Neutral Citation No: [2025] NIMaster 6 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **2025NIMaster6** *ICOS No:* **15/045465 & 22/003075** *Delivered:* **24/03/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Brigid Moss

Plaintiff

and

Chief Constable of the Police Service of Northern Ireland

First Defendant

Ministry of Defence

Second Defendant

The Attorney General for England and Wales

Third Defendant

and between

Brigid Moss

Plaintiff

and

The Foreign, Commonwealth and Development Office

First Defendant

Home Office

Second Defendant

Mr Scott BL (instructed by KRW Solicitors) for the Plaintiff
Mr McAteer BL (instructed by The Crown Solicitor) for the Defendants

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MASTER BELL

Introduction

[1] This application concerns whether the tort of deceit, most often used in a commercial context, can be applied in the particular circumstances of an action involving the dark, troubled days of Northern Ireland's past.

[2] The background circumstances of the litigation are heart-rending. The plaintiff, Brigid Moss, is the widow of Edward Kane. On 4 December 1971 Mr Kane was a patron in McGurk's Bar, North Queen Street, Belfast when an explosion occurred which killed fifteen people, including Mr Kane, and injured sixteen others. It would subsequently emerge that the explosion was caused by a terrorist act perpetrated by Robert James Campbell and others who were members of the UVF. On 27 July 1977 Mr Campbell was arrested and admitted being part of the team which had planted the bomb. On 6 September 1978 he was convicted at Belfast City Commission in relation to the bombing.

[3] The plaintiff's first Writ was issued in 2015 against the Chief Constable, the Ministry of Defence and the Secretary of State for Northern Ireland. It claimed damages for conspiracy to murder, misfeasance in public office and negligence in respect of Mr Kane's death, together with a claim under section 6 of the Human Rights Act 1998 and Article 2 of the European Convention on Human Rights that no compliant investigation into Mr Kane's death had been carried out. The plaintiff then apparently reached a view that an action in those terms would not be successful and applied to amend her statement of claim to abandon those torts. The amendments removed causes of action alleging that the defendants had had involvement in Mr Kane's death and substituted the Attorney General for England and Wales in place of the Secretary of State for Northern Ireland. I granted an application to amend on 13 November 2020 and the tort of deceit is now the sole basis on which the plaintiff claims against the defendants.

[4] A second writ was then issued in 2022 against the Foreign, Commonwealth and Development Office and against the Home Office. This Writ also claimed damages for the tort of deceit.

[5] The plaintiff claims that there was a unit entitled the "Information Research Department" (hereafter "IRD") operating in Northern Ireland. Part of the IRD's role was to place anti-IRA material in the press. One of the unit's specific objectives was to create a belief that IRA munitions were unstable and exploding prematurely so that individuals would not be prepared to store explosives on behalf of that organisation. The disinformation policy was operated for the purpose of alienating the IRA from the civil population. The plaintiff does not know which government department the IRD was a unit of, or which government department provided staff for the IRD. Accordingly the Attorney General for England and Wales is sued in relation to the actions of the IRD.

[6] An article published in The Times on 6 December 1971 stated that the theory in Army intelligence circles about the explosion at McGurk's Bar was that an IRA bomb which was in transit to be used in an attack elsewhere but had been temporarily left in the bar and had accidentally detonated. Subsequent disinformation suggested that the bomb had been carried by one of the customers in the bar.

[7] The particulars pleaded by the plaintiff to prove the tort of deceit were as follows:

> (i) The defendants placed false information in the public domain by briefing local politicians and journalists with false information that the bomb was likely to have been an IRA device.
>
> (ii) The defendants knew that the representations were false or were reckless as to whether they were false.
>
> (iii) The defendants intended the plaintiff, as a member of the Catholic community in Belfast, to be deceived and/or influenced by the misrepresentation in order to discredit the IRA. Furthermore, the defendants intended or were reckless as to whether the plaintiff and/or Mr Kane would suffer the stigma in their local community that they were involved in, or responsible for, the bomb.
>
> (iv) The defendants as a consequence of their representations caused the plaintiff loss or damage in the form of a personal injury, namely complex Post-Traumatic Stress Disorder.

[8] In their defence, the defendants assert that the information adviser from the IRD, a department within the Foreign and Commonwealth Office, was seconded to work in Northern Ireland from in and about 1971 but otherwise deny that the IRD was operating in Northern Ireland prior to 7 December 1971. The defendants assert that the IRD's role included producing material to counter propaganda produced by Republican and Loyalist organisations and to provide decision makers, influencers and members of the public with a balanced and accurate account of the facts. They otherwise deny the allegations claimed in the Statement of Claim. In particular they deny that the defendants sought falsely to blame any of the patrons of McGurk's Bar for the explosion.

[9] The defendants apply to the court under Order 19 Rule 18 for the Statement of Claim to be struck out on the basis that it discloses no reasonable cause of action against the defendants, or that it is otherwise scandalous, frivolous or vexatious and an abuse of process. The defendants also apply under Order 33 Rule 3 that the Court determine as preliminary issues in each case:

(i) Whether the plaintiff's claims have been brought in time; and
(ii) If any of the plaintiff's claims have not been brought in time, whether time should be extended to permit the plaintiff to bring the said claims.

[10] The defendants' position is that limitation is a significant issue in the action because the delay between the date of the explosion and the issue of the first writ is inordinate and that, because of the passage of time, the prejudice arising in respect of the availability of witnesses and them having recollection of relevant events is extreme.

Defendants' Submissions

[11] Mr McAteer submitted that the key issue before the court was whether or not the plaintiff had performed any *act* in reliance upon the defendant's "representations". He argued that this is a crucial element of the tort of deceit, without which proof any claim must inevitably be unsustainable. He did not concede that the defendant had made any representation, false or otherwise, but was choosing not to contest that issue in this interlocutory forum. He considered that that would be a matter for trial, if indeed the action got that far. He submitted that the tort of deceit could not, and did not, arise on the facts of this case as pleaded in relation to whether an act had been performed by the plaintiff and as to whether it was the intention of the defendant, or whether the defendant had been reckless, that an act in reliance upon the representation would be carried out. The authorities state that the representor must have known the representations to be false, or have had no belief in their truth, or have been reckless as to whether they were true or false: *Derry v Peek* (1889) 14 App Cas 337.

[12] Mr McAteer referred me to Clerk and Lindsell on Torts (24th edition). Paragraph 17-01 states:

> "The tort involves a perfectly general principle: 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"

Counsel also noted paragraph 17-19 of the textbook where the authors state:

> "The tort of deceit is complete only when the representation is acted upon."

[13] Mr McAteer observed that the issue of acting in reliance upon a representation is further expanded upon in paragraph 17-36:

> "To entitle a claimant to succeed in an action in deceit, he must show that he acted (or in a suitable case refrained from acting) in reliance on the defendant's misrepresentation. If he would have done the same thing even in the absence of it, he will fail. What is relevant here is what the claimant would have done had no representation at all been made. In particular, if the making of the representation in fact influenced the claimant, it is not open to the defendant to argue that the claimant might have acted in the same way had the representation been true. It also seems clear that the claimant must have acted himself to his detriment. If his loss results, not from his own reliance, but from that of third parties, the defendant may be liable for torts of unlawful interference with trade, passing off or malicious falsehood, or even negligence; but he will not be liable in deceit."

[14] Counsel also submitted that Clerk and Lindsell state in paragraph 17-32 that, for the tort to have been committed, it is necessary not only that the representation was acted upon by the plaintiff, but that the defendant must have intended that the plaintiff shall have acted upon it. The authors state:

> "In order to give a cause of action in deceit, not only must the statement complained of be untrue to the defendant's knowledge, but it must in addition be made with intent to deceive the claimant: with intent, that is to say, that it shall be acted upon by him."

[15] Mr McAteer submitted that the plaintiff's use of the tort of deceit amounted to a clear attempt to find a tort to fit the facts when other torts, originally pleaded, had been ruled out. He argued that the current form of the action alleging that the defendants had made a false representation which had damaged the plaintiff's late husband's reputation and that she had been injured by the stigma almost amounted to a form of defamation action. Mr McAteer submitted that the tort of deceit had nothing to do with reputational damage. He noted that the plaintiff argues that other people in the community, having believed the briefing that the explosion had been caused by a malfunctioning IRA bomb, had then concluded that the plaintiff's late husband may have been an IRA bomber and that as a result they therefore stigmatised her. In this regard Mr McAteer reminded me of the final sentence of paragraph 17-36 of Clerk and Lindsell, referred to above, which indicates that, if the plaintiff's loss results, not from his own reliance on the false representation, but from the reliance of third parties on the false representation, the defendant will not be liable in deceit.

[16] In relation to the matter of loss, Mr McAteer also argued that the evidence of Dr O'Neill did not support the allegation that the plaintiff's PTSD had been caused by the defendant's representations. Rather it had been caused by the community reactions to the representations. The plaintiff had been distressed by the community reaction, not by the misinformation itself.

[17] In summary therefore, counsel argued that the pleadings contained no allegation that there had been an intention that the plaintiff would act upon any representation of the defendants, nor was there any pleading that she had in fact performed any act in reliance upon any representation by the defendants. Furthermore, there was nothing in the medical evidence to demonstrate that the cause of her PTSD was any false representation by the defendants. As a result, counsel submitted that it would be best for all parties to bring this unarguable and unsustainable action to a close at this stage.

Plaintiff's submissions

[18] On behalf of the plaintiff, the core of Mr Scott's submission was that an *act* in reliance on a false representation was not required as a matter of law. Rather, it was sufficient if the plaintiff had been *influenced* by the defendant's false representation.

[19] In paragraph 17-36 of Clerk and Lindsell, the authors have a paragraph which is headed, "The claimant must have been influenced by the misrepresentation". A footnote is attached to that heading which states:

> "This formulation of the law was specifically approved by Lord Clarke in *Hayward v Zurich Insurance Co Plc [2016] UKSC 48; [2017] A.C. 142* at [26]. "

[20] Mr Scott referred me in particular to those comments of Lord Clarke in paragraph 26 of that judgment where Lord Clarke said:

> "In this regard I agree with the judge when he said at the end of para 2.5 that the statement in Clerk & Lindsell on Torts, 20th ed (2010) fits the case better. It simply said, "The claimant must have been influenced by the misrepresentation." That is a sub-heading to para 18-34 in the 21st ed (2015). In para 18-35 the editors say that, although the claimant must show that he was induced to act as he did by the misrepresentation, it need not have been the sole cause. It is submitted on behalf of Mr Hayward that the claimant's mind must be at least partly influenced by the defendant's misstatements. In *Edgington v Fitzmaurice* (1885) 29 ChD 459, 483 Bowen LJ said:
>
> > '__The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference.' "

On this basis Mr Scott therefore submitted that the forming of a belief based on the misinformation released by the defendants could constitute an act. Reaching a belief was an act of the mind, but an act nonetheless. (During the hearing I invited

Mr Scott to make a further submission within seven days if he could locate any authority where a court had agreed with the proposition that forming a mental belief amounted to an act for the purpose of the tort of deceit. Subsequent to the hearing, I received a letter from his instructing solicitor that no such authority had been identified. The letter went on to say that equally, there was no case which stated the opposite and that accordingly, in the plaintiff's view, this point was entirely undecided.)

[21] In response to the submission made by Mr McAteer that there was no pleading in respect of the defendant's intention, Mr Scott argued that it was the clear intention of the defendants that the community be split from the IRA. Mr Scott reminded me that paragraph 36(i)(3) of the Statement of Claim asserts that the defendant

> "… intended the Plaintiff, as a member of the Catholic Community in Belfast, to be deceived and/or influenced by the misrepresentation in order to discredit and/or isolate and/or alienate the IRA and/or PIRA from the local Catholic community in Belfast. Further, and/or in the alternative, intended, or were reckless about whether, the Plaintiff and/or Mr Kane would suffer the stigma in their local community that they were involved in or responsible for the Bar bomb."

[22] As regards the issue of causation, Mr Scott argued that the psychiatric report by Dr O'Neill was a sufficient basis for asserting that the plaintiff has suffered damage by the actions of the defendants.

Discussion

The Law on Striking Out

[23] The plaintiff and the defendant agree as to the law in respect of the power of the court to strike out pleadings.

[24] In the decision of the court in *Magill v Chief Constable*, [2022] NICA 49 McCloskey LJ summarised the principles to be applied in strike out applications:

> "[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:

(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.

(ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

(iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-bycase basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim'.

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) 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, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated:

> "This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim *in limine*."

[25] These are the principles which the court must therefore apply in deciding whether or not to strike out the plaintiff's Statement of Claim.

The Tort of Deceit

[26] The tort of deceit has existed for nearly 250 years. Clerk and Lindsell on Torts observes that the modern development of the tort of deceit (sometimes simply called "fraud") dates from *Pasley v Freeman* in 1789. It explains that, although most cases concern claimants duped into entering into commercial transactions, deceit extends well beyond this. As examples of that extension outside its usual commercial context, Clerk and Lindsell refer to the decision in *A v Att-Gen* [2018] NZHC *986* which concerned a police "search", under a fake warrant, for the purpose of bolstering the credibility of an undercover police officer who was investigating the Red Devils Motorcycle Club. In that action the plaintiff, who was working off site, had to down tools and return to the property he had rented to the undercover officer so that access to the property by the

investigating police officers could be facilitated. Hence he lost the money that he would have been paid for the work he was unable to do due to being deceitfully called away by the police. Another example of the extension of the tort of deceit has been in relation to paternity fraud. In *P v B (Paternity: Damages for Deceit)* [2001] 1 F.L.R. 1041 a cohabitee sued his partner for deceiving him into believing that a child was his and causing him to pay for the child's upkeep. In the light of these authorities therefore there is no difficulty with the tort of deceit applying outside the usual commercial context as long as the constituent elements of the tort are satisfied.

[27] The necessity of proving that the plaintiff acted in reliance upon the false representation has been an element of the tort of deceit for many years. In *Smith v Chadwick* (1884) 9 App Cas, the House of Lords considered an action concerning whether the plaintiff had been induced to buy shares by a false statement. The lead judgment, with which the Earl of Selborne LC and Lord Watson agreed, was given by Lord Blackburn. He stated that the plaintiff had not sufficiently proved that the false representation did influence him. Lord Blackburn said that the plaintiff must prove damage and, if he did not act upon the representations, he showed no damage. (The decision in *Smith* was summarised in *Crossley v Volkswagen AG* [2021] EWHC 3444 (QB) by Waksman J.)

[28] Moving past the older cases such as *Smith v Chadwick*, the elements of the tort of deceit have continued right up to the present time to require an act of reliance (or a decision to refrain from acting) upon a false representation. There are many examples of this.

[29] In his judgment in *ECO3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413, Jackson LJ identified the required elements of the tort of deceit in the following terms, at paragraph [77]:

> "What the cases show is that the tort of deceit contains four ingredients, namely:
> i) The defendant makes a false representation to the claimant.
> ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
> iii) The defendant intends that the claimant should act in reliance on it.
> iv) The claimant does act in reliance on the representation and in consequence suffers loss.
>
> Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does."

[30] In *Simetra Global Assets Ltd and another v Ikon Finance Ltd and others* [2019] EWCA Civ 1413 Males LJ, giving the judgment of the court, said;

"The elements of a claim in deceit are well established. They were succinctly summarised by Rix LJ in *AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 1601; [2007] 1 All ER (Comm) 667, at para 251:

> 'The elements of the tort of deceit are well known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on.' "

[31] In *Nistor and Nistor v Union of Shop, Distributive and Allied Workers* [2024] EWHC 1165 (KB) Bourne J described the elements of the tort as follows:

> "Fraud, or the tort of deceit, is committed where a defendant makes a false representation, knowing it to be untrue or reckless as to whether it is untrue, intending that the claimant should act in reliance on it. If the claimant does so and suffers loss, the defendant is liable."

[32] In *Patarkatsishvili and another v Woodward-Fisher* [2025] EWHC 265 (Ch) Fancourt J summarising the tort of deceit made the following observation:

> "In law, to entitle a claimant to succeed in an action in deceit, they must show that they acted in reliance on the defendant's misrepresentation. If they would have done the same thing even in the absence of it, they will fail: Clerk and Lindsell on Torts (24th ed.) para 17-36. The first step is therefore to prove knowledge of the misrepresentation; the second is to establish inducement, by acting with that knowledge; and the third step is to consider whether there was in fact no inducement because the claimant would have acted in the same way regardless."

[33] Academic authorities similarly adopt a consistent approach. In addition to Clark and Lindsell's articulation of the elements of the tort, the authors of "Civil Fraud" by Grant and Mumford (Sweet and Maxwell, 2018) state at para 1-122 in relation to reliance:

> "In the vast majority of cases the claimant's case will be that he relied upon the relevant representation by taking a positive step, typically by entering into a contract under which he has sold or purchased property at an under—or overvalue. However actionable reliance may take the form of inaction, that is a conscious decision, induced by the misrepresentation, not to take a step which, if taken, would have avoided the loss claimed in the action. Examples of such a claim in the decided cases are rare. Similarly persistence in an existing course of conduct may constitute reliance sufficient to ground a claim in

damages, on the basis that absent the fraudulent misrepresentation, or had the claimant known the truth, he would not have persisted in that course of action."

[34] In Northern Ireland while litigation alleging the commission of the tort of deceit occurs much less frequently than in England and Wales, the courts in this jurisdiction have not differed in their understanding of the principles involved. A number of examples will suffice.

[35] In *Abbey National plc v McCann* [1997] NIJB 158 Carswell LJ stated:

> "The elements which a plaintiff must prove in order to found an action in deceit are succinctly set out in Salmond and Heuston on the Law of Torts, 21st ed, p 369:
>
> > 'The tort of deceit consists in the act of making a wilfully false statement with intent that the plaintiff shall act in reliance on it, and with the result that he does so and suffers harm in consequence.' "

[36] In *Walsh v The Department of Justice* [2020] NICA 65, the defendants had moved to strike out the plaintiff's writ as disclosing no reasonable cause of action or being scandalous, frivolous or vexatious or an abuse of the process of the court contrary to Order 18 Rule 19(1) of the Rules of the Court of Judicature and the inherent jurisdiction of the court. Master McCorry had found for the defendants. Mr Walsh appealed, but Judge Burgess, sitting as a High Court Judge, upheld the decision of the Master. Mr Walsh then appealed to the Court of Appeal. Sir Donnell Deeny, giving the judgment of the court, stated:

> "[8] Following amendment [the plaintiff] alleged the tort of deceit against the Minister. Master McCorry dealt with this at paragraphs [30] and [31] of his well marshalled and comprehensive judgment.
>
> > "[30] The 21st edition of Clerk and Lindsell on Torts at paragraph [18-0] defines the modern tort of deceit in these terms:
> >
> > > 'The tort involves a perfectly general principle: 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.'

> Whilst the normal standard of proof in civil cases applies, in practice more convincing evidence is required than would be in other civil cases (18-04).
>
> [31] Clerk and Lindsell goes on to consider the four general principles upon which the tort is based. The first requirement is that there be a misrepresentation of present fact (18-05) which can include misleading conduct or can be express or implied. The second concerns the state of mind of the person making the misrepresentation who must do so knowingly, without belief in its truth, or recklessly or carelessly (18-19). The third requirement is that the misrepresentation must be intended to be acted upon by the claimant, in other words with the intention of deceiving him (18-30). This is where the plaintiff's argument falls down because even if it was correct that Mr McGleenan knowingly or recklessly withheld information from the court: where careful reading of Weatherup J's judgment shows that he was aware of, and took into account, the matters the plaintiff says were withheld, any wrongdoing by the second defendant was done to the court and no misrepresentation was made to the plaintiff with the intention that he act upon it. The fourth principle is that the claimant shows that he was influenced by the misrepresentation in that he acted in reliance upon it (18-34). As there was no misrepresentation made by the second defendant that could have influenced the plaintiff, this simply does not arise. The plaintiff cites the cases of *Derry v Peek* (1889) 14 App. Cas. 337and *Myers v Elman* [1940] AC 282, but counsel correctly distinguishes them and I do not propose to consider them further. Therefore, the plaintiff's claim against the second defendant in deceit is inarguable and no other causes of action being raised against him, so far as he is concerned the plaintiff's claim must be dismissed."

[9] We agree with that helpful summary of the Master."

[37] Further, in *Shaw and Shaw v James J Macaulay Solicitors* [2011] NIQB 45 McCloskey J stated:

> "By well established principle, the tort of fraud (or deceit) possesses the following ingredients:
>
> > (a) The Defendant makes a false representation.
> > (b) The Defendant does so with knowledge that it is not true or reckless as to whether it is true.

(c) The Defendant makes the false representation with the intention that the Plaintiff should rely upon it.
(d) Such reliance ensues, with consequential loss to the Plaintiff."

[38] There are essentially three questions for the court to consider in this application:

(i) Assuming for the purpose of this application that there was a false representation by the defendants, does the Statement of Claim sufficiently plead that the defendants *intended* that the plaintiff would rely upon it or was *reckless* that she would do so?
(ii) Assuming that there was a false representation, does the Statement of Claim identify an *act* (or a *positive step*, to use the language of Grant and Mumford) which the plaintiff performed in reliance upon the representation?
(iii) Does the Statement of Claim sufficiently plead that the plaintiff suffered loss or damage which was caused when she *acted* upon the representation?

[39] In relation to the first question I am required to address, the latest iteration of the pleadings avers that the defendant intended the plaintiff to be deceived and/or influenced by the misrepresentation.

[40] As Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] a pleading must be supported by evidence which establishes a factual basis for an allegation. It is not sufficient simply to plead allegations which, if true, would establish a claim. There must be evidential material which establishes a sufficiently arguable case which undergirds it.

Similarly, as Humphreys J stated in *McIlroy Rose v McKeating* [2021] NICh 17:

"A cause of action is a factual situation the existence of which gives rise to an entitlement on the part of one person to a legal remedy against another. In order to disclose a reasonable cause of action, the pleaded case must set out each element required to constitute a particular cause of action."

[41] The concept of "material facts" is described in *The Supreme Court Practice* (1999 edition), at para 18/7/11:

"It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139).

> "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v R* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193)."

The law reports are replete with explanations as to how pleadings must be drafted. In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J said:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

[42] In *NEC Semi-Conductors Ltd v* IRC [2006] STC 606 Mummery LJ made the following observations at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well-known pleading requirements, should suffer the consequences with regard to such matters as limitation."

[43] In the decision in *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J noted that particulars of claim should generally aim to set out the essential facts which go to make up each essential element of the cause of action and that thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation.

[44] In relation to whether the defendants intended to cause the plaintiff to act, or were reckless as to whether would do so, upon a false representation, I find that there are no facts pleaded which could either directly demonstrate such an intention or recklessness, nor are there any facts pleaded from which such an intention or recklessness could be inferred. In *Thorn Security Ltd v Siemens Schwartz AG* [2008] EWCA Civ 1161 Mummary LJ described what an inference is:

> "The drawing of inferences is, of course, a familiar technique in judicial decision making. It enables a judge to conclude that, on the basis of proven facts A and B, a third fact, C, was more probable than not.

In *Jones v Great Western Railway Company* (1930) 144 LT194 at p 202, Lord Macmillan observed that:

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

I must therefore conclude that the plaintiff's pleading is defective in that it does not properly plead one of the crucial elements of the tort of deceit. The action is therefore unarguable and unsustainable and must be struck out.

[45] In relation to the second question I am required to address, namely whether or not an act of the plaintiff in reliance upon a representation of the defendant has been identified, what is argued by counsel and pleaded in the Statement of Claim is not that the plaintiff, having heard the misrepresentations put into the public realm by the IRD, then *acted or refrained from acting* and that such action or refraining from acting was to her detriment, but rather that the misrepresentation had an *influence* upon her mind and upon the minds of others.

[46] Mr Scott's argument based on *Zurich Insurance Co plc v Hayward*, that reaching a belief is a mental act but nonetheless still an act, is, in my view, an untenable one. A correct analysis of that decision makes it clear that the plaintiff's proposed approach is not what Lord Clarke was articulating in that decision. In

Zurich Insurance Co plc v Hayward, the misrepresentation was that the claimant had dishonestly exaggerated the extent of an injury suffered at work. The act that the plaintiff insurers had been induced to perform by the defendant's misrepresentation was to enter into a settlement agreement in respect of the personal injuries claim. The insurance company did not believe that the misrepresentation was true but they did believe that there was a real risk that the court would accept it as being true. This was the reason that the insurance company performed the act of entering into the settlement agreement. The issue before the court in *Zurich Insurance Co plc v Hayward* was whether it was sufficient for the plaintiff to establish that the misrepresentation had merely been a material cause (that is to say one of the influencing factors) of its entering into the settlement agreement. What Lord Clarke articulated was that, as long as the plaintiff was influenced by the misrepresentation, then even if they had not themselves believed the misrepresentation to be true, that was sufficient to prove that element of the tort of deceit. Mr Scott's cherry-picking of a brief quotation from Lord Clarke's speech seeks to use those words in a way which they were never intended to be used.

[47] As such I must conclude that the plaintiff's pleading is defective in that it does not properly plead another of the crucial elements of the tort of deceit. The action is therefore unarguable and unsustainable and must be struck out on this basis also.

[48] The third question I am required to address is whether the Statement of Claim sufficiently pleads that the plaintiff suffered loss or damage which was caused when she acted upon the representation?

[49] The latest iteration of the Statement of Claim provides:

> "By reason of the aforesaid wrongful acts and omissions the Plaintiff suffered personal injuries.
>
> Particulars of Personal Injuries
>
> The Plaintiff suffered complex Post-Traumatic Stress Disorder. The Plaintiff will rely upon the report of Dr O'Neill, Consultant Psychiatrist dated 8 November 2019."

[50] Counsel furnished me with a psychiatric report prepared by Dr O'Neill. The most relevant portions of the report are paragraphs 6.1, 6.2 and 6.5. The first two of these paragraphs state:

> "Her PTSD is entirely related to the bombing of McGurk's Bar and the death of her husband. The spreading of rumours about her husband had a devastating effect on her and exacerbated her symptoms and made a recovery more difficult."

The final paragraph states:

> "The impact of the disinformation about her husband had a devastating effect on her, directly and indirectly through her loss of trust in the legal system and her inability to take advantage of the help available."

[51] Paragraph 2.1 of Dr O'Neill's report is also noteworthy, stating:

> "I was asked to assess the impact on Mrs Moss' mental health as a result of her late husband, Edward Kane's death in the McGurks Bar bombing on 4 December 1971 and in particular her mental health as a result of the stigma she suffered due to the misinformation put forward by the British Army that the explosion was an 'own goal' by the IRA and that her husband was to blame for the attack."

[52] If this is a correct summary of Dr O'Neill's letter of instruction it is obviously capable of being attacked at trial in that it asks the expert to assume that disputed matters are resolved in favour of the plaintiff, namely that the rumours which had a devastating effect were in fact caused by misinformation released by the British Army. There are therefore real issues of causation which would have inevitably been raised. The expert appears to assume as a matter of fact that disinformation about the husband's death was released by the British Army. A further difficulty with the report is that while it mentions the murder of the plaintiff's son in 1988, and the impact that this had upon her, the report does not appear to attempt to distinguish the relative contributions of the two tragic events upon her. However, the weight to be attached to Dr O'Neill's report is entirely a matter for a trial judge to decide and not one to be decided on an interlocutory application. If the defendants' application had been simply to strike out this portion of the Statement of Claim, I would not have granted it. While it would have been a weak case, it would not have been obviously unsustainable.

Conclusion

[53] As Tugendhat J observed in *In Soo Kim Park & Others* [2011] EWHC 1781 (QB) at [40]:

> "However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right…."

[54] This application however presents a different type of situation. The defendants' call to have the plaintiff prove the defendants' intention or recklessness and to identify a specific act which she performed in reliance upon their misrepresentation has essentially gone unanswered. The response by the plaintiff's legal team has been to ask the court to change the law which has existed for over 140 years and to argue that an act is unnecessary if there has been a damaging influence on the mind of the plaintiff by the defendant's' representation or, alternatively, to ask the court to change the meaning of the word "act" so as to interpret it as also meaning "belief". It is clear therefore in the face of these arguments that providing the plaintiff with an opportunity to correct the pleading defects would be unfruitful.

[55] The attempt to shoehorn the facts of this case into the legal framework of the tort of deceit must therefore fail. I therefore strike out the Writ and the Statement of Claim.

[56] In the light of the fact that I have concluded that there is no proper basis for this action to proceed, it is unnecessary to determine the application under Order 33 Rule 3 for an order that whether the plaintiff's claims have been brought in time should be dealt with as a preliminary issue.

[57] I shall hear counsel on the matter of costs at their convenience.