Neutral Citation: [2013] IEHC 362

**THE HIGH COURT**

**COMMERICAL**

**[2010 No. 6443 P]**

**[2010 No. 223 COM]**

**BETWEEN**

**HARLEQUIN PROPERTY (SVG) LIMITED AND HARLEQUIN HOTELS AND RESORTS LIMITED**

**PLAINTIFFS**

**AND**

**PADRAIG O'HALLORAN AND DONAL O'HALLORAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 25th day of July 2013**

1. In these proceedings, the plaintiffs' claim against the first named defendant is in essence that he misappropriated large amounts of money paid by the plaintiffs to him in connection with a construction project to build a luxury hotel and resort in the Caribbean. The plaintiffs seek declarations that monies held by him in certain bank accounts in the State are held by him as constructive trustee for the benefit and to the use of the plaintiffs and that the funds constitute unjust enrichment by the first defendant at the expense of the plaintiffs. The plaintiffs also seek restitution or damages (including exemplary damages) for fraud and/or fraudulent misrepresentation and a declaration that the plaintiffs and each of them are joint beneficial owners of a dwelling house in County Cork which, the plaintiffs allege, was purchased by the first defendant out of monies misappropriated from the plaintiffs.

2. The second named defendant is the father of the first named defendant and the plaintiffs' claim against him is that he received money from the first named defendant from sums misappropriated by the first named defendant from the plaintiffs.

3. These proceedings are part of a multi-jurisdictional fraud claim arising out of a construction project to build a luxury hotel and resort at Buccament Bay in Caribbean islands of St. Vincent and the Grenadines ("SVG"). The events in issue before the court took place between 2008 and 2010.

4. The plaintiffs claim that during that period, approximately US$50m was paid by or on behalf of the plaintiffs (together hereinafter referred to as "Harlequin") to companies owned and controlled by the first named defendant. These companies were ICE (SVG) Ltd. ("ICE"), Cellate Caribbean (SVG) Ltd. ("Cellate SVG") and Cellate Caribbean Ltd. ("Cellate"), which are collectively known as "the ICE Group". It is the plaintiffs' case that they were the only significant source of income for the ICE Group at that time and they allege that despite receiving more than US$50m from the plaintiffs, the value of construction carried out by the ICE Group companies between 2008 and 2010 was approximately US$22.4m.

5. The ICE Group of companies had taken over work on the site after a previous contractor Ridgeview Construction (SVG) Ltd. ("Ridgeview") had been dismissed following serious differences between it and the plaintiffs over the works being carried out and alleged misappropriation of funds.

6. There is no agreement between the parties on the precise terms of the contract between the plaintiffs and the ICE Group. I will deal with the differences between the parties on this issue later in this judgment.

7. The development was to be built in stages. After the ICE Group took over the site from Ridgeview, some changes were made to the design of the resort and as time went by, the plaintiffs became concerned about delays in completing Phase 1 of the development. The plaintiffs allege that after numerous meetings between the parties, the ICE Group agreed to complete phase one by 1st July, 2010. Specifically, the plaintiffs allege that the first named defendant gave an absolute assurance that this would be done and the plaintiffs marketed the development on that basis. In order to achieve that opening date, a revised schedule of payments was agreed between the parties. The plaintiffs marketed the development at a major trade fair in London and arrangements were put in place to bring tour operators and investors to the site for the opening. The plaintiffs allege that not only was that deadline not met by the ICE Group, but at a time when they had been pumping ever-increasing sums of money into the ICE Group for the purpose of meeting the deadline, the first named defendant was simultaneously misappropriating large amounts of money for his own benefit.

8. The plaintiffs claim that between 2008 and 2010, the first named defendant misappropriated for his own personal benefit a sum in excess of US$13.5m that should have been deployed on the Buccament Bay project or other authorised Harlequin projects and which was paid by Harlequin to the ICE Group for that purpose. The plaintiffs claimed that the first named defendant lived a very lavish lifestyle at the expense of the plaintiffs and spent their money, *inter alia*, on purchasing a private jet, renting an expensive mansion in Sandy Lane, Barbados, buying a racetrack in St. Lucia, purchasing a quarry in SVG and buying expensive gifts for his girlfriend. Although the plaintiffs claim these were illegitimate payments and expenditure, they do not form part of the Irish proceedings other than being offered as evidence corroborating his misappropriation of funds.

9. The plaintiffs claim that the first named defendant diverted approximately US$2,283,600 to Ireland for his own use, including a sum of US$226,800 for a wedding that was planned but never took place.

10. The first named defendant denies that he misappropriated any money and claims that all of the sums expended by him were either for the benefit of the Buccament Bay project or the ICE Group of companies in facilitating their work on the project, and that insofar as some of the payments made were for him personally, he was entitled to make these payments as part of his remuneration for the work which he was doing.

**Legal Issues**

11. The following are the legal issues which arise for consideration in this case:-

(i) Whether the first named defendant obtained monies from the plaintiffs on foot of fraudulent misrepresentations and whether he fraudulently misappropriated some of those monies for his own purposes;

(ii) whether the fact that the first named defendant utilised corporate vehicles (the ICE Group) to carry out the alleged fraudulent scheme offers him a personal exemption or immunity from suit in respect of that fraud;

(iii) further, or in the alternative, whether the monies advanced by Harlequin were held on a "*Quistclose*" trust by the ICE Group and can now be traced to the accounts and assets of the defendants and each of them;

(iv) In the event that the court holds there is no direct claim in fraudulent misrepresentation and/or fraud against the first named defendant, whether the court is entitled to lift the corporate veil so as to enable the plaintiffs to claim directly against the first named defendant in respect of that fraud?

(v) If the ICE Group is insolvent, is the first named defendant liable to the plaintiffs on the basis of a breach of duty owed by him as a director to the company's creditors?

(vi) Whether the assets of the first named defendant, which are the subject of this action, are held on trust to the benefit of the plaintiffs; and

(vii) Whether the second named defendant knowingly received monies that were disposed of fraudulently and/or in breach of trust, or whether the second named defendant is in any event liable to pay those monies as monies had and received by him to the use of the plaintiffs.

**General Outline of the Project at Buccament Bay**

12. The first named plaintiff is registered in SVG and was involved in overseeing the construction of Buccament Bay Resort. Mr. David Ames and his wife, Mrs. Carol Ames, are the directors of the company. The business of the company is to buy land and build and operate luxury hotels and resorts in the Caribbean. The company sells villas and hotel units to property investors.

13. The second named plaintiff is registered in Grand Cayman and is the operator of the Buccament Bay and other resorts in the Caribbean. Mr. David Ames is the owner and sole director of the company.

14. The first named defendant was at all material times the CEO of a number of construction companies based in Barbados and SVG and which comprise the ICE Group.

15. Before the ICE Group was contracted to work on the Buccament Bay site, Ridgeview Construction (SVG) Ltd. ("Ridgeview") had been employed to construct the development. The ICE Group had been subcontractors to Ridgeview in the period between March 2007 and July 2008.

16. The development at Buccament Bay is in an area of approximately 60 acres and is the largest private development so far undertaken in SVG. At its height, approximately 1,000 workers were engaged on development. The site is located on land adjoining the sea and accommodation is arranged in apartment blocks and cabanas or villas which vary in size from one to four bedrooms. Some are detached and some are semi-detached.

17. The resort was pitched at the luxury end of the market and, as one would expect in a development of this nature, there were to be a number of different restaurants and sporting and leisure facilities.

18. The development was to be built in a number of phases. This dispute is primarily concerned with Phase 1 of the development. The original agreement was that Phase 1 would be built by 1st March, 2010. This date was later extended to 1st July, 2010. While the scope of Phase 1 altered to some extent over time, it can be summarised as follows:-

(a) In September 2008, it was agreed that the ICE Group would complete two apartment blocks which had been partially constructed and would also build the cabanas and other areas while the design of the swimming pool and beachfront area was being finalised.

(b) By 26th May, 2009, the parties were working towards an opening day of 1st July, 2010, and the scope of Phase 1 was set out in an email of 26th May, 2009, from Mrs. Carol Ames in which she stated that Phase 1 "*. . . will consist of a 362-room key 5-star resort*". Included in the opening would be a marina, dive shop, reception, beach bar and restaurant, galleon ship, 'Trader Vic's' restaurant, steak and fish restaurant, Asian fusion restaurant, fine dining Italian restaurant and a buffet restaurant. Further details as to the types of suites and rooms and their dimensions were set out in the email. It also appeared from that email that the "*water's edge*" area was to be finished.

(c) On 23rd and 24th November, 2009, a project progress meeting took place at the site and the key decisions taken at that meeting were set out in minutes which were circulated by an email on 14th December, 2009. It is not necessary to set out all the details of Phase 1 as therein recorded. What is important is that at the commencement of the minutes, it is stated "*the meeting began with a review of the overall site plan to establish the exact extent of works for Phase 1 that is to be completed by July '01 2010*".

(d) A further project progress meeting took place on 25th and 26th January, 2010, and the minutes of that meeting set out the scope of works in Phase 1 to be delivered by 1st July, 2010. Although the completion date is stated to be "*July 3rd 2010*", the parties are agreed that that was an error. While there is some lack of precision in what was agreed (for example, the reference to "*approx 150 cabanas*"), the general scope of Phase 1 is set out. It included the cabanas, a waterfront village, including four restaurants and ancillary works, a beach bar, a retail village building, pool areas, a marina boardwalk and jetty with breakwater and beach works, Apartment Block 1 and Apartment Block 2 to be fully completed externally but left as a shell and core standard internally, certain works to be carried out in Apartment Block 3 and some temporary backup house buildings. Some further matters are also referred to in those minutes.

(e) 18th May, 2010. A reduced scheme of works to comprise Phase 1 is set out in a memorandum of a meeting on that date. This includes two restaurants (with some uncertainty about "Trader Vic's" being completed on time), a swimming pool, 60 cabanas for guests and other cabanas to be used on a temporary basis for other purposes, Apartment Block 2 to be completed for accommodation (but hotel staff to reside in cabanas until available), some sports facilities, Apartment Block 3 to be completed to 5th floor with roof frames fitted, waterfront village and retail village. There are other matters referred to in the memo.

**The Contract**

19. Extraordinarily, for a development of this size, there was no written contract. Mr. David Ames said that he was persuaded not to have a written contract by Mr. Martin MacDonald who had become a close and trusted advisor and confidante. Throughout the proceedings, Mr. MacDonald was generally referred to by the soubriquet of "Mac". Mac was a partner in the accountancy firm of Wilkins Kennedy. Mrs. Ames got to know him when she was employed with Patten Pools (Construction) Ltd. As the plaintiffs' business grew, they needed someone who could advise them on financial matters and Mac became the point of contact between the plaintiffs and Wilkins Kennedy. But he was more than that. He eventually became *de facto* the Chief Financial Officer of the plaintiff's company as he carried out work going way beyond the role of an accountant. He also became a close personal friend of Mr. and Mrs. Ames and they trusted him absolutely. Although Mr. MacDonald played a pivotal role in the events giving rise to this litigation, it is of some significance that he was not called to give evidence, nor did he supply a witness statement.

20. For whatever reason, Mr. Ames did not see the need for a written contract and he appears to have willingly gone along with the suggestion that the parties to the building contract for the resort at Buccament Bay would work things out on an ad hoc basis as they went along. As matters transpired, this turned out to be a very poor decision on his part.

21. The plaintiffs claim that the ICE Group agreed to undertake Phase 1 of the building work at a rate of US$96 *per* sq. ft. The plaintiffs agreed to make regular interim payments to fund the construction costs. Mr. Ames gave evidence that the rate of US$96 *per* sq. ft. was agreed in respect of the cabanas and apartment blocks, but conceded that the waterfront village area had not been costed, although he claimed that the rate was never questioned in relation to the restaurants. Although his evidence varied somewhat on the issue, he came down on the figure of US$96 *per* sq. ft. for the whole of the Phase 1 contract. In his witness statement, he stated that the rate remained US$96 *per* sq. ft. for all building costs with a reduced rate for pools, decking and car parking. This was corroborated by Mac's handwritten endorsement on a document which was contained in Appendix 4 of Mr. Ames' statement and was put in evidence.

22. The first named defendant contends that in the pleadings, both parties have asserted that the contract price was US$76m.

23. Paragraph 16 of the amended statement of claim says that figure was "*. . . to complete the Buccament Bay project based on an agreed price per square footage for works due to be competed by 1 July 2010*". At paragraph 7 of the amended defence and counterclaim, the first named defendant denies that the ICE Group agreed to undertake the building works at an agreed price of US$96 *per* sq. ft., but states that the price *per* sq. ft. varied for different areas of the project from US$57 to US$102 *per* sq. ft. and that the total agreed was the price of US$76,208,132 plus the cost of any variations requested as described by the scope of works.

24. There is no doubt that even when the statement of claim was amended, the figure of US$76m was not altered. Furthermore, in an affidavit sworn on 11th April, 2011, in these proceedings, Mr. Ames refers to a figure of US$76,843,396. In the course of his evidence, Mr. Ames sought to resile from that figure.

25. Mr. Ames said that the price of US$96 *per* sq. ft. was to cover all the services to the accommodation including finished plastering, painting, tiling, sanitary ware and connection of utilities so as to leave the premises ready for the hotel operator to put in furniture, pictures, TVs and matters of that kind. Mr. Simon Taylor, who works on business and brand development with Harlequin, and Mr. David Campion, an architect (formerly with Murray O'Laoire and now working for Harlequin) both confirmed that a rate of US$96 *per* sq. ft. was agreed. In his evidence, Mr. Campion said that the first named defendant confirmed that this was his agreement with Mr. Ames. Mr. Campion said that the remark was made in the context of a discussion about the cabanas, apartment blocks and joinery tenders for the restaurants. While there is some uncertainty as to the precise basis for calculating the contract price, the evidence established that - whether one takes the plaintiffs' figures or the defendants' figures - the profit margin on the job would be tight. Indeed, there was a body of evidence to suggest that the work simply could not have been done for a rate of US$96 *per* sq. ft.

26. The court heard evidence from Mr. Campion and Mr. Sanjay Amin, a quantity surveyor retained by the plaintiffs, to the effect that it would simply have proved impossible for the ICE Group to deliver the resort at that rate. Mr. Amin estimated that a rate of US$154 *per* sq. ft. may more reasonably have been expected in 2010, although even this rate would result in little profit accruing to the defendants. Mr. Amin was of the view that profit margins for construction contracts in the Caribbean typically come to between 8% and 15%.

27. While there are disputes on the exact costings for the project, these disputes are not critical to the issues which I have to decide because this is not a building contract case. The figures may be of some importance in tending to support the position of one party rather than another, but it is a peripheral issue. Whether the contract was for a fixed lump sum, as contended for by the defendants, or a fixed amount, as contended for by the plaintiffs, is somewhat tangential to the main issues that arise in this case. What is clear on the evidence is that there was an agreement that monies would be paid on a periodic basis. The plaintiffs contend that while these sums varied from time to time, they were - by and large - paid as they fell due, up to the date of termination of the defendants' contract.

**Payments made by Harlequin to ICE Group**

28. An extensive review of the financial payments made by the plaintiffs to the ICE Group in respect of the Buccament Bay project was carried out by Mr. Paul Jacobs of Grant Thornton chartered accountants. Mr. Jacobs is head of the Forensic and Investigation Services Unit of Grant Thornton in Ireland. He prepared a report for the court which analysed a very large number of transactions and accounting entries. His report was submitted to the court and indicates the methodical manner in which he went about his task, including looking at bank statements and what were referred to as "*quick books statements*" used by the ICE Group to record transactions. He presented to the court extensive spreadsheets and schedules showing payments made by the plaintiffs to the ICE Group, and also showing payments which, he said, were made by the first named defendant for purposes totally unconnected with the Buccament Bay project and for his own benefit. These were set out in what was called a *'Misappropriation Schedule'*.

29. Is worth remarking that at the commencement of his cross-examination, counsel for the first named defendant acknowledged that there was no great dispute between the parties as to the figures set out in his reports, but that the dispute arose in relation to the

characterisation of certain payments as "*misappropriation*". Mr. Jacobs acknowledged that in relation to one of the Irish payments there was a duplication involved in relation to a payment to Adare Manor Hotel and '*Weddings by Franc'*. That amounted to a double counting of US$25,800. When Mr. Jacobs discovered that duplication, he corrected the figure in Appendix 10 of his report.

30. I am satisfied that Mr. Jacobs' analysis of the books and records which he examined and the conclusions which he reached are fair and reasonable and I accept his evidence.

31. Mr. Jacobs expressed the view that 94% of the income of the ICE Group came from Harlequin. In other words, apart from one or two small projects, they were entirely dependent on Harlequin. The evidence which I heard in this case overwhelmingly supports that view. Furthermore, the evidence proffered showed that Buckley Meadows and Harmony Hall, the two other construction projects with which the ICE Group was involved in the Caribbean, independently of the plaintiffs, were unlikely to turn a profit. Indeed, the Buckley Meadows project was described by Mark Wallerson, former financial director of the ICE Group as a "*loss leader*". Having considered the evidence available to him, including the figures provided by BCQS in a report, Mr. Jacobs concluded that the ICE Group was effectively insolvent at the time of the termination of their contract by Harlequin.

32. Quite apart from that evidence, it was clear, from the evidence as a whole in this case, that the ICE Group was never going to make a substantial profit out of the completion of Phase 1 of the development. It seems to me that this is a relevant consideration in evaluating the Irish payments which are at the heart of these proceedings.

**Misappropriation**

33. In order to properly understand the allegations of misappropriation and put them in context, it is necessary to set out, in general terms, a timeline showing the amounts of the periodic payments and how they were amended from time to time by agreement.

34. At a meeting on 1st September, 2008, that took place at the plaintiffs' office at Basildon in the UK, Harlequin agreed to make weekly payments to the ICE Group. The first payment of US$100,000 was transferred on 4th September, 2008, and this was followed by payments of US$125,000 per week thereafter. The agreement was that that sum would be paid per week for 12 weeks. At some time around 13th October, 2008, Mr. Ames was informed by Mr. MacDonald that the ICE Group was doing a very good job on the project and that the weekly payments should be increased to US$165,000 until Christmas in order to speed up construction. Mr. Ames agreed to increase the weekly payment accordingly. The project continued in this way until early 2009.

35. On 17th March, 2009, Harlequin's payments to the ICE Group increased to Stg.£400,000 per week with effect from 19th March, 2009. This increase was linked to discussions between Mr. Ames, Mr. MacDonald and the first named defendant on site at Buccament Bay in late February 2009. In May 2009, Mr. Ames committed to making increased payments and, specifically, to make 43 weekly payments of Stg.£450,000 in return for the complete delivery of Phase 1 on 1st July 2010. Mr. Ames' understanding was that those payments would enable Phase 1 to be completed. The price did not include the fit out or furnishing of the restaurants. The weekly payments of Stg.£450,000 continued with some variations until 23rd February, 2010. At a meeting in November 2009, the plaintiffs agreed a revised and reduced scope for Phase 1 to be completed by 1st July, 2009. It was agreed that some remaining elements of Phase 1 would be delivered after 1st July, 2010. By 28th January, 2010, Harlequin had paid 41 of the 43 weekly payments agreed with the ICE Group in May 2009.

36. On 23rd February, 2009, a new payment plan was agreed which involved payments of Stg.£600,000 per week to be made and which were to be supplemented by additional *ad hoc* payments as and when required to ensure Phase 1 was delivered by 1st July, 2010. These payments were agreed at a time when Mr. Ames was becoming increasingly concerned that the 1st July, 2010, deadline would not be met. The first of the Stg.£600,000 payments was made on 24th February, 2010, and weekly payments in that sum continued until 18th May, 2010. Meanwhile, on 10th May, 2010, a payment of US$435,000 was made by Harlequin to ICE Group.

37. On 18th May, 2010, a meeting took place at Harlequin's offices in Basildon. By this time, the plaintiffs were extremely concerned about the lack of progress on the development and felt they had been misled. Desperate to ensure that an opening could proceed on 1st July, 2010, Mr. Ames agreed that the plaintiffs would make seven payments of US$1m *per* week to the ICE Group. On the day following the meeting, Harlequin paid US$1m to the ICE Group, and on 27th May, 2010, they paid another US$1m. That was the last payment made before the ICE Group was dismissed from the site.

38. Mr. Paul Jacobs, in his report and evidence, stated that from August 2008 until June 2010, payments of US$9,942,633.59 were made from ICE Group bank accounts in respect of matters which the plaintiffs claim were totally unrelated to the Buccament Bay project. These included monies spent in relation to the purchase of a jet aircraft, the purchase of a Hertz franchise in St. Lucia, the purchase of racetrack and the purchase of a quarry in SVG. There were also monies paid in respect of a Romanian ski resort project in which the first named defendant was involved with Mr. Noel Tynan. The first named defendant maintains that some of these payments were for the benefit of the Buccament Bay project, for example, the purchase of a jet aircraft and the quarry. He sought to justify the purchase of the jet aircraft on the basis that there was no scheduled air service between the Caribbean Islands and other destinations where the first named defendant was required to travel on Harlequin related business. With regard to the quarry, the first named defendant claims that this was a purchase which would save costs in the sourcing of raw material for use on the Buccament Bay building project.

39. This case is concerned with payments which were allegedly misappropriated and paid into Irish accounts. So far as the Irish payments were concerned, they were made from the ICE Group, primarily to bank accounts of the first named defendant with the exception of a sum of US$201,000 to 'Weddings by Franc Ltd'.

40. The first named defendant had two accounts in Ireland which are relevant to these proceedings. One was a Bank of Ireland Account No. 72907584 ("the 584 Account") and the other was with TSB, Account No. 15434479 ("the 479 Account"). The second named defendant had an account with Permanent TSB in Ireland which bore the Account No. 16111530 ("the 530 Account).

41. The plaintiffs contend that the evidence of Mr. Jacobs establishes that between January 2009 and May 2010, the ICE Group transferred US$2,283,600 into bank accounts in Ireland which had nothing to do with ICE Group's business, much less the Buccament Bay project. This is disputed by the first named defendant who claims that some of these monies were connected with his plan to set up offices for the ICE Group within Ireland. In the last month alone, before the contract with the ICE Group was terminated in June 2010, the Group transferred US$350,000 into the first named defendant's own personal bank accounts in Ireland at a time when the plaintiffs claim the Buccament Bay project urgently required supplies to be purchased to complete the building of Phase 1.

42. The Irish payments started in January 2009 and continued through to the conclusion of the contract in June 2010. As the payments increased in amount, the plaintiffs allege that the first named defendant siphoned off ever-larger sums for non-Buccament Bay project items in the Caribbean and also transferred ever-larger sums to his Irish accounts.

43. Mr. Roberts' evidence shows the following Irish payments having been made:-

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

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

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

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

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

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

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

***November 2009***: Donal O'Halloran (second defendant) US$358,000. Transfer to Bank of Ireland Account (the 584 Account) US$150,000. Transfer to PTSB (the 779 Account) US$150,000. Weddings by Franc Ltd. US$72,000.

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

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

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

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

After making allowance for the double counting of US$25,800, the total Irish payments amount to US$2,257,800.

44. In the meantime, the first named defendant was making substantial payments in the Caribbean in respect of other matters which the plaintiffs allege were quite unconnected with the Buccament Bay project. These have been referred to earlier and include such matters as the purchase of a Falcon Jet aircraft, a racecourse in St. Lucia, the Hertz franchise in St. Lucia and a quarry in SVG. There were other items referred to in the course of the evidence. The Schedules appended to the witness statement of Mr. Paul Jacobs and supported in his evidence show that the level of payments for what the plaintiffs claim were matters unrelated to Buccament Bay increased in the latter half of 2009 and the beginning of 2010. While these payments are not part of the Irish proceedings, they are relevant to establish a pattern of behaviour on the part of the first named defendant and high levels of expenditure at a time when more and more money was required to complete the construction of Phase 1 of the development. In the course of his evidence, Mr. Paul Jacobs referred to a study which he undertook to show in percentage terms what monies paid by Harlequin to the ICE Group were paid out on items which are shown in the *'Misappropriation Schedule'* to his report which includes both Irish and Caribbean payments. He noted that there was an increase in the proportion of monies being used for items on the Misappropriation Schedule as time went by, and in particular, he noticed an uplift in relation to the period of October and November 2009. He calculated that approximately 26% of the monies paid to the ICE Group by Harlequin in respect of the Buccament Bay project were paid out on items specified in the Misappropriation Schedule.

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

46. A total of US$1,673,000 was sent by the ICE Group to the first named defendant's bank accounts in Ireland to establish what was referred to as "*Irish operations*". In February 2010, there were three payments US$100,000 sent to the first named defendant's Irish accounts. One was sent on 11th February, 2010, one on 17th February, 2010, and one on 24th February, 2010. They were described as management fees. It was also put to the first named defendant that between October 2009 and February 2010, US$950,000 had been sent to his Irish accounts excluding repayments made to loans alleged to have been made by the second named defendant. The first named defendant said that the funds were sent to set up an operation in Ireland. He stated that the money was ring fenced for expenditure on Harlequin projects. He stated that the ICE Group intended to set up an operation in Ireland which would support the Caribbean operations. When asked how this would do so, his evidence was vague and unclear. Although he claimed that the monies were ring fenced for that purpose, some of the monies included the substantial sum of US$201,000 to *'Weddings by Franc'*. The first named defendant admitted that insofar as some of these payments were stated to be for discharging invoices and some were stated to be for management fees or salary, that they were not in fact for that purpose. While he did give some evidence about negotiating for the lease in respect of offices at Penrose Wharf in Cork, no lease was ever signed and it was difficult to understand how his business, which was predominantly in the Caribbean at that stage, was going to be helped by relocating offices to Cork. The first named defendant admitted that an ICE Group company had been incorporated in the UK on 2nd October, 2008. Therefore, if the Group required a European based company to handle its affairs, one wonders why it could not have been done by the UK company. In any event, it was clear that at the time when many of these payments were made, the Buccament Bay project was stalling and required substantial injections of cash to meet the opening deadline.

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

48. I am satisfied that some negotiations had taken place with a view to renting premises in Cork. A sales note of 1st June, 2010, from the agent states:-

*"To your clients, the ICE Group and No. 5, First Avenue, Belview, St. Michael's Barbados, West Indies. I now enclose a copy of the Heads of Terms of Agreement which have been fully reached by both parties and negotiated by our firm."*

49. By this time, the relationship between the first named defendant and Mr. Ames had completely broken down and it may well be that the ICE Group was going to move its headquarters to Ireland with a view to conducting business other than in the Caribbean. But by June 2010, it made no sense for the ICE Group to be setting up headquarters in Cork with a view to managing the Caribbean business and, in any event, there did not appear to be sufficient funds from the Buccament Bay project to enable the ICE Group to do this. If the true purpose of the transfers to the Irish accounts of the first named defendant was to set up an ICE Group business, it is difficult to understand why a bank account in the ICE Group name was not set up in Ireland. Furthermore, it does not explain why the monies were transferred to personal accounts of the first named defendant and why those transfers falsely stated that they were being made against invoices and for salary payment when that was clearly not the case.

**Control over ICE Group**

50. Ms. Shona Quammie was employed by the ICE Group on 22nd June, 2009, as accounts supervisor and remained in the employ of the Group until she resigned on 16th June, 2010. She then joined the first named plaintiff company in the same position. Part of her role involved the transfer of funds from the bank account of ICE to Cellate SVG bank account in Barbados. She was involved in all the ICE Group companies and her job involved keeping track of suppliers and arranging payments from ICE Group's bank accounts in SVG. She gave evidence of the numbers of relevant bank accounts and her role in the ICE Group. She was intimately involved in the bookkeeping and funds transfer within the Group and transfers to creditors and other accounts outside the ICE Group. I found her to be a credible witness and her evidence was important in understanding the way in which the ICE Group was run and what payments were made. She gave evidence that there were no cash flow projections while she worked with the ICE Group and it was impossible to try and reconcile payments coming in from Harlequin against the likely expenditure over any specific future period or against any category of cost or towards a budgeted spend. Matters were managed on an *ad hoc* basis.

51. Ms. Quammie gave evidence that the first named defendant would chose what was paid and what was not. Apart from the monthly payroll, there was no set payments system. Everything other than payroll was paid on an approval basis by him.

52. In April 2010, Ms. Quammie was becoming very concerned about the cash flow position at the ICE Group and the amount of money which was being spent on matters unrelated to the Buccament Bay project. She was aware that there was constant negotiation between various members of the ICE Group and the first named defendant to try and get payments for the Buccament Bay project. As the agreed opening date for Phase 1 became closer, she found herself dealing more and more with pressure and queries from creditors. Especially, from around March 2010 until the ICE Group was dismissed from the site, a lot of creditors were calling about payments and she could not pay invoices or bills without approval from the first named defendant. At the same time, she was being directed to make regular and substantial payments from the ICE Group's bank accounts to the first named defendant's personal bank accounts in Ireland. By way of example, she said that on 16th February, 2010, she received an email from Mr. David Wallerson, the corporate accounts manager for the ICE Group, to send US$100,000 to Mr. Padraig O'Halloran's Bank of Ireland account "*when the transfer hits tomorrow*" and on 5th March, 2010, she received an email from the first named defendant saying that €50,000 needed to be sent weekly to his Irish bank account. At the end of May 2010, a sum close to US$1m was received from Harlequin and the majority of payments paid out immediately thereafter were for matters which Ms. Quammie said were unconnected with the Buccament Bay project. US$250,000 was sent to the first named defendant's own bank account in Ireland. She had no doubt that the person who controlled the ICE Group and the financial disbursements made on its behalf was Mr. Padraig O'Halloran, the first named defendant. Because of the position which she held within the ICE Group and her areas of responsibility, she was in a unique position to give such evidence and I accept that evidence.

53. She was cross-examined about the retention by her of emails and she stated that she did so as she was concerned to protect her position. She said that as time went by, she would submit requests for payment of various creditors. While these would be turned down, she would "*. . . get ad hoc instructions for stuff as planes, stuff as money to Mr. Padraig O'Halloran and items that were not exactly related where the actual expenses remained outstanding from (sic) my own personal benefit, in the event that it ever got out of control, I retained my emails*".

54. I found this evidence to be compelling. While Ms. Quammie was cross-examined robustly about her characterisation of certain payments, and in particular the purchase of KLB, a company involved in selling and/or hiring plant and machinery, no ulterior motive was ascribed to her for giving evidence which suggested many of the payments made by the ICE Group were to the first named defendant's personal bank accounts or were for matters unrelated to the Buccament Bay project.

55. Quite apart from the testimony of Ms. Quammie, the evidence as a whole supports her view that the first named defendant was the controlling hand over the ICE Group and all significant decisions concerning expenditure were made by him.

**Representations made by the First Named Defendant**

56. It is clear on the evidence that an agreement was in place from the summer of 2009 that Phase 1 of the Buccament Bay resort would be delivered by 1st June, 2010. Implied in this agreement and the assurances given by the first named defendant was a representation that *bona fide* efforts would be made to deliver the resort according to the agreed timetable.

57. On numerous occasions, the first named defendant promised the plaintiffs that the ICE Group would deliver Phase 1 of the Buccament Bay resort by 1st July, 2010. These representations were made orally at many meetings and also in frequent emails. When these representations were made by the first named defendant, he knew that the deadline was of great importance to the plaintiffs. The first named defendant linked the delivery date with ongoing payments, stating that if the plaintiffs kept up the payments then the ICE Group would deliver Phase 1 by 1st July, 2010.

58. It is not necessary to outline all the occasions on which these misrepresentations were made as the transcripts of evidence are replete with these matters. Oral representations by the first named defendant assuring the plaintiffs of delivery of Phase 1 by 1st July, 2010, were made at meetings on the following dates:-

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

59. The first named defendant repeated these assurances in many emails including on the following dates:-

16th February, 2010; 15th, 18th, 25th, 28th March, 2010; 5th, 19th and 30th April, 2010; 5th, 7th and 23rd May, 2010.

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

*OPEN! On 1st July!"*

**The First Named Defendant's State of Mind**
60. The plaintiffs allege that when these representations were made, the first named defendant knew very well that the date he was promising for delivery of Phase 1 was unachievable and that he knew this by at least September 2009, and probably earlier. Mr. David Campion, an associate director of Murray O'Laoire, architects, and acting at the relevant time as consultant architect for the ICE Group, confirms that the first named defendant had promised that Phase 1 would be completed by 1st July, 2010, and that this deadline was very much on the agenda at a meeting of 23rd and 24th November, 2009. By that time, the project was so far behind he felt that all monies received by the ICE Group needed to be spent on the development in order to deliver anything meaningful by that date. By January 2010, Mr. Campion said there was no evidence that procurement was in hand so that essential works could be undertaken.

61. The evidence in this case established that from October 2009, legitimate requests for information by Mr. Ames to the first named defendant in the ICE Group were not being dealt with. Mr. Ames gave evidence of sending frequent emails to which he received no response. In January 2010, the first named defendant promised to send weekly site reports but these were not sent. Mr. Ames found that he was not being kept abreast of developments. As Mr. Ames continued to look for information, the first named defendant sent an email on 15th January, 2010, to Mr. Mark Coggle and Mr. Kevin Webster which was copied to Mr. Stephen McConaghy and Mr. Gilbert Aquino, the text of which is quite revealing. He stated:-

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

62. This was in response to a plea from Mr. Mark Coggle as to how he should deal with ongoing requests from Mr. Ames so as to enable an appropriate response to be delivered. The evidence established quite clearly that the first named defendant deliberately tried to keep Mr. Ames and the plaintiffs in the dark as to the true state of progress of Phase 1 of the development and the only plausible explanation for this is that The first named defendant knew that the assurances he had been giving the plaintiffs about the completion date of 1st July, 2010, could not be met.

63. In January 2010, Mr. Kevin Webster, the project manager for the ICE Group at Buccament Bay, produced a *'Gantt chart'* (a bar chart illustrating a project schedule) setting out a realistic schedule of works and a timeframe for completion of Phase 1. The achievable completion date was shown on this chart as being April 2011, and not 1st July, 2010. In Mr. Campion's account, this chart was shown to the first named defendant who rejected it out of hand and instructed his staff not to tell Harlequin what the realistic date for delivery would be.

64. Mr. Sean O'Connor, who is an experienced project manager, gave evidence as to what system should be in place in a construction project of the size of the Buccament Bay resort. He was astonished that there was no bill of quantities or schedule of works, and when he arrived on site after the ICE Group contract had been terminated, he said the "*site was an absolute mess*" and "*there was a lack of essential supplies on site*". He found that suppliers had not been paid and credit lines under the ICE Group had dried up. Mr. Gilbert Aquino, an architect, also confirmed that he was firmly of the view that the works could not be completed by 1st July, 2010, and that he had this view since the summer of 2009. He knew that Mr. Webster was also of that view.

65. It is of some importance to note that when Mr. Webster asked the first named defendant on 5th May, 2010, how he should respond to a request from Mr. Ames for an update on progress, that the first named defendant sent an email to Mr. Webster stating that his response should be "*. . . nice and simple, along the lines that we are working towards the required deadlines, don't spook him*". Clearly, the first named defendant did not intend Mr. Ames or the Harlequin companies to become aware of the actual prospects of an opening by 1st July, 2010. If they knew the true position, they were unlikely to keep putting money into the project.

66. The court heard evidence that in certain respects the works resembled a *'Potempkin village'*, with the façade of progress belying the fact that essential infrastructure had not been put in place. It emerged that while open areas around the cabanas had been fully landscaped, the requisite waste water drainage systems had not been put in place, such that sewage was found to have escaped into the soil. Mr. O'Connor described this state of affairs as "*almost incomprehensible*", and gave evidence that, upon Harlequin's taking control of the site in June 2010, all of the landscaping works had to be dug up and the appropriate waste water works installed. While Mr. O'Halloran's evidence is that this approach was taken due to the need for the landscaping to bed in, and that it would require a small team only seven days to take up the sod and lay the pipes, it is impossible to avoid the conclusion, given the weight of corroborative evidence, that the true reason had been to convey a false impression as to the extent to which the construction works had been completed.

67. It emerged in the evidence, also, that Mr O'Halloran and key advisors, including Mr. Newman, had sought advice in February of 2010 from Knowles, a consultancy firm specialising in construction disputes. In Mr. Newman's evidence the meeting was primarily concerned with assessing the possibility of the ICE Group "discontinuing" its involvement with the Buccament Bay project at short notice. However, it appears that they were advised that this would not be possible. The first named defendant claimed in evidence that the company had sought this advice because of failures on the part of the plaintiffs to make payments on schedule. Indeed, the first named defendant claimed that the ICE Group is owed a significant sum of money by the plaintiffs. However, there was no evidence of complaints having been made by the ICE Group or The first named defendant regarding purported difficulties in obtaining payment from the plaintiffs. Indeed, the meeting with Knowles took place in the same month that an agreement was reached with the plaintiffs for an increase in the payments to be made in pursuance of the Buccament Bay project. Around this time, also, the first named defendant and his senior advisors travelled to the UK, Jordan, Romania and Morocco canvassing for new business. It appears that a ticket had been purchased for Mr. MacDonald, but that he had ultimately not travelled with the other members of the party.

**RLB Reports**
68. The first named defendant relies on reports of RLB Rider Levett Bucknal ("RLB") in support of his case that no misrepresentations were made by him as to the feasibility of opening Phase 1 on 1st July, 2010. RLV was commissioned by the plaintiffs to monitor the construction and the development progress of the Buccament Bay project and they prepared reports in January 2010, February 2010 and 21st May, 2010. In the January 2010 report, the author concluded that the construction programme "*. . . although ambitious, is achievable with the continued diligence of the main contractor and design teams should ensure a successful outcome*". The February 2010 report concluded with the words "*. . . we believe that overall the Phase 1 soft opening date can be achieved at Buccament*". Both reports raise concerns about the level of coordination required to ensure that the resort would be ready on time and pointed to a number of possible threats to the achievement of the planned opening date for Phase 1.

69. A careful reading of the reports indicates that the authors considered that a soft opening for Phase 1 was achievable but was

"*ambitious*". In their closing submissions, the plaintiffs draw attention to what they argue is a significant qualification of the January 2010 report, where it is stated "*in the absence of any financial information relating to project cash flow requirements or procurement programmes, these elements have not been considered in forming our conclusion*". The plaintiffs argue that these elements are absolutely essential in determining the question as to whether or not the project would be delivered by 1st July, 2010. Mr. David Campion, a development director with the plaintiffs, was consultant architect for the ICE Group at the relevant time and said at that no time did RLB speak to him about the contents of the reports or discuss any of the issues arising therein. He said that he would have expected that the author of the report would speak with the architect for the project before completing it.

70. In its final report of 21st May, 2010, RLB concluded:-

> *"Having gauged the progress on site with the soft opening date in mind for 1st July 2010, we conclude that the soft opening date is not achievable for 1st July given the lack of functional infrastructure and the current level of works incomplete . . . the levels of resources did not appear to be the same as observed in February. The absence of key materials and labour skills upon the site at this late stage i.e. cabling, infrastructure, Vinlec, WWT, etc. is of concern. Until these key items are confirmed in terms of orders placed, delivery dates to site, times required to installed etc. it is not going to be possible to project a revised date for opening with any confidence."*

Whatever hopes might have existed until then about meeting the opening date, they were now well and truly dispelled.

71. There is undoubtedly a conflict between the evidence given by a number of witnesses on behalf of the plaintiffs and the evidence of the first named defendant himself and what is contained in the RLB reports. However, under cross-examination, the first named defendant admitted that in March 2010, it was wrong to give an assurance to Mrs. Ames that Phase 1 would be open on 1st July, 2010, as he required further information from Mr. Ames and assurances as to what would be done by the plaintiffs to facilitate that opening date. At the very least, he agreed that at the meeting of 25th and 26th March, 2010, it would have been wrong for him to give an unqualified answer that Phase 1 would have been finished by 1st July, 2010. To that extent, there is some difference between his evidence and what is contained in the RLB report. But what I think is of more importance is the fact that no witness from RLB was called to give evidence which would have led to the contents of the report being tested. This is against a background where Mr. Campion said that RLB never discussed any of the matters contained in the report with him, even though he was the project architect.

72. Mr. Rupert Spencer, a quantity surveyor who worked for Tower Consultants Ltd., gave evidence on behalf of the first named defendant and prepared a valuation report on the works executed by ICE Group at Buccament Bay. He received instructions from Cellate which was part of the ICE Group and his instructions were to prepare a report with the objective of providing an independent and expert opinion as to the value of the construction work executed by the ICE Group at Buccament Bay. Tower Consultants Ltd. had done work for Ridgeview Construction in or around the years 2006 and 2007, and the company had a one-third interest in RLB up to July 2009. Some evidence was presented to the court suggesting there may have been a relationship of sorts between the first named defendant and RLB. On 15th May, 2009, an email from Mr. Mark Williamson, the managing partner of RLB, to Mr. Stephen McConaghy, an employee of the ICE Group, and the first named defendant commenced with the following sentence:-

> *"Just a quick note to bring you up to speed on this week and to say thanks for the work you are passing RLB's way on both sides of the Atlantic!!"*

The same email also made reference to a meeting in Romania which was a reference to a project in which the first named defendant was involved with Mr. Noel Tynan. Mr. Garrett Ronan, Vice President of hotel and resorts development with Harlequin, said that he was astonished to see the RLB reports in January/February 2010, which suggested that Phase 1 would probably be completed by 1st July, 2010. He was aware from a discussion with the RLB representative that a meeting was to take place with the first named defendant to go back over what was to go into the RLB report and he told Mr. Ronan that he did not want to upset anyone and that the first named defendant was quite aggressive. He also said that the RLB man who came on site expressed his personal concerns but they did not appear in the report and that he thought it a little strange that the RLB representative would be discussing the report with the first named defendant. He said he got sense from talking to him that the report would be tempered. Quite clearly, the plaintiffs were challenging the accuracy of the reports furnished by RLB and, in particular the reports in January and February 2010.

73. Having considered all the evidence in this case, I am satisfied that from some time in the summer of 2009, it was clear to the first named defendant that it was unlikely that Phase 1 would be completed by 1st July, 2010. The position was abundantly clear by November 2009, from which time the first named defendant was making assurances about the delivery date. I do not accept that the RLB report is of sufficient weight to give comfort to the first named defendant because of the information deficit which existed when they prepared the report, and because there are unresolved disputes about the accuracy of that report and the independence of RLB.

**Reliance placed by Harlequin on Representations of First Named Defendant**

74. I have already concluded that the first named defendant made representations concerning the opening date of Phase 1 by 1st July, 2010, and that these representations were made by the first named defendant in circumstances where he knew that the opening date of 1st July, 2010, could not be achieved for Phase 1. Those representations were made knowingly, or at the very least, recklessly, as to their truth. There can be no doubt, on the evidence, that Harlequin placed reliance on those representations. The first named defendant was well aware of the fact that Harlequin was under enormous commercial pressure to deliver the Buccament Bay resort by 1st July, 2010. As a result of the representations made by the first named defendant, a number of steps were taken by Harlequin:-

> (a) Harlequin purchased a large quantity of furnishings at a cost of approximately US$12.7m which were delivered from China. These were for the fitting out and furnishing of the rooms and facilities in the resort;
>
> (b) Harlequin employed a large number of managers and staff in SVG to prepare for the opening on 1st July, 2010;
>
> (c) Bookings had been made and commitments were made to investors and 397 people were booked to visit the resort in July 2010;
>
> (d) From March 2010, Harlequin took steps to ensure that the hotel would be ready and operational by 1st July, 2010. Recruitment interviews took place and rooms were hired in other local small hotels to establish temporary offices in order to conduct training for new staff to run the resort;
>
> (e) The plaintiffs committed to purchasing all of the food and beverage items necessary for the opening. This required considerable logistical commitment and expense to bring in stores from Miami to SVG in refrigerated containers.

**The Role of Wilkins Kennedy Accountants, Mr. Martin MacDonald and Mr. Jeremy Newman**

75. Wilkins Kennedy had been accountants to a business run by Mrs. Carol Ames and subsequently became accountants to Harlequin. The contact between Harlequin and Wilkins Kennedy was Mr. Martin MacDonald ("Mac"). Mac became more than a member of an accountancy firm retained by Harlequin. He became a close friend and confidante of Mr. and Mrs. Ames and, as time went by, Mr. Ames relied more and more on his assistance. Eventually, he became, to all intents and purposes, the Chief Financial Officer of Harlequin. Mr. Jeremy Newman was retained to give tax advice to Harlequin. After some time, he became involved in giving advice to the ICE Group. This was a matter of concern to Mr. Ames, who was reassured that sufficient safeguards were put in place to avoid any conflict of interest on the part of personnel within Wilkins Kennedy. On 23rd November, 2012, Mr. Newman resigned from Wilkins Kennedy and has now gone into business with Mr. Padraig O'Halloran. Together, they have set up a new construction and civil engineering company in Jordan.

76. Again and again, throughout this lengthy trial, evidence was produced which showed what a pivotal role Mac played in the day-to-day business of Harlequin. What also emerged in the course of the trial was the growing relationship that developed between Mr. Padraig O'Halloran and Mac. It developed to such a point that Mac attended the stag party of the first named defendant at Monte Carlo during the Grand Prix weekend in 2010. Although Mr. Newman gave evidence in the trial, Mr. MacDonald did not. He neither turned up at the trial nor furnished a witness statement.

77. I am satisfied that the evidence establishes that by the spring of 2010, Mr. MacDonald was working in league with the first named defendant and he had a serious conflict of interest in continuing to act for Harlequin. Mr. Ames felt very let down by Mr. MacDonald, and with some justification. By that time, Mr. Newman was also working for the ICE Group.

78. Mr. Newman gave evidence about the manner in which the Harlequin Group was funded, pointing out that it did not avail of loan facilities, but rather, brought in investors into the project. In the course of the trial, there were oblique references to Ponzi schemes and investigations in the UK into the way in which the companies were financed. These are matters for the appropriate authorities in another jurisdiction and are not relevant to the matters which I have to decide. A great deal of this trial was taken up with matters that were peripheral to the issues which I have to decide and did little more than add colour.

**Conclusion on the Facts**

79. Having considered all the evidence in this case, I have come to the following conclusion with regard to the facts:-

(i) By the time the ICE Group's contract at Buccament Bay was terminated on 11th June, 2010, a substantial amount of work remained to be done in order to complete Phase 1. I do not propose to repeat in detail the evidence which was given in relation to this aspect of the case. Suffice it to say that while there was some disagreement between witnesses tendered on behalf of each of the parties, it was clear that the ICE Group had not brought Phase 1 to completion nor was there any prospect of it being completed by 1st July, 2010. I accept the evidence of Mr. David Ames that the agreement made in May 2009 to make 43 payments of Stg.£450,000 was intended to complete Phase 1 of the development. On 23rd February, 2010, the plaintiffs agreed to pay Stg.£600,000 per week plus *ad hoc* payments. On 19th May, 2010, the first named defendant and the ICE Group demanded a further seven payments of US$1m each to complete Phase 1 of the development and these payments were made on the basis that they were necessary to secure essential supplies and pay construction costs so as to enable the ICE Group to deliver Phase 1 of the project by 1st July, 2010.

(ii) The ICE Group failed to complete Phase 1 within the agreed time.

(iii) A series of substantial payments were made by the plaintiffs to the ICE Group on specific representations made by the first named defendant that Phase 1 would be completed by 1st July, 2010, when he knew or ought to have known that this was not true.

(iv) The payments made by the plaintiffs to the ICE Group for the completion of Phase 1 ought to have been sufficient for that purpose but would not have provided significant profit to the ICE Group.

(v) At a time when the ICE Group should have been applying the monies received from Harlequin towards the completion of Phase 1 of the Buccament Bay development, the first named defendant diverted substantial sums of money to bank accounts which he held in Ireland using false invoices and descriptions in respect of the transfers. Detailed and persuasive evidence was also given to show that the first named defendant was also diverting substantial sums of money for other matters unconnected with the Buccament Bay project which are not part of these proceedings and involve other jurisdictions.

(vi) Some of the monies paid by the plaintiffs to the ICE Group were diverted to the account of the second named defendant. There was no evidence establishing any connection between these monies and the Buccament Bay project. While the defendants claim that these monies involve the repayment of loans made by the second named defendant to the first named defendant, the evidence in support of that claim was vague and unspecific.

(vii) The only effective source of income of the ICE Group was the plaintiffs.

(viii) The ICE Group was effectively under the control of the first named defendant who made all the significant decisions about financial disbursement.

(ix) From the beginning of 2010, the first named defendant ensured that Mr. David Ames and the plaintiffs were not kept fully informed as to the progress of the building works at Buccament Bay despite requests for information and he sought to ensure that all such information going to Mr. Ames and the plaintiffs would be directed through him. His determination to control this information was to ensure that the plaintiffs did not ascertain the true position with regard to the works at Buccament Bay.

(x) Harlequin had made the payments required of them under the contract up to the date of termination (apart from an insignificant number of occasions when some payments were delayed for a matter of days). Harlequin successfully built out the remainder of the first phase of the resort for a soft opening on 1st August 2010, albeit with the scope of works having been substantially reduced, and subsequently built out other parts of the resort.

**The Law**
80. In paragraph 11 of this judgment, I set out the legal issues which arise for consideration in this case. It is necessary to look at the legal principles which should be applied to these issues and the findings of fact which I have made.

**Fraudulent Misrepresentation**
81. At law, a misrepresentation is made fraudulently if, when he makes it, the representor knows that the representation is untrue or is reckless as to whether it is true or not. A person who deceives another fraudulently and thereby causes loss is liable in damages for the tort of deceit. The elements of the tort of deceit may be found in the case of *Derry v. Peek* [1889] 14 App. Cas. 337 at 279. The tort was restated in this jurisdiction in *Northern Bank Finance v. Charleton* [1979] IR 149, and the parties are agreed as to its constituent elements, being:-

> (a) That the alleged representation consists of something said, written or done that amounts to a representation;
>
> (b) that the defendant was the person who made the representation;
>
> (c) that the plaintiff was the person to whom the representation was made;
>
> (d) that the representation was both false and fraudulent;
>
> (e) that the representation was a material inducement to the claimant to act on it;
>
> (f) that the plaintiff did in fact alter his position on foot of the representation;
>
> (g) that the plaintiff thereby suffered damage.

82. The defendants submit that a distinction must be drawn between actionable fraudulent misrepresentations which, they say, must necessarily relate to present facts or present intention, and statements of future fact or future intention which are said to be incapable of amounting to an actionable misrepresentation, see *Mulcahy & Keaton v. Mulcahy* [2011] IEHC 186, *per* Laffoy J. where it was submitted that a statement of future intention, as distinct from present fact, would only constitute a misrepresentation if the statement of intention was not honestly held at the time the statement was made. The learned judge referred to the speech of Lord Wilberforce in *British Airways Board v. Taylor* [1976] 1 ALL E.R. 65 (at p. 68):-

> *". . . the distinction in law between a promise as to future action, which may be broken or kept, and a statement as to existing fact, which may be true or false, is clear enough. There may be inherent in a promise an implied statement as to a fact, and where this is really the case, the court can attach appropriate consequences to any falsity in, or recklessness in the making of that statement. Everyone is familiar with the proposition that a statement of intention may itself be a statement of fact and so capable of being true or false. But this proposition should not be used as a general solvent to transform the one type of assurance with another; the distinction is a real one and requires to be respected . . ."*

The caution expressed in the above remarks reflects the difficulty that may exist in ascertaining a person's intention in a way which enables a court to reach a conclusion that in many cases will amount to a finding of fraud.

83. The defendants rely on *Cecil v. Bayat* [2010] VWHC 641 (Comm.) where at p. 26, Hamblen J., sitting in the High Court of England and Wales, adopted the following formulation:-

> *"A representation of intention is a statement of present intention. It is only because it speaks to the present that it can be regarded as a representation of fact. If it speaks to the future it would be a statement of future intention, not a representation of fact."*

84. A statement as to the future will often imply a statement as to present intention. A promissor generally represents by implication that he has, at the moment of making the promise, the intention of fulfilling the obligations that he is undertaking. If it can be shown that no such intention existed at that moment, he is guilty of a misrepresentation. But the mere fact that the intention which was represented to exist was not eventually carried into effect offers little evidence of the original non-existence of the intention. (See '*Clerk & Lindsell'* 20th Ed. Thompson Sweet and Maxwell 2010).

85. The plaintiffs argue that the position in this case was similar to that in *Edgington v. Fitzmaurice* (1885) 29 Ch. D 459, where it was held that a prospectus was deceptive when it contained false statements of what the company intended to do with the investor's money once they had got it. In that case, a company issued a prospectus seeking subscriptions by way of debenture bonds, which were purportedly to be applied towards development and expansion of the trade of the company. In fact, the funds were put towards discharging existing liabilities. Furthermore, the plaintiff erroneously came to the belief that the debentures would incorporate a charge over the property of the company. The monies were advanced by the plaintiff and the company subsequently became insolvent. The court held that the representation as to the purpose for which the monies would be applied was capable of operating as a "*material misstatement of fact*" capable of giving rise to a tortious action in deceit.

**Personal Liability of a Director for Deceit/Fraudulent Misrepresentation**
86. In *Edgington v. Fitzmaurice*, the court held that the defendants, being promoters and officers of the company, could be held liable for fraudulent misrepresentation in their personal capacity. This principle was affirmed in *Standard Chartered Bank v. Pakistan National Shipping Corporation* [2003] 3 WLR 1547. In that case, the managing director of the defendant was held personally liable for deceit, relating to the fraudulent dating of Bills of Lading. Lord Hoffmann, in his speech in the House of Lords at p. 1554, stated:-

> *"No one can escape liability for his fraud by saying: 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable'."*

87. In *Shinkwin v. Quin-Con Ltd. & Quinlan* [2001] 1 I.R. 514, the plaintiff, who had suffered personal injuries in the course of his employment, sued his employer (a limited company) and a director. The first named defendant (the company) was impecunious and uninsured. The second named defendant was found to be liable having regard to the particular facts of the case. Fennelly J., speaking for the Supreme Court, held that while due regard must be had to "*the separate legal character of the company, the principle of limited liability and the rule of Salomon v. Salomon & Co.* [1897] A.A. 22", these principles do not preclude the imposition of a separate personal duty on a director arising from his or her close proximity to the tortious act. In reaching this determination, the learned judge distilled the question as follows:-

> *". . . did he involve himself so closely in the operation of the factory and, in particular, in the supervision of the plaintiff as to make him personally liable for any of the acts of negligence which injured the plaintiff ?"*

88. The evidence in this case is that the ICE Group was effectively under the control of the first named defendant and that he made all significant decisions with regard to the Group, and in particular, the disbursement of monies received by the Group. Furthermore, from at least September 2009, the first named defendant specifically directed that all communication with the plaintiffs, and in particular, Mr. David Ames, would take place through him.

89. While there was some argument addressed to the issue of the standard of proof required to establish fraudulent misrepresentation, it seems to me that the ordinary civil burden of proof applies, namely, proof on the balance of probabilities. That is not to diminish the seriousness of making a claim of fraudulent misrepresentation and the consequences which may flow from failing to prove such an allegation where it is pleaded. The issue was canvassed in *Banco Ambrosiano SPA v. Ansbacher & Company Ltd. [*1987] ILRM 669, where Henchy J. stated at p. 701:-

> *". . . I am unable, therefore, to discern, in principle or in practice, any rational or cogent reason why fraud in civil cases should require a higher degree of proof than is required for the proof of other issues in civil claims."*

The factual background in this case is such that if misrepresentations were made, they were made by the first named defendant in circumstances where he cannot shelter behind the companies in the ICE Group.

**Conclusion on Fraudulent Misrepresentation**

90. I am satisfied that the first named defendant, on numerous occasions, represented that Phase 1 of Buccament Bay project would be completed by 1st July, 2010. These representations were made by him at a time when he knew they were untrue or when he was reckless as to the truth of the statements. He knew that the plaintiffs were relying on those statements, and acting on his representations, they continued to employ the ICE Group and pour ever-increasing sums of money into the project. The first named defendant induced Harlequin to continue making payments on foot of his representations. There is convincing evidence that the first named defendant knew both of his own knowledge and from information he was receiving from other professionals employed by the ICE Group that Phase 1 could not be delivered by 1st July, 2010. The first named defendant persisted in ignoring all warnings which he received from such professionals and continued to press Harlequin for more and more funds.

91. The actions of the first named defendant illustrate that he did not intend to deliver the project as agreed and on time. I accept the evidence from expert witnesses which shows that basic elements of a major construction contract had not been put in place by the ICE Group in order to enable the works to be completed on time. There was no detailed breakdown of costs similar to a cost plan, bills of quantities or a schedule of builder's quantities, a project programme or schedule or a detailed procurement plan. I also accept the evidence of those who entered on the site after the ICE Group was dismissed from the project and who found that the site was not in the condition one would have expected if there had been a genuine intention to finish the project on time. Essential building materials were not on site and when Harlequin took over the site in June 2010, many essential supplies had neither been ordered nor paid for and essential equipment was found to be in a poor state of repair or not operational. The evidence established that the ICE Group was in a financially insolvent position and did not have the capital required to meet its contractual obligations to Harlequin and honour the representations made by the first named defendant. Yet, at the same time the first named defendant continued to divert substantial sums of monies paid by Harlequin for the completion of the project when he must have known that by doing so, Phase 1 could not have been delivered on the agreed date.

92. All the evidence points to the conclusion that the first named defendant misappropriated significant sums of money paid to the ICE Group for the completion of Phase 1 and that the level of misappropriations increased significantly in the last few months prior to the ICE Group being dismissed from the site. While there was some dispute between the parties on the question of whether or not the first named defendant was entitled to draw down some of the monies paid by Harlequin to the ICE Group for his own purposes, whether by way of salary or otherwise, there could be no justification for the very substantial payments diverted from the project to the first named defendant's Irish accounts and to the second named defendant to repay loans which were alleged to have been made by him to the first named defendant some years earlier.

**First Named Defendant's Duty to the Plaintiffs as Creditors of the ICE Group**

93. An alternative claim was advanced on behalf of the plaintiffs that the first named defendant may be held personally liable by reference to the duty owed to creditors by directors in circumstances where the latter are aware that the company is insolvent, or nearly so. Reliance is placed upon the decision of McGuinness J. in *Jones v Gunn* [1997] 3 I.R. 1, wherein, following a comprehensive review authorities including, *inter alia*, In *Re Frederick Inns* [1991] IRLM 582 (HC) and [1994] 1 ILRM 387 (SC), *West Mercia Safetywear v. Dodd* [1988] B.C.L.C. 250, and *Winkworth v. Edward Baron Development Co.* [1987] 1 All E.R. 114, the learned judge held at p. 22 that:-

> *"… where a company is clearly insolvent, even if not in liquidation, the directors owe a fiduciary duty to the general creditors and may not make payments which benefit either closely connected companies or themselves personally to the detriment of the general and independent creditors."*

94. In her closing submission to the court, counsel for the first named defendant acknowledged that, while in general a director's duty to creditors extends only to the preservation of the corporate structure, a liability may well arise in circumstances where it can be demonstrated that the director was aware that the company was "*clearly insolvent*". However, it was submitted that this liability is to the company and does not bestow *locus standi* upon a creditor to sue a director in a personal capacity. An extract from Ahern, '*Directors' Duties: Law and Practice'* (2009 Round Hall) was opened to the court, where at p. 185 the author commented that:-

> *"There is an issue as to whether a direct duty is owed to creditors once the duty to consider the interests of creditors is triggered or whether it is simply an aspect of the duty to act in the company's interests. The preferred view is that the duty is owed to the company rather than a duty owed directly to creditors and directly enforceable by them."*

95. In support of this proposition, the first named defendant further relied on the statement of Toulson J. in *Yukong Lines Ltd of Korea v Rendsbury Investments Corporation of Liberia (No. 2)* [1998] 4 All ER 82 at p. 99:-

> *Where a director, or person having the management, of an insolvent company acts in breach of his duty to the company by causing assets of the company to be transferred in disregard of the interests of its creditor or creditors, under English law he is answerable through the scheme which Parliament has provided. In my judgment he does not owe a direct fiduciary duty towards an individual creditor, nor is an individual creditor entitled to sue for breach of the fiduciary duty owed by the director to the company.*

96. The plaintiffs argue that, *per Jones v. Gunn*, the position in this jurisdiction is distinct from that set out in *Yukong Lines Ltd of Korea v Rendsbury Investments Corporation of Liberia (No. 2),* and support this assertion by reference to the analysis of Lightman & Moss in '*The Law of Receivers and Administrators of Companies'* (5th Ed., 2011, Sweet & Maxwell) at p. 12, where the authors state:-

> *"It is suggested that the obiter dictum of Lord Templeman in Winkworth v Edward Baron Development Co Ltd [1986] 1 W.L.R. 1512 (HL), 1516, which suggests that the duty is owed to creditors as well as to the company, does not accurately represent English law. Such a direct duty has, nevertheless, been held to exist in Ireland: see Jones v Gunn [1997] 3 I.R. 1"*

97. Accordingly, it seems that there is some uncertainty as to the whether a director's duty to creditors in circumstances of clear insolvency may give rise to a direct cause of action. Given my findings that the first named defendant should be liable on foot of his fraudulent misrepresentations, it is unnecessary to determine this point.

**Quistclose Trust**

98. A Quistclose Trust is one whereby one party (A) pays money to another (B) so that B holds the money in trust for A subject to a power for B to apply the money for a stated purpose. Such an arrangement has the effect that A's beneficial interest in the money will remain unless and until the money is applied in accordance with the stated purpose of the power (see '*Equity and the Law of Trusts in the Republic of Ireland'*, Keane 2011, 2nd Ed.). The Trust gets its name from the case of *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] AC 567, although it was acknowledged that this form of trust had been in existence for over 150 years. Quistclose Trusts were recognised in Ireland in *In Re Money Markets International Stockbrokers Ltd. (No. 2)* [2001] 2 I.R. 17.

99. The parties are agreed that the recent statement of the nature of the Quistclose Trust in *Bieber v. Teathers Ltd.* [2012] EWCA Civ. 1466 should be adopted. In that case, Patten L.J. reviewed and distilled the principles set out in *Quistclose Investments and in Twinsectra Ltd. v. Yardley* [2002] UKHL 12, as follows:-

> *"First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient: Re Goldcorp Exchange [1995] 1 AC 74 and Twinsetra at [74].*
>
> *Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough. The recipient may have represented or warranted that he intends to use it in a particular way or had promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: Twinsetra at [73].*
>
> *Thirdly, it must be clear from the express terms of the transaction (properly construed) or it must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: Toovey v. Milne (1819) 2 B&A 683 and Quistclose Investments at 580 B.*
>
> *Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: Twinsetra at [69].*
>
> *Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who has placed trust and confidence in the recipient to ensure the proper application of the money paid: Twinsetra at [76].*
>
> *Fifth, such a trust is akin to a 'retention of title' clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved. It is not as such a 'purpose trust' of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally, the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in accordance with the stated purpose. If the stated purpose cannot be achieved, then the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: Twinsetra at [81], [87], [92] and [100].*
>
> *Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (or the objectively ascertained circumstances in which) payer and recipient enter into an arrangement has the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement: Twinsetra at [71].*
>
> *Seventh, the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms: Twinsetra at [16]."*

100. In *Twinsetra* [2002] 2 AC 164 at [73] Lord Millett observed:-

> *"A Quistclose Trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often enquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent, the money is at the free disposal of the borrower. Similarly, payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cash flow. Commercial life would be impossible if this were not the case."*

101. In *Re Kayford* [1975] 1 ALL ER 604 at 607, [1975] 1 WLR 279 at 282, where the same question arose in the same context, Megarry J. stated:-

> *"As for the requisite certainty of words, it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: the question is whether, in substance, a sufficient intention to create a trust has been manifested."*

102. In Thomas & Hudson '*The Law of Trusts'* (2nd Ed. Oxford 2010), the authors address the question of the character of a relationship capable of giving rise to a Quistclose Trust at p. 276 thus:-

> *"All decisions have emphasised one highly significant factor in that analysis, and that is whether the money is intended to be at the free disposal of the borrower or whether it is intended to be used exclusively for the stated purpose. This is normally (but not necessarily) evidenced by payment of money into a separate bank account. If such intention exists, the fact that the borrower fails to deal with the money in the agreed manner (by not keeping it separate from his own money or actually misapplying it) is immaterial: there is then a breach of an established trust. On the other hand, when money may be placed in a general operating account, or where it is merely recorded by a book entry, it is unlikely the requisite intention to create a Quistclose Trust (or indeed any trust) will be found."*

103. The intention must be common to both donor and recipient to create the trust and evidence sufficient to demonstrate a requisite intention is required.

104. Applying these principles to the present case, it seems to me that although Harlequin clearly provided payments on an agreed schedule to the ICE Group for the completion of Phase 1, it cannot be said that there was an intention that the particular funds advanced from time to time were for a specific purpose and no other purpose. Undoubtedly, the monies advanced were for the general purpose of completing Phase 1 of Buccament Bay. But that would not be sufficient to establish a Quistclose Trust. If, for example, Harlequin had paid to the ICE Group a specific and precise sum intended to discharge an invoice for an essential piece of equipment on the clear understanding that the monies would be used by the ICE Group for that purpose and no other purpose, a Quistclose Trust could be said to arise. But it seems to me that that is not what actually happened. The funds which were advanced by Harlequin to the ICE Group for the completion of Phase 1 were for that general purpose and to ensure completion by 1st July, 2010. In my view, the plaintiffs have not established that the facts of this case fit within the ambit of a Quistclose Trust.

**Constructive Trust/Knowing Receipt**

105. Quite apart from any remedy available to the plaintiffs against the first named defendant for his fraudulent behaviour, the plaintiffs argue that it is an appropriate case in which to fix on the Irish payments and their traceable proceeds, a constructive trust in favour of the plaintiffs. The plaintiffs cite the case of *East Cork Foods Ltd. v. O'Dwyer Steel Company* [1978] I.R. 103, in which the Supreme Court recognised that the courts can impose a constructive trust in circumstances amounting to unjust enrichment. In that case, Henchy J. said at p. 111:-

> *"The real reason why the Courts would uphold the claim is because it would be unjust and inequitable to allow the first defendant to keep the money. To refuse the claim would mean that the first defendant would be unjustly enriched . . . fair dealing and commonsense should have told the first defendant that it had a fiduciary responsibility in regard to the money. In the event, it has been held that the first defendant was not entitled to be paid any part of the £20,000, so the law must treat that defendant as a constructive trustee of the whole of that sum for the second defendant."*

106. The plaintiffs also rely on *Murphy v. The Attorney General* [1982] I.R. 241, where at p. 316, Henchy J. held as follows:-

> *"The implied condition that the State is a constructive trustee of the money collected as Income Tax under the condemned sections is the counterpart in equity of a claim in common law for money had and received. In Moses v. Macferlan at p. 1012 of the report, Lord Mansfield held that 'the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'. Thus, he put the claim on the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay money had and received.*
>
> *Whether the action be framed at common law for money had and received or (as here) in equity for an amount of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances . . . such money may be recovered."*

107. The plaintiffs further submit that each of the defendants may be compelled to return to them monies obtained from the ICE Group on the basis of a cause of action for knowing receipt, or in the alternative an action for monies had and received. *In Re Frederick Inns Limited* [1994] 1 ILRM 387 at p. 398, Blayney J. approved the following statement of Buckley LJ in *Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2)* [1980] 1 All ER 393 at p. 405:-

> *So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.*

108. Both parties opened to the court the conceptual analysis of receipt based and fault based liability contained in the dissenting judgment of Lord Millett in *Twinsectra Ltd v Yardley* at page 190:-

> *Liability for "knowing receipt" is receipt-based. It does not depend on fault. The cause of action is restitutionary and is available only where the defendant received or applied the money in breach of trust for his own use and benefit: see Agip (Africa) Ltd v Jackson [1990] Ch 265, 291-292; Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 386. There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient, and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence . . .*
>
> *. . . The accessory's liability for having assisted in a breach of trust is quite different. It is fault-based, not receipt-based. The defendant is not charged with having received trust moneys for his own benefit, but with having acted as an accessory to a breach of trust. The action is not restitutionary; the claimant seeks compensation for wrongdoing. The cause of action is concerned with attributing liability for misdirected funds. Liability is not restricted to the person whose breach of trust or fiduciary duty caused their original diversion. His liability is strict. Nor is it limited to those who assist him in the original breach. It extends to everyone who consciously assists in the continuing diversion of the money."*

109. The defendants argue that this *obiter* statement and the principle of strict liability of a recipient, subject to a defence of change of position, has not attained widespread acceptance in England and Wales, submitting that an element of unconscionability on the part of the recipient should be demonstrated, as illustrated in *Charter plc v. City Index Ltd* [2008] 2 WLR 950. That case is

noteworthy, in particular for its discussion of the distinction in the framing of an action in knowing receipt between restitutionary, equitable principles operating *in rem* and an alterative tortious, compensatory approach, operating *in personam*, with the Court of Appeal holding that unconscionability is an essential ingredient in the latter instance.

110. Notwithstanding the foregoing, regard should be had to Keane's comment in his text on '*Equity and the Law of Trusts in the Republic of Ireland'* (2011, 2nd Ed. Bloomsbury Professional) at p. 245, that the approach of Blayney J. in Re Frederick Inns was such that:-

> *". . . the threshold for finding a person accountable as a constructive trustee for the knowing receipt of misapplied trust property had been set at a significantly lower level in Ireland."*

111. This issue is, to some extent, tied up with the claim against the second named defendant. The plaintiffs claim that the monies paid to him were fixed with a constructive trust and that they are entitled to trace those funds into his account and recover them on the basis that he has become a constructive trustee of the misapplied funds.

112. In '*Equity and the Law of Trusts in the Republic of Ireland'*, Keane (2011) 2nd Ed. Bloomsbury Professional) at p. 370, the author states:-

> *"A person, then, who is entitled to any equitable interest in any property, real or personal, will be entitled to trace their property, for so long as it continues to exist and even though it may have been mixed with other property, into the hands of anyone in a fiduciary relationship with him and into the hands of any third party, except a bona fide purchaser for value without notice of the fiduciary relationship."*

113. There is no evidence that the second named defendant was aware of the fiduciary relationship between the plaintiffs and the ICE Group and/or the first named defendant. Whether he was a *bona fide* purchaser for value is unclear because of the unsatisfactory nature of the evidence surrounding the alleged loans by him to the first named defendant. While the onus of proving that he is a *bona fide* purchaser for value without notice is on the second named defendant, it seems to me that if there is a remedy at common law for the plaintiffs by way of damages for fraudulent misrepresentation, it would not be necessary to determine the issues in this case by reference to a constructive trust.

114. If I was to make a decision in this case based on constructive trust, it would have consequences for the second named defendant as he would be a recipient of monies to be fixed with such a trust. In the course of the trial, I formed the view that he had been unwittingly dragged into the proceedings by the action of the first named defendant.

115. The second named defendant may have lent money to the first named defendant some years ago. Such evidence as was available on the issue was unsatisfactory. But it was clear that if loans were made, most of them were made prior to the Buccament Bay project and all were quite unrelated to it. In giving his evidence, the second named defendant presented as an elderly man who was in frail health and seemed somewhat confused. I am quite satisfied he was not knowingly a party to any misappropriation of the plaintiffs' funds.

116. If he was paid out of misappropriated funds, then, as a matter of justice, any liability for that misappropriation should rest with the first named defendant. At the time the first named defendant procured the payment of those sums from the ICE Group accounts to the second named defendant's account, the first named defendant knew or ought to have known that the monies concerned should have been expended on the Buccament Bay project and not to discharge any possible private indebtedness he might have to his father.

117. I am therefore satisfied that powerful countervailing factors operate in this case against the imposition of a constructive trust in relation to the second named defendant. With regard to the first named defendant, the plaintiff has established an entitlement to an effective remedy at law, such that it is unnecessary for the court to exercise its equitable jurisdiction.

**Conclusion on the Law**

118. Applying the law to the facts in this case, I hold that the first named defendant was guilty of fraudulent misrepresentation and deceit and that he is liable to the plaintiffs in damages. I am satisfied that this is the appropriate way in which to deal with the claims made by the plaintiffs in these proceedings. The facts do not establish the existence of a Quistclose Trust. I am also satisfied that it is not necessary to deal with the question of compensation or restitution within the rubric of a constructive trust for the reasons I have set out above.

**Damages**

119. In assessing damages, I am confining myself to what were referred to as the "*Irish Payments*" and will take as a starting point the summer of 2009. Taking the evidence as a whole, but particularly the evidence of Mr. Gilbert Aquino that from the summer of 2009, the first named defendant knew that the ICE Group could not deliver Phase 1 of the project by 1st July, 2010, and that the "*Irish Payments*" from that time on were sums misappropriated from the plaintiffs, these are the sums which can be taken into account in assessing the damages to be awarded for fraudulent misrepresentation and deceit. I have ignored all the Caribbean and other payments referred to in the course of the trial, save as to their corroborative value and showing a pattern of behaviour on the part of the first named defendant with regard to the diverting of funds from the Buccament Bay project.

120. Between 29th June, 2009, and 31st May, 2010, 22 payments were made from the ICE Group accounts to the first named defendant's personal bank accounts in Ireland. These payments totalled US$1,488,000. In addition, the following payments were made by the ICE Group to 'Weddings by Franc' in respect of a wedding planned by the first named defendant at Adare Manor, County Limerick, but which never took place:-

6th November 2009 US$72,000

17th December 2009 €20,000

8th March 2010 €50,000

12th March 2010, Eastern Caribbean equivalent of €50,000

Total: US$72,000

Plus €120,000

Finally, there were direct payments made from the ICE Group accounts to the second named defendant's accounts in Ireland as follows:-

13th November 2009 US$179,000

20th November 2009 US$179,000

121. The ostensible reason for these payments was to repay loans which the first named defendant claims he was given by the second named defendant some years earlier. Notwithstanding the fact that the evidence proffered supporting the contention that loans had been made in the first instance was unsatisfactory, the payment of these sums had no apparent benefit to either the Buccament Bay project or to the ICE Group and its business. The loans appear to have been given by the second named defendant to help out the first named defendant.

122. In assessing damages, I have regard to all these payments which were misappropriations of funds paid by the plaintiffs to the ICE Group as a result of fraudulent misrepresentations made by the first named defendant. I measure the damages to which the plaintiffs are entitled from the first named defendant against those sums. Those sums, in summary, are US$1,918,000 and €120,000. The US Dollar sum will be converted on the date of this judgment and I will hear counsel as to the precise sum in respect of that figure before pronouncing judgment. The judgment shall be against the first named defendant alone.