casing stock, either at an undervalue to NTM, or to third parties directly, with the proceeds going to NTM and not to the pursuer. He did so without the pursuer's knowledge or consent to sell on said stock for further secret profits.

…"

The Evidence

[7] At the Preliminary Proof I heard evidence from only two witnesses. Both of these witnesses gave expert evidence on UAE law. On behalf of the pursuer I heard evidence from Mr James Whelan and on behalf of the defender I heard evidence from Mr Faisal Attia.

[8] Each expert witness had prepared three lengthy and detailed reports. Mr Whelan's reports were set out at tabs 1 to 3 of the joint bundle of expert reports and Mr Attia's reports were set out at tabs 4 to 6 in the joint bundle.

[9] Each expert in the course of his evidence spoke to the terms of his reports and adopted these reports as his evidence in the case.

[10] Both experts gave oral evidence, however, I do not intend to detail that oral evidence in that neither of them departed to any material extent from what they had said in their various reports and in my view added nothing of materiality to what had been said in their reports.

Common Ground Between the Experts

[11] There was a certain amount of common ground between the experts:

[12] First: "As a matter of UAE law, in order for the pursuer to successfully establish the defender's liability in tort, the following requirements must be satisfied:

a. A breach of a legal duty (ie, a harmful act) on the defender's part;

b. Damages sustained by the pursuer;

c. There must be a causal link between the breach and the damages suffered."

(See: paragraph 12 of tab 5).

[13] The foresaid test is referred to as the Tripartite Test.

[14] The pursuer's expert only added this gloss to the above:

> "I agree that an actionable harmful act necessarily involves a breach of a legal duty, but for the sake of legal correctness and fidelity to the way it is expressed in UAE law and the judgments of the UAE courts, and indeed for centuries in Islamic law, from which the relevant UAE statutory provisions are derived, we should speak of a harmful act." (See: 5.12 to 5.14 of tab 2).

[15] The second matter on which the experts were in agreement was this:

> "… deception is a harmful act which would trigger liability in tort under UAE law. In other words, the act of deception is a breach of legal duty. The basis of this is Article 285 of the UAE Civil Code." (See: tab 6 paragraph 7)

The Essential Dispute Between the Expert Witnesses on the Application of UAE Law

[16] Mr Whelan's position was that the claim advanced by the pursuer sounds in terms of

tort in UAE law. He accepted that its claim did not sound in contract in terms of UAE law. (See: paragraph 6 of tab 1.)

[17] Mr Attia also accepted that the pursuer's case did not sound in terms of UAE contract law. However, it was also his position that its case did not sound in terms of the law of tort of the UAE.

The Experts' Positions

[18] The dispute as to whether the pursuer's case sounded in terms of UAE law in terms of the law of tort turned largely on a single and narrow question, namely: the relevance of the defender's contract of employment in respect to the alleged breaches of Articles 282 and 285. It was not a matter of dispute that at no relevant time was the defender an employee of the pursuer.

The Position of Mr Whelan

[19] In his first report in section 6 Mr Whelan commences by saying the pursuer's claim does not sound in contract. However, he goes on to make certain observations regarding the contract of employment at paragraph 6.5:

> "For the purposes of the present case, the question is not so much about the interpretation of words that are in the contract, but about whether in the light of the nature of the relationship as a whole as demonstrated by the contract, the contract allowed the defender to act in the manner alleged against him, or whether it impliedly contained a prohibition on such conduct. "

[20] He then goes on to say this at paragraph 6.8:

> "From my experience in practising in the UAE from 1985 – 2001, and from translating about 6,000 principles of judgments from the higher courts of the UAE (see the last paragraph of my curriculum vitae at Appendix 1), my opinion is that a UAE judge would regard it as virtually axiomatic that the job title 'Contracts, Procurement and Logistics manager' (2012 Agreement, Schedule 1, Part 1A)

necessarily involved a duty to act with loyalty and honesty towards the employer in respect of the making of contracts on his employer's behalf, and to refrain from entering into deals that resulted in either or both of (a) a secret private benefit to the employee or others beyond the scope of the contract, and (b) a detriment to the employer or the employer's associated entities or clients any other persons that a prudent and honest contracts manager would not have caused."

[21] Finally at 6.9 he says this:

"A contracts and procurement manager who enters into the kind of transactions complained of in the summons will be regarded as a crooked manager equally in both countries, and will be liable to an action under the contract by the employer, and in tort (or 'harmful act') by the victim."

[22] Mr Whelan's position with respect to the relevance of the defender's contract of employment is first expressly set out at paragraphs 5.10 and 5.11 of tab 2 (his second report) where he says this:

"5.10 The various contractual connections notably as between (a) the Defender's employers and the Defender, (b) the Defender's employers and the Pursuer, do not, I agree, form part of the cause of action. They do, however, form an integral part of the background story. They are the setting in which the alleged harmful acts were committed. They explain how the acts complained of came to be committed, and how the Pursuer was deceived.

5.11 Mr Attia has misunderstood the nature of the Pursuer's claim. I repeat that … the contractual arrangements form an integral part of the factual background story, but not part of the cause of action as legally defined. …"

He further develops this position at 5.17 and 5.18.1:

"5.17 Mr Attia seems to misunderstand the position here. The employment contract is relevant, but only as part of the background story to the action in tort for the harmful acts alleged by the Pursuer.

…

5.18.1 It is to be noted first that all of the acts of the Defender causing harm, as alleged in paragraphs 3, 4 and 5 of the condescendence in the adjusted summons, were done by the Defender in his capacity as an employee of associated companies of the Pursuer. The Pursuer would have been entitled to rely on the Defender acting in accordance with his contract. In particular, the Pursuer would have been entitled to rely on Article 246 of the Civil Code, which imposes on both contracting parties an obligation to perform it.

> **'… in accordance with its contents, and in a manner consistent with the requirements of good faith'.**
>
> I emphasise that the reliance that the Pursuer would be entitled to place on the Defender acting in a manner consistent with the requirements of good faith is not the reliance that one contracting party is entitled to place on his contractual counterparty. Rather, it stems from the general underlying principle that people are presumed to be behaving lawfully and honestly. I take this to be axiomatic, but there is statutory backing for this notion. for example, Articles 47 and 49 of the Civil Code provide respectively:
>
> **The common usages[1] of people will have probative force[2] and shall be abided by.**
>
> [1] *isti `māl*
> [2] *ḥujja*
>
> **Greater [evidential] weight[1] shall be given to the prevailing and the commonplace than to the rare [and exceptional].''**
>
> [1] *al- `ibra* – the criterion, that to which one looks in order to distinguish truth from falsehood

[23] In further explanation of his position in respect to the relevance of the contract of employment and in response to points made by Mr Attia in his report Mr Whelan in his third report says this:

> "As I have tried to show, the relevance of the contractual arrangements between the Defender and his employer is that they formed part – a very important part I say, but that is ultimately for the proof judge to decide – of the background against which the Defender was, on the Pursuer's case, able to deceive the Pursuer into paying dishonestly inflated prices for services. The Pursuer is thus not proceeding against the Defender for harm arising out of a breach of contract, contrary to what Mr Attia appears to think, but for harm arising out of a tort – a 'harmful act' in the vocabulary of the UAE law – in the form of deceitful overcharging. The tort requires an understanding of the contractual background in order to be understood." (See: paragraph 5 of tab 3.)

[24] Further on in said report at paragraphs 9.11, 9.12 and 9.13, in response to points made by Mr Attia, Mr Whelan goes on to make the following further points regarding this issue:

"9.11 – 12 Again, we appear here to be dealing with a misunderstanding on the part of Mr Attia, rather than with a disagreement as between experts in the law of the UAE. A disclosure obligation may or may not have existed as part of the contractual relationship between the Defender and his employer. On the facts that I am assuming, the complaint made against the Defender is not that he established companies, nor is it the fact that he did not disclose his interest in them. I entirely agree with Mr Attia that these are not harmful acts, and I also entirely agree with Mr Attia that if there was a contractual duty of disclosure, that duty would have been owed solely under a contract. I again emphasise that the relevance to the present case – as I understand it – of the setting up of those companies was that it was part of a larger scheme of deception, which the Defender used in order to extract money from the Pursuer that the Pursuer was not obliged to pay. Article 285 is in point here. It is not the deception that is actionable, but the harm resulting from it.

9.13 The disclosure obligation is a red herring."

[25] Then at paragraph 9.20 he says this:

"Mr Attia has pointed out an 'obvious difficulty' of which I am completely unaware. Once we have separated out the principles of reliance (a) on a breach of contract, in an action brought in contract, and (b) on a harmful act, in an action brought in tort, in which the existence of a contract is part of the background story, and indeed an essential element in the background story in that it enabled a deception to be successful, then this 'obvious difficulty' will be seen never to have existed in the first place."

[26] Finally with respect to the relevance of the defender's contract of employment in founding the cause of action in UAE law Mr Whelan says this at 9.25 – 27.11:

"If the Pursuer went to a third party, it would be entitled to presume that the services would be rendered in good faith. In the context of the affiliate relationship, I have no doubt that a UAE court would regard it as being especially so entitled. The Defender was under an obligation to his employer to act in good faith in discharging his employment obligations. The Pursuer was entitled to expect that the affiliates' employees would discharge their obligations (to their employer, and through their employer to the Pursuer) in good faith and honestly."

Position of Mr Attia

[27] Mr Attia's position was this:

[28] He looked at the Tripartite Test and applying that to the pursuer's averred case he commented at paragraphs 16 and 17 of tab 5 as follows:

> "16. … if the Defender incorporated corporate entities and conducted business as the Pursuer alleges, such actions would not, *per se*, amount to a harmful act (which would give rise to liability in tort). This is because merely 'doing business' is not a breach of a legal duty under UAE law.
>
> 17. Put differently, if the Pursuer's allegations are correct as a matter of fact (ie, the Defender conducted business secretly while he was employed by RAK Petroleum), then these acts may amount to a breach of the Employment Contract that might give rise to contractual liability (but not liability in tort). This is because in the absence of the Employment Contract, there would certainly be no issue with the Defender doing business. I am therefore of the opinion that the relevancy of the Employment Contract to this action is inevitable. Given that the Pursuer now confirms that it does not pursue a claim for a breach of contract, the Pursuer does not have title to sue the Defender."

[29] In further explanation of the position set out above he said this at paragraph 23 of the same report:

> "There can be no dispute that merely 'doing business' is not an act prohibited by UAE law. On the assumption that such doing business would conflict with certain contractual obligations owed by the Defender to his employer, then it would be open to this employer only to pursue the Defender under contract."

Finally at paragraph 26 he said this in response to Mr Whelan's report at 5.7 (tab 1):

> "I disagree with Mr Whelan's statement that 'On the assumption that the defender did not have the right to perform the acts complained of …' In my view, this statement is incomplete. For the present purpose, Mr Whelan should have identified on what basis the Defender did not have the right to perform the acts complained of. If this basis was his employment contract, then it is a matter of contract between the Defender and his employer and hence, the Pursuer does not have title to sue the Defender."

[30] Moving on, in his third and final report (tab 6) Mr Attia set out in some detail his analysis of the position:

> "8. The Dubai Court of Cassation has explained that there are two types of deception, namely verbal and physical deception. Verbal deception is basically telling lies and physical deception is the commitment of

fraudulent actions. Both types of deception could be used to induce an innocent party.

9. It seems to me that the Pursuer's pleaded case is entirely based on the allegations that the Defender set up LSES and NTM and he concealed the fact that he has a personal interest in these entities.

10. In terms of setting up LSES and NTM, this is not a harmful act under UAE law and Mr Whelan has agreed with me on this point.[1]

11. I address below the alleged concealment of the Defender's personal interest in LSES and NTM.

12. The act of concealment is a breach of a disclosure obligation and the Pursuer is required to establish that the Defender was under any such disclosure obligation.

13. It is common ground that the Pursuer was/is a third party *vis-à-vis* the Defender. Accordingly, I fail to see how the Defender owed the Pursuer any disclosure obligation. Mr Whelan did not provide any explanation as to how the Defender was under a disclosure obligation. In particular, Mr Whelan clearly says that:

'The various contractual connections, notably as between (a) the Defender's employers and the Defender, and (b) the Defender's employers and the Pursuer, do not, I agree, form part of this cause of action.'

14. However, these contractual obligations do not form of the present cause of action, the consequent question would be what is the basis for the Defender's obligation to disclose his interest in LSES and NTM to a third party (ie, the Pursuer)? Although Mr Whelan agreed with me that each entity has its own separate legal personality[2], he did not answer this question. Rather, Mr Whelan entirely built his analysis of the basis of Articles 246, 47 and 49 of the UAE Civil Code. I will address each of these articles below.

15. Mr Whelan says that 'The Pursuer would have been entitled to rely on the Defender acting in accordance with his contract. In particular, the Pursuer would have been entitled to rely on Article 246 of the Civil Code'[3]. In my opinion, this is clearly wrong and the Pursuer has no such entitlement.

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[1] Paragraph 5.16 of Mr Whelan Second Report.

[2] Paragraph 5.8 of the Mr Whelan Second Report.

[3] Paragraph 5.18.1 of Mr Whelan Second Report.

16. Article 246 provides that any contract must be performed in good faith and this obligation is placed on the contracting parties. The Pursuer is not a party to the Employment Contract and it cannot possibly rely on this contract.

17. Mr Whelan's position is contrary to the principle of privity of contract which is a fundamental principle of UAE law. As I previously explained[4], the principle of privity of contract is expressly provided for in Article 250 of the UAE Civil Code. Article 250 states:

> '*Subject to the rules relating to successions, the effects of a contract shall apply to the contracting parties and to their general successors in title, unless it follows from the contract, the nature of the transaction or a law provision that such effect shall not apply to the general successors in title.*' [Emphasis added]

18. The practice of the Dubai Code of Cassation shows that the effects of a contract shall be confined to the contracting parties in accordance with the principle of privity of contract[5].

19. It must follow that the Pursuer has no entitlement to rely on the Employment Contract and/or Article 246 of the UAE Civil Code.

20. Mr Whelan attempted to justify this obvious difficulty with the Pursuer's case by saying that the Pursuer's reliance on the principle of good faith 'is not the reliance that one contracting party is entitled to place on his contractual counterparty. Rather, it stems from the general underlying principle that people are presumed to be behaving lawfully and honestly.'[6] I entirely disagree with Mr Whelan's justification for the following reasons:

a) A harmful act (which is the basis of liability in tort) cannot be based on a contractual breach.

b) I agree that people are presumed to be acting in good faith. However, the failure to comply with the contractual obligation of good faith does not give 'people' title to sue. Such failure will only give the contracting party (to whom the good faith obligation is owed) the title to sue.

c) If Mr Whelan's position would be correct, then a person would be liable to pay damages twice for the same act which is, of course, not permitted under UAE law. In other words, Mr Whelan suggests that the Pursuer has the title to sue the Defender for his failure to comply with his

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[4] Paragraphs 18-20 of the First Expert Report.

[5] Annex 1

[6] Paragraph 5.18.1 of Mr Whelan Second

contractual duty of good faith. However and pursuant to the Employment Contract, the Defender's employer (no doubt) also has the title to sue the Defender for his failure to comply with his contractual obligation of good faith. Consequently, **Mr Whelan's position would result in an illogical outcome where the Defender would be liable to pay damages twice for the same act (being his alleged failure to act in good faith)**.

21. I note that Mr Whelan did not submit any authorities in support of his position. In support of my position, I confirm that UAE Courts apply the principle of good faith in the context of contractual claims only. For instance, I refer to the following judgments[7]:

a) Dubai Court of Cassation Judgment No 23/2009 dated 5 April 2009.

b) Dubai Court of Cassation Judgment No 82/2010 dated 7 November 2010.

c) Dubai Court of Cassation Judgment No 119/2011 dated 18 September 2011.

d) Dubai Court of Cassation Judgment No 117/2011 dated 29 January 2012.

e) Dubai Court of Cassation Judgment No 380/2011 dated 3 April 2012.

f) Dubai Court of Cassation Judgment No 280/2011 dated 11 November 2012.

g) Dubai Court of Cassation Judgment No 384/2011 dated 23 December 2012.

h) Dubai Court of Cassation Judgment No 204/2012 dated 20 January 2015.

i) Dubai Court of Cassation Judgment No 33/2016 dated 7 June 2016.

22. I emphasise that these judgments are submitted by way of example and confirm that there are numerous judgments and other UAE law authorities that demonstrate that the principle of good faith applies to liability in contract only (not liability in tort).

23. Mr Whelan's position and his reliance on the contractual obligation of good faith show (once again) that the Pursuer's pleaded case is of contractual nature. Mr Whelan mentioned that I misunderstood the nature of the

[7] Annex 2

Pursuer's claim. I did not. In my view, and as explained above, the nature of the Pursuer's claim is contractual notwithstanding the Pursuer's attempt to describe it as tort claim.

24. On the latter point, UAE Courts are not bound by a party's characterisation of its own case. Rather, these courts shall have the power to determine the correct legal characterisation of the case in question[8]. Therefore, the Pursuer's characterisation of the present case does not prevent a UAE court from considering this case as one based on contract. If the nature of the Pursuer's case is determined to be contractual (as it should in my opinion), the consequence for this determination is that the Pursuer did not establish *locus standi* to claim damages from the Defender.

Articles 47 & 49

25. Articles 47 & 49 are both contained in Chapter Two of the Introductory Part of the UAE Civil Code. This chapter contains a number of general Islamic law rules (legal maxims) that were codified in the UAE. Mr Whelan says (again without any substantiation) that these two articles 'are statutory backing' for the Pursuer's entitlement to rely on the principle of good faith. In my opinion, Mr Whelan's reliance on these articles is misplaced and/or wrongful.

26. Article 47 provides for the application of custom (or common usage). This is irrelevant to the present case. I set out below the UAE Commentary (concerning Article 47) as translated by Mr Whelan himself:

'The meaning of that is that if a person is physically in possession of a thing and makes a disposition of a thing and over it, then that is evidence of his apparent ownership. Usages of people may be general, in which case they will have probative force in respect of people's rights generally, but if it is particular to one location for example then it will not have probative force. An example of that is if a person seeks the help of another to purchase property and the person engaged to help asks for a fee, then they must look to the usage of the people in the market to see whether such a fee is due. If the usage exists then it will be due, otherwise it will not. Likewise, if somebody delivers apples for example on a dish, then the purchaser must return the dish, but if for example grapes are brought in a basket then the basket does not have to be returned, as there is a custom to that effect. Likewise where a time is specified for doing work, the point of reference in determining the time will be the custom of the district. Likewise where there is a convention as to the creation of a charitable endowment over moveable property, the endowment will be valid. In order for a custom to have

[8] Annex 3

probative force, it must not be contrary to a provision of the law or to a contractual stipulation."[9]

27. The Commentary is self-explanatory. It shows that there is no relevance whatsoever between Article 47 and the Pursuer's case.

28. Article 49 provides that the common should prevail over the rare. Similar to Article 47, Article 49 has no relevance whatsoever to the present case. The Commentary states (also as per Mr Whelan's translation):

'The prevailing is what is known to people generally and in circulation among them. An example is the presumption of death of a missing person after the expiration of 90 years from when he was last seen alive, in reliance on the fact commonly known to people that life does not generally last more than 90 years, and although some people live longer than that age it is rare. No regard shall be had to what is rare, and that is why he will be presumed to be dead, pursuant to common custom, and his goods will be divided by his heirs.'[10]"

Submissions on Behalf of the Pursuer

[31] Lord Davidson said that the primary question for the court was which expert to prefer.

[32] He commended the evidence of Mr Whelan. With respect to Mr Whelan's background and experience he said this:

"Mr Whelan had had decades of experience in UAE law; he was intimately informed as to the law of that country; he had looked at some 6,000 cases; he was completely imbued in the law of the UAE"

[33] So far as the way he had presented his evidence: it was cogent and coherent.

[34] On the other hand when Mr Attia's evidence was looked at he had an *idée fixe*: he focused only on the contract between the defender and his employer and said that obligations which emerge from such a contract were only owed to the counterparty. Thus the pursuer could have no case in tort. He had failed to take account of the approach of

[9] Annex 4

[10] Annex 5

Mr Whelan. In his various reports he had fully analysed the position in terms of UAE law and set out how the averments made on behalf of the pursuer amounted to a tort in terms of UAE law and in particular amounted to breaches of Articles 282 and 285 thereof. The court should prefer the analysis of Mr Whelan.

[35] Mr Attia he submitted continued to look at the question of the defender's contract of employment and argued that no rights are given to the pursuer as a third party from this contract and therefore the pursuer has no cause of action in terms of UAE law of tort. That was to misunderstand the pursuer's position and the position of Mr Whelan.

[36] He asserted that from the outset Mr Whelan had identified that the essence of the claim was Article 285. On the other hand Mr Attia had not referred to Article 285 until his third report.

[37] He submitted that Mr Attia had accepted that deception, leading to loss was harm. Thus he argued Mr Attia had accepted that the core of the pursuer's case amounted to a breach of Article 285.

[38] Overall he described Mr Attia's position as producing the very odd result that given the various factors founded upon by the pursuer in its averments to show dishonesty on the part of the pursuer they give rise to no claim in terms of the UAE law of tort.

[39] His position was that I should reject Mr Attia's evidence and that I should rely on the evidence and position as advanced by Mr Whelan.

[40] As regards the points he understood Mr Currie intended to advance relative to relevancy and specification of the pursuer's pleadings he reminded the court this was a Preliminary Proof not a debate.

The Reply on Behalf of the Defender

[41] The first part of Mr Currie's submissions related to the specification contained within the pursuer's pleadings. Generally he described these pleadings as being far from clear. It was his position that they were lacking in essential specification. In development of that position he said the following:

[42] The pursuer's averments confuse obligations owed by the defender to his employer with tort-based obligations not to perform harmful acts or to perpetrate deception within the meaning of Articles 282 and 285 of the Code. It is apparent that this is because Mr Whelan seeks to invoke the pursuer's alleged entitlement to rely on the defender having performed his employment contract consistently with the duty of good faith owed to his employer for the purpose of establishing liability under Articles 282 and/or 285.

[43] Although the pursuer's pleadings refer to Articles of the Code dealing with contractual matters, the defender proceeds on the basis that the claim against him is not based on contract. As there was no contract between the pursuer and the defender, the issue of whether the Dubai court could re-classify the pursuer's tort-based claim as one for breach of contract does not arise.

[44] The pursuer, he submitted, makes in-specific and irrelevant averments in Articles 2 and 3 of Condescendence that the defender carried out certain actions "on behalf of the pursuer" and "caused the pursuer" to enter into certain transactions. For example, there is no specification of the averment in Article 3 of Condescendence that "the defender caused the pursuer to enter into arrangements … LSES"; or of the averment in Article 4 that "the pursuer via the defender issued a purchase order to NTM …". Document 9 is the purchase order and is not signed or issued by the defender. The pursuer does not explain how the defender allegedly induced or caused the pursuer to enter into the transactions. It does not

specify any false representation made by the defender, which induced the pursuer to so transact. Without such specification it is not possible for the court to decide whether the defender's alleged conduct amounts to a harm under Article 282 or deception within the meaning of Article 285 of the Code.

[45] There is no suggestion in the pleadings, or in the Whelan reports, that the case is based on an agency relationship between the pursuer and defender or on any breach of fiduciary duties owed by the defender to the pursuer. There is no averment of conscious dishonesty or fraud.

[46] The deficiencies in the pursuer's pleading have led to Mr Whelan putting a highly tendentious gloss on the pursuer's averments against the defender.

[47] The pursuer uses the term "secret profits" on four occasions in Articles 3, 4 and 5 of Condescendence. It is clearly a fundamental part of the pursuer's pleaded case. They are patently irrelevant. An obligation not to make or to account for secret profits would properly be understood, in UAE law, as in other systems of law, as deriving from an employment or fiduciary relationship. Mr Whelan makes only brief reference to secret profits, asserting, without citing any basis in the Code or judgments of the court, that it is a tort under UAE law. It is wholly unclear whether the pursuer's case is that the defender breached a duty owed to the pursuer by making secret profits, or whether its position is that any such duty was owed to the employer but that breach of duty forms part of the factual background.

[48] The second chapter of Mr Currie's submissions was to make certain submissions with respect to the credibility and reliability of the two expert witnesses.

[49] Mr Currie said this: the court should accept all of the evidence of Mr Attia. His evidence is clear and supported by relevant provisions of the Code and judgments of the

court. He initially dealt with the pursuer's claim as based in contract; this was entirely due to the misconceived reliance in the pursuer's pleadings and expert evidence on the contract between the defender and his employer.

[50] He submitted that the court should accept the evidence of Mr Whelan only where Mr Attia agrees, or where it is clearly based on a provision of the Code or judgment of the court.

[51] He submitted that, in his reports Mr Whelan is argumentative, and adopts the position of advocate of his client's case. He has sought in his reports to engage in argument with Mr Attia. He has misrepresented Mr Attia's views, for example, claiming in paragraph 3 of his second report, that Mr Attia agreed that the pursuer's averments disclosed a harmful act within the meaning of Article 282, when it was plain from Mr Attia's second report that he considered the Tripartite Test was not satisfied.

[52] Mr Whelan's evidence is vitiated by his failure to confine himself to the proper role of an expert on foreign law and simply to state the UAE law relevant to the pursuer's averments of fact. Instead he has chosen to put a tendentious gloss, in various differing formulations, on the pursuer's averments. He uses emotive words not found in these averments, such as "dishonestly and deceitfully abused the position he held with his employers"[11]; "crooked manager who cheated his employers' customer"[12]; "web of deception"[13].

[53] Mr Whelan changes his position in relation to the relevance of the employment contract and advances a patently unsound argument as to its relevance.

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[11] Whelan (2) [4]

[12] Whelan (2) [4]

[13] Whelan (3) [9.15 – 19]

[54] The third chapter of his submissions was to look at the issue of the relevance of the defender's employment contract. In development of his argument regarding this he first submitted: that the evidence of Mr Attia on the employment contract is clear and supported by relevant provisions of the Code and judgments of the Dubai Court of Cassation[14]. A contract may not impose obligations on a third party, but may confer rights. The contract of employment confers no rights on the pursuer and it is irrelevant to the pursuer's claim against the defender. The pursuer has no right to invoke the principle of good faith; that applies only as between the contracting parties.

[55] Articles 264 and 265, referred to by Mr Whelan are wholly irrelevant.

[56] In his first report, Mr Whelan refers to the contract of employment only to rebut an argument, not, in fact, made by the defender, that his actions did not constitute a tort against the pursuer because they were permitted by his employment contract[15].

[57] In his second report, Mr Whelan initially reiterates that the contract is only relevant as part of the background[16]. He then, however, significantly moves away from his initial position that the employment contract is merely part of the factual context to which the court would refer in deciding whether the defender committed an actionable tort. He contends "the Pursuer would have been entitled to rely on the Defender acting in accordance with his contract[17]." Mr Whelan seeks to distinguish this "entitlement to rely" from the reliance that a contracting party is entitled to place on his contractual counterparty, but there is no such distinction. "Entitlement" is tantamount to a right.

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[14] Attia (1) [18 – 24 and Annex 3 and 4; 37 – 39]; Attia (2) [19 – 28]; Attia (3) [15 – 22].

[15] Whelan (1) Section 6

[16] Whelan (2) [5.17]

[17] Whelan (2) [5.18.1]

[58] In his third report, Mr Whelan describes the employment contract as "a very important part of the background …"[18], and states "The Pursuer was entitled to expect that the affiliate's employees would discharge their obligations (to their employer, and through their employer to the Pursuer) in good faith and honestly." This passage also constitutes a significant change of position from the initial assertion that the employment contract was merely part of the relevant background. Mr Whelan now asserts, in effect, that the defender owed a duty of good faith to the pursuer. This assertion is unsupported by any provision of the Code or court judgment and is un-tenable in view of the provisions of the Code and judgments referred to by Mr Attia.[19]

[59] It is clear that the defender's employment contract and his obligations to the pursuer are a fundamental part of Mr Whelan's argument that the defender committed a tort against the pursuer. The court should reject Mr Whelan's evidence on the relevance of the employment contract. It is unsupported by any provision of the Code or judgments of the court. It is contradicted by Mr Attia, whose evidence on this point is clear and compelling.

[60] The fourth chapter was to turn to look at the issue of "secret profits". He reminded the court that the pursuer in its averments made reference to "secret profits" in Articles 3, 4 and 5 of Condescendence. The only reference to "secret profits" in Mr Whelan's reports could be found at paragraph 5.18.3 of tab 2, where he states as follows:

> "The making of a secret profit as pleaded in paragraph 4 of the condescendence also amounts to an actionable tort under UAE law."

[61] He pointed out that Mr Whelan cited no provision of the Code or judgment of the court in the UAE to support this proposition. He did not state by whom such a tort would be actionable. He submitted that this evidence should be rejected.

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[18] Whelan (3) [5]; [9.25 – 27.11]

[19] Attia (3) [20 – 22]

[62] In support of the above he directed my attention to the second report of Mr Attia at paragraph 16 and 17 where he said the following:

> "If the Defender conducted business secretly while he was employed by RAK Petroleum, then these acts may amount to a breach of the Employment Contract that might give rise to contractual liability (but not liability in tort)".

[63] In the next chapter of his submissions Mr Currie turned to look at the issues of the alleged breach of Article 282 and Article 285 and in respect to these made the following submissions: Mr Whelan advances various formulations as to what is required to constitute a harmful act in terms of Article 282. In paragraph 5.4 of his first report, Mr Whelan states that an unjustified act would fall within the category of harmful act. It is submitted that this terminology is unsatisfactory for the reasons given by Mr Attia.[20] In paragraphs 5.7 of his first report Mr Whelan characterises a harmful act as one that the defender did not have the right to perform. As Mr Attia correctly points out that characterisation is incomplete and would require specification of on what basis the defender did not have the right to perform the acts complained of.[21] The only basis identified by Mr Whelan for saying that the defender did not have the right to do the acts complained of in paragraph 5.9 of his first report is the employment contract.

[64] It is submitted that the court should accept the evidence of Mr Attia in paragraph 29 of his second report that Mr Whelan had not identified a basis for contending that the Tripartite Test had been satisfied.

[65] In paragraph 5.14 of his second report Mr Whelan agreed with Mr Attia, that "an actionable harm necessarily involves a breach of a legal duty."[22] It follows from that concession that Mr Whelan requires to identify a legal duty owed to the pursuer by the

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[20] Attia (2) [25]

[21] Attia (2) 26

[22] Whelan (2) [5.12 – 14]

defender, which the defender has breached. It is clear from paragraph 5.18.1 of the second report that an essential element of Mr Whelan's evidence that the defender breached Article 282 is Mr Whelan's contention that the pursuer was entitled to rely on the defender acting in accordance with his contract of employment. He also relies on the notion of secret profits. These fallacies fatally undermine his view that the defender breached a legal duty that he owed to the pursuer.

[66] In his third report Mr Whelan proposes that Article 282 requires an unlawful act on the part of the alleged wrongdoer, unlawful act meaning that the wrongdoer did not have the right to do what he did. Mr Whelan, however, fails to specify what acts the defender did not have the right to do.

[67] In his first report Mr Whelan refers to Article 285 and seeks to identify the acts of the defender that constitute deception. He makes a sweeping assertion that "I can see no way in which, as a matter of UAE law, the defender can plausibly argue that he had the right to perform the acts complained of."[23] Here Mr Whelan is patently departing from his proper function, as an expert witness, of putting the court in the position of making findings in fact. He is acting as an advocate for the pursuer.

[68] In paragraph 5.10 of his first report he refers to a deception as to the *bona fides* of the contractual arrangements and the correctness of the excessive invoices. No such deception is averred in the pursuer's pleadings. This again is a tendentious gloss on the pursuer's averments. Mr Whelan does not aver when or by what means the defender made any misrepresentation as to the *bona fides* of the contracts or the correctness of the invoices. In paragraph 5.11, he reformulates the deception as the ongoing maintaining of the pretence

[23] Whelan (1) [5.9]

that the contracts in question were correctly made, and that the excessive payments were properly due. Again Mr Whelan is glossing and innovating on the pursuer's pleadings.

[69] In paragraph 5.18.2 of his second report he states that the defender set up LSES, placed the pursuer's business through it with SFM, concealed the fact that he was behind LSES and by means of that arrangement caused the pursuer to enter into contractual arrangement with LSES, which then rendered inflated invoices to the pursuer. Mr Whelan specifies the deception as deceiving "the pursuer into believing that the transactions were *bona fide* transactions and that the invoices were correct".

[70] That formulation is another gloss on the pursuer's pleadings, which rely heavily on the notion of secret profits. In any event the expressions "*bona fide* transactions" and "invoices were correct" are wholly unclear. The transactions were binding contracts. The pursuer became contractually bound to make the payments. The pursuer has not sought to have them set aside. The contracts are not void.

[71] In paragraph 5.18.4, Mr Whelan fails to identify any legal duty owed by the defender to the pursuer but states "the deception was the concealment of the beneficial interests behind NTM. The unlawful act was the deliberate taking of the pursuer's property at an undervalue.".

[72] This clearly will not do. Mr Whelan has identified no legal basis for an assertion that the defender was bound to disclose to the pursuer that he had set up NTM. This is another example of the pursuer seeking to rely on breach of duties owed by the defender only to his employer. Mr Attia is clearly right about this.[24] Mr Whelan has cited no authority in the Code or judgments of the court that overcharging amounts to breach of a legal duty or deception.

[24] Attia (2) [16 – 17]; Attia (3) [12 – 14]

[73] In his third report[25] Mr Whelan makes another attempt at identifying the alleged deception, and contradicts both his earlier formulation and the pleadings. His characterisation goes well beyond the pleadings and is highly tendentious.

[74] He first says that "the wrongful act was the taking of the money, and not the setting up of those two companies, or even the deception". There are no averments that the defender took any money from the pursuer. Mr Whelan also seems to be departing from reliance on Article 285.

[75] He then says the complaint is not that the defender established companies or his non-disclosure of his interest in them. The deception is now said by Mr Whelan to be a larger scheme of deception or a web of deception. He says the defender committed a wrongful act by taking money from the pursuer that the pursuer was not obliged to pay. As noted above there is no averment that the defender took money from the pursuer. There is a clear distinction between taking another person's money and overcharging. Mr Whelan has to resort to the gloss that the defender took the pursuer's money because he is unable to characterise the alleged overcharging as constituting deception.

[76] The court is invited to accept Mr Attia's evidence that it is not possible to ascertain whether the defender committed deception within the meaning of Article 285 without knowing by what means the defender *"caused"* the pursuer to enter into transactions (as averred in Article 3) or what is meant by "via the defender" in Article 4. The lack of specification precludes the identification of any deception.

[77] It is submitted that owing to the failure of the pursuer to make clear averments of fact and Mr Whelan's consequent gloss on the pleadings and conflicting analyses of the harmful act/deception, the court is left with no basis to make the necessary finding in fact as

[25] Whelan (3) [9.9]; [9.11 – 12; 9.14; 9.15 – 19]

to whether the defender's alleged conduct constitutes a tort under Article 282 or deception under Article 285.

[78] In conclusion it was his position that for the foregoing reasons the court should accept the evidence of Mr Attia and reject the evidence of Mr Whelan. It would follow therefore that the court would grant decree of absolvitor.

Discussion

[79] The question for the court is this: is there a basis in the evidence of the two experts to make the necessary findings in fact that the alleged conduct of the defender constitutes a tort under Articles 282 or 285 of the UAE Code?

[80] As I earlier noted the core of the dispute between the experts related to the relevance of the defender's contract of employment.

[81] Mr Whelan's starting point in respect to this issue is in section 6 of his first report and as Mr Currie submitted the comments in this section appear to be directed to a defence not advanced by the defender, namely: that his contract of employment entitled him to act as alleged by the pursuer. However, it is noteworthy that he says in terms of the law of contract of the UAE the defender owed a duty of good faith to his employer and in terms of that duty could not enter into a deal which resulted in a "secret benefit" to him (see: paragraph 6.8). It is further noteworthy that in the earlier part of his report where considering Articles 282 and 285 he does not refer to the contract of employment as being relevant to the views he expresses as to whether what is averred by the pursuer amounts to a breach of these Articles. Rather at paragraph 5.7 he says this:

> "On the assumption that the defender did not have the right to perform the acts complained of, …, then he will be liable to make good the loss."

He does not at this stage give any basis for this assumption.

[82] He goes on in the following paragraph to say this:

> "I see no way in which as a matter of UAE law, the defender can plausibly argue that he had the right to perform the acts complained of."
>
> Once more he does not give any basis for that bald assertion.

[83] Mr Whelan in his second report further considers the relevance of the contract of employment and begins by saying this at 5.17:

> "Mr Attia seems to misunderstand the position here. The employment contract is relevant, but only as part of the background story to the action in tort for the harmful acts alleged by the Pursuer."

[84] I do not understand Mr Attia to dispute that characterisation of the relevance of the contract of employment.

[85] However, in the following paragraph Mr Whelan goes on to say this:

> "It is to be noted first that all of the acts of the Defender causing harm, as alleged in paragraphs 3, 4 and 5 of the condescendence in the adjusted summons, were done by the Defender in his capacity as an employee of associated companies of the Pursuer. The Pursuer would have been entitled to rely on the Defender acting in accordance with his contract. In particular, the Pursuer would have been entitled to rely on Article 246 of the Civil Code, which imposes on both contracting parties an obligation to perform it:
>
> '… in accordance with its contents and in a manner consistent with the requirements of good faith.'" (emphasis added).

[86] I believe that the above statement in paragraph 5.18.1 is materially different from the statement in 5.17.

[87] It seems to me, that by a roundabout route, Mr Whelan is saying that the duty to act in good faith which is owed by an employee to an employer, is owed to a third party. He cites no basis in UAE law which properly supports that assertion. As he himself points out the obligation in terms of Article 246 is one which is owed by one contracting party to the

counterparty. It is a contractual duty. This does not give a right to a third party. I believe this shows that Mr Whelan's position is misconceived.

[88] In the next paragraph in his report he seeks, somewhat, to retreat from the statement at 5.18.1, perhaps recognising that it is not one which can be supported in terms of UAE law. He says this:

> "I emphasise that the reliance that the Pursuer would be entitled to place on the Defender acting in a manner consistent with the requirements of good faith is not the reliance that one contracting party is entitled to place on his contractual counterparty. Rather, it stems from the general underlying principle that people are presumed to be behaving lawfully and honestly."

[89] I accept what Mr Currie says about the terms of that paragraph, namely: that what Mr Whelan sets out there does not amount to a distinction in law. The entitlement to which Mr Whelan refers is equivalent to a right. He is saying in effect that a third party has the same right as a party to the contract. In particular he is saying that the third party has the right to expect that a party to the contract will act in good faith.

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

[91] Mr Whelan cites in support of this position two Articles of the Code, namely: Articles 47 and 49. I do not believe they in any way assist his argument. To say that common usage will have probative force, does not it appears to me to support a contention that a third party can rely on the obligation of good faith imposed on parties in terms of a contract. Equally I do not think that greater evidential weight being placed on the commonplace is of any assistance. Neither of these Articles supports the creation of a legal

right of the type Mr Whelan is asserting. I am persuaded that Mr Attia's position in respect to these two Articles is correct.

[92] Mr Whelan again seems materially to change his position in his third report, where at paragraph 5 he refers to the contract of employment forming a "part of the background".

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

[94] Mr Attia sets forth a detailed analysis of this issue in his third report (tab 6) between paragraphs 8 and 28 which I have set out in full earlier in this Opinion.

[95] In particular he deals with Articles 246, 47 and 49 upon which Mr Whelan relies.

[96] He draws the attention of the court to Article 250 which expressly states: "The effects of a contract shall apply to the contracting parties". The other Articles to which reference is made by Mr Whelan have to be seen in the context of this specific provision.

[97] That the UAE Code applies the principle of good faith in the context of a contract and in the context of a contract alone Mr Attia supports his position by reference to nine cases as set out at paragraph 21 of his third report. Mr Whelan on the other hand did not direct the court to any case law which supported his position.

[98] With respect to Articles 47 and 49 he directed the court's attention to the commentary to the Articles. The examples stated in the commentaries he argued evidenced why these provisions had no relevance to the present case. This in my view having regard to these examples is undoubtedly correct.

[99] I believe the analysis of Mr Attia is clear and compelling. It is fully argued and supported by case law and reference to the Code. Mr Attia has maintained a consistent position throughout his reports unlike Mr Whelan. I have no difficulty in preferring his evidence on this central issue. Mr Whelan has no option but to attach significance to the contract of employment given the way that the case is pled on behalf of the pursuer. On a fair reading of the pursuer's cases, with respect both to breaches of Articles 282 and 285, the failure of the defender to act in good faith and in particular in terms of that obligation to disclose to the pursuer the setting up of the companies and his role therein is central to the pursuer's position.

[100] That this is the central plank in its case can be seen by the averment that as a result of his actings the pursuer made "secret profits". This averment is contained in each of Articles 3, 4 and 5 of Condescendence. I believe Mr Currie is correct in submitting that the phrase "secret profits" is one which would properly be understood in UAE law, as in other systems of law, as deriving from an employment or fiduciary duty. No such employment or fiduciary duty exists between the pursuer and defender which would be commonly

understood and understood in terms of the law of the UAE in the context of a breach of a contractual duty of good faith.

[101] In addition with respect to the issue of secret profits Mr Currie submitted that there is only a single reference to this in the reports of Mr Whelan. He makes certain criticisms of that reference. I believe these criticisms have considerable force. The reference comes out of the blue and is wholly unsupported by reference to the Code or authorities. As set out by Mr Attia unless you owe a duty of good faith and thus disclosure, no tort is committed by the making of a "secret profit". As I pointed out earlier at paragraph 6.8 of his first report Mr Whelan refers to the employee "making a secret benefit". This is, however, in connection with contractual obligations and tends to support the view that it is in that context that UAE law approaches this issue.

[102] Overall I conclude the pursuer is seeking to rely on a contractual duty owed by the defender to his employer but not to it as a third party in order to found its case in tort. Further confirmation that that is the case is found in the following: the lack of averments of false representations made by the defender, which induced the pursuer to transact. There are no averments as to how the defender allegedly induced or caused the pursuer to enter into the transactions. From the lack of such averments it is clear that the heart of the pursuer's case is the failure to disclose the setting up of the other companies, his role therein, and his thus deriving a secret profit. On looking to the evidence of the two experts I believe that in terms of UAE law it is clear that no such duty of disclosure exists in the absence of a contractual relation between the parties.

[103] I turn now to look in a little more detail at the expert's evidence with respect to Articles 282 and 285 of the Code. First Article 282, Mr Whelan's formulation of what is required to constitute a harmful act in terms of Article 282 is at paragraphs 5.4 and 5.7 in his

first report. I believe the criticisms of these formulations advanced by Mr Currie are justified and that on this basis of these formulations the Tripartite Test is not made out.

[104] Mr Whelan does concede in his second report that "an actionable harm necessarily involves a breach of a legal duty" (see: paragraph 5.14). For the reasons I have earlier set out, the evidence of Mr Whelan seeking to identify a breach of a legal duty by the defender, comes to this: a failure to act in accordance with his contract of employment. For the reasons I have advanced earlier that is not a duty he owed to the pursuer.

[105] The third report of Mr Whelan does not for the reasons advanced by Mr Currie advance his position beyond the above.

[106] With respect to the Article 285 case there are a number of further observations which I would make.

[107] Mr Currie refers to how Mr Whelan characterises the deception in his first report. Mr Whelan says this at paragraph 5.10:

> "The facts regarding the making of the contract between the pursuer and variously LSES and NTM as described in paragraphs 3 to 5 of the condescendence appear on their face to show a deception practised by the defender on the pursuer as to the *bona fides* of the contractual arrangements entered into by the pursuer and the correctness of the excessive invoices paid by it".

[108] I believe Mr Currie is correct in submitting that no such deception is averred by the pursuer. I made the point earlier there are no averments of misrepresentations by the defender as to the *bona fides* of the contracts or the correctness of the invoices.

[109] I consider it is fair to say that a striking feature of the averments made on behalf of the pursuer is the almost complete absence of any averments of misrepresentation.

[110] At paragraph 5.18.4 of his second report (tab 2) Mr Whelan states this with respect to the defender's deception:

> "The deception was the concealment of the beneficial interests behind NTM. The unlawful act was the deliberate taking of the Pursuer's property at an undervalue."

[111] As I have said there is no legal basis for the assertion that any such duty to disclose was owed by the defender to a party other than his employer.

[112] By the time of the third report Mr Whelan's characterisation of the alleged deception has gone well beyond the setting up of the companies and the non-disclosure by the defender to the pursuer of his interest therein. He now characterises the deception in this way: he now relies on "a larger scheme of deception" (see: paragraph 9-11/12) and a "web of deception" at paragraph 9.19. There are no averments of such a larger scheme or web of deception. The case as averred is that the companies were set up by the defender, he did not disclose his interest in these companies to the pursuer and these companies overcharged. As I have said: there are no averments as to how the defender allegedly induced or caused the pursuer to enter into the transactions and nor are there any specified false representations which are alleged to have been made by the defender. There are no averments of conscious dishonesty or fraud. Nor are there averments that the defender took money from the pursuer. What therefore are the averments which amount to deception within the meaning of Article 285? There are no specific averments regarding this. The averments as to how the defender deceived the pursuer are limited to his having set up this company unknown to the pursuer and where his interest in the company was not known to the pursuer. It is thus based on the failure to disclose this position, which was a duty he did not owe to the pursuer.

[113] Mr Whelan's various attempts to characterise the deception in terms of Article 285 underlines again the general difficulty in accepting the evidence of Mr Whelan.

[114] In conclusion I preferred the evidence of Mr Attia on the essential issues. I accepted Mr Currie's submission that I should accept all of the evidence of Mr Attia. I believed that his evidence was clear and supported by relevant provisions of the Code and judgments of the UAE courts. Overall, I believe his analysis of the UAE law to be correct, for the reasons I have above set out. Mr Whelan's argument as to the relevance of the defender's contract of employment which formed the core of his evidence with respect to Articles 282 and 285 was for the reasons that I have above set out unsound.

[115] Mr Currie in the course of his submissions urged me to reject the evidence of Mr Whelan on the basis that his reports were argumentative, he had adopted the positon of advocate in his client's case and failed to confine himself to the proper role of an expert.

[116] I do not accept that Mr Whelan's reports were argumentative. Their form was to seek to reply to specific points put forward by Mr Attia in his reports and did not in the pejorative sense advanced by Mr Currie seek to engage in argument with Mr Attia.

[117] Nor am I persuaded that he adopted the position of advocate of his client's case. I believe on a proper reading of his reports and having regard to his oral evidence he understood his role as an expert witness and did not go beyond the role of stating the UAE law.

[118] I do not think he placed tendentious glosses on the pursuer's averments. I believe he had at all times sought to understand and put forward what he understood to be the pursuer's case. If at any point he went beyond what was averred, I think this was because he had erred in understanding the written pleadings.

Conclusion

[119] For the foregoing reasons I conclude that the court is left with no basis to make the

necessary findings in fact that the defender's alleged conduct constitutes a tort under Article 282 or deception under Article 285. I am satisfied, that if the case as averred were proved this would not amount to a breach of Article 282 or 285 of the Code.

[120] I accordingly sustain the second to fifth pleas-in-law of the defender; repel the pleas-in-law of the pursuer; assoilzie the defender from the first conclusion of the Summons; and reserve all questions of expenses.