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Case No: A3/2007/1926

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
MS S ASPLIN QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
HC 05C00244

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd December 2008

Before:

THE RT HON. LORD JUSTICE WARD
THE RT HON. LORD JUSTICE MOORE-BICK
and
THE RT HON. LORD JUSTICE RIMER

- -

Between :

(1) Sprecher Grier Halberstam LLP
(2) Edward Judge — Appellant

- and -

Martin Walsh — Respondent

- -
- -

Mr Jonathan Phillips (instructed by Barlow Lyde & Gilbert) for the appellants
Mr Peter Irvin (instructed by Needleman Treon) for the respondent

Hearing date: 17th June 2008

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DRAFT JUDGMENT

Lord Justice Ward:

Introduction

1. This is an appeal from the order of Miss Sarah Asplin Q.C. sitting as a deputy judge of the High Court made on 26th July 2007 whereby she dismissed the application made by the second and third defendants, Sprecher Grier Halberstam LLP ("SGH") and Mr Edward Judge, to strike out the claim of Mr Martin Walsh on the grounds that:

> "(1) the particulars of claim and the further information served under it fail to disclose any proper case of deceit or conspiracy or of any reliance; and/or
>
> (2) upon the evidence, the claim stands no real prospect of success; and/or
>
> (3) the claim, or alternatively paragraphs [4] and [5] of the particulars of claim are contrary to public policy and/or infringe the privilege attaching to the evidence of witnesses."

The litigation between these parties

2. The story begins with a claim brought in April 2002 by Mr Paul Staines against Mr Walsh and a Mr Howard. SGH acted for him. Mr Judge, a partner in the firm, had conduct of the case on his behalf. Richards Butler acted for Mr Walsh at that time. The dispute arose out of a course of trading between the parties in equity derivatives through an offshore company Mondial Global Investors Ltd incorporated in the Bahamas. The arrangement was for sharing profit and expenses. When the relationship between the parties broke down, Mr Staines alleged he was owed $250,000. Liability was furiously disputed. Though we have been spared the detail, it does seem to have been the most acrimonious litigation, hard fought at every turn of a number of interlocutory

skirmishes. No holds were barred; no punches were pulled. The level of animosity between the parties was, and remains, very high.

3. Our concern centres on the opening salvo of that battle – the application made without notice on 23rd April 2002 for a freezing order to restrain Mr Walsh dealing with assets up to a limit of £180,000. It was granted by my Lord, then Rimer J., and, notice of the application having been given, it was continued on 1st May 2002**.** At the heart of the case before us is the contention of Mr Walsh that Mr Staines knowingly misrepresented his financial position in the affidavit he swore on 23rd April 2002 to support his application for that injunction and that he did not have the means to meet any damages that might be awarded against him under the undertaking in damages he had to give; that his solicitors later wrote to Richards Butler about his finances in terms which they knew were untrue; and that they all deceitfully failed to reveal the true position.

4. On 28th November 2002 Mr Walsh applied to set the freezing order aside on the ground of a failure to make full and frank disclosure and on 2nd December he applied to strike out the claim for want of jurisdiction. On 14th March 2003 Goldring J. dismissed the latter application but adjourned the former. Because he was being prevented – wrongly he would say – from dealing with properties because of the freezing order, Mr Walsh eventually on 14th May 2003 paid £180,000 into court.

5. Mr Staines's riposte was to apply to increase the amount of the freezing order to £370,000 on the basis of further sums alleged to have been found to be owing. That application was heard and dismissed by Laddie J. on 10th June

2003. He described the evidence put forward by Mr Walsh in support of that application as "grossly misleading". He also observed that:

> "[36] … so long as the freezing order is in force, it appears to me that there is a continuing obligation on a claimant, not only to be willing to honour the cross-undertaking in damages, but draw at least the defendant's attention to any material change for the worse in his financial position."

He was of the view that, in view of the payment into court and the declaration by Mr Walsh that he did not intend to withdraw that money, the result was that the existing freezing order had expired by virtue of the payment in of that amount.

6. Those proceedings ended almost immediately thereafter on 30th June 2003 when they were discontinued by Mr Staines. In October he was made bankrupt.

7. On 7th February 2005 Mr Walsh issued the claim against Mr Staines, SGH and Mr Judge with which we are now concerned. The claim form gives these "brief details of claim":

> "(1) The recovery of costs against the second and third defendant who were instructed by, and at all material times acted as solicitors on behalf of the first defendant for an action previously commenced by the first defendant against the claimant.
>
> (2) An action for damages for fraudulent deceit and conspiracy arising from representations made by the [second] and [third] defendants on behalf of the [first] defendant in the course of those proceedings."

The claim for wasted costs stands adjourned: we are only concerned with the action for fraudulent deceit and conspiracy.

The first issue: does the claim disclose a proper case of deceit or conspiracy?

8. There is no dispute that the claim in conspiracy is limited to a conspiracy to deceive. The conspiracy is pleaded perfectly properly:

> "19. The proceedings were conducted by the defendants acting in concert, and to the extent that the allegations of deceit set out above are made good the defendants therefore conspired together during the course of the proceedings to commit an unlawful act, namely the tort of deceit."

9. The deceit is based on three representations, the first being the affidavit sworn by Mr Staines to support his application for the freezing injunction, the second in a letter written by Mr Judge on 13th August 2002 and the third by omission arising from the non-disclosure of Mr Staines's true financial position. The challenge is directed first to whether the claimant's pleaded case discloses a proper case of reliance/inducement capable of supporting the claim in deceit, and secondly, to whether there is a proper plea of deceit.

The requirements for a valid claim in deceit

10. Taking it from the 19th edition of *Clerk and Lindsell on Torts* at 18-01:

> "Where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable for that loss."

11. The case is pleaded in this way in the particulars of claim:

> "**Fraudulent deceit**
>
> 4. In support of the First Defendant's application for the freezing order, the Second and Third Defendants put forward on behalf of the First Defendant an affidavit purporting to disclose the First Defendant's financial position to the Court. The affidavit stated that the First Defendant owned a flat ("the flat") which he believed to be worth £750,000 and that he had an outstanding mortgage liability in respect of it of £350,000,

thus leaving him with some £400,000 of assets to support his cross-undertaking in damages ("the First Representation").

5. The First Representation to the knowledge of the Defendants and each of them … was misleading and/or untrue in that:

a. The flat was probably worth no more than £620,000, having been bought by the First Defendant for that sum in or around July 2001. At a conference with counsel for the First Defendant which took place on 19th April 2002 only four days prior to the date of the First Defendant's affidavit and at which the Third Defendant was present, the value of the First Defendant's flat was stated to be £600,000. Moreover, a materially identical flat one floor below the flat of the First Defendant was valued on 21st August 2002 at £607,000 and was subsequently sold in December 2002 for £570,000. There was no apparent support for the alleged belief that the flat was worth £750,000.

b. The First Defendant's affidavit failed to reveal that he had a substantial unsettled tax liability to the Inland Revenue …

6. In or around August 2002 the First Defendant remortgaged the flat, with the consequence that the outstanding mortgage liability on the flat increased to nearly £650,000.

7. In response to repeated enquiries made by the Claimant's solicitors as to the First Defendant's financial circumstances, the First Defendant caused or permitted the Second Defendants to state in a letter dated 13th August 2002 to the Claimant's solicitors that they had received:

"in excess of £230,000 on account with which to pursue firstly the fraud against MGI committed by your clients, and secondly the claim for monies owed to our client (*i.e. the First Defendant*) by Mr Walsh and Mr Howard."

8. The above statement was intended to and did in fact represent, by implication if not expressly, that the Second Defendant held substantial sums for the purpose of the proceedings and that the First Defendant was a man of financial substance who would have the means to satisfy his cross-undertaking in damages if called upon to do so ("the Second Representation").

9. The Second Representation was, to the knowledge of the Defendants and each of them, grossly misleading and materially untrue in that:

a. The First Defendant still had a substantial outstanding tax liability to the Inland Revenue.

b. As set out in paragraph 6 above, the flat, which constituted the First Defendant's only significant asset, had been remortgaged in the amount of nearly £650,000 earlier that month, leaving negligible equity.

c. The funds which had been received by the Second Defendant were largely derived from the remortgage monies obtained by the First Defendant.

d. The funds were not in any event intended by the First Defendant to remain with the Second Defendant for more than a short time. £150,000 of the £230,000 was in fact paid away by the Second Defendants to the order of the First Defendant within only a few days of this letter of 13th August, namely on 20th August 2002.

10. The Defendants, and each of them, failed to disclose to either the claimant or the court the fact that the First Defendant had remortgaged his flat some six months later on 13th August 2003. Further, the Defendants and each of them failed to disclose until June 2003 that the sums which the Defendant referred to in the letter of 13th August [2002] had been derived largely from the remortgaging of the flat, that a significant proportion of those funds had then been paid away and that there was little or no money left in the client account of the Second Defendant.

11. The failure to reveal the true position regarding the First Defendant's current or changed circumstances arising from the remortgage of the flat or subsequent payment out of the remortgage funds constituted a breach by each and all of the defendants of their continuing obligation (referred to in paragraph 36 of Mr Justice Laddie's judgment) to reveal to the claimant and the court any significant change in circumstances which had a crucial bearing on the First Defendant's ability to comply with his cross-undertaking in damages.

12. In failing to disclose the matter set out above, the Defendants and each of them impliedly, but nevertheless deliberately and continuously represented to the Claimant and to his advisers (as well as the court) that there had been no material change in the First Defendant's financial position from that which it [had] been alleged to be in April 2002 ("the Third Representation").

13. The Third Representation was to the knowledge of the Defendants and each of them, false for the reasons aforesaid.

> 14. The First, Second and Third Representations ("the Representations") and each of them were made with the intent that the claimant would be induced to alter his position by resigning himself to the existence of a freezing order and not to apply to have the freezing order set aside and/or by relying on the expectation that any damage suffered as a consequence of the freezing order would be met by the First Defendant's undertaking in damages.
>
> 14.2 The Claimant was in fact induced to alter his position in reliance on the Representations and each of them, in that he did not make an application to set aside the freezing order until 28th November [2002]. Had the Claimant known that the Representations were false, and in particular that the First Defendant was not in a position to pay the substantial damages caused to the claimant by the freezing order, the application to set the freezing order aside would have been made and/or heard at a much earlier stage. Further, had the freezing order been set aside, the Claimant would have discontinued the proceedings with the consequence that the First Defendant would not have incurred costs arising from numerous interlocutory hearings in the proceedings, including a hotly contested challenge to jurisdiction."

It is unnecessary for present purposes to recite more from the further information given of the particulars of claim than to record that particulars of the material matters known to SGH and Mr Judge were given to support the allegation that each of them knew of the falsity.

12. The deputy judge held:

> "[18] … it cannot be said that it is sufficiently clear that the pleading does not contain the requisite allegations, including that of deceit by implication, knowledge of falsity by Mr Judge and SGH, inducement and reliance to warrant a strike out."

13. In my judgment, she was quite right to refuse to strike out the claim on this ground. In my view the pleading is plain and it is adequate in respect of each representation. It is alleged that to the knowledge of the defendants and each of them the representations were false. The further information expanded the case against SGH and Mr Judge that facts were incorrectly stated as they well

knew. That is a perfectly proper way to plead the necessary allegation of the guilty state of mind of the defendants. They know exactly what case of deceit they have to meet. The particulars of claim cannot be struck out on this ground.

14. Paragraph 14 pleads that each of the representations was made with the intent that the claimant be induced to alter his position as a result and paragraph 14.2 pleads that the claimant was in fact induced to alter his position in reliance on the representations and each of them. Once again that is a perfectly proper and good pleading sufficient to set up the case of inducement/reliance.

15. It follows that this ground of appeal is hopeless and the claim should not be struck out for not disclosing a proper cause of action.

The second issue: summary judgment: does the claim have no real prospect of success?

16. The prospect of the claimant's succeeding must be real. A fanciful prospect is not enough. "The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality," per Lord Hobhouse of Woodborough at paragraph 158 in *Three Rivers D.C. v Bank of England (No. 3)* [2003] 2 A.C. 1, 282. Without conducting a mini-trial, the task of the court is to deal with the case justly and give judgment against the claimant only if there is no real prospect of success. The more complex the case, the more difficult it is to deal with it justly without discovery and without oral evidence. But if the court is satisfied that it is doomed, then summary judgment may be entered.

17. Here the challenge is focused on whether or not the claimant was induced by the misrepresentations. They must have operated on his mind so as to be a cause, not necessarily the only cause, of his acting to his detriment. The law is stated by Sir George Jessel M.R. in *Redgrave v Hurd* (1881) 20 Ch. D. 1, 21:

> "If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the grounds that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation."

A man cannot be deceived if he knows the truth.

18. It is necessary to explore in a little more detail how the case is put. The second and third defendants sought further information of the statement of claim, pressing in respect of each misrepresentation for "the facts known or believed or suspected by the claimant", for example under paragraph 7 of the particulars of claim of the repeated enquiries made by the claimant's solicitors as to the first defendant's financial circumstances. In that instance the claimant replied:

> "The claimant was aware that a) the First Defendant was averse to paying taxes; b) the First Defendant had boasted to the Claimant that he had not paid tax on certain sums; and c) the valuation of the flat advanced by the First Defendant in his affidavit in support of the freezing injunction appeared to the claimant to be very high. These matters caused the Claimant to be concerned that the First Defendant may not be able to honour his undertaking in damages. … … the Claimant had no means of knowing or proving the extent to which such assurances [that the First Defendant had sufficient unencumbered assets to honour his cross-undertaking in damages] were misleading and/or false."

As for the claimant's paragraph 14.2, the defendants asked:

> "14. Is it alleged that it was at any time the belief of the claimant that the first defendant would be able to meet such a liability [to pay damages for breach of his undertaking]?"

The answer was:

> "14. In the light of the First, Second and Third Representations, and further in the light of the Second and Third defendants' persistent assurances on behalf of the First Defendant as set out above that the First Defendant had sufficient unencumbered assets to honour his cross-undertaking in damages, the Claimant had no means of knowing or proving the extent to which such assurances as to the First Defendant's ability to meet such liability were misleading and/or false."

19. The formula of having "no means of knowing or proving … were misleading or false" was repeated in the reply and, responding to the allegation in the defence that the claimant's belief that Mr Staines' lack of means to satisfy any order for damages was demonstrated by a series of communications made by him immediately he received notice of the freezing order, the claimant pleaded in the reply that:

> "21. … It is admitted that by the e-mails pleaded in that paragraph, the claimant expressed his suspicion as to the true financial circumstances of the First Defendant. However, in the light of the responses of the Second and Third Defendants to the claimant's queries, the claimant had no way of knowing or proving with any certainty the extent to which the First Defendant lacked the means to satisfy any order for damages made pursuant to his undertaking."

20. What then was the evidence before the deputy judge on this issue? This is how the claimant set out his case on his state of knowledge and reliance upon the alleged misrepresentation. He said in paragraph 4 of his witness statement:

> "… although I and my then solicitors had our doubts about Mr Staines' ability to honour his cross-undertaking in damages, the misleading information we were given, as well as the information that was deliberately withheld from us, left us in

> the position where we had no way of knowing or proving with any certainty the extent to which Mr Staines lacked the means to satisfy an order for damages made pursuant to his cross-undertaking. We were therefore not in a position to take effective action to discharge the freezing order."

21. There are other passages to like effect. For example:

> "6. … I felt obliged to take the documentation drafted by SGH at face value, and, despite some misgivings, I reluctantly proceeded on the basis of the information they were putting forward and allowed the freezing order to remain in place. I would obviously not otherwise have done so. …
>
> 8. … I continued, through my solicitors, to press the defendants for proper disclosure in order to be absolutely sure, but nevertheless felt unable to act on my suspicions regarding Staines' true financial position and his actual ability to pay costs and damages in due course. …
>
> 10. … I therefore reluctantly accepted the mortgage figure given to me. …
>
> 12. … Nevertheless, because of the impression I had by then [3rd August 2002] gained that Mr Staines was a rather devious character, I had my doubts as to whether the mortgage figure and the picture presented of Mr Staines' financial ability to support his cross-undertaking were correct.
>
> …
>
> 55. … I certainly had my doubts. [Dealing with the emails he sent] I was trying to use a bit of bluff to draw Staines and his solicitors out. ….
>
> 68. The questions of the precise state of knowledge of the defendants and the extent to which I relied upon the misrepresentations I allege are complex and will require the sifting of a substantial amount of contested evidence. I do not see how the court can be in a position to decide these questions of the basis of conflicting witness statements in the course of a mini-trial. …"

22. The evidence against him was mainly set out in the affidavit of Mr Cathie, the solicitor having conduct of the matter on behalf of SGH and Mr Judge. He exhibited a copy of the affidavit Mr Staines had sworn on 23rd April 2002 to

support his application for the freezing order. That contains these, the relevant paragraphs:

> "**Undertaking as to damages**
>
> 28. I accept that I shall have to give an undertaking as to damages and in respect of various other matters. I am now based permanently in this country. I am in the process of establishing my own trading firm. I own a flat at D 42 Parliament View, 1 Albert Embankment, London SE1 7XQ. At page 31 of the exhibit is a copy of the purchase particulars.
>
> 29. I believe the property now to be worth about £750,000 and the mortgage outstanding is £350,000."

This gives rise to the first representation.

23. According to the evidence filed, the claimant's immediate reaction to the receipt of the freezing order was to telephone Mr Staines and say to him – omitting the expletives – "I'm going to grass you to the tax man, it's war …". On 28th April 2002 the claimant e-mailed Mr Judge saying:

> "I would make sure you have plenty of money on a/c as with the state of Mr Staines' affairs you may not get paid in the end."

24. On 29th April he e-mailed Mr Judge to say:

> "I hope you have taken my advice and got some money from your client you "kosher bastard". Get your money quick from the losing side as I will be coming after him for some money as well and it would not be good for your firm if we were both creditors *in his pending bankruptcy*."

(I have edited this and other e-mails to correct the obvious typographical errors. I have italicised the passage which most clearly demonstrates his true state of mind, and will also do so in the subsequent citations.)

25. On 30th April Mr Staines e-mailed Mr Walsh to say:

> "Have just had two hour meeting with my accountant. Finalising my proposal to the Revenue regarding my tax affairs, I have made a full and complete return … I am going to have to pay a substantial amount because I was negligent in making returns 98-99."

On the same day Mr Walsh forwarded that message to Mr Judge and added:

> Eddie did you take my advice re: your fees? Your call, however, as from this e-mail your client is soon to pay a big fine or go to jail. Best you advise him due to the fact that *his affidavit of 23/4 has now some major holes in it* and he will soon have a criminal record directly related to this case, best you drop your client drops [sic] the case and to use a phrase from an e-mail from Mr Staines you use your "kosher bastard" skills on somebody else."

26. On 10th May 2002 Richards Butler wrote on the claimant's behalf:

> "… our clients intend to contest the jurisdiction of the court and have reserved their position in relation to the propriety of the freezing order.
>
> One point in particular which does concern our clients is the information given by your client in relation to his undertaking in damages. Your client has testified to his interest in a flat of which his equity is said to be about £400,000. Our client's understanding, *based on what your client has said directly to Mr Walsh, is that your client has not accounted to the Inland Revenue for any tax payable on very substantial sums* which have been earned as a result of the trading activities referred to in his affidavit. *That would mean a very considerable debt is owed to the Revenue.* There may be substantial penalties applicable too. *Our clients are very concerned that your clients worth may not therefore be accurately represented in his affidavit."*

27. On 19th June 2002 the claimant e-mailed Mr Staines saying:

> "… furthermore *you have deliberately misled the court re your assets* and you have not replied to my lawyers on this matter."

28. Mr Walsh then swore an affidavit in the first proceedings on 28th June 2002 in which he said:

> "18. … To this day, the claimant has not provided details of his indebtedness [in respect of tax]. This is of great concern to me because *it is my view that the claimant has misrepresented his true worth to this court in the context of his ex parte application.*"

29. On 26th July 2002 Mr Walsh emailed Mr Judge in a communication which goes some way to explain the proceedings before us. It reads:

> "… As you are well aware tax evasion is a criminal offence and while previously you could hide behind "I was going on client's instructions" now you cannot. You are duty bound in your professional capacity to "know your client"! *Make no mistake this person is now insolvent and will be going bankrupt*, in which case he will not be able to pay my costs. What I have been trying to do for some time is break the doctor's club which operates in your profession and somehow put you in a position when he goes bankrupt to have a claim against your company insurance policy. RB have some very good ideas along these lines. All this being said suggest you get plenty of fees on a/c as I suspect he has little or no personal funds as otherwise why would he write to John Connell and sign himself off as an attorney. Number one rule in your srummy [sic] profession is get the fees on a/c. A very angry rich Irishman."

30. Richards Butler continued to press for further information writing on 9th August 2002 that:

> "If your client persists in withholding full and frank details we will simply have to put the matter to the judge."

The response dated 13th August 2002 founds the second representation. SGH wrote:

> "We refer to the recent correspondence from you and your client in relation to the concerns you have in relation to our client's undertaking as to damages. We confirm that we have taken our client's instructions on the same and in order to allay your client's fears we have been authorised by Mondial Global Investors Ltd's board of directors to confirm the following. We have to date received in excess of £230,000 on account with which to pursue firstly the fraud against MGI committed by your clients, and secondly the claim for monies owed to our clients by Mr Walsh and Mr Howard."

The reply is significant. Richards Butler responded on 14th August:

> "Second, the fact that unnamed person(s) have given you authority to state that you have received money on account (from persons undisclosed) to pursue various alleged claims is of *no comfort whatsoever* to our client in relation to Mr Staines' undertaking in damages. On the contrary *it gives no information whatsoever as to his financial status or his ability to meet his undertaking* and *reinforces our clients' view that Mr Staines' true financial worth has been misrepresented to the court."*

31. On 28th November 2002 Richards Butler applied to discharge the freezing order on various bases including the alleged breach of the obligation to make full and frank disclosure. Mr Melvin, the claimant's solicitor, filed a witness statement to support that application in which he said of the affidavit of Mr Staines sworn on 23rd April 2002:

> "27. My client was, and remains, extremely concerned that this statement does not accurately represent the claimant's worth.
>
> 28. Firstly, the claimant appears to have substantial liabilities which he has not revealed to the court. [Mr Walsh's] understanding based on statements made directly to him by the claimant was that the claimant had not accounted to the Inland Revenue for any tax payable on the very substantial sums which he has earned as a result of the training activities referred to in the claimant's affidavit. Indeed [Mr Walsh] informs me that during a telephone conversation with the claimant *on 25th April*, the claimant stated that he had paid no tax for five years, so that there was *a very considerable debt owing to the Inland Revenue* regardless of any further penalties that might have been incurred."

32. In his fourth witness statement of 24th February 2003 Mr Walsh dealt with Mr Staines's financial position and said:

> "117. By his own admittance, the claimant was aware that he had to give an appropriate undertaking to the court to meeting any damages which the court might order. *I have **always** regarded that undertaking as wholly inadequate* and following his witness statement response to the issue raised in Robert Melvin's statement, summarised in the replies at paragraph 54

> of his witness statement, my concerns have increased." (The added emphasis is supplied by me.)

33. Finally there is the evidence of Mr Kirkpatrick, the claimant's former solicitor, who said in a witness statement dated 25th January 2007 he said:

> "In the face of the representations which have been made about Mr Staines's assets, and although Mr Walsh still had lingering doubts about Mr Staines's ability to satisfy the cross-undertaking, there appeared little real prospect of being able to set aside the freezing order on the basis of the inadequacy of the cross-undertaking or non-disclosure. Mr Walsh was therefore obliged to resign himself to the existence of the freezing order and concentrate on the question of jurisdiction."

34. In a second witness statement dated 2nd February 2007 Mr Kirkpatrick answered a question directed to him by SPG and Mr Judge who enquired whether the letter of 13th August 2002 (the second representation) "caused Mr Walsh to hold such a positive belief [that Mr Staines was "a man of substance who would have the means to satisfy his cross-undertaking in damages"]". Mr Fitzpatrick said:

> "4. … Obviously only he [Mr Walsh] can say what his actual belief was. I can say from my discussions with Mr Walsh at the time, that notwithstanding the SGH letter, and the apparent existence of a flat with £400,000 equity, he still remains sceptical and suspicious about Mr Staines and his financial position but nevertheless derived reassurance from the fact that SGH apparently held £230,000 in their client account and that this money was going to remain in the client account for the alleged purpose of the proceedings."

Discussion

35. The deputy judge concluded:

> "28. Overall, despite the colourful language in the e-mails sent by Mr Walsh, the only explanation for which is that he was trying to call Mr Judge and SGH's bluff, or that the assertions were posturing, the reference in Mr Walsh's witness statement to his reluctance to believe the financial statements and his

> doubts and suspicions, I am not able to conclude that there is no prospect of showing that Mr Walsh was deceived by the financial information provided by Mr Staines, or that it contributed substantially to deceiving him. Mr Walsh asserts in his witness statement that albeit reluctantly, he took the statements at face value. When this is taken together with Mr Kirkpatrick's assertions in his witness statement as to his understanding of the letter of 13th August 2002, it would be wrong to grant summary judgment on the basis of lack of reliance."

36. In my view this court is able to take a more robust view. The gravamen of the claimant's case is that he was deceived into believing that Mr Staines was in a financial position to meet his undertaking in damages. The startling feature of the claimant's case is that despite numerous requests for further information which explicitly sought to clarify his belief in what he was being told, nowhere does he say he believed what he was being told. The silence is deafening. On the other hand his immediate response to the freezing order was emphatic incredulity. As far as Mr Walsh was concerned, Mr Staines had lied about his financial position. He had a substantial tax liability and was insolvent. He never wavered in that belief. He knew from the beginning of the litigation that the truth had not been told. The passages I have emphasised in the preceding paragraphs make that clear beyond peradventure. That the court was deceived is not to the point. The court made the freezing order on the basis of the affidavit but Mr Walsh knew that full and frank disclosure of his true financial position – assets *and liabilities* – had not been given. Had the failure to reveal the full extent of Mr Staines' tax liabilities been raised, and Mr Walsh had ample evidence of it from the telephone conversation on 25th April (see [30] above) and the e-mail of 30th April (see [25] above), then the probability is that the injunction would not have been continued on the return date on 2nd May. He stands condemned by his own words. The stark

fact remains that Mr Walsh "always" knew that Mr Staines had not been frank in a material respect, was suspicious about everything he said and in those circumstances he cannot in my judgment have any realistic prospect of persuading the court that he relied evenly partly upon these lies, prevarications and omissions to tell the whole truth. The action is, in my judgment, bound to fail and I would allow the appeal accordingly.

37. The deputy judge also held that there was no other compelling reason why this matter should go to trial. In his respondent's notice relying on *Mills v Bull* [1969] 1 Ch 258 Mr Irvin contends on Mr Walsh's behalf that the serious question of professional conduct or, more accurately, misconduct, itself constitutes a compelling reason requiring the matter to be disposed of at a trial after a full investigation of the alleged impropriety. I agree with the judge that these conduct issues can be dealt with in the wasted costs proceedings and that they do not render necessary a trial of a case of deceit which is otherwise destined to fail.

The third issue: does the claim infringe the privilege attaching to the evidence of witnesses?

38. The issue as joined on the pleading begins with the plea in the defence that it is denied that any action may be brought against any party (including Mr Staines or SGH or Mr Judge) arising from the contents of the affidavit sworn by Mr Staines, whether in deceit or conspiracy as alleged or otherwise. It is asserted that such action is barred by public policy and the immunity attaching to statements of witnesses in legal proceedings. In his reply, Mr Walsh contends that these principles have no application to evidence given *ex parte*

in support of a cross-undertaking in damages for the purposes of obtaining a freezing injunction.

The law relating to witness immunity

39. The doctrine is well settled. In *Watson v M'Ewan* [1905] A.C. 480, 486, the Earl of Halsbury L.C. said:

> "By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable – it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument."

40. A more modern exposition of the rationale for the rule is given by Lord Hutton in *Darker v Chief Constable of the West Midlands Police* [2001] 1 A.C. 435, 464:

> "… in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were actuated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one."

He added at p. 468:

> "Furthermore, the authorities make it clear … that where the immunity exists it is given to those who deliberately and maliciously make false statements; the immunity is not lost because of the wickedness of the person who claims immunity."

41. In *Marrinan v Vibart* [1963] 1 Q.B. 234, 238 Salmon J. held:

> "It is true that in nearly all the reported cases in which the principles to which I have alluded were laid down, the form of action was for damages for libel or slander, but in my judgment these principles in no way depend upon the form of action. In *Hargreaves v Bretherton* [1959] 1 Q.B. 45, an unsuccessful attempt was made to evade the immunity to which I have referred by suing for damages for perjury. Counsel for the plaintiff attempted to distinguish that case on the ground that an action for damages for perjury is unknown to the law, whereas an action for damages for conspiracy is of respectable lineage. As far as it goes, the distinction is a sound one. It does not, however, affect the point that *Hargreaves v Bretherton* demonstrates that the immunity to which I have referred is not only an immunity to be sued for damages in libel or slander. The immunity, in my judgment, is an immunity from any form of civil action."

There the plaintiff brought an action claiming damages for conspiracy against two police officers alleging they had conspired together to make false statements defamatory of him as a barrister. It was held that the gist of the tort of conspiracy was not the conspiratorial agreement alone, but that agreement plus the overt act of causing damage and the evidence given was an act done in pursuance of the agreement. The claim was accordingly struck out. The Court of Appeal endorsed what Salmon J. had said, Sellers L.J. adding at [1963] 1 Q.B. 528, 535:

> "Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given."

42. In *Roy v Prior* [1971] A.C. 470, the defendant was a solicitor who took the view that the plaintiff was evading service of a witness summons requiring him to attend to give evidence for the solicitor's client. The solicitor gave evidence in support of the application for the issue of a bench warrant to

compel the plaintiff's attendance. Dr Roy was duly arrested and compelled to give evidence and he then brought an action against the defendant claiming damages for causing his arrest and his being forcibly brought to the court to attest. Lord Morris of Borth-Y-Gest made this important distinction at p. 477:

> "What the plaintiff alleges is that the defendant, acting both maliciously and without reasonable cause, procured and brought about his arrest. The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of judicial process which the defendant instituted both maliciously and without reasonable cause. … The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (though if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause."

Mr Peter Irvin, counsel for Mr Walsh, relies on the minority speech of Lord Wilberforce in which he said at p. 480:

> "The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.
>
> But none of this applies as regards such evidence as was given in support of the application for a bench warrant. It was given ex parte: Dr Roy had no means, and no other party any interest, in challenging it: so far from the public interest requiring that it be given absolute protection, that interest requires that it should have been given carefully, responsibly and impartially. To deny a person whose liberty has been interfered with any opportunity of showing that it was ill founded and malicious, does not in the least correspond with, and is a far more serious denial than, the traditional denial of the right to attack a witness to an issue which has been tested and passed upon after a trial. Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public

> interest. So checked, the present case provides no justification for protecting absolutely what the solicitor said in the court."

43. Lord Hutton in *Darker* applied the last dictum saying at p. 468:

> "The predominant requirement of public policy is that those who suffer a wrong should have a right to a remedy, and the case for granting an immunity which restricts that right must be clearly made out. In *Mann v O'Neill* (1997) 71 ALJR 903 the judgment in the High Court of Australia of Brennan CJ, Dawson, Toohey and Gaudron JJ states, at p. 907: "the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'." And in *Roy v Prior* [1971] AC 470, where this House held that a defendant was not entitled to the absolute immunity which he claimed, Lord Wilberforce stated, at p. 480: "Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest.""

44. Our attention was drawn to *Surzur Overseas Ltd v Koros* [1999] 2 Lloyds L.R. 611, where it was alleged that the defendants had conspired together by submitting false evidence supported by forged documents to remove three vessels from the ambit of a freezing injunction granted against them. Waller L.J. held at p.619:

> "The real question is whether this action for conspiracy is against parties or witnesses for the evidence they gave … so as to bring it within the immunity rule. …
>
> What the above [review of the authorities] demonstrates is that it is certainly not every cause of action which includes an averment that false evidence was given will be struck out on the basis of witness immunity. It also seems to me that what the above demonstrates is that it is not permissible to divide allegations up as Mr Schaff sought to do into those that involve giving evidence and those which do not. …
>
> Albeit there may not be a cause of action without a conspiracy for abusing the process of the Court, … abuse of process can very arguably be the unlawful means on which a conspiracy can be founded. Clearly a conspiracy simply to give false evidence falls within the witness immunity rule … Equally however a conspiracy which had its aim and objective of defeating an order of the Court and obtaining the release from a

> *Mareva* of assets by persons who were not, I emphasize, parties to the original action, must be a conspiracy to abuse the process very akin to the malicious arrest which was the subject of *Roy v Prior*. There is no logic in creating an exception for malicious arrest, and not a conspiracy to abuse the process entailing the defeating of something very close to an arrest, a *Mareva* injunction."

Discussion

45. In her judgment the deputy judge reached this conclusion:

> "39. However, although there may be a strong case for the application of immunity, I cannot be certain that the claim will fail on that ground. First, the judgment of Laddie J. in *Staines v Walsh* [2003] EWHC 1486 (Ch), upon which the majority of the claim is based, has injected some uncertainty into the law as to the duties arising in relation to a cross-undertaking given in support of a freezing order. Rather than the duty to make full disclosure being owed solely to the court, Laddie J held:
>
> > 'Certainly, so long as the freezing order is in force, it appears to me that there is a continuing obligation on a claimant not only to be willing to honour the cross-undertaking in damages, but to draw at least the defendant's attention to any material change for the worse in his financial position …'
>
> In the circumstances, therefore, I accept Mr Irvin's submission that there is uncertainty as to the position concerning financial statements in a witness statement in support of a cross-undertaking in damages. It is appropriate that the question of whether a free-standing duty is owed in such circumstances to the defendant as well as the court and the full nature and consequences of that duty be considered at trial.
>
> 40. I also take account of the exceptions to the witness immunity rule considered in cases such as *Surzur v Koros* and *Roy v Prior* referred to above. Although the label "abuse of process" is not used in the particulars of claim, there must be a reasonable prospect that the facts pleaded albeit under the head of deceit will be held to amount to such an abuse. To put the matter another way, although I consider that there is a strong case for the application of principle, I cannot be certain that the claim will fail as a result."

46. I regret that I do not agree. In the first place the case before us is not about a conspiracy to injure by unlawful means such as abusing the process of the

court: it is not the kind of conspiracy envisaged by *Surzur v Koros* as constituting another exception to the immunity rule; nor has any attempt been made to amend the pleading to effect that dramatic reconstitution of the claim. On the contrary, this is a conspiracy to do an unlawful act, namely to deceive. The deceit, certainly in respect of the First Representation, lies in what was said in Mr Staines' affidavit. As Waller L.J. put it, it is "an action for conspiracy against parties or witnesses for the evidence they gave." The affidavit is vital to prove the representations contained within it. It is a discrete claim: there is no question of dividing up the allegations in the way which would have met with Waller L.J.'s disapproval. It seems to me to be beyond argument that Mr Walsh is suing in respect of evidence given to the court by Mr Staines.

47. Secondly, this is not the case to examine whether a free-standing duty is owed by a party, and particularly by his solicitors, not just to the court but to the other side as has been suggested by Laddie J. as set out at [5] above. We are concerned with a well-recognised tort – conspiracy – and, as I see it, this interesting question does not arise for decision by us. I should, however, note that the observations of the learned judge were obiter and were not concerned with witness immunity. He was concerned with the duties owed to the court and the duty to the court may arguably encompass an obligation to conduct a trial fairly and justly by giving certain information to the other side. I say no more about it save to observe that Laddie J.'s views are difficult to reconcile with the judgment of this Court in *Al-Kandari v J.R. Brown and Co* [1988] Q.B. 665 where Lord Donaldson of Lymington M.R. said at p. 672:

> "A solicitor acting for a party who is engaged in "hostile" litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent: *Business Computers International Ltd v Registrar of Companies* [1987] 3 W.L.R. 1134. This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby, that person is without a remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation: *Myers v Elman* [1940] A.C. 282.
> …
>
> I would go rather further and say that, in the context of "hostile" litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes: *Rondel v Worsley* [1969] 1 A.C. 191."

Bingham L.J. expressed the principle in this way at p. 675:

> "In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavour, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent."

In that case the solicitors were held liable in negligence, but that is far removed from the case before us. This is a claim for the tort of conspiracy to deceive. Either the elements of deceit are made out, or they are not.

48. It seems to me plain that no action can lie against Mr Staines for the falsity of the matter stated in his affidavit, no matter how reprehensible his conduct may have been in failing to disclose the truth. I note the warnings of Lord Wilberforce and Lord Hutton, (see [42] and [43] above) but this is, in my judgment, a clear case of witness immunity involving, contrary to Mr Irvin's

submission, no extension of the established rule. If and in so far as the solicitors have been complicit in any wrongdoing, there is no need to restrict the application of the rule because there are alternative remedies available to give redress, for example, through wasted costs orders. Nor, as Mr Irvin again suggests, is Mr Walsh in the same predicament as Dr Roy, who had no chance to refute the allegations in the evidence given against him. Here Mr Walsh had the opportunity to challenge the accuracy of Mr Staines' affidavit when the matter returned to the court on 2nd May. He chose not to do so.

49. It seems to me, therefore, inevitable that paragraphs 4 and 5 of the particulars of claim be struck out least vis à vis Mr Staines. Can they survive to make a case against SGH and Mr Judge? In my judgment they cannot. The representations were made in the affidavit sworn by Mr Staines. SGH and Mr Judge as solicitors did not themselves make any representation by "putting forward" that affidavit on their client's behalf. If the act of the conspirator, Mr Staines, cannot be proved against him, it cannot survive against the co-conspirators. The claim in deceit against SGH and Mr Judge pleaded in paragraphs 4 and 5 cannot succeed against them either.

50. That leaves the Second Representation in the letter of 13th August. As I have already indicated at [30**],** the immediate response from Mr Walsh's solicitors was that the letter "reinforces our client's view that Mr Staines' true financial worth has been misrepresented to the Court". That is an altogether too shaky a base upon which to build a case of deceit even one where the implied representation is pleaded in a way which I doubt can be spelled out from the terms of the letter. But there are other difficulties.

51. In *Watson v M'Ewan* the Earl of Halsbury C.J. said at p. 487:

> "… the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them - that is, to the solicitor or writer to the Signet. … It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice - namely, the preliminary examination of witnesses to find out what they can prove."

52. It seems to me that this must be extended to cover instructions given to solicitors and repeated by them as their instructions in their correspondence with the other side. Everything written was capable of being the subject of cross-examination and so given in evidence were Mr Staines called upon, as he could have been, to justify his assertions in an application to set the injunction aside. I do not see this as an unacceptable extension of witness immunity for as Lord Hoffmann recently said in *Arthur J.S. Hall and Co v Simons* [2002] 1 A.C. 615, 687:

> "The rule confers an absolute immunity which protects witnesses, *lawyers* and the judge. The administration of justice requires that *participants in court proceedings* should be able to speak freely without being inhibited by the fear of being sued, even unsuccessfully, for what they say. The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court," with emphasis added by me.

It would, as Mr Jonathan Phillips submits on behalf of the appellants, circumvent the policy which underpins the immunity if the solicitors were to be sued for any inaccuracy in the party to party correspondence.

53. Consequently, in my judgment, the Second Representation should also be struck out.

54. The Third, and implied, Representation was that there had been no material change in Mr Staines' financial position "from that which it had been alleged to be in April 2002". Here, in addition to all his other manifold difficulties, the problem for Mr Walsh is that if he cannot prove what the position in April 2002 was alleged to be because he cannot put the affidavit in issue in his claim, then he cannot prove that there was no change in that position. Without the affidavit, the whole foundation of his case crumbles in ruins.

Conclusion

55. For those reasons I am satisfied that this appeal must be allowed. Nothing in this judgment should be taken in the slightest way to condone any impropriety or misconduct by solicitors in the course of the performance of their retainer. The Court relies upon the honourable behaviour of those conducting litigation in the courts and the courts will not flinch from taking condign steps to stamp out improper conduct by wasted costs orders and/or by reporting it to the Law Society or the Bar Council. In this case the allegations against these defendants have been assumed and I have proceeded upon that assumption and so in fairness to SGH and Mr Judge, I should add that nothing in this judgment is intended to suggest they have been guilty of such impropriety.

Lord Justice Moore-Bick:

56. I agree.

Lord Justice Rimer:

57. I also agree.