

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

**ROBERT JAMES SHAW
and
DEIRDRE KATHLEEN SHAW**

Plaintiffs:

-and-

JAMES J MACAULAY SOLICITORS

Defendant:

McCLOSKEY J

[1] This is the court's determination of the Defendant's application for an order pursuant to Order 18, Rule 19 of the Rules of the Court of Judicature or, alternatively, invoking the inherent jurisdiction of the High Court dismissing the Plaintiffs' claim and entering judgment for the Defendant accordingly. This judgment should be considered in conjunction with the court's judgment in the related case of *Shaw -v- Patterson*, delivered today. I refer particularly to paragraphs [1] - [4] and [7] thereof.

[2] The Writ of Summons herein, issued on 29th June 2010, is indorsed (so far as material) as follows:

"The Plaintiffs' claim is for damages for vexation, inconvenience, distress, upset, loss, slandering our name, failing in his duty of care to us his clients regarding health and safety matters, abuse of position (failing to disclose), false representation, aiding and abetting in perverting the course of justice."

It is not disputed that the Defendant was the Plaintiffs' solicitor for a limited period in the underlying County Court proceedings. The Writ continues:

"Mr. Macaulay failed in his duty of care to us his clients, he was professionally negligent, dishonest, fraud by abuse of position [sic], false representation and failing to disclose, aiding and abetting in perjury ...

Mr. Macaulay failed to see that the judge in question was incompetent in her duties ... [and] introduced us his clients to a map that he advised was the map that defined the lawful right of way and was used in previous litigation. We now have the evidence from the courts that this was a false map and this was a false statement which misled us."

I pause to observe that there is no "evidence from the courts" (or from any source) to the asserted effect. On the contrary, it was represented to this court, painstakingly, by the Plaintiffs that they continue their efforts via Northern Ireland Courts and Tribunals Service to ascertain *whether* any such evidence exists.

This Application

[3] The affidavit of Mr. McGrattan grounding the present application contains the following averment:

"As appears from the Statement of Claim, Reply and answers to particulars the gravamen of the Plaintiffs' case against the Defendant is that it concealed the 'map coloured red' which, had it been disclosed, would have established that Mr. Patterson's claim was unsustainable and that the wall which they proposed to construct did not interfere with his right of way. It is further asserted that the interim injunction was obtained by Mr. Patterson on the basis of a false map ('the 1997 map')."

I concur with this succinct formulation of the Plaintiffs' claim against the Defendant. This may also be properly characterised as encapsulating the Plaintiffs' central grievance. The grounding affidavit further highlights the judgment of Deeny J (considered in greater detail in my related judgment) and suggests, correctly in my view, a persisting misconceived characterisation of the County Court proceedings by the Plaintiffs. This gives rise to the following averments:

"The issues which had been raised by the Plaintiffs in respect of the 'map coloured red' and 'the 1997 map' proved to be irrelevant to the determination of Mr. Patterson's claim for injunction and immaterial to the judgment of Her Honour Judge McReynolds. In the circumstances, any alleged

failings/misrepresentation by the Defendant in respect of those maps cannot sustain the Plaintiffs' cause of action in negligence or fraud/collusion."

I agree with these averments. Furthermore, as the next succeeding paragraph of Mr. McGrattan's affidavit highlights, the "map coloured red" in any event formed part of the evidence adduced in the hearing conducted by Judge McReynolds, with the result that (per Mr. McGrattan's affidavit) –

"... any alleged failings by the Defendant to produce or disclose the map (which are denied) cannot have caused or contributed to any loss sustained by the Plaintiffs which flow from the decision of Her Honour Judge McReynolds."

Again, I accept this contention. Finally, as regards the Plaintiffs' claim in negligence, there is a judicial finding (that of Judge McReynolds), undisturbed on appeal, that the initial decision to grant an interim injunction against the Plaintiffs was both appropriate and proportionate.

Negligence

[4] The Statement of Claim consists of twenty-eight numbered paragraphs and invokes four causes of action – negligence, defamation, fraud and collusion. There is also a related document, consisting of twenty-eight pages, entitled "Service of Claim". The deployment of the "map coloured red" in the County Court proceedings features prominently in the various formulations of the Plaintiffs' case against this Defendant. (In passing, each of the seven particulars of fraud can be related in one way or another thereto). Virtually all of the pleaded particulars of negligence relate to the map also. There are two identifiable particulars of negligence raising separate issues. One asserts a failure to lodge a counterclaim on behalf of the Plaintiffs: this is misconceived, as there plainly was a counterclaim which, in the event, was successful to the extent that Judge McReynolds awarded damages of £150 against the original Plaintiff (Mr. Patterson). There is a further assertion of a failure to lodge an affidavit: this is demonstrably immaterial, given the duration of the substantive hearing conducted by Judge McReynolds (several days) and the ability of the Plaintiffs to give such sworn testimony as they desired. This is also manifestly of no consequence, having regard to what I record in paragraphs [8] – [9], *infra*.

Defamation

[5] There are three pleaded particulars of defamation:

- (a) *Statements made that the [Plaintiffs] did not pay their bills.*
- (b) *Statements made regarding the integrity and honesty discrediting the character of the [Plaintiffs].*

- (c) *Made dishonest claims in court by means of reports which would have misled the honourable judge.*

Taking these particulars at their zenith, I find that they disclose no reasonable cause of action in defamation against the Defendant. They fail to satisfy the elementary requirements of clarity, particularity and pleading the allegedly defamatory words. My second main conclusion is that insofar as any of the alleged statements was made in connection with the litigation, for the purpose of giving or receiving legal advice or in a courtroom forum, they are protected by a mixture of absolute and qualified privilege, in circumstances where the Plaintiffs make no allegation of malice. Thirdly, I find that, as a matter of law, the Defendant was incapable of defaming either Plaintiff through the medium of an engineering report prepared for the purpose of litigation and compiled by a person who was neither a servant nor an agent of the Defendant. Fourthly, it is clear that at least some of the brief particulars of defamation allege slander on the part of the Defendant, thereby engaging the well established principle that slander is not actionable in the proof of special damage. While there are some limited exception to this rule, I find that, taking the Plaintiffs' allegations at their zenith, none of these could conceivably apply. Finally, insofar as the Plaintiffs' case in defamation rests in part in a letter dated 30th November 2007 from the Defendant to them, there is no allegation of publication to a third party, which is fatal *per se* to this discrete allegation.

Fraud

[6] 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.

Of the seven pleaded particulars of fraud, the first four relate explicitly to a map or maps. The final three particulars, by a process of interpretation and examination in their full context – including affidavits sworn on behalf of the Plaintiffs, their written submissions and their oral representations to the court – are, in my view, members of the same category. I find that none of the pleaded particulars of fraud, taken at their zenith, could, as a matter of law, establish the tort of deceit. Accordingly, the pleading fails to disclose any reasonable cause of action in this respect.

[7] My second main conclusion is that having regard to the earlier judgments of Judge McReynolds and Deeny J the Plaintiffs' allegations of fraud are frivolous, vexatious and a misuse of the court's process. These conclusions are further reinforced by the unequivocal statement in paragraph 54(b) of the Plaintiffs' response to the Defendant's request for further particulars that they at no time believed that the allegedly "*false 1997 map*" delineated the right of way in question. Furthermore, there are repeated averments in the Plaintiffs' affidavits to the following effect:

"... this matter could be resolved within five minutes by Diamond Heron Solicitors, their client and others admitting that they used a false 1997 map on which they gained the interim injunction and all that followed."

[This example is taken from paragraph 13 of Mr. Shaw's affidavit sworn on 3rd March 2010].

This gives rise to the further and independent conclusion that, in addition to betraying a fundamental misconception, the Plaintiffs are invoking the process of this court for an improper purpose. Finally, I would highlight those pleaded particulars of fraud which allege that the Defendant made false statements on oath, perverted the course of justice and aided and abetted perjury in judicial proceedings. Having regard to all available evidence, I find that these are wild and unfounded allegations which are scandalous and disclose no reasonable cause of action. They are unsustainable on the further, and independent, ground that they are incapable of establishing the tort of deceit.

Collusion

[8] As I have held in my judgment in the related proceedings, collusion is not a recognised cause of action, impelling inexorably to the conclusion that no reasonable cause of action is demonstrated in this respect. Furthermore, having regard to the terms of the two particulars pleaded (obtaining information from the police, contrary to the Data Protection Act and in breach of confidentiality *and* defrauding the Plaintiffs of their legal rights and working with others to assist them to make a gain), I find that they are scandalous, vexatious, frivolous and constitute a misuse of the court's process.

Conclusion

[9] Generally, it is appropriate to note the proliferation of claims, proceedings, allegations and complaints which the Plaintiffs have pursued and ventilated since the making of Judge McReynolds' order. The nature, substance and multiplicity thereof speak for themselves. They are detailed in paragraphs 26 - 27 of Mr. McGrattan's affidavit sworn on 30th March 2011. Taking this protracted and

regrettable history into account, it is also appropriate to record that, in the hearings conducted before me, Mr. Shaw acknowledged unequivocally that:

- (a) The correct “red” map did form part of the materials considered by District Judge Brownlie at the beginning of the saga.
- (b) It also formed part of the evidence considered by Judge McReynolds at the substantive hearing.

Furthermore, in their oral presentation to this court, the Plaintiffs made abundantly clear that the crux of the grievance and injustice asserted by them lies in their allegation that in the course of the County Court proceedings the parties’ respective engineers operated from an incorrect map. This, in turn, gave rise to three acknowledgments on the part of the Plaintiffs:

- (a) They have no means of substantiating this allegation.
- (b) Even if correct, it could have been the product of a simple error.
- (c) The alternative explanation – a fraudulent and collusive misrepresentation by both engineers – is intrinsically unlikely.

I would add that the alternative explanation, in my view, belongs to the realm of fantasy. Finally, the Plaintiffs made clear that *they* instructed the engineer in question (Mr. Wilson).

[10] I have highlighted the above aspects of the Plaintiffs’ oral presentation to this court for the purpose of highlighting how remote their central suspicions and allegations are from the inventive, but utterly misconceived and unsustainable, case which they purport to make against the Defendant in their Statement of Claim, further particulars, affidavits and written submissions.

[11] The jurisdiction which is exercised by the High Court in its determination of the present application exists to protect the integrity of its processes. It simultaneously serves the important function of providing a measure of protection to those whose conduct is the subject of wild, reckless, unsubstantiated, misconceived and unsustainable allegations formulated under the cloak of litigation. For the reasons elaborated above, my omnibus conclusion is that the Plaintiffs’ case against the Defendant, in all respects, fails to disclose any reasonable cause of action; is frivolous, scandalous and vexatious; is pursued for an improper purpose; and constitutes a misuse of the process of the High Court.