**Judgment 23/2004** **IFS Investments Limited v. Manor Park (Guernsey) Limited, Manor Park Guaranteed Investment Funds Limited, Williams and Dinning – Royal Court (Civil Action File 817) – 11 June, 2004**

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**Rule 36 of the Royal Court (Civil) Rules, 1989 – strike out application by the Fourth Defendant – whether no reasonable cause of action was disclosed – whether the action was an abuse of process – strike out application dismissed as respects the second alleged conspiracy and unlawful interference with the business interests of the Plaintiff and associated alleged loss – strike out application upheld in respect of the first alleged conspiracy, defamation and the claim for injunctive and declaratory relief. [See also Judgment 13/2004]**

**IN THE ROYAL COURT OF GUERNSEY**

The 11th day of June, 2004 before Andrew Christopher King Day, Esquire, Lieutenant Bailiff; sitting alone

IN THE MATTER OF

IFS INVESTMENTS LIMITED

Plaintiff

v

MANOR PARK (GUERNSEY) LIMITED

First Defendant

and

MANOR PARK GUARANTEED INVESTMENT FUNDS LIMITED

Second Defendant

and

ALAN WILLIAMS

Third Defendant

and

GILLIAN SARAH DINNING

Fourth Defendant

WHEREAS THE COURT, on the 17th and 18th May, 2004, having heard Advocates R.J. Collas and J.E. Roland, Counsel for the Fourth Defendant and Plaintiff respectively, on the Fourth Defendant's application dated 20th April, 2004, that the proceedings instituted against her be struck out, RESERVED JUDGMENT;

THE COURT this day handed down JUDGMENT in the terms attached hereto and DISMISSED the application insofar as it related to the second alleged conspiracy and unlawful interference with the business interests of the Plaintiff and associated alleged loss and UPHELD the application in respect of the first alleged conspiracy, defamation and the claim for injunctive and declaratory relief.

M. A. TOSTEVIN
Her Majesty's Deputy Greffier

**Approved Judgment**
**11th June, 2004**

**IN THE ROYAL COURT OF GUERNSEY**
**ORDINARY DIVISION**

Between:

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| **IFS INVESTMENTS LIMITED** | Plaintiff |
| **v** | |
| **MANOR PARK (GUERNSEY) LIMITED** | First Defendant |
| **MANOR PARK GUARANTEED INVESTMENT FUNDS LIMITED** | Second Defendant |
| **ALAN WILLIAMS** | Third Defendant |
| **GILLIAN SARAH DINNING** | Fourth Defendant |

Judgment of Day L.B. on the Fourth Defendant's Application that the action, as against her, be struck out as disclosing no reasonable cause of action, etc.

Advocate R. J. Collas appeared for the Fourth Defendant.
Advocate J. E. Roland appeared for the Plaintiff.

Hearing date: 17th and 18th May, 7th June, 2004
Judgment handed down: 11th June, 2004

**Legislation referred to:-**

Royal Court Civil Rules 1989 ("RCCR").

Supreme Court Practice 1999 ("the White Book").

Rules of the Supreme Court – Order 18 Rule 19.

Butterworth's Common Law Series – The Law of Tort 2002.

Clerk & Lindsell on Torts 18th Edition.

**Cases referred to:-**

Allen v. Sir Alfred McAlpine & Sons Ltd. (1968) 2QB 229.

Birkett v. James (1978) AC 297.

Nagle v. Feilden [1966] 2 QB 633.

Silver Falcon and others v. International Helenic Operations Ltd. and others
Court of Appeal 20th October 1994 (Civil Appeal 202 – "Striking Out Appeal").

Pinson v. Lloyds etc. Bank (1941) 2 KB 72.

Marrinan v. Vibart (1963) 1 QB 234.

Crofter Hand Woven Harris Tweed v Veitch (1942) AC 435.

Gregory v. Duke of Brunswick (1844) 6 Man & G 953.

Quinn v. Leathem (1901) AC 495.

Lonhro Ltd. v. Shell Petroleum Co. Ltd. (No. 2) (1982) AC 173

Lonhro plc v. Fayed (1992) AC 448.

Williams & Humbert Ltd. v. W & H Trademarks (Jersey) Ltd. (1986) AC 386

1. This judgment relates to what I shall describe as the Fourth Defendant's "strike out application" which is in the following terms:-

*"Advocate G.S. Dinning, whose address for service is Manor Place, St. Peter Port, Guernsey ("Adv Dinning")*

*APPLIES*

*Pursuant to Rules 34 and 36 of the Royal Court Civil Rules 1989 and/or pursuant to the inherent jurisdiction of the Court for an Order that the proceedings instituted by IFS Investments limited against Adv Dinning ("the IFS Action") be struck out and/or amended and/or that Adv Dinning shall cease to be a party on the grounds that:*

*(a) No reasonable cause of action is disclosed against Adv Dinning;*

*(b) The allegations in the IFS Action relating to Adv Dinning are scandalous, frivolous or vexatious;*

*(c) The IFS Action against Adv Dinning is an abuse of the process of the Court; and or*

*(d) Adv Dinning is not a proper or necessary party to the IFS Action.*

*AND Adv Dinning claims the costs hereof on a full indemnity basis or such other basis as the Court may be pleased to order.".*

2. I recently heard an application by the Fourth Defendant that this application should be heard in private and that the Cause, as far as she was concerned, should not be made public until such time as judgment had been delivered on her strike out application. That privacy application I dismissed on the 22nd April, 2004.

## A. Background

3. In that previous judgment I outlined briefly the background to this litigation. I must repeat that exercise in respect of the relevant background to this application, drawing on that previous review and that which is contained in the Plaintiff's Cause.

4. The Plaintiff, a company incorporated in Guernsey (on 22nd March 2002) and duly authorised to carry on restricted activities in connection with investment funds, provides, amongst administrative and other services, a guaranteed fund service to institutional clients. The Second Defendant carries on business as an investment company and in particular operates an "umbrella" fund ("the MP Fund") consisting of a number of sub-funds. The First Defendant provides management services to the MP Fund (in effect the Second Defendant). Both of these companies are again incorporated in Guernsey and have as a director the Third Defendant, who is the ultimate beneficial owner of the First Defendant and the principal controller of the Manor Park group of companies. The Fourth Defendant is a Guernsey Advocate, a partner in the firm of Carey Olsen and a shareholder in Carey Olsen Trust Company (Guernsey) Limited ("COTC"). At the material times she was the legal advisor to the other three Defendants, and also an alternate director (to two of her colleagues at Carey Olsen) of the First and Second Defendant.

5. On the 1st June 2001 International Fund Services (Guernsey) Ltd. ("IFSG"), at that date called FnP Fund Services Ltd., entered into a Distributor Agreement with the First and Second Defendants to provide services in relation to the latter, and at the same time entered into an Administrative Agreement with the First Defendant in respect of the Second Defendant. IFSG was specifically incorporated in Guernsey (on the 23rd February, 2001) for those purposes and is related to the Plaintiff, a loose description intended solely to indicate there are those with an interest in both.

6. To state the matter starkly, by the summer of 2003 the First and Second Defendants had fallen out with the Plaintiff, IFSG, and four individuals, particularly in relation to the activities of another fund, the Acumen Guaranteed Fund. The first two Defendants instituted injunctive proceedings on the 25th July, 2003, against the Plaintiff and the five other connected parties, seeking to restrain the use and disclosure of information which they alleged to be confidential to those two Defendants and thus in breach of the 2001 Agreements. Undertakings were given by both sides, the litigation was "fast-tracked" for full hearing in November, but in the event was settled by the signing, on the 7th November 2003, of a Settlement Agreement between all the interested parties. That Agreement was stated to be in full and final settlement of the litigation and all other claims and disputes between the parties, save in certain limited circumstances such as fraud and dishonesty, and contained the usual mutual obligations of confidentiality. All commercial relations were severed and each party was free to go their respective ways.

7. Peace did not break out for long. The relevant events between early November, 2003, and the end of January, 2004, and the participation and role of various players therein, are at the very heart of the disputes which have now arisen, and no doubt may be the subject of much future evidence and argument, but I think I can identify the main features in this way.

8. The Plaintiff entered into, and for all I know may still be currently engaged in, commercial dealings with Norwich Union International Ltd. ("NUIL") a company based in Dublin, in relation to the launch of an open ended fund which could be sold as one of NUIL's products ("the Fund"). Such business ventures would appear to be potentially well rewarded.

9 However, the Third Defendant alleges that since the 7th November, 2003, (the date of the Settlement Agreement) he has learnt that contact was established between the Plaintiff and NUIL back in the summer of 2003 and therefore the First and Second Defendants might have justified grounds of complaint. Namely, that such contact would have been in breach of the 2001 agreements (which were then still extant), that it might have been in breach of undertakings given to the Royal Court in July, and thereafter, 2003, and that, if such contact had been made between those two parties, then the disclosure obligations of the Plaintiff in the 2003 substantive proceedings should have revealed that fact. Moreover, there might also have been a breach of the terms of the Settlement Agreement itself. (These I refer to generally as "the MP complaints").

10. Certainly there has been contact between the Third Defendant and NUIL on this matter, upon which he has also sought advice from the Fourth Defendant. On the 16th January, 2004, there was what would appear to have been a lengthy telephone conference featuring the Fourth Defendant, as advocate of the other three Defendants, and the Third Defendant on the one hand, and the marketing director and a legal advisor of NUIL on the other ("the January telephone conference"). The only evidence I have of the contents of this conversation is a file note prepared by the Fourth Defendant, which I therefore treat with circumspection as it is potentially self-serving (as are all file or diary notes and similar records). However it is clear from other sources, as well, that the main purpose of the conference call was to discuss the legal aspects of the MP complaints, and their implication for NUIL and its projected venture with the Plaintiff.

11. This was followed up by a letter of the 26th January from Carey Olsen to NUIL ("the January letter") by which time the Fourth Defendant was on holiday, though she

apparently approved its terms. It was expressly stated to be written on the Third Defendant's instructions to provide an opinion, as requested by NUIL, on the legal basis of the MP complaints and their implications, further to a telephone discussion on the 20th January (with the same participants as on the 16th January save for the holidaying Fourth Defendant). The thrust of Carey Olsen's advice to NUIL was that, on the basis of certain clearly set out factual assumptions (the accuracy of which, Mr. Collas submitted, NUIL would have the knowledge to assess) certain legal consequences would follow so as to justify, in their opinion, full complaint by the First and Second Defendants as to the activities of the Plaintiff.

12. The letter concluded:-

> *"These matters amount to conduct in respect of which Manor Park is entitled to commence legal proceedings now against IFS, Mr. Toothill* (a director of the Plaintiff) *and others, notwithstanding the existence of the settlement agreement.*
>
> *Manor Park is considering what action to take against Mr. Toothill and IFS. Of course, I am not suggesting that NUI has behaved in any way in an improper fashion. The issues I have identified are matters between Manor Park and IFS and its officers. Whilst that is so, no doubt NUI will be concerned to ensure that any product with which it is associated is not in any way tainted.*
>
> *In the circumstances, my clients would welcome the opportunity of a meeting in Dublin with yourself and your team, together with legal advisers, to discuss the situation, and NUI's requirements for a guaranteed fund product.".*

13. Wherein lies another tale, the second theme which emerges from the Manor Park/NUIL contacts in these winter months - from this letter, from supposedly part of the January telephone conference and other documents before me. Not only was the former making complaint about the conduct of the Plaintiff (and associates), it was actively advancing its own case as a rival suitor for the business hand of NUIL. Mixed motives indeed.

14. For its part the Plaintiff asserts that the contacts and communications with NUIL on the part of the Third Defendant, and other colleagues of the First and Second Defendants, were maliciously motivated, seeking to interfere unlawfully with proper business relations between the Plaintiff and NUIL, the former's lawyers, Ozannes, having given, unsurprisingly, wholly contrasting legal advice with regard to the MP complaints. In

the middle of January, 2004 (I believe I can infer, from Counsel's correspondence, after the 16th January), Ozannes were already making strong representations and complaints about the alleged involvement and conduct of the Fourth Defendant (the source of their information for which I surmise must have been NUIL as relayed by their clients).

15. I further note (as specifically stated in para. 22 of the Cause) that, as a result of the "clean break" brought about by the Settlement Agreement of the 7th November, 2003, the administrative and other services which had been provided by IFSG to the Second Defendant from June, 2001, were transferred by it, in late 2003, and for whatever reason (see the Fourth Defendant's affidavit of 5th February 2004), to COTC.

16. On 26th January, 2004, the Plaintiff made an *"inter partes"* application to the Court for injunctive relief, both mandatory and prohibitory, against the first two Defendants alone, which application was supported by an affidavit from Mr. Toothill, ("the injunction application"). The relief sought consisted, firstly, of the provision of a "letter of comfort" to be sent to NUIL to the effect that the First and Second Defendants did not have cause for complaint against the Plaintiff in respect of its contacts and relationship with NUIL and would not be taking any legal action in that regard. Thus NUIL would be given the "green light" to continue and finalise its business relations with the Plaintiff, vital to the latter, which otherwise NUIL was reluctant to do because of the potential damage which these allegations might cause (to the Fund and thus NUIL). Secondly, the Plaintiff sought to restrain any unlawful interference by the First and Second Defendants in business relations between the Plaintiff and NUIL.

17. As a consequence of a direction from the Deputy Bailiff, the Fourth and Third Defendants filed affidavits, in the case of the Fourth Defendant on the 5th February, in which she provided a full statement with regard to the January telephone conference and, as I have said, her firm's file note thereon. The Third Defendant produced a copy of the January letter. At this time the Fourth Defendant and her firm ceased to act in these disputes for the Manor Park interests. In due course, when the matter came before him on the 10th February, the Bailiff ordered that proceedings should be formally instituted by the filing of a Cause in the Ordinary Court, as what was being sought was an injunction of a permanent nature and not one of an interim kind pending other substantive proceedings. Those substantive proceedings were instituted, I understand, on the 12th February, though the Cause, for proper reasons, was not formally filed in Court until the 5th March, 2004 (for ease of reference the Cause is Appendix 1). The

Fourth Defendant's strike out application (and others which she made) was in fact filed before the Cause.

18. There are now four named Defendants against whom damages in the sum of €32 m are claimed, as also injunctive relief of both a mandatory and prohibitory nature similar to that sought in the injunction application involving the first two Defendants alone. Further, the Plaintiff seeks a declaration from the Court that it may continue its business as a consultant providing a guaranteed fund service to institutions without the unlawful intervention of the Defendants, and in particular its proposed business with NUIL, and that in carrying on its proposed business with NUIL it will be acting lawfully and not in breach of the Settlement Agreement.

19. I will necessarily have to examine the complaints and allegations in the Cause in detail, as they are the bases upon which the damages and injunctive and declaratory relief are being sought, and thus the very crux of this application. For now, I only need say that they comprise allegations of conspiracies to injure, of unlawful interference with the Plaintiff's business interests, and defamation. By these unlawful acts and conspiracies, the Plaintiff alleges, the launch of the new Fund, which was to be effectively and lawfully the joint venture of NUIL and the Plaintiff, has been frustrated, so far; and unless satisfactory comfort is given to NUIL, which has not been forthcoming from the Defendants, then the launch will be cancelled, and the Plaintiff will not receive the fees which would have been otherwise payable to it in the estimated sum over a ten-year period of €32 m.

## B <u>The general legal principles in respect of Rule 36 strike out applications</u>

*1. Rule 36 of the RCCR provides:-*

*"36. (1) The Court may order any cause, counter-claim or other pleading, or anything therein, to be struck out or amended on the grounds that-*

*(a) it discloses no reasonable cause of action or defence, as the case may be;*

*(b) it is scandalous, frivolous or vexatious;*

*(c) it may prejudice, embarrass or delay the fair trial of the action or any other proceedings; or*

*(d) it is otherwise an abuse of the process of the Court;*

*and the Court may order the claim or counterclaim to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

*(2) The Court may also order a cause or counter-claim to be struck out for want of prosecution.*

20. Mr. Collas accepted that the primary ground under this Rule upon which his client relied was that the Cause disclosed no reasonable cause of action, with a secondary ground that it was an abuse of the process of the Court. He did not seriously advance any argument that the Cause was scandalous, frivolous or vexatious. The Royal Court is equally empowered to make such orders under its inherent jurisdiction, a submission which is not disputed and with which I concur.

21. (For completeness, I would add that Rule 36(2) expressly empowers the Royal Court to dismiss an action for want of prosecution, which in my view is a power also enjoyed under this Court's inherent jurisdiction, as it is by the courts in England and Wales under the jurisprudence developed in the long line of cases starting with Allen and authoritatively established in the opinions in Birkett – for which see generally the White Book at 25/L/1 onwards).

22. Rule 34 provides:-

*"34. (1) The Court may in any proceedings order that-*

*(a) any person who has been improperly or unnecessarily made a party, or who has ceased to be a proper or necessary party shall cease to be a party;*

*(b) any person-*

23. Mr. Collas also acknowledged that the provisions of Rule 34(1)(a) – *"improperly or unnecessarily made a party"* – was really of little additional assistance to his client. If she failed under Rule 36(i)(a) – *no reasonable cause of action* – then in the circumstances of this case I was hardly likely to rule that nevertheless she had been unnecessarily or improperly joined as a party.

24. I therefore concentrate on the ground that this Cause discloses no reasonable cause of action.

25. Our Rule 36(1) almost precisely reflects Order 18 Rule 19 of the Rules of the Supreme Court, as in force in England and Wales prior to the enactment of the new Civil Procedure Rules in 1999; save that 018 r.19(2) further provides that no evidence is to be admissible on an application under Rule19(1)(a). This is in contrast to the position when the courts in that jurisdiction exercise their concurrent inherent jurisdiction to strike out pleadings, when affidavit evidence may be and ordinarily is used (White Book 18/19/5). In my view, there being no such statutory restriction in this jurisdiction, it will be a matter for decision in any particular case, depending on its own facts, whether evidence should or should not be allowed, regardless as to whether an application is solely made under Rule 36(i)(a) or, a far more likely scenario, concurrently under the Court's inherent jurisdiction. In this case, as the brief review of the background indicates, some evidence has already been placed before the Court, which it would be artificially unnatural to exclude. I have allowed limited reference to be made to it, as also to exchanges of correspondence.

26. This is an area of the law where this Court, rightly, is very much guided by, without slavishly following, the principles adopted by the courts in England and Wales in relation to O.18, r.19 as identified in the White Book (at 18/19). The relevant principles are not a matter in dispute between Counsel and I will briefly cite those which I consider to be the most relevant referred to me by them.

27. In general terms (at 18/19/6, without citation of the authorities), *"it is only in plain and obvious cases that recourse should be had to the summary process under this Rule,… It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really has a cause of action…If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the points set down for argument under O.33,r.3"* - time, etc. of trial of questions or issues, the comparable local provisions being contained in the generality of Rule 43, (an unhappy amalgam of a number of disparate matters). As Salmon LJ stated in Nagle (p. 651):-

*"It is well established that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable.".*

28. That test was cited with approval by Sir Godfrey Le Quesne JA giving the judgment of the Court of Appeal in Silver Falcon (at para. 64).

29. With regard specifically to 19(1)(a) (at 18/19/10 again without citation), *"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered…So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out";* and (at 18/19/11)*"Where a pleading is defective only in not containing particulars to which the other side is entitled, application should be made for particulars under r.12,* (particulars of pleading) *and not for an order to strike out the pleading under this rule. Even a serious want of particularity in a pleading may not justify striking out if (1) the defect can be remedied, and (2) the defect is not the result of a blatant disregard of court orders.".*

30. With regard to abuse of process of the Court (18/19/18), *"this term denotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation… the categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.".* And further (18/19/20), *"if an action is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it may be struck out as an abuse of process of the Court.".*

31. The inherent jurisdiction in England and Wales (18/19/26) (as I would suggest also in Guernsey) to dismiss for abuse of process is in no way affected or diminished by the specific rule, but this jurisdiction "*will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed.".* (18/19/27).

32. In summary, therefore, the authorities are clear that a defendant has a high hurdle to surmount if he is to succeed in a strike out application under Rule 36. I also bear in mind the guidance (again at 18/19/6 in the White Book):-

> *"Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore, where the Court is satisfied,*

*even after substantial argument both at first instance and on appeal, that the Defence did not disclose a reasonable ground of defence, it will order it to be struck out (Williams and Humbert Ltd v. W & H. Trademarks (Jersey) Limited (1986) AC 386.".*

33. By the same reasoning I consider it to be the duty of this Court to strike out such part of the pleadings as is necessary in order to identify what is in effect the real issue or issues between the parties; if you like, to remove the obvious dead wood to see if so doing gives any potential green shoots more air. This, I believe, also reflects to an extent the emerging jurisprudence in England and Wales under the Civil Procedure Rules and is a proper development to encourage here.

34. I think it would be useful at this stage also to address the question of the function of particulars, an exercise required of the Court of Appeal in Silver Falcon. Le Quesne JA, giving the judgment of the Court, referred to certain passages from the current edition of the White Book which, in the Court's view, were equally applicable to procedure in the Courts of Guernsey. I refer to the equivalent passages in the 1999 White Book (at 18/12/2):-

*"The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs…the function of particulars is accordingly:-* (to inform as to the case to be met, avoid surprises, prepare evidence, limit issues and discovery, and tie the party's hands)

*…*

*It is not the function of particulars to take the place of necessary averments in the pleading, nor to state the material facts omitted.. in order by filling the gaps, to make good an inherently bad pleading (per Scott LJ in Pinson v. Lloyds etc Bank (1941) 2 KB 72 at 75).*

*The purpose of pleadings is not to play a game at the expense of the litigants but to enable the opposing party to know the case against him…*

*Whenever either party is imputing fraud, negligence, or misconduct to his opponent, the facts must be stated with a special particularity and care. Thus, in an action…*(wrongful dismissal, defamation, negligence, etc.).".

35. I cite this authority not because particulars are the issue before me, but because the adequacy of the pleadings, to establish a cause of action, is.

## C. The nature and ingredients of the alleged economic torts

36. Allegations of conspiracy are at the heart of this case, thus making the principles in relation to the function of pleadings and particulars of crucial application (see Silver Falcon at para. 34). With regard to the concept of conspiracy, I can do no better than to adopt the statement of Le Quesne JA (at para 34), as follows:-

> *"Every conspiracy involves a combination of two or more persons, natural or legal, with a view to carrying out certain action. In the nature of things, it is rarely possible for a Plaintiff who claims against alleged conspirators to particularise when, where and in what terms the combination was effected. He must be able to particularise those who he says were parties to the combination, but to expect him to give particulars of the conspiracy as if it were a commercial contract is unrealistic. Realising this, the Courts have required him to particularise the overt acts through which the conspiracy was carried out. We adopt the statement of principle laid down in this respect by Salmon, J. in Marrinan v Vibart [1963] 1 QB 234 at p.238:*
>
> > *"… the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy is complete only if the agreement is carried into effect so as to damage the plaintiff. Accordingly, the acts done in pursuance of the agreement are an integral part of the tort: Crofter Hand Woven Harris Tweed Co. Ltd v Veitch."*
>
> *On appeal, the judgment of Salmon J. was expressly approved by all three members of the Court: [1963] 1 QB 528.".*

37. Leaving aside the allegation of defamation for the moment, three separate economic torts are pleaded, at least according to the Plaintiff who in its skeleton argument (at para. 10), states that the causes of action comprise lawful means conspiracy, unlawful means conspiracy, and unlawful interference with business. The essential elements of each must be analysed in turn.

Lawful means conspiracy/unlawful conspiracy to injure

38. Whilst the former description has been that largely if not solely used by Counsel, the latter is in more general use in the authorities. This tort apparently dates back to at least 1844, when it was held, in Gregory, that concerted action to drive an actor off stage by hissing him, and thereby to ruin him, was an unlawful conspiracy. It subsequently became known as a Quinn v. Leathem conspiracy. The tort is widely, if not universally, considered to be *"anomalous"*, but is too well established to be *"discarded"* (per Lord Diplock in Lonrho Ltd v. Shell (at p.188-189). As the editors of Butterworths state (at 27.68.) *"an agreement to act in concert with others makes wrongful what would not be wrongful if done individually: the gist of the action is the conspiracy itself, not particular wrongful acts done in pursuant of it (Crofter). But, for this form of conspiracy to be actionable, it must be shown that the conspirators' predominant* (my emphasis) *purpose was to injure the claimant, which is not a requirement of conspiracy to do an unlawful act or to use unlawful means.".* I would add that injury must in fact occur.

39. The necessity to establish a predominant purpose to injure a plaintiff is emphasised in Silver Falcon.

Unlawful means conspiracy

40. The ingredients of this tort are the combination of two or more persons, the intention to injure, the fact of injury, and the use of unlawful means in doing so. What may amount to "unlawful means" is the subject of much academic debate, but if they amount to a tort itself that must be sufficient. In contrast to an unlawful conspiracy to injure, there is no requirement that the predominant purpose must be to injure rather than, for example, the furtherance or protection of legitimate self-interest. As Lord Bridge stated in Lonrho v. Fayed (at p. 465-466):-

> *"When conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.".*

41. And see Silver Falcon (at para. 113):-

> *"When discussing interference with business, we concluded that (ii)(a)* (deceit) *and (e), each being an allegation of a tort, are allegations of unlawful acts for the purposes of the tort of unlawful interference. (ii)(a) and (e) are equally allegations of unlawful acts for the purposes of the tort of conspiracy.".*

42. For my part, I prefer not to be too bound by theoretical distinctions between these two torts, but to treat them as two varieties of the single tort of conspiracy to injure, those variations involving a differing intent and the nature of the overt acts committed in furtherance of the conspiracy. Thus, the three essential elements in the overall conspiracy are the agreement or combination, the overt acts in furtherance of it, and the resulting damage. The overt acts may be lawful, but if the predominant object of the combination is to cause injury, which in fact results, the tort is complete (the unlawful conspiracy to injure). If, on the other hand, the overt acts are unlawful, then that fact in itself is sufficient to found the tort even if it was not the predominant object of the combination to injure the victim (the unlawful means conspiracy). This I believe is the appropriate approach in the circumstances of this case.

Unlawful interference with business

43. Which leads to the third tort, that of unlawful interference with business. Any tort will be an unlawful act (see the previous reference to Silver Falcon) which, if combined with the object and effect of causing damage to the complainant, will complete the tort of unlawful interference with business. Thus, also, a conspiracy unlawfully so to interfere will be a tort (the "unlawful act", and third, variety of conspiracy to injure)

## D. The Cause: issues, submissions and conclusions

44. I turn now to examine the Cause and whether or not it sufficiently establishes a cause of action in respect of each tort.

45. I earlier referred to the fact that in late 2003 the administrative and other services which had since 2001 been provided by IFSG to the Second Defendant were transferred to COTC. The reference to it in the Cause (at para. 22) has to be taken as deliberate on the part of the Plaintiff. Does the Cause therefore impliedly allege, as Mr. Collas submitted, that the Plaintiff attributed significance to the Fourth Defendant's financial interest in the well-being of the First and particularly Second Defendant (an allegation which had been stressed by Mr. Toothill in his affidavit of the 26th January, 2004 (e.g. at para. 23), and also had been raised in earlier proceedings before this Court), the

inference being that if the Manor Park group were able to replace the Plaintiff in establishing full commercial relations with NUIL, being business competitors, the financial benefits could be very considerable, which in turn could be of advantage to COTC?

46. In my assessment, leaving aside the allegation of defamation for the moment, there are three separate complaints, pleaded in paragraphs 26-28, paragraphs 29-31 and paragraph 32, respectively.

47. In paragraph 26, it is alleged that on or about the 7th November, 2003, the First and Second Defendants, with a named other person not a party to these proceedings, *"wrongfully and maliciously conspired and combined together with intent to injure the Plaintiff and /or cause loss to the Plaintiff. The Plaintiff is unable to provide further particulars until after discovery and/or the administration of interrogatories."*. The overt acts of this conspiracy can only be those provided in paragraph 27, which alleges: *"Pursuant to and in furtherance of the conspiracy pleaded in paragraph 26 above the Defendants (or more than one of them) have from the 7th November 2003 falsely and maliciously undertaken actions by which the Plaintiff was injured or is likely to be injured."*. The particular acts of which complaint is made are that the Defendants have revealed, to a greater or lesser extent, the terms of the Settlement Agreement to independent financial advisors, that such advisors have been wrongfully and falsely informed as to the circumstances of the breakdown of relations between IFSG and the First and Second Defendants, and that the Plaintiff obtained the Settlement Agreement in the absence of good faith and/or fraudulently. The Cause proceeds to allege (in para. 28) that *"if the Defendants are allowed to carry on in such a way the Plaintiff will continue to suffer loss and damage."* From which I infer that loss and damage has already been suffered ("the first conspiracy").

48. The difficulty with this conspiracy is that the particular actions of which complaint is made relate back to the conspiracy pleaded in paragraph 26 in which the Fourth Defendant is not alleged to be a participant. This is in stark contrast, as Mr. Collas pointed out, to the second conspiracy alleged in paragraphs 29 and 30, in which the Fourth Defendant is clearly alleged to be involved. As Mr. Collas observed, paragraph 27 may allege that acts have been carried out by the Fourth defendant as an agent, but there is no allegation that they were carried out as a conspirator. Miss Roland's submission in respect of this particular allegation is effectively limited to saying that

any further particulars which might be desirable could well emerge during subsequent interlocutory proceedings.

49. I agree with Mr. Collas. Whatever actions the Fourth Defendant may have carried out it is clearly not alleged that she did so as a conspirator. Thus, in my view, it is immaterial whether those acts are lawful (and their predominant object to injure as Miss Roland submits), or unlawful, though if the latter a separate cause of action might exist, but it is not pleaded. Mr. Collas' argument has even greater force if the acts particularised in paragraph 27 are accepted as being lawful, as they in themselves cannot be impugned but only because they were taken in consequence of a non-existent conspiracy as far as the Fourth Defendant is concerned. No attempt has been made to seek to amend this fundamental flaw, though there has been plenty of time to do so. The only proper course is to strike out the first alleged conspiracy as far as the Fourth Defendant is concerned.

50. I turn to the second conspiracy. In paragraphs 29 it is asserted that, after the First and Second Defendants had become aware on Christmas eve, 2003, of agreements between the Plaintiff and NUIL, the four Defendants (or any two or more together) *"wrongly conspired and combined together with intent to injure the Plaintiff and/or cause loss to the Plaintiff.*

*"30. Pursuant to and in furtherance of the conspiracy pleaded in paragraph 29 above the Defendants have between the 24th December, 2003 and 26th January, 2004, falsely and maliciously undertaken actions by which the Plaintiff was injured.".* Particulars are then provided of these actions, comprising eleven different instances of information or advice given, or statements or representations made, to NUIL about the Plaintiff and/or its directors, all of which it is claimed *"were false and without foundation in fact, to the knowledge of the Defendants.".*

*"31. By reason of the said actions NUIL have been deterred from continuing with the Fund and the Plaintiff has suffered and continues to suffer loss and damage.".*

51. The acts complained of I take to be unlawful, though Mr. Collas submitted that they are not specifically stated to be unlawful. The only unlawful act, he said, which the particulars might disclose was deceit. He accepted that such a tort would certainly be sufficient (but not breach of contract in this case because negotiations are still taking place), and as confirmation he helpfully referred me to the analyses of Le Quesne JA in Silver Falcon (at para. 113 leading back to paras. 102 and 105).

52. In respect of the tort of deceit Mr. Collas further referred me to Clerk & Lindsell (at 15-01):-

> *"The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the claimant should act in reliance on such a representation and the claimant in fact does so, the defendant will be liable in deceit for the damage caused. (Damage is the gist of the action).".*

53. Deceit, said Mr. Collas, was not sufficiently pleaded in paragraph 30. No allegations at all were made against the Fourth Defendant, and/or which identified the way in which she might have committed the tort. Yet, in paragraph 31, it was alleged that, as a result of the alleged actions, NUIL had been deterred from continuing with the Fund, and that the Plaintiff "*has suffered and continues to suffer loss and damage.".* How could that loss and damage be attributable, therefore, to any actions on the part of the Fourth Defendant? Moreover, and this was a recurring theme of Mr. Collas' submissions, if the Carey Olsen letter of the 26th January, 2004, was to be the foundation for any allegation of deceit, all the matters upon which the legal opinion was specifically based would have been known to NUIL, and therefore whether those bases were true or false. How, therefore, could it be alleged that the Fourth Defendant had intended NUIL to act in reliance on false statements?

54. In contrast, Miss Roland argued that, with regard to the contents of the January letter, namely the specified bases for the opinion given, there might well be other matters and evidence which came to light – all the correspondence between the Defendants and NUIL had not yet been produced – to establish more precisely what was NUIL's true knowledge and belief. Only at trial would the Fourth Defendant's full part in the events be established, and which aspects of the relief sought might be applicable to her. For now, the fundamental case against her was sufficiently pleaded. In any event, some of the false statements made to NUIL had still to be corrected; for example, as pleaded under paragraph 30.6, the use of the description "injunctive relief" was incorrect as undertakings only had been given, so that the use of the actual words falsely indicated wrongdoing of some sort. It is clearly a matter of some dispute between Counsel as to exactly what had been ordered by the Deputy Bailiff on the 1st August, 2003.

55. As she clarified when I asked Counsel to reconvene briefly, Miss Roland argued that it was immaterial whether the acts specified in para. 30 were lawful or unlawful, as the predominant purpose of the Defendants was to injure the Plaintiff. In that regard, she

argued that the circumstances of this case and Silver Falcon were analogous. The Court of Appeal in the latter case was satisfied that the use of the phrase *"unlawfully conspired to injure the Plaintiffs"* was the only purpose alleged in the Cause and it was therefore permissible to read it as an allegation of predominant purpose; so in this case. Mr. Collas submitted that there was no allegation, express or implied that the object of injuring the Plaintiff was predominant. In Silver Falcon the Court of Appeal may have decided that such a predominant purpose was to be implied from the pleadings in the particular circumstances of that case, but no such implication could be made in this case. Unlike in Silver Falcon, two purposes are alleged or at least can properly be inferred from reading the Cause as a whole (the earlier relevant parts of which I have already referred to), indicating both an allegation of intent to injure and the potential lawful furthering of the Fourth Defendant's own interests - the COTC connection.

56. I proceed now to paragraph 32 in which the third economic tort is alleged, in these terms: *"Furthermore, each of the acts above taken together or individually as particularised in paragraphs 27 and 30 above amount to unlawful interference with the business interests of the Plaintiff by the Defendants and each of them with intention to injure the Plaintiff and has caused and continues to cause the Plaintiff loss."*.

57. The sole test with regard to this allegation is whether the acts complained of in paragraph 30 can amount to the tort of unlawful interference.

58. For his part Mr. Collas argued that whilst the tort of deceit was unquestionably an unlawful means for the purposes of this tort (see the analysis of Le Quesne JA in Silver Falcon (at para. 104), for all the reasons already advanced with regard to paragraph 30 the tort of deceit cannot be established in this case. Likewise, Miss Roland's arguments were essentially the same.

59. I turn next to the issue of loss and damage.

60. I have already cited the allegations of loss and damage in respect of both conspiracies and the unlawful business interference in paragraph 32. Thereafter, in paragraph 33, it is claimed that the First and Second Defendants have been requested to make good the alleged harm that they have done to the Plaintiff by their contacts with NUIL, but have refused to do so. The pecuniary nub of the claim is the Fund which was to be launched as a joint venture between the Plaintiff and NUIL. On the one hand, in paragraph 31, it is alleged that the unlawful contacts by the Defendants with NUIL have deterred the latter from continuing with the Fund; whereas in paragraph 34 it is alleged that, to the

knowledge of all Defendants, if the First and Second Defendants do not give such undertakings as are required by NUIL, then the Fund will be cancelled. Paragraph 37, on the other hand, specifically states that the Plaintiff has suffered loss and damage, which is clearly based on the cancellation of the Fund, rather than its mere deferral, as the damages claimed are based on the loss of fees which the Plaintiff would have earned over a ten year period, arriving at the figure of €32 m.

61. I have also already referred to Mr. Collas' submission that, with regard to the second conspiracy, nothing contained in the January letter could have been intended to be relied upon by NUIL, as it itself would have full knowledge as to whether the assumptions upon which the advice was given and statements made were true or not. Nor could there have been any reliance by NUIL on false statements made by the Fourth Defendant. Therefore any such statements could not be causative of the alleged loss.

62. Moreover, at the time when the substantial proceedings were instituted (on 12th February, 2004) it was clear, from the correspondence and the information which had been provided, that NUIL had not yet decided whether to proceed or not, and therefore it was impossible to say if loss had been suffered. Nor was it open to the Plaintiff to argue with regard to the Fourth Defendant that further information might be forthcoming on discovery. In early February, 2004, the Fourth Defendant had produced her file note of the telephone conference of the 16th January, and Mr. Williams had produced a copy of the January letter. There was nothing further to be discovered as far as she was concerned.

63. For her part, Miss Roland submitted that as a result of the contacts made between the Defendants and NUIL in December, 2003, and January, 2004, including the communications which the Fourth Defendant had had with NUIL, the latter was clearly and rightly impressed with the strength of the threat against it of injunctive action being taken against the Plaintiff, should NUIL proceed with the Fund. It was "a clear and apparent risk". In December, 2003, she argued, the Plaintiff had the real prospect of a very successful business venture with NUIL. Because of the Defendants' actions, including those of the Fourth Defendant, the Plaintiff no longer had that business nor the prospect of it. That was the loss which it had suffered, which was certainly quantifiable, although the present estimate might require adjustment.

64. Which leads me to Mr. Collas' final submission, one which he forcefully made. It is clear, he argued, from the Cause itself that the reason for joining the Fourth Defendant

in these proceedings was for an unworthy collateral purpose, and thus an abuse of the process of the Court. The objective of such joinder was to bring pressure to bear, by and/or through her, on the Manor Park group to provide NUIL with what it allegedly required to be persuaded that it was not at risk if it went ahead with the Fund with the Plaintiffs' involvement. That pressure might be applied by the Fourth Defendant either on her former clients, or on her partners Mr. Greenfield and Mr. Carey as directors of Manor Park. That was illustrated by the contents of paragraphs 33 and 34 which I have already cited. It was an allegation which Mr. Collas made in his letters to Ozannes in the early weeks of this year. Whilst on another occasion, for other purposes, I gave no consideration to the merit or otherwise of such an allegation, clearly I must do so for the purpose of this strike out application. As was to be expected, Miss Roland vigorously denied the truth of the submission. Far from there being any unworthy collateral purpose in joining her, the Fourth Defendant was viewed by the Plaintiff as having played a leading role in the contacts and communications with NUIL of which the Plaintiff made such strong complaint. It was because the Fourth Defendant had exceeded her "representative role" as an advocate, that she was then involved and is now. Miss Roland further emphasised, relying on the White Book at (15/6/7) that *"prima facie, the plaintiff is entitled to choose the person against whom to proceed, and to leave out any person against whom he does not desire to proceed."*.

65. I take together the second conspiracy (paras. 29-31) and the allegations of unlawful interference with the Plaintiff's business interests (para. 32). The latter allegations must necessarily be of unlawful acts; in my view, at this stage, so must the former, making the predominance of motive irrelevant. Whether that preliminary conclusion is correct or not must, if necessary, await decision on a later occasion, as must the question of motive. It may also be the case that some further particularisation may in due course be required, is sought to be introduced, or indeed may emerge from subsequent interlocutory proceedings. Similarly, adjustment may be necessary or desirable to the actual loss claimed. But I am satisfied that those paragraphs sufficiently plead the alleged torts, identify the issues with which the Fourth Defendant has to deal, and potentially establish the necessary causal link between acts and loss. Thus, in my view in this regard, the Cause sufficiently *"discloses some cause of action or raises some question fit to be decided…* (White Book 18/19/10), at trial or other appropriate stage of the proceedings.

66. I turn next to the allegation of defamation. It is contained in the last sentence in paragraph 32 (which generally contains the allegation of unlawful interference with the business interests of the Plaintiff) and is brief in the extreme:-

*"Yet further, the Defendants have defamed the Plaintiff.".*

67. Nothing further is pleaded about defamation whatsoever. The Plaintiff argues that the particulars of the allegation are sufficiently provided in paragraph 30 (the unlawful means conspiracy allegation). I reject that submission. Defamation requires special and careful pleading, both with regard to the elements of the tort and the particulars of its alleged commission. The pleading with regard to defamation in this Cause is both woefully inadequate, and unworthy. In the course of argument I described it as appearing as no more than a throw away line; I have no hesitation in repeating such description. Again, not attempt has been made to rectify the position. The allegation, and I am only immediately concerned with the Fourth Defendant, must be struck out.

68. I would make two general observations, both of which have weighed with me in reaching all these conclusions. Firstly, I consider that the Plaintiff has inappropriately, and I suspect in undue haste, adopted what might be called a "scatter gun" approach to the pleadings and the allegations against the Fourth Defendant, and in that sense I have a certain sympathy with Mr. Collas' submission as to a collateral purpose in bringing the proceedings. Prime examples of this are the allegations in respect of the first conspiracy and the allegation of defamation. I suspect that with a little more thought the Plaintiff might have identified more precisely that which it was complaining about as far as she was concerned – though not for one moment am I expressing any view as to justification for such complaint. Likewise, I suspect that the Fourth Defendant reacted too precipitately to the institution of proceedings against her (as illustrated by the number of applications she filed before the Cause was even tabled).

69. Secondly, it is unusual, to say the least, to attempt to join a legal advisor, or for a legal advisor to be joined, as a party with her clients; and equally not unknown for advocates to advance their client's case robustly. As the normal overwhelming rule, a legal advisor is clearly the disclosed agent of a principal. It is the right of a Plaintiff to choose the person against whom it desires to proceed, provided there are potential grounds for doing so. Whether it is wise to do so is a separate matter. In my view, the issue or issues between the Plaintiff and the Fourth Defendant relate to what Miss Roland has described as an advocate's proper representative role, and whether on the yet undetermined facts in this case, the limits of that role, whatever they may be (I

suspect a matter which might be subjected to much argument), have or have not been exceeded. The resolution of these matters must await another day (or days). For the moment, it seems to me that any case which the Plaintiff may have against the Fourth Defendant is limited both in time and content to the January telephone conference and the January letter. Much has been said in argument about the January letter. For now, I merely offer the view that that letter may provide no evidence against the Fourth Defendant, as a conspirator or otherwise. Whilst apparently she approved its contents, it was clearly her firm's letter and, more importantly, was specifically written on the instructions of the Third Defendant to provide the firm's opinion on certain legal matters to, and as requested by, the managing director of NUIL in Dublin. The January telephone conference could be, again I express not even a tentative conclusion, a different matter. It does seem to me to be the nub of any complaint against the Fourth Defendant.

70. Finally I turn to the injunctive and declaratory relief sought by the Plaintiff. The injunctive relief, which is both of a prohibitory and mandatory nature, is contained in paragraphs 1.1 to 1.3 of the prayer.

71. The prohibitory injunction (1.1) seeks to restrain all and each of the Defendants from interfering with the business of the Plaintiff. The basis for this injunction is the allegation (in para. 35) that each of the Defendants "*intend unless retrained by the Court to continue to act unlawfully in such a way so as to interfere with the legitimate business and commercial interests of the Plaintiff and/or to injure the Plaintiff.".* That allegation relates back to the allegations, as far as the Fourth Defendant is concerned, contained in paragraph 30, which in turn were largely a summary of the January telephone conference as recorded by the Fourth Defendant's file note, and the January letter, both of which took place at a time when the Fourth Defendant was legal advisor to the other Defendants. That is no longer the position.

72. Whatever may be the rights and wrongs of what may have been said in the January telephone conference and the January letter, nothing in the Cause provides any basis for the allegation, now that she no longer acts for the other Defendants, that she *"intends unless restrained by the Court to continue to act unlawfully…"* The first three Defendants and the Plaintiff may be bitter business rivals but there is no unequivocal allegation that the Fourth Defendant is part of that rivalry, whether jointly with or independently of the other Defendants. Miss Roland may argue that it is only after all the evidence has emerged at trial that the nature of any appropriate prohibitory

injunctive relief will become clearer. I take that as an unacceptable fishing expedition. There is nothing in the Cause which is sufficient, even if relevant evidence were produced, to found a permanent prohibitory injunction against the Fourth Defendant in the terms sought.

73. The mandatory injunction sought (at 1.2) would require the Fourth Defendant *"to send to NUIL a letter forthwith confirming that the statements they have made are withdrawn and that they will not interfere with the Fund or NUIL and further that the Plaintiff may lawfully carry on business with NUIL;".*

74. This relief, as far as the first two Defendants are concerned, was in substance that which was sought against them in the injunction application of January, 2004. Paragraph 33 of this Cause, as already stated, refers to the two requests made prior to the lodging of that application for the provision of the required "letter of comfort" from the first two Defendants, which was refused. Furthermore, in paragraph 34 it is alleged that all these Defendants are aware that the Plaintiff has been informed by NUIL that if the first two Defendants do not undertake *"whether by their own accord or by order of the Court a commitment not to interfere with or otherwise disrupt the Fund, the Fund will be cancelled.".* It is difficult to see, either on the basis of the pleadings or otherwise, what letter could be provided by the Fourth Defendant in satisfaction of the mandatory injunction which is sought. Indeed, as Mr Collas pointed out, and by reference to the correspondence between Counsel in the first few weeks of this year – when the Fourth Defendant still acted for the other Defendants – the comfort being sought is from the first three Defendants, or at least the first two, and certainly not from the Fourth Defendant. I therefore concur with Mr. Collas' submission that this aspect of the injunctive relief sought by the Plaintiff has no application as far as the Fourth Defendant is concerned.

75. The request for declaratory relief is contained in paragraph 38 as follows:-

> *"..the Plaintiff seeks a declaration from the Court that the Plaintiff may continue its business as a consultant providing a guaranteed fund service to institutional clients such as banks, building societies and insurance companies without the unlawful intervention of the Defendants and in particular… in carrying on its proposed business with NUIL it will be acting lawfully and not in breach of the Settlement Agreement.".*

76. Whilst one can see that that might be a matter for dispute between the Plaintiff and its trade rivals, the first three Defendants, I cannot for one moment see how the Fourth Defendant, as a party, could have any contribution to make or position to advance in any legal proceedings in respect of this aspect of the litigation. There is effectively nothing in the Cause which provides any basis for an argument that she should be so involved.

## E. Summary of conclusions

77. In summary, therefore, I reject the Fourth Defendant's application insofar as it relates to the second alleged conspiracy and unlawful interference with the business interests of the Plaintiff (paras. 29-32) and associated alleged loss; but uphold her application in respect of the first alleged conspiracy, defamation and the claim for injunctive and declaratory relief.