

Judgment 42/2004

**IFS Investments Limited v Manor
Park (Guernsey) Limited, Manor Park
Guaranteed Investment Funds
Limited, Williams and Dinning –
Royal Court (Civil action file 817) –
1 October, 2004**

Action in tort – strike out application by second defendant – whether the action disclosed no reasonable cause of action – legal principles in respect of strike out application under Rule 36 of the Royal Court (Civil) Rules, 1989 – “unless order” made – plaintiff to file application to amend the pleadings as regards the first conspiracy by 15th October, 2004, failing which the plaintiff’s claim in that regard shall be struck out automatically.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 1st day of October 2004 before A C K Day Esquire, CBE, Lieutenant Bailiff sitting alone:-

In the matter of

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

Whereas on 15th September 2004 and on this day, 1st October 2004, the Lieutenant Bailiff considered the Second Defendant’s application dated 30th April 2004 to strike out the proceedings against it and heard thereon Advocates P Richardson and G Dawes, Counsel for the Second Defendant and Plaintiff respectively, the Lieutenant Bailiff this day gave judgment in the terms attached hereto and ordered that:

- (1) Unless by 4pm 15th October 2004 the Plaintiff lodges and serves an application to amend the pleadings as regards the first conspiracy, as identified in the judgment attached hereto, the Plaintiff's claim in that regard shall be struck out automatically. If an application is made and opposed the Court will consider further the application to strike out in respect of the first conspiracy;
- (2) Save as provided in paragraph 1 of this order, paragraphs 1 and 2 of the the Second Defendant's application dated 30th April 2004 are hereby dismissed;
- (3) Costs reserved.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Judgment
1st October, 2004

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

Between:	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 LB on the Second Defendant’s application that the action, as against it, be struck out as disclosing no reasonable cause of action, etc.

**Advocate P. Richardson appeared for the Second Defendant.
Advocate G.S.K. Dawes appeared for the Plaintiff**

**Hearing date: 15th September, 2004
Judgment handed down: 1st October, 2004**

Legislation and Texts referred to:-

Royal Court Civil Rules 1989 (“RCCR”).
Supreme Court Practice 1999 (“the White Book”).
Butterworth’s Common Law Series – The Law of Tort 2002
McGregor on damages 17th Edition 2003 Ch.9

Cases referred to:-

Nagle v. Fielden [1966] 2 QB 633
Silver Falcon and others v. International Hellenic Operations and others
Court of Appeal 20/10/1994 (No. 202)
Drummond-Jackson v. British Medical Association and others (1970) 1 AER 1094
Gregory v. Duke of Brunswick (1844) 6 Man & G 953
Quinn v. Leathem (1901) AC 495
Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No2) (1982) AC 173
Lonrho v. Fayed (1992) AC 448
Vardinoyannis v. Ansol Ltd. and others 20/11/2001 R. Ct.

1. This judgment relates to what I shall describe as the Second Defendant’s “strike-out application” which is in the following terms:-

“Manor Park Guaranteed Investments Funds Limited, whose address for service is Manor Place, St. Peter Port, Guernsey (“the Fund”)

A P P L I E S

“1. pursuant to the inherent jurisdiction of the Royal Court and/or Order 36 of the Royal Court Civil Rules 1989 for an Order that the proceedings instituted by IFS Investment Limited against the Fund (“the IFS Action”) be struck out and/or amended and/or that the Fund shall cease to be a party on the grounds that:

(a) No reasonable cause of action is disclosed against the Fund;

(b) The allegations in the IFS Action relating to the Fund are frivolous or vexatious or an abuse of the process of the Court; further or alternatively,

2. pursuant to Order 34 of the Royal Court Civil Rules 1989, for an Order under subsection (1)(a) of that rule that the Second Defendant has improperly or unnecessarily been made a party to these proceedings and should cease to be such; further or alternatively.

For the reasons set out in the affidavit of Nigel Thomas Carey sworn in support of this application

3. AND the Fund claims the costs hereof on a full indemnity basis or such other basis as the Court may be pleased to order

30 April 2004”

A. Background

2. This is the fifth preliminary application upon which I have been called to adjudicate during the course of this year arising from the proceedings instituted in early 2004 by the Plaintiff, proceedings which I continue to describe as bitter and substantial (“the substantive proceedings”). No defences have yet been filed. The majority of those applications were brought by the Fourth Defendant, one being in respect of a similar strike-out application in which judgment was delivered on the 11th June, 2004 (“the June judgment”).

3. Necessarily, the background to the substantive litigation and the particular applications themselves and the issues involved therein, have been previously reviewed to a greater or lesser extent. I must now repeat that exercise, not least because it is the first time the Second Defendant has been involved. The Plaintiff (as also the Fourth Defendant) has had full opportunity to give its perspective of this litigation. It is only right that the Second Defendant be afforded a similar opportunity, and it is also relevant to this application, to assess its role as a party in the substantive proceedings.

4. Also as a matter of necessity, or at least as a matter of fact, I have already considered a certain amount of affidavit evidence, whether by a Mr. Toothill a director of the Plaintiff, by the Third Defendant, by a Mr. Holton (a consultant to the First Defendant), and by the Fourth Defendant; as well as a certain amount of correspondence and other documents such as file notes recording the contents of telephone conversations. In those circumstances, I felt it only fair to allow Mr. Richardson to review some of that evidence, to which are now added two affidavits by Advocate N.T. Carey on behalf of the Second Defendant, and a second affidavit by Mr. Toothill, and to identify his client's perspective thereof, though I appreciate that strike-out applications (under Rule 36(1)(a)) should not develop into a mini trial. Moreover, the opportunity to conduct a limited review of some evidence in a case such as this, may be counter-productive.
5. The Plaintiff, a company incorporated in Guernsey 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. According to Mr. Williams' affidavit sworn on the 2nd February, 2004, there are currently approximately sixty-seven sub-funds being managed under the Manor Park Fund umbrella, and in addition approximately twenty five further sub-funds have reached the end of their investment term and all investors have been successfully paid the returns promised to them. The First Defendant provides management (and marketing) services to the MP Fund (in effect the Second Defendant). Both of these companies are also incorporated in Guernsey. The directors of both are Advocate J.P. Greenfield, Advocate N.T. Carey (both partners in Carey Olsen) and the Third Defendant.
6. Again according to Mr. Williams' affidavit, in 1990 he established the actuarial consultancy business of Manor Park and has been managing director of companies within the Manor Park Group (including the First and Second Defendants) from 1990 to date. From around 1991 as a director of Manor Park (sic) he started to design bespoke guaranteed investment structures for insurance companies, charities and pension funds and also provided consultancy and design services to insurance companies on these new structures. In 1994 he received approval from the Guernsey Financial Services Commission to be a director of a fund manager in Guernsey and to establish a funds operation. Thus, under this authority, the First Defendant was established as the manager of the Second Defendant. From 1995, as a director of the First Defendant he

designed and launched the first sub-funds of the Second Defendant with multiple guarantee levels from which the investor could choose to suit his risk profile. As the investment manager of the Second Defendant Mr. Williams manages all of the sub-funds held therein. It would not be inaccurate to say, I believe, that the first two Defendants are part of the Williams empire.

7. 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 two colleagues at Carey Olsen) of the First and Second Defendant.
8. 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 (generally “the 2001 Agreements”). IFSG was specifically incorporated in Guernsey for such purposes and is related to the Plaintiff, a description intended solely to indicate there are those with an interest in both.
9. 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 specifically set up by the Plaintiff to provide a guaranteed fund to an offshore bank. 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 the parties were free to go their respective ways. At the heart of the 2003 litigation appears to have been commercial rivalry in the lucrative fund management business.

10. The truce did not last 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 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.
11. The Plaintiff entered into commercial dealings with Norwich Union International Ltd. (“NUIL”), a company based in Dublin, in relation to the launch of an open ended guaranteed fund, the International Structured Guaranteed Fund PCC Ltd, which was established as a protected cell company under instructions from NUIL so as to be sold as one of the latter’s products (“the Fund”).
12. 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 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”).
13. 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.
14. This was followed up by a letter of the 26th January from Carey Olsen to NUIL (“the January letter”). 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 Fourth Defendant). The thrust of Carey Olsen’s advice to NUIL was that, on the basis of certain clearly set out factual assumptions 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. NUIL had received, at about the same time, advice from Ozannes to the contrary. NUIL’s attempt, therefore, to obtain consistent, and unambiguous legal advice from the legal advisors to the two warring factions foundered. *Quel Surprise*.

15. It is also clear, from the concluding paragraph of the letter of the 26th January:- “*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.*” - and from other sources (the matter is not disputed), that Manor Park was seeking to market its own expertise and ability to provide an appropriate fund for NUIL, in direct competition with the Plaintiff. The commercial rivalry between the main protagonists, evident in 2003, continued apace.
16. 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.
17. Following correspondence between Counsel, 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.

18. As a consequence of a direction from the Deputy Bailiff, the Third and Fourth Defendants filed affidavits, in the case of the latter including a full statement with regard to the January telephone conference and 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, effectively terminating the injunction application. The substantive proceedings were instituted, only in the non-legal sense that the Defendants were informed of their contents, 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). As already noted, this Application was filed on the 30th April, 2004.
19. 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. That additional relief being sought is now effectively only of historical interest, as the proposed fund relationship between the Plaintiff and NUIL has not materialised.
20. I will necessarily have to examine the complaints and allegations in the Cause in detail, as they are the bases upon which the damages 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 and of unlawful interference with the Plaintiff's business interests. 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; its launch has been 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. A separate self-standing allegation (in para. 32) of defamation (as opposed to any allegation that some of the acts complained with regard to the economic torts were unlawful because defamatory) I dismissed as far as concerns the Fourth Defendant, and the Plaintiff accepts that it must be deleted as far as all Defendants are concerned.

B The general legal principles in respect of Rule 36 strike out applications

21. 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) (power to strike out for want of prosecution – irrelevant in this case).”.

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;*
- (c) any person-*

..... (provisions as to joinder)

23. As in the case of Fourth Defendant’s strike-out application, it is accepted by counsel that Rule 34 (1)(a) is of little assistance to the Second Defendant, as it effectively adds nothing to the submission that the Cause discloses no reasonable cause of action against it. On reflection, having heard oral submissions in support of the Second Defendant’s case, the position is not as clear-cut as that in my opinion, as one of the main prongs of Mr. Richardson’s argument is that by its very nature and structure, his client is an inappropriate defendant. Nevertheless, Rule 36(1)(a) is the main provision relied upon and I therefore concentrate on it, though it is also submitted that the proceedings as against the Second Defendant are an abuse of process. It is not disputed, and in my

view cannot be, that the power of this Court to strike out under Rule 36(1)(a) and (d), also derives both from its inherent jurisdiction; equally, with regard to removal of a party under Rule 34.

24. Counsel for the greater part accepted what I said with regard to the relevant legal principles relating to strike-out in the June 2004 judgment, based on the White Book (commentary on 0.18 r.19). Intending no disrespect to the Second Defendant I do not propose to repeat them in full. They may be summarised in these ways:-

“It is only in plain and obvious cases that recourse should be had to the summary processes under this rule” (see 18/19/6).

“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.”. (As stated by Salmon LJ in Nagle at p. 651) a test cited with approval by Sir Godfray Le Quesne JA giving the judgment of the Court of Appeal in Silver Falcon at para. 64.

“A reasonable cause of action means a cause of action with some chance of success when only the allegations and the pleadings 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.”. (18/19/10).

25. With regard to what may be plain and obvious, Mr. Richardson helpfully referred me to a passage of the judgment of Sir Gordon Willmer in Drummond – Jackson (at p. 1105 c):-

“The question whether a point is plain and obvious does not depend on the length of time it takes to argue, rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result. When Archimedes exclaimed “eureka” he was rejoicing in the discovery of a proposition which for centuries now has come to be regarded as plain and obvious. But it must have been anything but plain and obvious to him and his predecessors until he had made his discovery and proved its truth.”

26. The position with regard to abuse of process can be sufficiently summarised, I believe, in this way:-

“This term connotes that the process of the Court must be used bona fide and properly and must not be abused.”. (18/19/18);

“this jurisdiction will not be exercised except with great circumspection unless it is perfectly clear that the plea cannot succeed.”. (18/19/27).

27. As in the June 2004 Judgment, so in this case, it is relevant to refer to the function of particulars which was an exercise required of the Court of Appeal in Silver Falcon. Le Quesne JA referred to certain passages from the White Book which in the 1999 edition are to be found 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 especial particularity and care. Thus, in an action...(wrongful dismissal, defamation, negligence, etc.).”.

28. Le Quesne JA continued (at para. 27):-

“We recognise that parties often give the best particulars they can of an allegation, reserving the right to add to them after discovery. We regard this as legitimate provided, and provided only, that the particulars given provided some reasonable foundation for the allegation to which they are appended. Such, as we understand it, was the approach of Hoffmann J in Arab Monetary Fund v. Hashim (1910) 1 AER 673. Where, however, there is nothing in the statement of claim but a bold assertion, wholly unparticularised, if that assertion forms a necessary ingredient in

the relevant cause of action, and if also particularisation is necessary in order to satisfy the principles which we have set out in para. 20, in our judgment that cause of action should be struck out.”. (Para. 20 cited the passages in the White Book (at 18/12/2) to which I have previously referred).

29. Mr. Richardson made much reference to the inadequacy of a claim which was nothing but a bald statement, wholly unparticularised.

C. The nature and ingredients of the alleged economic torts

30. Again, with regard to the nature and ingredients of the alleged economic torts, I repeat what I stated in the June judgment, my analysis being uncontested.

31. 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.” (1942 AC 435).

On appeal, the judgment of Salmon J. was expressly approved by all three members of the Court: [1963] 1 QB 528.”.

32. Three separate economic torts might arise in this case, namely 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

33. 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.

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

Unlawful means conspiracy

35. 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.”.

36. 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.”.

37. 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

38. 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 Plaintiff’s allegations

39. I turn to the Cause and to the allegations therein, as far as it and they relate to the Second Defendant.
40. The parties are described and, as regards the Defendants, the relationship between them. The background is then outlined, including the 2001 Agreements, the 2003 litigation, the Settlement Agreement in November of that year, and the fact of the Plaintiff establishing commercial relations with NUIL in relation to the Fund.
41. The first alleged conspiracy is contained in paragraphs 26 and 27. Paragraph 26 alleges *“that on or about the 7th November 2003 the First and Second Defendants, with their officer, Lee Holten who is a consultant of the First and Second Defendants (or any two or more of them) 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.”*.
42. Paragraph 27 proceeds to provide the details of the false and malicious actions undertaken by all the Defendants (or more than one of them) in furtherance of the conspiracy pleaded in paragraph 26, by which actions the Plaintiff was injured or likely to be injured, and the resultant loss.

“Particulars

“27.1 By revealing partially or otherwise the terms of the Settlement Agreement to Independent Financial Advisors (“IFAs”).

27.2 By wrongly and falsely informing IFAs that the severance of the contractual relations between IFSG and the First and Second Defendant was because IFSG had breached the Administration and/or Distributor Agreement and/or that the Settlement Agreement was obtained by the Plaintiff in the absence of good faith and/or fraudulently.”

28 By reason of the matters aforesaid if the Defendants are permitted to carry on conducting themselves in such a way the Plaintiff will continue to suffer loss and damage.”

43. The second conspiracy is contained in paragraphs 29-31 inclusive. It is asserted (para. 29) 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 of them 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 the 26th January, 2004, falsely and maliciously undertaken actions by which the Plaintiff was injured.”.*

44. 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.”.* The twelfth act particularised, again falsely and without factual foundation, was that the Defendants had informed NUIL that if they continued to do business with the Plaintiff that they would apply to enjoin the Fund or otherwise disrupt the Fund.

45. It is then alleged (para 31) that by the reason of these actions *“NUIL have been deterred from continuing with the Fund and the Plaintiff has suffered and continues to suffer loss and damage.”.*

46. The third alleged tort is contained in paragraph 32, namely:-

“32. Furthermore, each of the acts above taken together or individually as particularised in paragraph 27 and 30 would amount to unlawful interference with the business interests of the Plaintiff by the Defendants and each of them with the intention to injure the Plaintiff and has caused and continues to cause the Plaintiff’s loss.”.

47. The Cause proceeds to relate the attempts made in the middle of January by the Plaintiff to persuade the First and Second Defendants to make contact with NUIL to make good the harm that all the Defendants had had allegedly caused to the Plaintiff by their previous communications with NUIL.

48. Paragraphs 34-36 describe the reasons for, and the terms of, the injunctive relief being sought by the Plaintiff, as does paragraph 38 in relation to the declaration being sought (all that relief being repeated in paragraph 39 1.1 to 1.3).
49. Paragraph 37 relates to the alleged loss and damage:-

“37. By reason of the matters aforesaid the Plaintiff has suffered loss and damage estimated at present as follows:

Particulars.

37.1 The estimated fees payable on each tranche of the Fund to the Plaintiff €800,000.00.

37.2 The predicted life of the Fund is 10 years with 4 tranches issued per year therefore the total gross loss to the Plaintiff if the Fund is cancelled is €32m.”. (As repeated in para. 39 1.4).

E. Issues, submissions and conclusions

50. I preface my consideration of Counsels’ submissions by reiterating the background to some of them, namely, that a certain amount of evidence has been placed before the Court, which perhaps it might not otherwise have been, arising from the particular course which this litigation has taken. It started as a stand-alone application for injunctive relief against the first two Defendants, as a result of which all the affidavits and documents to which I have referred (save for Advocate Carey’s two affidavits and Mr. Toohill’s second) were produced. There was, effectively, much pre-action disclosure.
51. That disclosure must have informed, to a greater or lesser extent, the substantive Cause which the Bailiff directed should be filed in place of the stand-alone injunctive application. In that regard, it is also pertinent to comment that that direction was interpreted, I know not rightly or wrongly, as requiring Plaintiff to file the Cause forthwith. The note on the Court file (which I appreciate can in no way be definitive) indicates that, when that direction was given on the 6th February, 2004, it required the Cause to be filed on the 13th February. Thus it was on the 12th February that, informally, the Plaintiff provided all four Defendants with a draft of that document, which was to be filed the following day. In retrospect, at least, much would seem to have been done in undue haste.

52. The Second Defendant's first submission, described by Mr. Richardson as the overriding point, was that when the proceedings were issued, which I take for the purposes of this argument to be the 12th February, 2004, the Plaintiff had suffered no loss or damage. The simple reason for that was because, on the evidence, NUIL had not by then positively decided not to proceed with the launch of the Fund. Until that decision had been so taken, whatever the conduct of the Defendants might have been, no loss and damage could have been caused as is claimed in the Cause, namely (at para. 37) the loss of the Plaintiff's fees during the predicted life of the Fund.
53. In response, Mr. Dawes submitted that the decision of NUIL on the 18th February, 2004 (a date again accepted for present purposes), resulted from the earlier activities of the Defendants. A cause of action and damage had arisen well before the 12th February, that is the matters complained of had occurred well before that date; in respect of the first and second conspiracies respectively, on or after the 7th November, 2003, and on or after the 24th December, 2003, and particularly the January telephone call. It is also clear that NUIL had taken a decision on the 13th January, 2004, to delay the introduction of guaranteed funds, as illustrated by its own news service reported on the industry web site. The decision not to proceed with guaranteed funds (for these purposes on the 18th February) was merely the crystallisation of the damage already done. It is commonly the case (and not only in personal injuries claims) that actual loss can be ascertained with greater clarity after the issue of proceedings. As McGregor states (at 9-024):-

“The rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, but also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent”.

54. I agree with Mr. Dawes. By its very terms, the Cause identifies the cause of action as arising well before the proceedings were instituted, and potentially, subject to one reservation to which I refer later, establishes the necessary causal link between the acts complained of and loss. Whether further particularisation may be required or desirable to the establishment of the loss, or whether for similar reasons adjustment may be similarly required of the actual amount claimed, are separate matters. But I reject Mr. Richardson's basic argument that, as no loss or damage could have occurred at the date of the issue of the summons, then the Cause should be struck out. In coming to that

conclusion, I also take into account the fact that, even if Mr Richardson was right, all that would happen, from a practical point of view, is that the Plaintiff could issue a new summons next week, against which the same argument could not conceivably be advanced. To require that course would only result in unnecessary cost, and be a waste of this Court's time.

55. The Second Defendant's second submission is not so much that the Cause discloses no cause of action against it, but that there can be (my emphasis) no cause of action against it. In effect, that it is not a proper party to these proceedings for the purposes of Rule 34(1)(a).
56. Two grounds are advanced for this argument. The first revolves around the very nature and structure of the Second Defendant, an off-shore closed umbrella fund, which necessarily has investors who cannot redeem their investments at any time they want but can only do so on a certain date, for example at the end of the term. It is described as an umbrella fund because it comprises a number of sub-funds. In essence, the shareholders of the Second Defendant are the investors in the Fund, and the assets of the Second Defendant are solely those backing the guarantees and the returns payable to investors in the various sub-funds. Thus the only persons with an interest in the Second Defendant are those investors, which does not include any of the parties within the Manor Park group.
57. The Second Defendant has no interest and cannot be involved in whatever may be the fierce competitive rivalry between the First Defendant and the Plaintiff. The Manor Park Fund is wholly unsuited for NUIL's purposes, being a closed-ended fund. It could not stand to benefit in any way from NUIL launching an open-ended fund through the Plaintiff (or associates). Thus there can be no necessary causal link establishing intent on the part of the Second Defendant to injure the Plaintiff.
58. Advocate Carey in his second affidavit advances reasons (para. 6) why the Third Defendant is not a controller of the Second Defendant, in which he has no shareholding. The First Defendant is part of the Manor Park group but not so the Second Defendant. The directors of both the First and Second Defendant may be the same but they have different responsibilities.
59. The second ground for this submission is that the inclusion of the Second Defendant as a party is merely illustrative of the Plaintiff's overall "scatter-gun" approach to the litigation. That is demonstrated, *inter alia*, by the total failure to provide any

particularisation of the Second Defendant’s participation in any of the impugned conduct (a matter to which I will return). Mr. Richardson seeks to rely, in part, on the contents of Mr. Toothill’s second affidavit, which, he argues, demonstrates an underlying theme as far as the deponent was concerned, namely the difficulty the Plaintiff has in assessing what role any particular defendant was playing at any one time; their respective roles seemed to be inextricably mixed up and confused. Thus the scatter-gun approach.

60. Mr. Richardson also sought support from much of the correspondence, particularly in January of this year, in which the relevant references were to the Third Defendant or to the First Defendant, but not to the Second Defendant. There was nothing to support the inclusion of the Second Defendant as a party. The fact that it had been one of the plaintiffs in the 2003 litigation merely arose from the fact that it was a party to some of the agreements which were at the heart of that dispute. That factor no longer applied.
61. In addition, the Plaintiff effectively alleges that the Third and Fourth Defendants were engaged in frolics of their own – hence the inclusion, for example, of the Fourth Defendant on the grounds that she had exceeded the proper boundaries of advocacy. If that were the case, then they could not simultaneously be acting on behalf of the Second Defendant.
62. In truth, the Second Defendant was joined as a party for an improper collateral purpose, namely to exert pressure on the other Defendants. If the Second Defendant remained a party to the action, then reports both to the Guernsey Financial Services Commission and to the Fund’s internal auditors would be required. Harm to the Fund, in the latter eventuality, might arise.
63. On this issue, Mr. Dawes argues that Mr. Williams is the “directing mind” of the Manor Park group of companies, or as he described it “the family of companies”. As illustrated by Newman LB in Vardinoyannis (at paras. 78-87), he can be the mind which both directs the Second Defendant, and be in conspiracy with it. As is well known to all involved in these disputes, the First Defendant is the agent of the Second Defendant (indeed it might be said that that was its only function). As the principal, the Second Defendant was tied into all the actions of the First Defendant. The First Defendant, by virtue of its contractual relations with the Second Defendant, was subject to the latter’s overall control. In addition, it was the Fund which had the assets. Although the Second Defendant itself was not, he agreed, in a position to provide the

open-ended guarantee fund vehicle required by NUIL, the Third Defendant had still continued to denigrate the Plaintiff.

64. One difficulty which Mr. Richardson faces on this issue is the extent to which he relies upon his analysis of the evidence. At times (as indeed on other occasions) he almost gave the impression of summing up the evidence after a full trial, which is the danger which can arise when seeking to use evidence in this type of strike-out application. Whether, eventually, there is merit in Mr. Richardson's argument must depend upon proper assessment of the evidence, once it has all been adduced. That is the function solely of the Jurats. The Cause clearly identifies the Second Defendant as being a party to the conspiracies and unlawful interference with the business interests of the Plaintiff. Whether or not, in due course, the evidence establishes that involvement, time alone will tell. I am not persuaded at present that the case against the Second Defendant is doomed to fail, as Mr. Richardson in effect submits. When one side to a dispute is principally an individual wearing a number of hats, he cannot complain if at the outset of the proceedings the other side is unable to state precisely what was his headgear at any particular time. This ground for strike out is rejected.
65. The Second Defendant's third submission, over and above, but in effect in conjunction with, the previous submission is that the Cause itself fails to provide any particulars of the Second Defendant's involvement in the acts complained of. This criticism applies equally to the first conspiracy (paras. 26-28), the second conspiracy (paras. 29-31) and the stand alone allegation of unlawful interference with business interests (para. 32). For example, who on behalf of the Second Defendant was responsible for any of the alleged comments made to NUIL?
66. As already indicated, Mr. Richardson relies much on the statement by Le Quesne JA in Silver Falcon (at para. 27), that "*where, however, there is nothing in the statement of claim but a bold assertion, wholly unparticularised, if that assertion forms a necessary ingredient in the relevant cause of action, and if also particularisation is necessary in order to satisfy the principles which we have set out in para. 20 (the function of particulars) in our judgment that cause of action should be struck out*".
67. The point, and this again was much emphasised by Mr. Richardson, was that in the peculiar circumstances in which these proceedings had developed, full disclosure had been made to the Plaintiff before the Cause was issued. He therefore doubted whether the Plaintiff was indeed in a position to particularise any further. There had certainly been a minor amendment to the pleadings, in respect of para. 37 of the Cause. That

apart, there had been no attempt materially to amend; and, at least with regard to the first conspiracy (at para. 26), the Plaintiff accepted that it was unable to provide further particulars until after discovery and/or the administration of interrogatories. That latter course should not be made available to the Plaintiff in this case, in view of the fact that the Cause itself was so woefully lacking in particularisation. To put the case simply; if the Plaintiff was unable to particularise now, it would never be able to do so.

68. Finally, on this issue, Mr. Richardson argued that, if one examined the evidence of the written exchanges with NUIL, there was no reference in them to any of the complaints which were now being advanced in paragraph 30 with regard to the second conspiracy. There was therefore no evidence to support those allegations. That is, again, dangerous ground for Mr. Richardson to tread.
69. For his part, Mr. Dawes argued that it was odd that this Defendant complained about the lack of particulars when it knew, through its main director the Third Defendant –“its mind” – and its legal advisor, the Fourth Defendant – the two key players – exactly what truly happened. That was the probable reason why, so far, they have not requested particulars. In Mr. Dawes’ submission, the basic complaint is clear. The Defendants, between them, had unlawfully interfered, beyond the proper boundaries, in the Plaintiff’s business. If some further particularisation was deemed desirable by the Second Defendant, then that could be the subject of application at the proper time. It was not justification in any way for striking out the Cause when the basic complaint is clear.
70. I agree with Mr. Dawes that the basic complaint is clear. No attempt has been made to seek further particulars at this stage to enable the Second Defendant, so it argues, to know exactly what is being alleged against it. I am not persuaded by Mr. Richardson’s argument that since full pre-action discovery has been effectively made in the circumstances of this case, then no further particularisation is possible by the Plaintiff, and that thus the bald assertions with regard to the Second Defendant, without more, must justify the Cause being struck out. My reasons for rejecting the previous submission – in summary that the case against the Second Defendant is not in effect doomed to failure – are equally applicable to this.
71. The submissions so far have been of a general nature, applicable to all three tortious allegations. I now turn to the specific criticisms of those allegations, as pleaded, and firstly to the second conspiracy, linked to the allegation of unlawful interference contained in paragraph 32.

72. With regard to paragraph 30, Mr. Richardson submitted that all the acts complained of were lawful. Initially, he sought to argue that there was no stated predominant motive, behind those lawful acts, to injure the Plaintiff. Thus it lacked the necessary ingredient to establish a lawful means conspiracy. On reflection, he, rightly, withdrew that submission, having considered the force of what Le Quesne JA had to say about a similar situation in Silver Falcon, where there was a bare allegation of intent to injure. The Court of Appeal on the facts in that case held that, as no other intent was alleged by the Plaintiff, then that alleged had to be the predominant one. (Mr. Richardson did not seek to advance any argument similar to that employed by Mr. Collas in the Fourth Defendant's strike-out application, that as far as she was concerned there might be an additional intent contained in the Cause).
73. That effectively meant that Mr. Richardson abandoned any attempt to strike out paragraph 30, save on the general grounds which I have already rejected.
74. However, his submission that all the allegations in respect of paragraph 30 amounted to lawful conduct, necessarily meant that paragraph 32 (the unlawful interference allegation) could not be sustained. I agree with Mr. Dawes that it is sufficient to plead the facts relied upon, and unnecessary to categorise them as particular torts, that is to plead what the legal consequences might be. The determination of whether the facts complained of in paragraph 30 were lawful or unlawful must await trial and the Jurats' consideration, following appropriate directions.
75. I turn finally to the pleadings regarding the first conspiracy (paras. 26-28), in respect of which Mr. Richardson's specific submission is that they establish no link between the wrongful acts alleged and any resultant loss. The loss claimed in paragraph 37 relates to the NUIL "connection" and the loss of estimated fees over a ten-year period. There is no causal link between that alleged loss and, as I have said, the actions complained of (in paragraph 27), which relate not to the NUIL Fund at all but generally to contacts with "independent financial advisors", and what may or may not have been said to them about the relationship between the first two Defendants and IFSG.
76. The only loss alleged with regard to those unlawful acts is that if they are repeated the Plaintiff will continue to suffer loss and damage.
77. I was asked to consider paragraph 31, which Mr. Richardson argued, by its terms, only referred to the conduct complained of in paragraph 30, whereas Mr. Dawes argued that it related to all the unlawful conduct previously instanced.

78. I tend to agree with Mr. Dawes' construction of the paragraph, but the arguments are irrelevant; for two reasons. Any defect in this paragraph can be simply amended. In any event, the real problem which Mr. Dawes faces, and one which I believe in all honesty he accepted, is that the pleadings do not relate the loss claimed in paragraph 37 to any of the impugned conduct with regard to the first conspiracy. The pleadings are certainly defective in that regard.
79. It is possible that that defect could be addressed by suitable amendment. I cannot give a considered view at this stage. If that is so, that would be the appropriate course to take, rather than striking out all allegations relating to the first conspiracy in their entirety. Even though no request has been made, I consider that the Plaintiff should be afforded the facility to seek to amend if it so wishes.
80. Accordingly, I think the appropriate course is to make an "*unless order*". To the effect that the allegations contained in the first conspiracy will be struck out, unless within a specified period (to be considered by Counsel), application is made to amend the pleadings, and that thereafter the Court rules that the pleadings should be amended so as to establish the necessary causal link between impugned conduct (in para. 27) and loss.
81. Having for the second time (albeit from different perspectives) considered at length this Cause, and the issues raised therein, it is plain and obvious to me that the Cause reveals a sufficiently good case in law to justify it going forward – the test which Mr. Dawes, rightly, submitted I should apply. The basic complaint is clear, at least in respect of the events of December, 2003, and January, 2004. The Plaintiff's vehicle has been stuck in neutral for too long. It is time to engage a forward gear.