THE HIGH COURT
COMMERCIAL

[2021] IEHC 142
[2017 No. 6277 P.]

BETWEEN
HKR MIDDLE EAST ARCHITECTS ENGINEERING LLC AND JEREMIAH RYAN
PLAINTIFFS

AND
BARRY ENGLISH

DEFENDANT

JUDGMENT (No.2) of Mr. Justice Denis McDonald delivered on 3rd March, 2021

The Application before the Court

1. This is a somewhat unusual application in which the defendant seeks an order striking out certain particulars delivered on behalf of the first named plaintiff ("*HKRME*"). These particulars have been furnished in respect of the last surviving claim made by the plaintiffs in these proceedings. The particulars in question purport to be given in respect of the claim made in relation to the unpaid and lawful liabilities of HKRME which HKRME contends should be paid by the defendant in circumstances where, as found by me in my judgment of 10th May, 2019 in these proceedings ("*my May 2019 judgment*"), the defendant was unjustly enriched by substantial payments made by HKRME to the defendant on foot of fictitious invoices in respect of equally fictitious introduction services purportedly provided by the defendant. HKRME contends that, as a consequence of the payments made to the defendant, it has been unable to discharge other debts due by it to its creditors.

2. In para. 399 of my May 2019 judgment, I found that:-

> *"…very substantial payments were made by HKRME to Sunvit in respect of completely fictitious introduction services purportedly to be provided by Mr. English. Those services were not provided and were never intended to be provided. There was accordingly a total failure on the part of Mr. English to perform what was promised under the agreement. In fact, the entire arrangement was simply a mechanism that had been put in place to enable monies to be extracted by Mr. English… While the monies were notionally received by Sunvit, it is Mr. English who was the beneficiary… Sunvit was no more than a vehicle to receive funds on his behalf."*

3. In para. 400 of my judgment, I concluded that this was a classic case in which the remedy of unjust enrichment applied and accordingly I found that HKRME was entitled to a remedy against Mr. English arising out of the transfers in question. However, I also found that, given the way in which the case had been pleaded in the statement of claim and had been run, it was clear that the only claim which was made by HKRME in that regard was in respect of its unpaid liabilities which, according to the statement of claim delivered in these proceedings, amounted to approximately AED 8.7 million. Thus, in para. 401 of my judgment, I indicated that the only relief which I could grant to any of the plaintiffs was in relation to the unpaid lawful liabilities of HKRME. As I had not heard any evidence as to those liabilities during the course of the trial of these proceedings, it

seemed to me that, as set out in para. 401 of my May 2019 judgment, the appropriate order to make was to direct that an account and enquiry be taken of the unpaid and lawful liabilities of HKRME. In the same paragraph of my judgment, I also said:-

> *"At the conclusion of that account and enquiry, an order will be made requiring the payment by Mr. English to HKRME of the amount found to be due… At this point, I do not have any details of the nature of the liabilities in issue. In particular, I do not know whether any of the liabilities may relate to sums claimed to be due to Mr. Ryan himself or to members of his family. Should it transpire that some of the liabilities are of that nature, it may become necessary, at that point, to consider whether any issues of illegality or public policy arise which would make it inappropriate that any such liabilities should be recovered from Mr. English."*

4. The account and enquiry in relation to the lawful liabilities of HKRME was the only aspect of the case made by the plaintiffs in these proceedings which succeeded.

5. The reference to AED 8.7 million in my May 2019 judgment was taken from para. 62 of the amended statement of claim delivered on behalf of the plaintiffs to the proceedings in which it was pleaded, in bald terms, that HKRME has "*unmet obligations, including staff and consultants' fees, amounting to approximately AED 8.7 million*". The defendant sought particulars of this allegation and in the response dated 18th September, 2017 to that request for particulars, the plaintiffs provided a schedule of HKRME's "*unmet obligations*" which showed a total sum of AED 8,483,686.28 alleged to be due which was made up of salaries paid in the period January to March, 2015 of AED 806,066.58 and sub-consultants' fees to a number of parties including Green Cube (in an amount of AED 3,436,470.00) which amounted, in the aggregate, to AED 7,677,619.70.

6. Following the delivery of the May 2019 judgment, the defendant's solicitors were informed by the solicitors acting for HKRME of their intention to deliver updated particulars of the liabilities of HKRME. Thereafter, on 20th June, 2019, the proceedings were listed before me and I ordered that further particulars of the alleged liabilities of HKRME should be delivered "*with all accompanying documentation*" on or before 12th July, 2019 without prejudice to the defendant's right to contest the entitlement of HKRME to provide any of these particulars. In an *ex tempore* ruling of the same day I directed that, to the extent that any items arise which were not addressed in the particulars previously provided in 2017, it would be appropriate to explain how it is that they arise since then and to provide as much detail as possible in relation to any such item.

7. On 12th July, 2019, a further schedule of the alleged liabilities of HKRME was provided to the defendant on foot of the ruling given by me on 20th June, 2019. The July 2019 schedule is different, in a number of significant respects, to the schedule furnished in 2017. The amount claimed in relation to staff salaries is substantially the same, save that a larger sum is now claimed in relation to one member of staff and there are now three additional staff members listed. The total claimed in relation to salaries is now AED 880,074. There is a new item claimed which is described as "*Jerry Ryan Loan*" in the sum of AED 800,000 together with "*compound interest at 5%"* which is claimed in the sum of

AED 377,080. There is also an intercompany balance claimed in respect of a related company which is designated by reference to the acronym HKRDMCC. The amount claimed in respect of this item is AED 1,074,237. With regard to consultants' fees, the total amount claimed has now been reduced from AED 7,677,619.70 to AED 5,165,208. A notable absence from the schedule is any reference to an amount due to Green Cube. In this context, it might be noted that, in para. 97 of my May 2019 judgment, I came to the conclusion that the Green Cube invoices were a fabrication. I found that they were put in place to facilitate a desire on the part of the first named plaintiff, Mr. Ryan, to artificially minimise the value of HKRME so as to make it less likely that any sale of his shares in HKRME to Mr. English would be investigated by a trustee in bankruptcy and also for the purpose of minimising the amount of money to be made available to the defendant, Mr. English, to enable the defendant to "*purchase*" the shares in HKRME (which was part of the elaborate steps taken by Mr. Ryan to disguise his continued interest in HKRME from a trustee in bankruptcy).

8. The July 2019 schedule also included a sum of AED 1,046,973 which was characterised as salary due to Mr. Ryan together with further sums alleged to be due to Ms. Dolly Sockett and Ms. Sofia Florendo in the amounts of AED 564,270 and AED 113,198 respectively. In addition, interest was claimed at 8%. Notwithstanding all of these changes, there was not much difference in absolute terms between the value of the 2017 schedule and the value of the July 2019 schedule. The amount claimed in the 2017 schedule equated to approximately €3,291,550 while the amount claimed in the July 2019 schedule amounted to €3,330,289.

9. Following receipt of the amended schedule, the defendant's solicitors responded in a letter of 17th July, 2019 in which they contended that HKRME had not properly complied with the directions given by the court on 20th June, 2019. In particular, they contended that the schedule did not "*provide anything approaching an adequate explanation as to how these newly particularised liabilities arose and why they were not included in the particulars provided in September 2017*".

10. The matter came before me again on 24th July, 2019. On that occasion, having heard the parties, I gave the following *ex tempore* ruling:-

> *"…on 12th July a new schedule was delivered with accompanying documents, but with several new items not in the previous schedule, several new figures different to those contained in the previous schedule and with several items omitted in the new schedule which had been included previously in the old schedule. This new schedule also does not contain any explanation as to how the items arose and in particular as to when and in what circumstances the liabilities are said to arise.*
>
> *In my view, that is entirely unsatisfactory, because the defendant will be left in a position where he does not know the gist of the plaintiffs' case. In my view, if the defendant is to be in a position to know the gist of the plaintiffs' case, it's a matter of basic justice that he should be aware of the circumstances in which it is alleged by the plaintiffs these liabilities arose and, in these circumstances, it is my view*

that it is essential that the plaintiff should provide those particulars. It's also essential, in my view, that to the extent that the schedule contains new items or new figures for old items or omits items in the previous schedule that the plaintiff should explain the basis on which this has been done, otherwise it will not be possible for the defendant to know whether or not the claims now being made are within the case pleaded.

In this context, I am not convinced that a plaintiff is always stuck with a particular figure that may have been pleaded. I am struck in this context by the way in which the statement of claim did plead that the figure given in paragraph 62 of 8.7 million was an approximate figure. However, a plaintiff, in the absence of an application to amend, is stuck with a substantive case pleaded, and of course the defendant needs to know the basis for the claims now made so that the defendant can assess whether they fall within the rubric of unmet obligations, which is the case pleaded in paragraph 62 of the amended statement of claim."

11. For completeness, it should be noted, in this context, that, at the hearing of the present application before me in January, 2021, the parties did not dispute that the reference in the amended statement of claim to "*unmet obligations*" is not, in substance, any different to the reference to unpaid liabilities in para. 401 of my judgment save that, of course, the account and enquiry to be undertaken is in respect of "*the unpaid and lawful liabilities of HKRME*" (emphasis added).

12. Subsequent to the hearing in July, 2019, the solicitors for HKRME delivered, on 5th December, 2019, more detailed particulars of the claims now advanced by HKRME in respect of its unpaid liabilities. These are the particulars which are now the subject of the present application by the defendant. In short, the defendant contends that the particulars which were furnished in December, 2019 ("*the 2019 particulars*") do not comply with the directions given in my July 2019 ruling (quoted above) and, furthermore, do not comply with the applicable legal principles governing the delivery of particulars.

13. Counsel for the defendant has submitted that, while some of the items set out in the December 2019 particulars are unobjectionable, there are a number of significant items which are entirely new items or heads of loss which, he argues, do not fall within the compass of what was previously pleaded. Thus, for example, while some changes have been made in the particulars delivered in 2019 in respect of salaries, the defendant (while not admitting that the salaries are due) accepts that they fall within the ambit of what was envisaged by the direction given by me previously. However, there are many other items (addressed in more detail below) which the defendant asserts do not fall within the four corners of the pleaded claim. It will be necessary, in due course, to consider the particulars delivered in December 2019 in more detail. Before doing so, I should, first, identify the relevant legal principles to be kept in mind on an application of this kind.

Relevant legal principles

14. The first point to bear in mind is that any particulars must fall within the ambit of the claim made in the underlying pleadings. The relevant principle is succinctly summarised in *Delany & McGrath on Civil Procedure*, 4th Ed., 2018, at para. 5-145 as follows:-

> *"Any particulars furnished must fall within the four corners of the relevant pleadings and, while they can clarify and elaborate upon the pleading, they cannot amplify or alter any claim made therein. If a party wishes to do this, then he will have to amend the underlying pleading."*

15. Important guidance was given by Lavery J. in the Supreme Court in *Fahy v. Pullen* (1968) 102 I.L.T.R. 81 as to the principles to be applied. In his judgment, Lavery J. said:-

> *"The principles may be stated thus:-*
>
> *1. Pleadings and particulars given, which are part of the pleadings, and must state the cause of action and the material facts to be proved to support it.*
>
> *2. The facts are to be stated – as naturally they only can be – as they are known at the time of the pleadings. A forecast of developments anticipated based on opinion – in this case medical opinion – is proper and sometimes necessary.*
>
> *3. The Rules do not provide for, or indeed admit of, any alteration of the pleadings or addition thereto without leave of the Court.*
>
> *4. A plaintiff is not required to amend his pleadings because of a change of circumstances which do not alter the nature of the claim stated therein.*
>
> *5. However, if a new and unexpected type of damage were to emerge the plaintiff should give notice – appropriately, but not necessarily in a formal manner – by giving further particulars.*
>
> *…The procedure is designed to secure that a defendant shall not be taken by surprise and find at the trial that he did not know the case he came to meet."*

16. The defendant also relied upon two decisions of Costello J. in which she concluded, in the first instance, that the particulars in the case before her raised new allegations which were not within the claim pleaded and, in a subsequent judgment, directed that those elements of the particulars which went beyond the claim pleaded should be struck out. In the first of those judgments, namely *James Elliott Construction Ltd v. Lagan* [2015] IEHC 480, an issue arose as to whether the plaintiff had provided adequate particulars of an allegation of deceit in the statement of claim. It was alleged that the defendants were aware from the nature and quality of investigations carried out at their quarry that the quality of rock supplied from their quarry was "*low grade*". It was also specifically alleged that the defendants were actively involved in making decisions in relation to the quarry and knew of test results performed on the rock. The defendants sought particulars of the latter allegation. In particular, the defendants asked the plaintiff to specify each and

every test result of which the defendants were alleged to have been aware. In the course of responding to that request for particulars, the plaintiff made an allegation that test results produced by the defendants were not, in fact, genuine. In essence, the allegation was that they had been fabricated. Costello J. held that this represented a new allegation of fraud that was not within the ambit of the case made in the statement of claim. At para. 30 of her judgment, she said:-

> *"30. Undoubtedly, these are serious and new allegations of deceit and fraud. The plaintiff is perfectly entitled to bring a claim based on this fraud if it so wishes. However, it must be properly pleaded and it is not appropriate to introduce it in the… reply to particulars arising out of the Statement of Claim…"*

17. Subsequent to the judgment given by Costello J. in July, 2015, the defendants brought an application seeking to strike out those portions of the plaintiff's response to the request for particulars which went beyond the ambit of the statement of claim. Costello J. dealt with this application in her judgment of 14th January, 2016, namely *James Elliott Construction Ltd v. Lagan* [2016] IEHC 5. In para. 9 of her judgment, she said:-

> *"9. As I held in my earlier judgment of 14th July, 2015, the replies to particulars… raised new allegations of deceit and it was not appropriate that such allegations be introduced into the case in this fashion. In light of the plaintiff's application to amend the Statement of Claim and the elaboration of its case in relation to these matters, it is clear that the allegation of falsifying or having suspicions as to the veracity… of test results does not in fact form part of the plaintiff's claim but rather its rebuttal of the anticipated line of defence on the part of all of the defendants. That being so, I am satisfied that these pleas are not in fact particulars of the Statement of Claim and therefore they should not remain in the replies to the particulars of the Statement of Claim… This is not appropriate and I therefore strike out… [the relevant portion of the response to the request for particulars]"*

18. In the present case, the defendant, in addition to making the case that the December 2019 schedule does not comply with the directions given by me in July, 2019, also makes the case, in reliance on the approach taken by Costello J. in *James Elliott Construction* that a number of aspects of the December 2019 particulars should likewise be struck out in these proceedings. It is therefore necessary to consider the 2019 particulars in some detail.

19. Counsel for HKRME was largely in agreement in relation to the applicable principles. However, counsel for HKRME argued that the defendant is entirely incorrect insofar as he has suggested that the additional particulars furnished in December, 2019 are not within the substantive case pleaded in the statement of claim. Counsel argued that the present case is quite different to that which was addressed by Costello J. in the *James Elliott Construction* case. Counsel for HKRME also argued that there is no principle that prevents a party updating its particulars to include losses which were within its knowledge or means of knowledge at the time when an earlier set of particulars was furnished. Counsel also submitted that there was nothing in my May 2019 judgment that pinned the HKRME

claim down to the specific figure claimed in the statement of claim or in the September 2017 schedule.

20. In order to properly assess the arguments on both sides, it is necessary to consider, in some detail, the particulars provided in December 2019.

The particulars provided in December, 2019

21. While I have referred, for convenience, to the particulars furnished in December, 2019 as "*the December 2019 particulars*", I should make clear that these comprise a lengthy letter (running to 73 paragraphs over eleven pages) in which additional details are provided and in which the solicitors acting on behalf of HKRME have also sought to explain the differences between the particulars furnished at that time and the previous schedules furnished in September, 2017 and July, 2019 respectively. The December letter correctly records that, in July, 2019, I had ruled that further particulars be provided including details as to the circumstances in which the liabilities claimed arose and providing explanations where the particulars contained new items or new figures for old items or omitted items contained in the previous schedules which had been furnished.

22. Before addressing the specific items which now comprise the claim in respect of the outstanding liabilities of HKRME, the solicitors acting for the plaintiffs provide the following general explanation in paras. 9-14 of their letter:-

> *"9. First, the 2017 Schedule did not purport to be a full and complete schedule of HKRME's liabilities. The figures provided were those which were available to HKRME at the time and which related to liabilities outstanding as of 31st March 2015. Moreover, the focus for the figures provided in the 2017 Schedule was on the international salaries and the sub-consultants relating to the Abu Dhabi Plaza project in Astana. Indeed, that project finished in March 2015. HKRME did not conduct an extensive investigation of its liabilities at the time and that is why, for example, liabilities owed to [the related company] were not included. Also, as noted in the letter of 12th July 2019, the figures which were provided in the statement of claim of (of AED 8.7 million) and in the… Particulars (of AED 8.4 million) were always subject to being updated and further particularised. The best information which was available at the time was provided but this never purported to be full and complete. Having gone through the exercise of obtaining documentation behind the liabilities, it was possible to provide better particulars…*
>
> *10. Second, HKRME's position is that HKRME sought the return of the entirety of the Transferred Monies in these proceedings and… its claim was never confined or dependant on particularisation of liabilities. Obviously, the Court has not agreed with that position and has limited the HKRME claim to the amount of its liabilities. However, this does provide further explanation and justification for the updating of particulars as part of the taking of the account and enquiry. Furthermore, HKRME's position of this issue remains fully reserved…*

11. *Third, there is no prejudice to the defendant by virtue of updated particulars… being provided in the context of the taking of an inquiry and account.*

12. *Fourth, the figures previously provided obviously took no account of costs and liabilities incurred after March 2015… While this will be a matter for the court… HKRME's position is that the unpaid and lawful liabilities of HKRME… include liabilities incurred subsequent to March 2015.*

13. *Fifth, and again while this is a matter for the court…, HKRME's position is that the effect of the judgment… is that the defendant is liable for the liabilities of HKRME, regardless of what precisely was pleaded in the statement of claim and in the… Particulars.*

14. *In some cases, it has been possible to collate further supporting documentation for HKRME's liabilities, additional to that which was supplied on 12th July 2019. Therefore, a revised exhibit of supporting documentation is enclosed as Appendix 2 to this letter."*

The claim in relation to salaries

23. Paragraphs 15 to 19 together with the attached table provide particulars of the claim now made in relation to salaries. In para. 16 it is explained that the differences between the figures now claimed in respect of salaries and those set out in the 2017 schedule arise as a consequence of "*a more comprehensive review of the liabilities for salaries, by reference to the detailed underlying documentation, and is therefore more accurate than the figure which was provided in the 2017 Schedule*". In the course of the hearing in January, 2021, counsel for the defendant confirmed that no issue was raised in relation to this element of the claim insofar as particularisation of the HKRME claim is concerned. This is obviously without prejudice to the defence which the defendant will advance in respect of the sustainability of the claim.

The new claim in respect of a loan alleged to have been made by Mr. Ryan to HKRME

24. The next item (which is addressed in paras. 20 to 24 of the December 2019 particulars) relates to a loan which it is claimed was made by Mr. Ryan to HKRME in July, 2011. In support of this item, a copy of a loan agreement dated 11th July, 2011 is annexed to the schedule together with a HSBC bank statement in respect of a current account held by HKRME which records the receipt on 29th June, 2011 of AED 376,352 under the narrative "*MR. JERRY RYAN LOAN*". The second tranche of AED 421,000.00 is shown on a HSBC bank statement dated 31st July, 2011 as having been received on 12th July, 2011 under the narrative "*MR. JERRY RYAN TOP UP*". In para. 23 of the schedule, the following explanation is given as to why this liability was not included in the 2017 schedule:-

"23. …Put simply, the focus of the 2017 Schedule was on the employees and external consultants on the Abu Dhabi Plaza project, which is reflected in the title… "Outstanding Fees". The liability for Mr. Ryan's loan was simply not considered at the time."

25. In para. 24, it is also stated that Mr. Ryan has issued a formal demand for repayment of the loan. The relevant demand is dated 4th December, 2019 and it seeks immediate repayment of AED 800,000 together with "*accumulated interest"* in the sum of AED 377,080.

26. In the course of his submissions at the hearing in January, 2021, counsel for the defendant highlighted the explanation given in para. 23 that the loan was not considered at the time the 2017 schedule was prepared. Counsel posed the question by whom was it not considered? By HKRME? By Mr. Ryan? Counsel stressed that Mr. Ryan, at all stages, was the person in control of running the case on behalf both of the Ryan Children's Trust and on behalf of HKRME and that he had retained the solicitors for the purposes of prosecuting the claim. Counsel submitted that the explanation given was manifestly insufficient. He submitted that it was clear, in circumstances where this item was directly linked to Mr. Ryan, that the liability was known to him at the time the September 2017 schedule was delivered. Counsel suggested that it had either been deliberately excluded from the 2017 schedule or no one had "*bothered to apply their mind to the claim*". In either case, counsel submitted that this was not a proper particular to be included now. The point was also made that, when one adds all of the additional items now claimed, the total represents an increase of approximately €1.2 million over the original claim of approximately €2.1 million in the 2017 schedule.

27. In response, counsel for HKRME strongly argued that there is no principle of law to the effect that, because a plaintiff has left out matters that were within his or her knowledge at the time particulars were previously furnished, the plaintiff is prohibited or is, in some way, estopped from including those items in updated particulars furnished subsequently. Counsel characterised the effect of the position for which the defendant contended as a "*radical proposition*". Counsel for HKRME accepted that there may well be a robust defence put up by the defendant to the notion that Mr. Ryan should be entitled to recover monies on foot of the alleged loan but that is a matter for the defence of this element of the claim at the hearing of the account and enquiry and is not a matter to be decided, at this point, on an application to strike out particulars.

28. In my view, it is essential to keep in mind that the direction given by me in para. 401 of my May 2019 judgment was given against the backdrop of the case pleaded in the statement of claim and, in particular, was directed towards the allegation that HKRME had unmet obligations including staff and consultants' fees amounting to approximately AED 8.7 million. While I did not use the words "*unmet obligations*" in para. 401 of my judgment, the reference made by me to unpaid liabilities of HKRME was intended to refer to the case made in para. 62 of the amended statement of claim where an equivalent expression, namely, "*unmet obligations*", was used. I made clear, however, in my judgment, that the only liabilities of HKRME for which the defendant could be made liable are the lawful liabilities of HKRME.

29. Thus, for the purposes of the account and enquiry directed by me, HKRME is confined to pursuing liabilities of HKRME which are both unpaid and lawful. That said, it is also

essential to bear in mind that there is nothing in para. 62 of the amended statement of claim to suggest that the total figure mentioned therein was intended to be a final figure. It is quite clear from the simple and straightforward way in which this matter was pleaded in the amended statement of claim that the figure of AED 8.7 million was an approximate figure only. This is a point that I have previously made in my ruling on 24th July, 2019. Referring to the fact that the figure pleaded was an approximate figure, I said:-

> *"I am not convinced that a Plaintiff is always stuck with a particular figure that may have been pleaded… However a Plaintiff in the absence of an application to amend, is stuck with the substantive case pleaded and, of course, the Defendant can assess whether they fall within the rubric of unmet obligations, which is the case pleaded in paragraph 62 of the amended statement of claim."*

30. In these circumstances, it seems to me that the alleged loan by Mr. Ryan to HKRME is capable of falling within the rubric of unmet obligations or unpaid liabilities of HKRME. Whether, in fact, it falls within that rubric remains to be established. Furthermore, it remains to be established that this is a lawful liability. These are matters that, in my view, can only be addressed at the hearing of the account and enquiry. It is impossible, at this interlocutory stage of the proceedings, to form any view on the sustainability of this element of the HKRME claim. In particular, it is not possible, at this stage, to form the view that the claim in respect of the loan plainly does not fall within the ambit of the pleaded case. In this context, it seems to me that, by analogy with the approach taken in the *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425 line of authority, the court should not strike out particulars unless it is very clear that the claim made in the particulars falls outside the ambit of the claim made in the relevant pleading.

31. However, the defendant does not confine its attack to this element of the claim now advanced by HKRME to a pleading point. In addition, as noted above, counsel for the defendant has submitted that the explanation given by HKRME for not including this item in the 2017 schedule does not withstand scrutiny. On that basis, counsel submits that HKRME has not complied with the direction given by me in my July 2019 ruling. In this context, the defendant makes the case that this item was either deliberately omitted from the 2017 schedule or was not included through carelessness or neglect on the part of HKRME or Mr. Ryan. While I fully understand why these criticisms have been advanced, I do not believe that they are sufficient to justify the court, at this stage in the proceedings, determining that HKRME should not be entitled to include this item in its claim for the purposes of the account and enquiry. While it is clear from the judgment of Lavery J. in *Fahy v. Pullen* that the facts are to be stated as they are known at the time of delivery of a pleading or the time that further particulars are furnished, I agree with the submission made by counsel for HKRME that there is no principle of law which goes so far as to prevent a party from revising or expanding particulars at a later stage even where the facts were known to that party at a time when particulars were originally furnished. Lavery J. in *Fahy v. Pullen* did not go so far as to suggest that a failure to fully state the facts which ought to have been known to a plaintiff would prevent the plaintiff from thereafter updating the particulars. While a failure to include appropriate particulars at

the time of their delivery is to be deprecated, I do not believe that the law has yet gone so far as to hold that such a failure is sufficient, of itself, to prevent a plaintiff from subsequently updating the particulars to include an item (which falls within the ambit of the claim pleaded) which was omitted at the time the original set of particulars was delivered and which ought to have been included. While Lavery J. envisaged further particulars being provided where a "*new and unexpected type of damage*" emerges, it is, regrettably, a not uncommon feature of litigation that a plaintiff, in the course of proceedings, provides periodic updates of particulars which become more extensive and more accurate as the proceedings progress and as more work is done both by the plaintiff and the plaintiff's lawyers in preparing for a hearing. That said, if there was evidence to suggest that a plaintiff had deliberately withheld particulars with a view to gaining some perceived advantage over the defendant, that might constitute an abuse of process and the particulars could be struck out on that basis. But the evidence here does not go that far. Similarly, if there was evidence of real prejudice to the defendant by reason of the delay in furnishing the particulars, the matter might be capable of being addressed by analogy with the long established principles governing delay in prosecution of proceedings. There is no evidence of such prejudice here.

32. In these circumstances, I do not believe that it would be appropriate to strike out this element of the case now made by HKRME. It seems to me that any issues in relation to this item will fall to be determined in the course of the account and enquiry directed by me. At that hearing, the defendant may well have significant additional points to make about the credibility of this item in circumstances where it was not previously included and in light of the rather thin explanation which has been given in para. 23 of the schedule for its omission from the previous 2017 schedule. Quite apart from any other issues which the defendant may wish to raise, the defendant will, of course, also be free, for example, to explore whether that loan is in any event repayable at this point having regard to the time which has elapsed since it was allegedly advanced in 2011.

The monies alleged to be owed to HKRDMCC

33. Very similar issues arise in relation to the next item in the December 2019 particulars. This relates to monies alleged to be owed by HKRME to a related company which is referred to in the particulars by reference to the acronym HKRDMCC. The total amount claimed in relation to this item is AED 1,074,237 which equates to approximately €261,040. The explanation given for not including this item previously in the 2017 schedule is, again, that the item was "*simply not considered at the time*". In my view, precisely similar considerations arise here as in relation to the claim in respect of the loan from Mr. Ryan. For the same reasons as are set out above in relation to the loan, it seems to me that this item is capable of falling within the rubric of unmet obligations and it is a matter for the hearing of the account and enquiry to determine whether it is, in fact, an unpaid and lawful liability which should now be paid by the defendant on foot of the HKRME unjust enrichment claim. For the reasons previously discussed in relation to the loan and subject to what I say in para. 34 below, it seems to me that the failure to identify this item previously does not, *per se*, prevent the item from being claimed now although the defendant will, of course, in addition to any defences he wishes to raise, be

in a position to attack the credibility of this item having regard to the failure of HKRME to advert to it in 2017.

34. However, the defendant also raises an additional argument in relation to this item, namely that part of the liabilities claimed in respect of the funds alleged to be owed to HKRDMCC relate to liabilities which are alleged to have arisen subsequent to March, 2015. In this context, counsel for the defendant drew attention to the plea made in para. 61 of the amended statement of claim to the effect that HKRME and its subsidiary in Kazakhstan, HKR Middle East Architects Engineering Limited Liability Partnership were forced to cease trading in or around March, 2015. On that basis, it was submitted that the liabilities do not come properly within the four corners of the pleaded claim. In this regard, the specific items which are said to have arisen since March, 2015 relate to "*Astana Salaries paid post April 2015*" and "*Sponsor fees paid since March 15*". I fully accept that the notion that salaries or sponsor fees could have arisen after a cessation of trade may appear to be counterintuitive but I do not believe that it is possible, at this point in the proceedings, to determine that these items fall outside the pleaded case. There is no suggestion that HKRME or its related entity ceased to exist as of March, 2015. I am aware from the evidence given at the main hearing that there appears to have been a requirement for HKRME to make periodic payments to UAE nationals in order to carry on business in the UAE and I cannot rule out the possibility that HKRME may be in a position to prove at the hearing of the account and enquiry that there was a continuing requirement to pay fees to local sponsors after the cessation of trade. Similarly, the fact that salaries continue to be paid subsequent to a cessation of trading is not beyond the realms of possibility. Where a business has ceased to trade, there may be steps that require to be taken in order to wind down a business and it may be necessary to retain staff for this purpose. I note that the amount claimed in respect of this item is relatively modest at AED 115,729 which equates to approximately €28,122.

35. The amounts claimed in respect of this item also include legal fees paid to a local firm of lawyers on 7th May, 2017 and an amount for office rental and fees payable to the local municipality since March, 2015. Again, the fact that HKRME ceased business in March, 2015 does not exclude the possibility that these fees would continue to accrue given that HKRME continues to exist.

36. In all of the circumstances described above, I have come to the conclusion that it is not possible, at this point in the proceedings, to determine that the amounts claimed in respect of items which have arisen since March, 2015 do not fall within the pleaded case and, in particular, within the rubric of unpaid liabilities of HKRME. The cessation of business by HKRME does not automatically mean that it would not continue to incur expenses for as long as it remains in existence.

Fees paid to sub-consultants

37. The next item which arises is in relation to fees paid to sub-consultants. The first point raised in relation to sub-consultants by the defendant is in relation to the non-inclusion of any sum due to Green Cube (which had appeared under this heading in the 2017 schedule). Counsel for the defendant complained that no adequate explanation had been

given for the omission of this item from the 2019 schedules and that, in those circumstances, the plaintiffs are in breach of the direction given by me in July, 2019. This issue was raised in the defendant's solicitor's letter dated 29th January, 2020. The solicitors acting for HKRME responded on 23rd March, 2020 in the following terms:-

> *"…you say that the omission of Green Cube from the list of liabilities is not explained. Having regard to the evidence already furnished and the findings of the court already made, it is clear that the Green Cube invoices are not "unpaid and lawful liabilities" of HKRME and as such they are not being claimed."*

38. In my view, that provides an adequate explanation as to why no claim is now made in relation to Green Cube. The approach taken by the plaintiffs is unsurprising in light of the finding made by me in my May 2019 judgment that the Green Cube invoices were fabricated.

39. The other issue raised in relation to the particulars provided in relation to sub-consultants is that the explanation given in respect of two new items, namely, an amount claimed of US$62,764 in respect of Byrne Looby and an amount claimed of AED 635,100 (equating approximately to €154,329) in respect of DMF only emerged after a *"more comprehensive itemisation of HKRME's liabilities"* was undertaken in 2019. In addition, it was explained that these items related to work done on projects other than the Abu Dhabi Plaza project. Both of these items relate to work done on what is described in the particulars as the Kabul New City project.

40. I take the same view in relation to these items as I did in relation to the claim in respect of the Jerry Ryan loan and the funds alleged to be owed by HKRME to HKRDMCC. It seems to me that these items cannot be excluded at this point in the proceedings. It will be a matter for HKRME to prove, at the hearing of the account and enquiry, that they do fall within the rubric of unmet obligations. I do not believe that they can be excluded because they relate to projects other than the Abu Dhabi Plaza project. In my ruling of July, 2019, I accepted that there were other projects that could be in issue in respect of the unpaid liabilities of HKRME other than the Abu Dhabi Plaza project. It will, however, be a matter for HKRME to prove these items in due course.

The claim in respect of the "*salary*" alleged to be due to Mr. Ryan

41. The next item relates to a claim for salary alleged to be due to Mr. Ryan by HKRME. This was not included in the 2017 schedule. The amount claimed is AED 1,046,973 which is based on an annual salary of US$300,000 for five years up to March, 2015. The claim is advanced on the basis that this would have been the average salary for a manging director in the region at the time. When translated to UAE Dinars, the plaintiffs' solicitors say that this would equate to AED 5,511,111. However, this has been reduced to take account of salary received by Mr. Ryan from a related entity in London, namely HKRAS, during this period and also to take account of drawings made by Mr. Ryan from HKRME during the same period. Counsel for the defendant suggested that the explanation given for the non-inclusion of this item in the 2017 schedule is particularly difficult to accept

given Mr. Ryan's central role in the affairs of HKRME and in the prosecution of these proceedings. The explanation given in para. 64 of the schedule is:-

> *"Again, the focus of the 2017 Schedule was on the employees and external consultants, which is reflected in the title of [the] document, "Outstanding Fees". The liability for Mr. Ryan's outstanding salary was simply not considered at the time."*

42. Counsel for the defendant drew attention to the fact that the claim made in relation to the salary alleged to be due to Mr. Ryan is not based on any contract but is a claim for an estimate provided by Mr. Ryan in respect of what he considers he ought to have earned. Counsel also suggested that there is an "*offensive element*" to this particular aspect of the claim in circumstances where Mr. Ryan, as the particulars make clear, gave evidence at the main hearing as to why he had not signed an employment agreement proffered to him by the defendant (while the defendant was in control of HKRME as "*caretaker*") at a salary of AED 35,000. Counsel posed the following rhetorical question:-

> *"Could you imagine the cross-examination which would have taken place if Mr. Ryan had disclosed in the middle of all this or in advance of giving this evidence, as he was obliged to do by way of particulars, that actually he was claiming a million dirhams by way of salary?"*

Counsel submitted that, in these circumstances, it could not be "*appropriate now for the Plaintiff to assert that there's no prejudice to my client in terms of advancing a claim in those terms".*

43. I can well appreciate that, had Mr. Ryan been making the case, in the course of his evidence at the main hearing, that he was entitled to be paid a salary as managing director of US$300,000 per annum, this would have been the subject of specific cross-examination and legal submissions on behalf of the defendant. However, if this item of alleged liabilities is to be pursued at the hearing of the account and enquiry, it is inevitable that Mr. Ryan will have to be called again as a witness. To the extent that the claim now made in relation to this item is inconsistent with the case made by Mr. Ryan at the main hearing, the defendant will, therefore, be in a position to pursue the matter by way of further cross-examination. Furthermore, insofar as legal submissions are concerned, the inconsistencies in Mr. Ryan's approach will undoubtedly be a matter for legal submission at the account and enquiry. In addition, as signalled in my May 2019 judgment, the fact that a claim is being made by HKRME in respect of monies alleged to be due to Mr. Ryan may well raise issues of illegality or public policy which can also be fully explored at the hearing of the account and enquiry. Finally, insofar as this item was not previously included in the 2017 schedule, it seems to me that I should take the same approach in relation to the item as I did in relation to the loan alleged to have been made by Mr. Ryan. I do not believe that I can determine at this stage that the salary claimed does not fall within the rubric of unmet obligations of HKRME.

The claim in respect of "*Other Liabilities*"

44. The next item is described in the schedule as relating to "*Other Liabilities"* and this amounts in total to €333,723. The amounts claimed here include sums alleged to be due to Mr. Suman Koirala and Ms. Dolly Sockett, both of whom gave evidence on behalf of HKRME at the main hearing.

45. Counsel for the defendant submitted that a deliberate and conscious decision must have been made not to include these items in the 2017 schedule. He also submitted that a significant part of the liabilities in issue appear to relate to the post-March 2015 period. In addition, he suggested that, it was clear from the underlying documents attached to the December 2019 schedule that the liabilities in issue arose in relation to services provided in respect of these proceedings and that, to the extent that they were referable to the proceedings, they could only be recovered by way of costs in the event that an order for costs is ultimately made in favour of HKRME at the conclusion of the proceedings. Counsel also submitted that, had the defendant known that, for example, a claim would be made in relation to sums due to Ms. Sockett, she could have been cross-examined in relation to this item at the hearing.

46. Notwithstanding the submissions made by counsel for the defendant, I do not believe that I am in a position, at this point in the proceedings, to determine that the amounts claimed under the "*Other Liabilities*" heading do not fall within the ambit of the claim made in respect of unmet obligations. It seems to me that these are matters that would have to be fully explored in the course of the hearing of the account and enquiry. I do not know whether it is the intention of HKRME to call Mr. Koirala or Ms. Sockett as witnesses at that hearing. If it is not the intention of HKRME to do so and if the defendant can show that, he has thereby suffered a real prejudice in not having had the opportunity to cross-examine those witnesses in relation to these issues at the main hearing, any such allegation of prejudice can be debated at the hearing of the account and enquiry also. There will be nothing to prevent the defendant raising the issue of prejudice at the hearing along with any defences that he proposes to raise.

The interest claim

47. The final item in the December 2019 schedule relates to a claim for interest in the amount of €658,894 in respect of the liabilities claimed to be due relating to staff salaries, the funds owed to HKRDMCC, sub-consultant fees and the salary claimed to be due to Mr. Ryan. The rate claimed is 8%. No explanation has been given as to the basis on which a claim for 8% is advanced. In my view, having regard to the direction given by me in July, 2019, it is essential that a full explanation is given as to the basis upon which interest is claimed and as to the rate of interest claimed. I do not, however, believe that I should strike out this element of the HKRME claim. There may well be a valid claim for interest but it needs to be explained and the rate also needs to be explained. I will, therefore, direct that within four weeks from the date of delivery of this judgment, HKRME should provide the defendant with an explanation for the claim for interest and the reasons why it was not previously included in the 2017 schedule.

The documents provided in support of the particulars

48. In the course of the hearing in January, 2021, the defendant also raised an issue as to the adequacy of the documentation provided with the December 2019 particulars. In this context, I should make clear that, in my view, having regard to the fact that the claim detailed in the December 2019 particulars is significantly different to that described in the 2017 Schedule, the defendant must be entitled to seek discovery in respect of the claims now made. Any such request for discovery should be pursued in accordance with the usual practice under O. 31, r. 12(6).

Revisiting the May 2019 judgment

49. Finally, in the course of the hearing in January, 2021, counsel for the plaintiffs raised an issue as to whether I should revisit the conclusion reached by me in para. 400 of my May 2019 judgment that the only claim which has been made by HKRME in the context of unjust enrichment is in respect of its unpaid liabilities. In para. 400 of my May 2019 judgment, I reached that conclusion on the basis on the way in which I understood the case to have been pleaded in the statement of claim and on the basis on which the plaintiffs' claim was pursued at the hearing. Counsel drew attention, in this context, to the position taken by HKRME (as described at para. 10 of the December 2019 particulars quoted in para. 22 above) that HKRME sought the return of the entirety of the monies transferred to Sunvit and that its claim was *"never confined or dependent on particularisation of liabilities".* In this context, the December 2019 particulars refer to the transcript of Day 1 of the main hearing at p. 59 and also to Day 24 at pp. 151-152 and to para. 25 of the plaintiffs' opening written submissions.

50. Counsel for the plaintiffs submitted that he thought it was important to bring this to my attention at this point while the case is still before me. While I understand the position of counsel, I do not believe that I can address this issue in the context of the defendant's application to strike out the particulars. If the plaintiffs wish to raise this issue before me, I believe it would require to be done formally on notice to the defendant (albeit that I do not think that a notice of motion, as such, would be required). In this context, I note that no order has yet been perfected on foot of my May 2019 judgment.

51. I wish to make it quite clear that I am not in any way suggesting that the plaintiffs may have an entitlement to a reconsideration of this aspect of the judgment or that they have any proper basis to suggest that the conclusion reached by me in para. 400 of my May 2019 judgment was mistaken. The issue would have to be fully debated before me if it is to be pursued. In particular, it seems to me that, before raising the matter with me, it would be necessary for the plaintiffs to set out, in a letter to the defendant's solicitor, the basis upon which they believe the finding made by me in para. 400 of my judgment to that effect is mistaken (together with copies of all supporting documents and transcript references) and any legal authorities on which they rely, following which, the matter can be listed before me for further direction. These proceedings are listed before me, in any event, for mention on Friday, 26th March, 2021. I suggest that, if the plaintiffs wish to pursue the issue, they should ensure that the letter to the defendant's solicitors should be sent well in advance of that date in order to give the defendant's solicitor an opportunity to respond prior to the matter being listed on 26th March. In addition, a copy of the

correspondence between the parties and any relevant underlying documents would need to be made available to the Registrar by email by Monday, 22nd March, 2021.

Conclusion

52. For all of the reasons outlined above, I have come to the conclusion that, save for the order proposed in para. 47 above, the application made by the defendant should be refused. My provisional view in relation to costs is that the costs of the application should be reserved. While the defendant has been unsuccessful in the application save in relation to the claim for interest, it seems to me that the defendant had some basis to be concerned about the nature of the particulars furnished in December, 2019 and more particularly about the extent of the explanations furnished. My provisional view, therefore, is that the fairest approach to take is to direct that costs should be reserved pending the outcome of the account and enquiry. However, I stress that this is no more than a provisional view and, if either party wishes to apply for a different form of order in relation to costs, they can so indicate by email to the Registrar not later than fourteen days from the date of delivery of this judgment, following which I will fix a date for the hearing of oral submissions in relation to costs. However, the parties should be aware that there may well be costs consequences if such a hearing has to take place.