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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 30/9/2010

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

2009 No 33859

DANIEL McATEER

Plaintiff;

-v-

(1) SEAN DEVINE

(2) STEPHEN McCARRON

(3) BRENDAN FOX p/a CLEAVER FULTON RANKIN, Solicitors,

(4) JOHN LOVE p/a MOORE STEPHENS BRADLEY McDAID,  
Accountants

Defendants.

2009 No 33855

DANIEL McATEER

Plaintiff;

-v-

(1) SEAN DEVINE

(2) MARY DEVINE

(3) BRENDAN FOX p/a CLEAVER FULTON RANKIN, Solicitors,

(4) JOHN LOVE p/a MOORE STEPHENS BRADLEY McDAID,  
Accountants

Defendants.

## WEATHERUP J

[1] There are three applications, one by Stephen McCarron, the second defendant in the first action, and two by John Love, the fourth defendant in both actions, to strike out the Statements of Claim in each action against the respective applicants. I shall refer to the first action as 'the McCarron action' and the second action as 'the Mary Devine action' as the distinction between the actions in the titles concerns the identity of the second defendants. The applications are brought under Order 18 rule 19 and under the inherent jurisdiction of the Court and seek the strike out on the basis that the Statements of Claim disclose no reasonable cause of action, are scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the actions and are otherwise an abuse of the process of the Court. The plaintiff appeared in person, the second defendant was represented by Mr Simpson QC and the fourth defendant was represented by Mr David Dunlop.

### The second defendant's summons in the McCarron action

[2] In the McCarron action the Statement of Claim recites that in March 2001 the first defendant approached the plaintiff about a business opportunity that involved the purchase of several parcels of land and partially completed housing development and the plaintiff offered to provide professional services as an accountant to the first defendant in relation to commercial, taxation and financing aspects of the proposed transaction.

[3] The first defendant is a property developer and businessman and he was a client and business partner of the plaintiff up to May 2002. The second defendant is an estate agent and acted for the vendor in relation to the lands that were proposed to be purchased by the first defendant and also acted for the first defendant. The third defendant is a solicitor and acted as solicitor on behalf of the plaintiff and also for a related company Roe Developments Limited and also for the first defendant. The fourth defendant is an accountant and acted as accountant and tax adviser to the vendor of the lands in question and he became the accountant and tax adviser of the first defendant in May 2002 when he took over that role from the plaintiff.

[4] From March 2001 to May 2002 the plaintiff worked for the first defendant in relation to the proposed transaction and claims to have drawn his attention to a substantial tax burden that might fall on the first defendant if the deal were to have been structured in a particular manner and that potential tax burden was estimated by the plaintiff in the sum of £500,000.

[5] After the fourth defendant took over as accountant for the first defendant he investigated the tax and accounting affairs of the first defendant. As a result the first and fourth defendant accused the plaintiff of failing to account for some £500,000 which belonged to the first defendant. In June 2002

the first defendant commenced an action against the plaintiff in relation to the alleged failure to account and the matter eventually came on for hearing in June 2004 when the first defendant did not proceed with the case.

[6] Some days after the conclusion of the proceedings against the plaintiff for failure to account the first defendant issued further proceedings against the plaintiff (known as the Henderson action). This action alleged inordinate delay on the part of the plaintiff in processing the proposed transaction involving the purchase of land by the first defendant with the result that the vendor removed part of the lands that were proposed to be sold to the first defendant and that part was sold to a third party, the first defendant buying the remainder of the lands. This was said to have occasioned a loss to the first defendant in excess of £1M. At the hearing of the proceedings the second defendant and the fourth defendant were witnesses for the first defendant and the third defendant acted as the first defendant's solicitor. This action against the plaintiff was dismissed.

[7] The plaintiff claims in the McCarron action that the basis for the first defendant's proceedings in the Henderson action was misleading and that each of the defendants knew that was the position and crucially, at paragraph 16 of the Statement of Claim, the plaintiff alleges that the defendants combined wilfully with the predominant purpose of deliberately inflicting damage on the plaintiff, his trade and professional standing. The plaintiff relies on six causes of action, conspiracy, abuse of process, negligent misstatement, malicious falsehood, deceit and negligence. Particulars are pleaded in respect of each cause of action against each of the defendants. The particulars against the second defendant total twelve.

[8] Against the second defendant, who acted as estate agent in the first defendant's land transaction, it is alleged that before and during the hearing of the Henderson action the second defendant conspired with the other defendants to inflict damage on the plaintiff's reputation and business by providing false information about the transaction and about the business affairs of the first defendant and the plaintiff's conduct of those affairs and provided false evidence against the plaintiff on the hearing of the action. There are really two aspects. One is false evidence given in Court by the second defendant and the other is that the second defendant conspired with the other defendants in the preparation of the false evidence prior to the hearing in Court.

(i) Malicious falsehood

[9] The cause of action for malicious falsehood against the second defendant concerns the alleged false evidence given by the second defendant against the plaintiff. Munster and Lamb [1883] 11 QBD 588 was concerned with whether an advocate who had suggested to a witness in the course of proceedings that that witness was keeping drugs at his house for immoral or criminal purpose could be the subject of an action for defamation. It was held

in the Court of Appeal that no action could be brought for defamation. In the discussion of liability for evidence given by a witnesses in a trial Brett MR at page 601 stated that -

“...with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court - whether what they say is relevant or irrelevant, whether what they say is malicious or not - are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, a viva voce examination, or whether it is made upon an affidavit. It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action, namely, an action analogous to an action for malicious prosecution which it would be alleged that the statement complained of was false to the knowledge of the witness and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable. If an action for libel or slander cannot be maintained, how can such an action as I have mentioned be maintained, it being in truth an action for defamation in an altered form? Every objection and every reason which can be urged against an action for libel and slander will equally apply against the suggested form of action.”

[10] Thus there is immunity from liability in respect of the evidence of witnesses given on the trial of an action. Accordingly, in so far as the plaintiff seeks to maintain an action against the second defendant for malicious falsehood based on the evidence that he gave at the earlier trial, that action is ill founded because the second defendant is immune from proceedings in respect of the evidence that he gave, even false evidence and even maliciously false evidence.

(ii) Deceit

[11] The cause of action for deceit against the second defendant concerns the alleged falsifying of records and falsifying of evidence given against the plaintiff. The action of deceit requires a number of ingredients to be established. First of all a false representation and for present purposes I proceed on the basis that the second defendant made false representations. Secondly the representation must be known to be untrue or that the maker is reckless as to whether it is true and I proceed on the basis that that is the case. Thirdly that the maker intended that the plaintiff should act in reliance on the false representation and fourthly that the plaintiff in fact relied on the representation. Finally it must be shown that the plaintiff suffered loss as a

consequence. However I refer to the third and fourth requirements which define the character of the action for deceit as arising where the plaintiff has been deceived by the falsehood of the defendant. That is not what is alleged to have happened in the present case. The plaintiff was not deceived by the action of the second defendant not can that be said to have been intended. What might be said to have been intended was that the Judge hearing the case would be deceived by the false representations of the second defendant and he would therefore make a finding against the plaintiff based on that false evidence.

[12] Does the action in deceit lie when a party makes a false representation that is not acted upon by the plaintiff but is acted on by a third party and that action causes detriment to the plaintiff. Clerk and Lindsell on Torts, 19<sup>th</sup> edition, at paragraph 18.32, states that the claimant must have been influenced by the misrepresentation -

“It seems clear that the claimant must have acted himself to his detriment. If his loss results, not from his own reliance but from that of third parties, the defendant may be liable for torts of unlawful interference with trade, passing off or malicious falsehood, or even negligence: but he will not be liable in deceit”.

Thus no action in deceit can arise in the circumstances relied on by the plaintiff. In any event the false representations relied on took place in the Court and as noted above there is no liability in relation to the giving of evidence. An action for deceit must fail.

[13] As noted by Clerk and Lindsell, where a defendant, by false representations, causes a third party to act so as to occasion damage to a plaintiff, there is the possibility of liability for the tort of unlawful interference with trade. Some of the activity relied on by the plaintiff would have taken place outside the Court and would not be subject to witness immunity. In relation to proceedings for unlawful interference with trade Clerk and Lindsell refer in the footnote to National Phonograph Company v. Edison-Bell [1908] 1 Ch 335 where lies told to third parties in order to gain an economic advantage at the expense of the plaintiff were held to be unlawful means, though no action in deceit could have been brought by the third parties, who themselves were not harmed. This is stated to have been accepted by the Court of Appeal in Lonrho v Fayad [1990] 2 QB 479, Dillen LJ asserting that liability for unlawful interference with trade did not depend on ‘a complete tort’. Thus there is a potential remedy for intentional action against a plaintiff outside Court intended to amount to unlawful interference with trade or business or profession. However this is not pleaded in the present case.

(iii) Negligent Misstatement

[14] The cause of action for negligent misstatement against the second defendant concerns false allegations against the plaintiff. In Hedley Byrne v Heller [1964] AC 465 the House of Lords established the existence of a remedy in respect of negligent misstatement causing economic loss when the tort of negligence had provided a remedy for negligent actions causing physical damage to property or the person and consequential economic loss. However in respect of a negligent misstatement causing economic loss there is a need to establish a special relationship between the plaintiff and the defendant. That special relationship generally arises by the assumption of responsibility by a defendant and reliance by the plaintiff. This is otherwise expressed in terms of proximity between the parties and fairness in imposing the duty of care. The present case does not involve a special relationship under Hedley Byrne. There is no assumption of responsibility. There is not sufficient proximity between the parties to establish a duty of care for any negligent misstatement. There is no basis for a claim for negligent misstatement.

(iv) Negligence

[15] The cause of action in negligence against the second defendant also concerns the false information about the plaintiff. The plaintiff has to establish a duty of care and a breach of that duty causing damage to the plaintiff. The thrust of the proceedings against the second defendant concerns intentional activity to damage the plaintiff. It is not negligent action in the sense of the defendant being careless. It is intentional and deliberate action and that is where one might expect to find the legal basis for any liability that arises. I am satisfied that the circumstances between the parties do not create any duty of care for the purposes of a negligence action any more than they create any special relationship for the purposes of proceedings for negligent misstatement. There is no basis for a claim in negligence.

(v) Abuse of Process.

[16] The cause of action for civil abuse of process against the second defendant concerns the giving of false information and the delaying of the trial. In Metall v. Donaldson [1991] QB 390 it was found that an abuse of process in tort required that the defendant's predominant purpose in using the legal process must be for a purpose other than that for which it was designed and that the plaintiff had been caused damage by the abuse of process. However adducing false evidence and presenting a false case to sustain or defeat a claim in legal proceedings does not constitute a tort. At page 61 Gatehouse J stated -

“No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way or a penal order for

costs or even a prosecution for perjury. In our judgment however it does not however expose him to an action for damages in tort under the principle of *Grainger v Hill*, 4 Bing. N.C. 212”

[17] Abuse of process concerns the taking or defending of proceedings for an improper purpose. It is not a tort that can arise in the present case because the second defendant was not a party in the earlier proceedings. The second defendant did not bring the proceedings against the plaintiff. The second defendant was a witness in the proceedings against the plaintiff. An action for abuse of process cannot be brought against the second defendant.

(vi) Conspiracy

[18] That leaves the cause of action for conspiracy. The conspiracy that is alleged is that the defendants agreed to make false allegations against the plaintiff so as to cause damage to the plaintiff and his trade and reputation. In Metall v. Donaldson it was held that there could be no claim against the defendants in conspiracy as, on the pleadings, the plaintiffs were unable to contend that the defendants, in making the alleged agreement, performing it and thereby causing damage, had the sole or predominant purpose of injuring the plaintiff. The issue in the case concerned the correct legal principle to be applied when the conduct in question was unlawful when undertaken by one person alone. In the present case the alleged conduct would be unlawful as amounting to perjury and conspiracy to commit perjury. In Metall v Donaldson it was confirmed that the conspiracy alleged would be actionable where the sole or predominant purpose was that of injuring the proposed victim. However it was admitted between the parties that the conspiracy did not have the sole or predominant purposes of injuring the victim.

[19] In the present case the alleged conspiracy took place outside the Court. It was unlawful conduct because it was an alleged agreement to commit perjury. The issue is whether or not the sole or predominant purpose was to injure the plaintiff. It is contended by the defendants that the plaintiff could not establish that the sole or predominant purpose of the alleged conspiracy could have been to injure the plaintiff. As the case is pleaded at paragraph 16 of the Statement of Claim the plaintiff asserts that injury to the plaintiff was the predominant purpose. I have not been satisfied that in respect of the cause of action for conspiracy the plaintiff has no reasonable cause of action, or that the claim is scandalous, frivolous or vexatious, or that it may prejudice, embarrass or delay the fair trial of the action or that it would otherwise be an abuse of the process of the Court.

[20] Against the second defendant I strike out all the causes of action except conspiracy. I will permit the plaintiff to amend the pleadings to plead such particulars as are relevant to the conspiracy. I will hear the parties as to which of the twelve particulars are not relevant to that issue.

### The fourth defendant's summons in the McCarron action

[21] The second summons is brought by the fourth defendant in the McCarron action. The plaintiff's complaints against the fourth defendant, who took over from the plaintiff as accountant for the first defendant, are first of all that he conspired with the other defendants to provide false evidence against the plaintiff, secondly that he was involved in making false allegations about the plaintiff embezzling funds from the first defendant and thirdly that he was engaged in conspiracy with others in proceedings issued against the plaintiff by members of the Gurum family, former clients of the plaintiff ('the Gurum action'). Further there is an issue that is not pleaded in the Statement of Claim relating to the plaintiff's engagement in a business in Kerry ('the Kerry issue').

[22] The action against the fourth defendant is also pleaded under the same six causes of action referred to above, with on this occasion twenty three particulars set out in the Statement of Claim. Many of the considerations set out above in relation to the second defendant's summons are equally applicable to the fourth defendant's summons. However, in respect of the causes of action for negligence and negligent misstatement the plaintiff contends that there was a duty of care owed by the fourth defendant to the plaintiff and a special relationship between the fourth defendant and the plaintiff. These were said to arise because of the status of the fourth defendant as an incoming accountant taking over conduct of the first defendant's business affairs from the plaintiff. The plaintiff contends that in those circumstances the fourth defendant owed a duty of care to the plaintiff and was in a special relationship with the plaintiff and was in breach of the duties to the plaintiff thereby arising when he did not give the plaintiff an opportunity to address the concerns that were claimed to arise in connection with the plaintiff's conduct of the first defendant's affairs. This may be regarded as a plea for courtesy and fairness but that is a different matter to the existence of a legal duty of care for the purposes of the tort of negligence or any special relationship for the purposes of any negligent misstatement. The fourth defendant reported to the first defendant in relation to the state of the accounts as he was contractually bound to do. I am satisfied that the relationship between the fourth defendant and the first defendant and any relationship and degree of proximity between the plaintiff and the fourth defendant could not have given rise to any legal duty of care for the purposes of the tort of negligence or any special relationship for the purposes of negligent misstatement.

[23] The findings that I make in relation to the fourth defendant are as the findings that I have made in relation to the second defendant. The result is that all the causes of action against the fourth defendant in the McCarron action, except conspiracy, will be struck out. The plaintiff will have leave to amend the particulars of conspiracy. I will hear the parties as to which of the twenty three particulars are not relevant to that issue.



### The fourth defendant's summons in the Mary Devine action

[24] The third summons is brought by the fourth defendant to strike out the Statement of Claim against him in the Mary Devine action. The Statement of Claim recites that Mary Devine, the second defendant, is the wife of the first defendant and in 1999 the first defendant approached the plaintiff to become his accountant and tax adviser and he set up an accounting system for the first and second defendants. In 2000 he entered into a formal engagement letter with both the first and second defendants. Further the first defendant became a shareholder in a private company in which the plaintiff was a director and shareholder and this led to shares being purchased in that company by the first and second defendants.

[25] In May 2002 the first and second defendants retained the fourth defendant to act as their accountant and tax adviser although it is alleged that before the professional relationship came into being the fourth defendant had been meeting clandestinely with the first defendant in a manner which the plaintiff describes as wholly inappropriate. The first defendant launched the failure to account proceedings against the plaintiff and those proceedings were not successful. It is further pleaded that the third defendant became solicitor for the Gurum family, former clients and business partners of the plaintiff. The Gurum family commenced a failure to account action against the plaintiff alleging some £1M in missing funds. The Gurum family are represented by the third defendant and their accountant is the fourth defendant. The plaintiff pleads at paragraph 17 that the defendants combined wilfully with the predominant purpose of deliberately inflicting damage to the plaintiff, his trade and professional standing.

[26] What distinguishes the Mary Devine action from the McCarron action is that in the Mary Devine action there is a claim for breach of contract against the first and second defendants. In relation to all defendants there is much duplication with the pleadings in the McCarron action.

[27] As against the four defendants in the Mary Devine action the pleadings rely on the same six causes of action namely conspiracy, misuse of process, negligence, negligent misstatement, deceit and malicious falsehood. As against the fourth defendant there are twenty two particulars. However the particulars of deceit and negligence against the fourth defendant are different to those set out in the claim for deceit and negligence in the McCarron action. In the McCarron action there are five particulars of deceit and negligence alleging false records in relation to the first defendant's land deal. In the Mary Devine action there are two particulars of deceit and negligence that relate to the land deal and three particulars of deceit and negligence relating to the fourth defendant's enquiries into the plaintiff as an accountant for the first defendant. The need for separate actions against the fourth defendant is unclear.

[28] As in the McCarron action I am satisfied that there is no basis for the causes of action, save for conspiracy. I will hear from the parties as to the

pleading of conspiracy against the fourth defendant, as to which action and which particulars should carry the claim.

[29] That brings me back to the Kerry issue. This issue is not pleaded in the Statement of Claim but in response to an extensive request for particulars the plaintiff was permitted to file a statement by way of reply. In the statement/replies to particulars the plaintiff set out his complaints against the first and fourth defendants and others in relation to a Kerry business in which the plaintiff was involved. It will be necessary to amend the pleadings to identify the cause of action relied on by the plaintiff and to disclose the relevant particulars. If the Kerry issue is not admitted to these proceedings I expect the plaintiff will issue further proceedings against the defendants. If there are to be proceedings taken in respect of the Kerry issue I am proposing to allow it to be introduced into these proceedings, if there is a basis for a cause of action against any of the defendants. The plaintiff is required to formulate his claim in writing on the Kerry issue and I will hear from the parties as to such amendments as may be permitted in relation to the issue.

#### Summary

[30] The outcome is that I dismiss all the plaintiff's causes of action, except conspiracy, against the second defendant in the McCarron action and against the fourth defendant in both actions. I will hear the parties on the amendment of the pleadings in the McCarron action in relation to the second defendant and in relation to the fourth defendant. I will hear the parties on the need to maintain proceedings against the fourth defendant in the Mary Devine action and if so the particulars to be relied on in that action. The plaintiff is to formulate his claim on the Kerry issue and I will hear the parties on the proposed amendments in relation to the Kerry issue.