Neutral Citation No: [2017] NICA 79 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **GIL10382** ***Delivered:*** **07.12.17**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

2009 No. 33855

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

_____

BETWEEN:

DANIEL McATEER

Plaintiff/Appellant;

-and-

(1) SEAN DEVINE
(2) MARY DEVINE

Defendants;

(3) BRENDAN FOX, PARTNER, CLEAVER FULTON RANKIN, SOLICITORS

Defendant/Respondent;

(4) JOHN LOVE, PARTNER, MOORE STEPHENS BRADLEY McDAID

Defendant.

BETWEEN:

DANIEL McATEER

Plaintiff/Appellant;

-and-

(1) SEAN DEVINE
(2) STEPHEN McCARRON

Defendants;

(3) BRENDAN FOX, PARTNER, CLEAVER FULTON RANKIN, SOLICITORS

Defendant/Respondent;

(4) JOHN LOVE, PARTNER, MOORE STEPHENS BRADLEY McDAID

Defendant.

Before: Gillen LJ, Maguire J and Madam McBride J

GILLEN LJ (giving the judgment of the court to which all have contributed)

Introduction

[1] This is an appeal from a judgment of Weatherup J (the "trial judge" or "TJ") dated 15 July 2015. The judgment relates to claims made by the then plaintiff, now the appellant, Daniel McAteer against the original third named defendant, now respondent, Brendan Fox.

[2] The appellant's claim was made in respect of two causes of action:

(i) Breach of contract.

(ii) Conspiracy to damage the appellant's business.

[3] Weatherup J, in a substantial judgment, dismissed both aspects of the appellant's claim.

[4] While there were originally two sets of proceedings relevant to the matters the court had to deal with, each against multiple defendants, including Mr Fox, the two actions were consolidated in 2012 and, as a result of various strike out applications and agreements arrived at, by the time the now single and consolidated action began, the parties alone were the appellant and Mr Fox.

[5] The action, the court has been told, took in the region of 28 days to hear, but the hearing did not take place over consecutive days and there were, on occasions, substantial gaps between hearing dates. The hearing seems to have begun in June 2012 but at one point the proceedings were adjourned in order to enable the appellant to pursue some of his complaints against Mr Fox before the Solicitors' Disciplinary

Tribunal ("SDT"). This course of action did not, however, end the litigation which later recommenced without their having been any actual hearing before the SDT. As far as the court knows, proceedings before the SDT remain pending. At all events, the trial before Weatherup J continued. In 2014, while there was no formal alteration of the pleadings, the judge permitted the appellant to put forward a large number of "points of claim" outside the pleadings, of which some 15 were accepted by the judge as a de facto extension to the appellant's claim. These, however, did not involve any new causes of action. The TJ dealt with this matter at para [11] of his judgment but it is unnecessary for present purposes to go into this matter in detail.

Overview of the claim

[6] The essence of the dispute between the appellant and the now respondent can be encapsulated shortly, thought the detail is anything but simple. The appellant at all material times was a chartered accountant. He provided tax and accountancy services to his clients, but he also involved himself in various deals with some of his clients. Many of these involved a private company called Roe Developments Limited ("RDL"), of which the appellant was a director. Two sets of his clients, the Devines and the Gurams, became shareholders in RDL and, for a time, a solicitor's firm, Cleaver Fulton and Rankin, provided legal advice to both the appellant and RDL, including in relation to litigation which both became involved in. The solicitor in that firm who initially dealt with the appellant and RDL was Brendan Fox, the respondent to this appeal.

[7] According to the appellant, the relationship between those involved in these dealings turned sour in or about May 2002. This manifested itself in various ways but it was and is the appellant's case that he became the subject of an organised campaign of litigation aimed at him. This, the appellant believes, was part of a wider conspiracy against him involving a range of people. At its centre, however, was, he alleges, Mr Brendan Fox and an assistant solicitor in the same firm who worked with him. The conspiracy embraced and involved, in the appellant's case, a large number of people, including his former clients the Devines and the Gurams, a partner in another firm of accountants, John Love, a further accountant, a Mr Duffy and two others, a Mr Pierce and a Mr Desmond.

[8] The essential allegation made by the appellant was that the above combined against him and that these persons, since 2002, have set out to damage the appellant's business and personal life. The main manifestations of the campaign, it is alleged, were:

(a) Numerous vexatious lawsuits against him, including the Sean Devine fees case; the Mary Devine fees case; the N and R Devine fees case; the Sean Devine Limited fees case; what was described as the "Ballymoney" case; the "Devine failure to account" case; the Henesseys case; the Henderson case; the Guram failure to account case; the Mary Devine tax

case; the Sean Devine IVA case; and various appeals arising from the above.

(b) Behaviour on the part of Mr Fox, in the ways in which he conducted himself in the context of the above and other litigation in which he was acting professionally against the appellant's interests.

(c) Interference by Mr Fox in respect of the appellant's business interests in the Republic of Ireland. In particular, it was alleged by the appellant, that Mr Fox had assembled a file of documents which was provided to the appellant's business partners in Kerry designed to discredit him. Some of those took the form of reports by forensic accountants which were distributed contrary to restrictions on their use.

(d) Attempts, which were partially successful, on the part of Mr Fox, to interfere with the appellant's dealings with the Northern Ireland Legal Services Commission and with various grants of legal aid to enable the appellant to procure legal representation for the purpose of defending litigation.

(e) Steps which were taken by some of those who conspired against him to have the appellant's professional status as an accountant made the subject of investigation by his relevant professional body.

The judge's judgment

[9] A substantial judgment concerning the merits of the appellant's claims was provided by Weatherup J on 15 July 2015. The TJ dismissed the appellant's claims. The dismissal is summed up at para [60] and [61] of the judgment as follows:

> "[60] I have not been satisfied that the defendant was orchestrating events or that he was responsible for a raft of unnecessary litigation against the plaintiff. I am not satisfied of any conspiracy by the defendant against the plaintiff nor am I satisfied of any breach of contract by the defendant against the plaintiff. Certainly the defendant acted unwisely on occasions in relation to the taking of instructions against the plaintiff, on-going to the plaintiff's office with the statutory demand, on writing to KPMG to seek to influence the opinions expressed in the report. While these were matters that were unwise they did not amount to conspiracy or breach of contract.

> [61] In any event I am not satisfied that losses have been sustained by the plaintiff as a result of the actions of the defendant. There are extensive claims for financial loss but no evidence of loss attributable to the actions of the defendant. Accordingly, I am not satisfied that the plaintiff has made out the case against the defendant. In 2014 the plaintiff informed the Court that he was proposing that the proceedings should be concluded and the defendant would not agree to do so. That is a matter that is clearly relevant to the costs incurred. I will return to the issue of costs at a later date. I have not been satisfied as to the plaintiff's claim against the defendant. Accordingly there will be judgment for the third defendant against the plaintiff."

[10] In the course of the TJ's judgment he dealt with the broad sweep of the now appellant's claim. The judgment is structured in the following way:

- The procedural background to the action is outlined.
- The range of legal proceedings against the appellant is set out.
- The various allegations made by the appellant are identified.
- The nature of the alleged breach of contract and conspiracy are recorded.
- The law relating to the causes of action is discussed.
- His findings in respect of the key issues are articulated.

[11] It is this last feature of the judgment which, in particular, requires elucidation for the purpose of this judgment.

[12] Early in the TJ's judgment he indicated that a wealth of detail had been presented to the court in a hearing which lasted many days. While the TJ did not set out that detail, it is plain that the judge fully took it into account. A particular problem confronting the judge was that in the context of the hearing, many sets of legal proceedings involving the plaintiff had to be gone into. In relation to some of these proceedings, judgment had at the time been provided by the courts, whereas in other cases they had been concluded by agreement between the parties. In these circumstances, the TJ made clear that he would not go behind the judgments that had been delivered or the terms of any agreements that had been entered into by the parties. There has been no challenge to that position in these proceedings.

[13] As regards the key issues, the following findings were made by the TJ:

(i) At para [16] he held, having set out the circumstances in which Mr Devine had discussed his concerns which led to litigation against the plaintiff, that he was satisfied that Mr Devine at that stage had lost faith

in the plaintiff and had turned to others, including the defendant, Fox, to advise him on legal aspects.

(ii) At para [23] he rejected the proposition that Mr Fox was the orchestrater of all of the actions taken against the plaintiff. In particular, he noted that, at the meeting with Mr Devine at the Inn in the Cross in May 2002 when an issue requiring litigation against the plaintiff arose the defendant did not act in that litigation which was dealt with by another firm of solicitors following the matter being referred to them by the defendant.

(iii) Later that litigation was transferred to the defendant's firm but, having examined how this came about, the TJ was satisfied that this was not as a result of orchestration by the defendant but arose by reason of Mr Devine preferring the defendant in circumstances in which a judge had suggested that one firm of solicitors should act in the proceedings (para [24]).

(iv) In respect of the defendant's involvement in relation to proceedings against the plaintiff, the TJ held that the defendant, on the facts, was not guilty of acting when there was a conflict of interest or breach of confidence or misuse of information by the defendant. In particular, he rejected the claim that the defendant had disclosed to Mr Devine the price (£437k) paid for a particular bar (Hennessey's). He, on the contrary, expressed his satisfaction that the source of that information was someone else (a Mr McVeigh). Specifically, the TJ found that the defendant was not the source of Mr Devine's information about the price of the bar: see [26]. Likewise the TJ, in respect of other alleged misuses of information by the defendant, held that he was not satisfied that any actual misuse of information had been established against the defendant arising from his prior engagement with the plaintiff or RDL: see para [27]. An allegation that Mr Pierce was involved in a conspiracy with the defendant against the plaintiff was rejected by the trial judge at paras [33] and [34].

(v) Similarly the TJ did not accept that a Ms Niblock, an accountant, was involved with the defendant in a conspiracy against the plaintiff: see para [36]. The judge stated that he was satisfied that Ms Niblock was pursuing a tracing exercise and that she found it difficult to get the information that she required. He went on to indicate that he was not satisfied that the defendant was orchestrating unnecessary or unnecessarily protracted proceedings.

(vi) At para [37]-[42], having reviewed the evidence, the TJ considered the plaintiff's claim in respect of interference with the plaintiff's legal aid to

defend actions against him. The TJ found none of these allegations to be made out, finding that the various investigations carried out by the legal aid authorities (resulting in more than one situation in which for a period legal aid had been withdrawn, though later restored) were legitimate and were in two circumstances which warranted investigation. The TJ saw no impropriety in requests for information being made to Cleaver Fulton and Rankin by the legal aid authorities for information about the plaintiff, which later was provided: see para [42]. At para [43], in respect of allegations that Mr Pierce and Mr Duffy had conspired against the plaintiff to provide information to the Legal Services Commission in 2014 to damage the plaintiff, the TJ concluded that co-operation with the LSC by those parties who had done so occurred in circumstances where such a step was one which those involved were perfectly entitled to take.

(vii) Later between paras [44]-[50] the TJ considered what he described as issues concerning "KPMG reports" which had been prepared on the instructions of Cleaver Fulton and Rankin, on behalf of Mr Devine. These had not been prepared for the purposes of the instant proceedings being heard by the TJ but were said to be critical of the plaintiff as a result (*inter alia*) of inappropriate contact being made with an expert witness by the defendant or his assistant. Hence, as the TJ put it, "the concern is with the solicitor/expert communications in other proceedings impacting on this plaintiff's cause of action against the defendant" (see para [39]). In respect of these matters the TJ rejected the plaintiff's claims though he accepted that the defendant's assistant had been "unwise … to write to the expert witness in the manner" she did "seeking to influence the opinion expressed by the expert": see para [50]. The TJ held that it had not been established that what was written finally in the expert's report was other than the author's own opinion on the issues discussed. While the reports were critical of the plaintiff, the TJ was not satisfied that "any changes were made that alter the import of the reports": see para [49].

(viii) There were allegations made by the plaintiff of inappropriate fees being charged by the defendant for expert reports and actions against the plaintiff. These were, however, not substantiated with the TJ holding that (at para [52]) that there was no evidence that the fees being charged to the plaintiff were inappropriate.

(ix) Allegations were made by the plaintiff which related to the defendant allegedly, withholding papers for the purpose of manipulating proceedings. These were discussed by the TJ at paras [53]-[54]. In respect of the allegation made by the plaintiff relating to Hennessey's Bar, the TJ, having outlined the dispute as it had emerged at the trial of

the Hennessey's Bar issue, concluded that he was satisfied that there had been an opportunity for all the issues to be examined at the hearing. Accordingly, he decided he should not examine the conduct of the proceedings. Another issue, about withholding by the defendant of a letter in the EIS case was held by the TJ not to be "to the point" in that litigation: see para [54].

(x) The release by Mr Devine to Mr Pierce of certain KPMG reports critical of the plaintiff was alleged by the plaintiff to be an instance of improper action by the defendant towards him, as he or his assistant had authorised it. The TJ considered this but rejected it on the basis that Mr Devine was entitled to disclose the reports to others for legitimate purposes. In particular, the TJ held that Mr Devine had not agreed to release the reports "simply to inflict damage on the plaintiff": see para [57]. Rather, in the TJ's view, the release was because Mr Devine believed that the contents of the reports were accurate and relevant in the context in which it was made – a position he was entitled to hold: see para [58]. The defendant and his assistant had acted for legitimate reasons when they advised as to the release of the reports to Mr Pierce.

[14] Overall, the TJ found that the disputes aired before him involved "genuine difficulties between former colleagues". As the TJ put it, "once parties fall out, the actions of the other are treated with suspicion and that has undoubtedly happened in the present case".

The Notice of Appeal

[15] There was considerable controversy engendered by the Notice of Appeal in this case. This related to the way in which it had been constructed and was linked also to the way in which the appellant had placed materials before the court for the purpose of the appeal and to issues about the true scope of the appeal.

[16] On the face of it, the Notice of Appeal, which was dated 27 January 2016, encompassed much more than a challenge to the TJ's judgment. The notice also referred to an appeal against orders made at various interlocutory stages in the proceedings. In particular, it sought to impugn the interlocutory decision (made long before on 22 May 2012) to dismiss the case against the original fourth named defendant (a Mr McCarron) from the proceedings. Likewise, it sought to impugn interlocutory decisions in the context of the case against Mr Fox which involved the court dismissing a variety of causes of action which had been originally pleaded by the plaintiff against him as the third named defendant.

[17] In the papers served by the appellant for the purpose of the proceedings, including the skeleton argument, these matters did not materially feature.

The Strike Outs

[18] At the hearing before this court the appellant did not seek pursue the issue of the dismissal from the case of Mr McCarron but he did seek to pursue the issue of the dismissal of other causes of action against Mr Fox. Allegations of unlawful interference with trade, malicious falsehood and negligence and /or negligent misstatement were struck out .In addition the TJ struck out a number of the allegations of conspiracy and breach of contract In respect of this issue, the appellant maintained that he had been told by the TJ that he could pursue an appeal on this issue later after the final decision in the case had been provided, a position which was strongly disputed by counsel for the respondent, Mr Hanna QC. The court indicated that it would seek from the TJ information as to whether he had said what the appellant alleged he had said. When this exercise was completed it was clear that the TJ had no recollection of having said what the appellant maintained he had said.

[19] In these circumstances it appears more likely than not that the ordinary rules relating to time apply to the appellant's attempts to appeal against the TJ's interlocutory rulings. At the time when they were made, any appeal in respect of them would have required the leave to the TJ and would have had to be taken within a period of three weeks from the date of the order. In fact no leave was granted and no step was taken within the time allowed. That, it seems, is the reality of the situation.

[20] There is nothing in the Notice of Appeal which addresses either the issue of leave to appeal the interlocutory orders or an application to extend time for this purpose. In those circumstances there would have, it seems to the court, to be a compelling reason why the court should be prepared now to intervene. The fact that the appellant had represented himself before the TJ and before us is not, a compelling reason to grant leave or to extend time. There is clear authority that procedural rules should be applied without favour whether a person if representing himself or herself or otherwise. That is the approach which the court will follow. There is, moreover, force in the submission made by Mr Hanna, on behalf of the respondent, that if these matters were to be made the subject of an appeal, the appeal should have been disposed of prior to the substantive hearing of the case. For my part, I would not be prepared to grant leave or to extend time for appealing these interlocutory matters. It must follow, therefore, that what the court is concerned with in this appeal are those matters which have been raised in the Notice of Appeal in relation to the TJ's substantive judgment in the case. This does not include these interlocutory issues. Nor does it, I consider, include the TJ's later judgments in relation to costs, which post-date the judgment and which were made the subject of a separate appeal to this court.

[21] As indicated during the hearing, the court is of the firm view that the parameters of the appeal are to be found in the substantive aspects of the Notice of Appeal. In accordance with this view, the court refused the appellant leave to file bundles of supplementary documents after the appellant had developed his case on

appeal. Thus, the appeal will be determined by the court on the basis of what is contained, as the substantive grounds of appeal, in the Notice of Appeal and in the light of the skeleton argument and materials filed by the appellant prior to the hearing of the appeal.

The grounds of appeal in relation to the TJ's judgment as stated in the Notice

[22] The following grounds of appeal appear in the Notice of Appeal in respect of the above:

> "(iii) The learned judge erred in his analysis of the facts that were before him drawing conclusions that the conduct of the defendants was 'unwise' but not such as to confirm a conspiracy;
>
> (iv) The judgment was obtained as a result of a process which was corrupted by the defendants/respondents and their professional advisors;
>
> (v) The learned trial judge erred in his analysis of the facts regarding the conduct and motive of Mr Pierce;
>
> (vi) The learned judge erred in law and in his analysis of the facts in relation to the conduct of the defendants in the manner in which they attempted and in fact did influence the independence of expert witnesses;
>
> (vii) The learned judge erred in law and in his analysis of the facts surrounding "Sandhu cheque" and the court effectively allowed Mr Hanna to rerun parts of the Guram failure to account case before the learned judge without permitting the plaintiff/appellant the proper right to challenge;
>
> (viii) The learned judge erred in law and in his analysis of the facts regarding the conduct of Mr Love and in particular the obligation on incoming accountants to resolve any issues of an accounting nature arising out of a previous engagement with another accountant in an effective, efficient and economic manner;

> (ix) The learned judge erred in law and in his analysis of the facts regarding the defendants failure to make proper disclosure of documents and the learned judge failed to properly punish the defendants regarding their breach of court orders made by His Lordship;
>
> (x) The learned judge erred in law and in his analysis of the facts when he concluded that it was in order for defendants and/or their agents in litigation to provide false and misleading information to the Legal Services Commission with the objective of damaging a party's entitlement to legal aid and therefore proper representation;
>
> (xi) The learned judge erred in law and in his analysis of the facts in relation to a letter dated 1 March 2001 which was central to the EIS case and regarding which His Lordship concluded "the absence of the letter was not to the point";
>
> (xii) The learned judge erred in law and in his analysis of the facts in relation to the position that the Devines were in in 2004 regarding costs which was claimed was the reason why the Devines continued with the litigation;
>
> (xiii) The learned judge erred in law and in his analysis of the facts regarding the use and distribution of the KPMG reports that was directed by the defendants in March 2009;
>
> (xiv) The learned judge erred in law in relation to the finding of fact that the Devines had contravened their agreement in that no sanction was imposed by the court even though the wrongdoing was acknowledged."

[23] In respect of these matters, the remedy sought by the appellant from this court was that:

- The judgment be set aside or amended; or
- The judgment may be entered for the appellant; or
- That a new trial should be ordered.

Appellate Restraint

[24] This court has recently reviewed the relevant legal principles it must apply in the course of its appellate jurisdiction *Weir v Countryside Alliance* [2017] NICA. That judgment reflects the principles set out in a number of leading authorities on the subject including *Yuill v Yuill* [1945] P 15, *Thomas v Thomas* 1947 SC (HL) 45, *Murray v Royal County Down Golf Club* [2005] NICA 2, *Savage v Adam* [1895] WN (95) 109 (11), *Coghlin v Cumberland* [1898] 1 Ch 704, *Lofthouse v Lester Corporation* [1948] 68 TLR 604, *Northern Ireland Railways v Tweed* [1982] NIJB 4, *McClurg v Chief Constable* [2009] NICA 37, *Biogen v Medeva plc* [1996] 38 BMLR 149, *Haughey v Newry & Mourne Health & Social Care Trust* [2013] NICA 78 *Benmax v Austin Motor Co Ltd* [1955] AC 370, *Thornton v NIHE* [2010] NIQB 7, *Gross v Lewis Hilman Ltd* [1970] Ch 445, *Carlyle (Appellant) v Royal Bank of Scotland Plc (Respondent) (Scotland)* [2015] UKSC 13 and most recently.

[25] From this array of authorities the following principles relevant to this case can be distilled.

1. Deciding the case as if at first instance is not the task assigned to this court.

2. An appellate court should defer to the findings of fact of the first instance judge unless satisfied that the judge was plainly wrong.

3. It follows that, in the absence of some identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

4. The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is that it is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence.

5. Specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification

and nuance … of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation.

6. No one should seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is or not trying to tell what he believes to be the truth, and it is only in rare cases that an Appeal Court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that; the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an Appeal Court. Evidence may read well in print but may be rightly discounted by the trial judge, or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an Appeal Court is and should be slow to reverse any finding, which appears to be based on any such considerations.

7. It is not enough that the appellate court has doubts, even grave doubts, as to the correctness of the judge's finding. It must be convinced that he was wrong.

[26] We draw attention to one further matter and cite the sage words of Simon Brown LJ in R (Richardson) v N Yorkshire CC (CA) [2004] 1WLR 1920 at [80](cited with approval in Smith v Secretary of State for Communities & Local Government & Others [2015] EWCA Civ.174 per Sales LJ) where he said:

> "I am conscious that despite the unusual length of this judgment it nevertheless leaves unaddressed a number of Mr McCracken's disparate arguments. For that I shall hope to be forgiven. Where, as here, a challenge or appeal is pursued in a somewhat scattergun fashion, it is simply not practicable to examine every pellet in detail".

[27] Richardson's case is relevant to these proceedings because of the tendency of Mr McAteer to pursue a disparate collection of issues, some fresh and some old, which were unconnected to the Notice of Appeal and, in any event, were often a bold attempt to conduct a rehearing of many factual issues heard before Weatherup J based purely on the appellant's own ipse dixit. That we do not intend to address the numerous issues raised by the appellant outside those contained in his Notice of Appeal may well leave him dissatisfied but our attempts to draw his attention to this during the hearing proved to be of no avail.

[28] Similarly I fear we failed to persuade Mr McAteer about the concept of appellate restraint and he continued to conduct his appeal as if there had been no exhaustive examination of all the facts of the case before Weatherup J and this was a

complete rehearing of all the issues. His attacks on the credibility of the various witnesses in the case seemed impervious to the fact that the TJ had heard 28 days of evidence and argument, including evidence from many of the main players in this whole saga, the appellant, Mr Fox, Mr Devine (called to give evidence by the appellant), Mr Pierse ,Patrick Good QC (on the Hennessy bar matter) etc.

[29] The Latin maxim judicis est judicare secundum allegata et vorbata in terms means it is the judge's duty to decide the case in accordance with what is alleged and proved. Unless allegations appear in the pleadings or leave is given by the judge to amend the pleadings to include them, the courts will not entertain them.

[30] As this appeal unfolded the appellant sought to introduce and develop fresh grounds of appeal. Indeed both parties, in breach of the practice direction which governs appeals in this court, sought to introduce voluminous extra papers towards the end of the hearing which we refused to admit. We have confined our findings in this appeal to those matters that were set out in the appellant's Notice of Appeal.

Fpara

[31] The thread running throughout the determination of this appeal is the appellant's abject failure to appreciate the role of the appellate court. He has conducted the case as if it was a de novo rehearing, neglecting throughout to recognise the advantages to assessing the credibility of witnesses in the course of an extremely lengthy trial and the fact that it was Weatherup J who had been assigned the task of determining the facts and not this appellate court.

[32] In short, the appellant has striven to re-open all the questions of fact for redetermination, a task that was wholly inappropriate for this court.

[33] At the outset therefore, before turning to the individual grounds of appeal, we make it clear that we found no identifiable error such as material error of law or the making of a critical finding of fact which had no basis in the evidence or a demonstrable misunderstanding of relevant evidence or, a failure to consider relevant evidence on the part of the learned trial judge.

Ground (iii) "The learned judge erred in his analysis of the fact that were before him drawing conclusions that the conduct of the defendants was unwise but not such as to confirm a conspiracy."

[34] The tort of conspiracy is now well-trodden in law. In law a conspiracy consists in the agreement of two or more people to do an unlawful act or to do a lawful act by unlawful means and where the burden of proof lies on the party asserting the conspiracy.

[35] The tort of conspiracy therefore takes two forms. It is clearly defined in the leading textbook "Clerk and Lindsell on Torts" and well covered in the leading case of *Sorrell v Smith* [1925] AC 711-712.

[36] The two forms are therefore conspiracy to use a lawful means and conspiracy to injury. The latter does, but the former does not, require a predominant purpose to injure.

[37] Liability for "conspiracy to injure" where the acts would without combination be lawful, forms a qualification to the general rule that the mere agreement of persons to act in concert cannot make the act of anyone or more wrongful, if it would not be wrongful when done by each alone independently.

[38] The appellant fell at the first fence in seeking to establish this tort. He failed to satisfy the judge on a factual basis that there had been any relevant combination. In the event in front of the learned trial judge he failed to factually establish an agreement, understanding or concert to injure involving two or more persons with the respondent.

[39] In short there was no acceptable evidence found by the judge of such a combination. In summary there was no evidence that:

- The respondent was party to such a combination and the common design.

- The respondent took actions which were unlawful in themselves with the intention of causing damage to the appellant who incurred the intended damage.

- With employing acts or means that were themselves unlawful, the respondent combined with others in a conspiracy to injure the appellant.

[40] Although this ground of appeal seems to in place only the concept of a conspiracy, it is relevant at this stage to also set out in broad terms the contractual duty of a solicitor to a client.

[41] The relationship of a solicitor and client is primarily a contractual one and, as with any contractual relationship, a solicitor's retainer is governed by the terms of the contract agreed with his or her client. The relationship is also regulated both by statute and the Rules of the Professional Conduct of the Profession. The Rules of Professional Conduct regulate the conduct of the profession as a whole. But subject to these constraints, the contract between solicitor and client need take no special form and need contain those specific terms. The contract may be express or implied and oral or written. It has to be recognised that a solicitor does not normally agree to undertake a strict obligation to achieve a particular outcome or give a warranty that this outcome

will be achieved. In the same way it is also important to recognise that the duty to exercise reasonable care is not a duty to achieve a particular result.

[42] Apart from the express terms agreed between the parties, the principal term implied by law into the contract of retainer is that the solicitor should take reasonable care in providing legal services.

[43] In tort the extent of a solicitor's duty depends upon the terms and limits of the retainer and any duty of care to be implied must be related to what he is instructed to do. The leading authority on this is *Midland Bank Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384 where the court said:

> "Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession but I think that the court must be aware of imposing upon solicitors … duties which go beyond the scope of what they are requested or undertake to do. … The test is what the reasonably confident practitioner would do having regard to the standards normally adopted in his profession."

[44] Of relevance to the case made by the appellant is the duty of confidentiality. A solicitor will, as part of the wider collection of contractual, tortious and fiduciary duties owed to his client, owe obligations of confidentiality to the client.

[45] The obligation of confidentiality clearly survives the termination of the retainer so that the obligation to preserve the former clients' confidentiality continues even after the retainer has come to an end. That duty to preserve confidentiality is unqualified and is a duty to keep the information confidential, not merely a duty to take all reasonable steps to do so (see the leading case of *Bolkiah v KPMG* [1999] 2 AC 222). That duty of confidentiality extends to everything learnt by the solicitor in the course of the retainer.

[46] *Bolkiah's* at 234E and 236B makes it clear that there is no absolute rule in English law that a solicitor cannot act for a client with an inference adverse to that of the former client in "the same or a connected manner". It follows that in the case of an old client there is no basis for granting relief if there is no risk of the disclosure or misuse of confidential information.

[47] Turning back to the facts of the instant case, and this ground of appeal, we commence by observing that having heard the case over the course of 28 days, fortified by the advantage of hearing the respondent and most of the alleged conspirators giving evidence, the learned trial judge came to the factual conclusion that there was no factual foundation for any alleged conspiracy or for that matter breach of contract.

[48] The learned trial judge specifically found that the defendant nor any of the other persons to which we have referred in para [78] of this judgment, have set out to damage the appellant's business or personal life.

[49] Because these are precisely the factual matters assessed by the learned trial judge, we do not intend to set them out all over again. Suffice to say that the appellant **dictation skips** virtually always relying on his own ipse dixit, boldly asserted before us that the judge had failed to take these allegations into account, merely rehearsing the same points that had been made before the judge. Such an approach was wholly inadequate to persuade us that the judge lacked a proper foundation for rejecting his assertions.

[50] As we have pointed out in para [9] of this judgment the learned trial judge, having heard all the facts, was not satisfied that the respondent had orchestrated the events or that he was responsible for a raft of unnecessary litigation against the appellant.

[51] We found no basis for a contrary conclusion that there was such a combination (or indeed a breach of contract in this respect) or that there was any combination which had the common objective of damaging the interests of the appellant either personally or commercially.

[52] The appellant invoked the authority of *W H Newson Holding Limited and Others v IMI Plc and Ors* [2013] EWCA Civ 1377. This was an appeal concerning the scope of the statutory remedy available under section 47A of the Competition Act 1998 in following on damage actions. Section 47A does not specify the type of claim upon which follow on actions might be brought. Such claims (being claims alleging a breach of EU law) are ordinarily pursued as breaches of statutory duty. The appeal considered whether section 47A encompassed claims beyond breach of statutory duty, and in this case, conspiracy. The importance of the case was that the Court of Appeal confirmed that section 47A was not limited to claims for breach of statutory duty but disagreed with the court at first instance who found that the appellant could pursue one of their two pleaded claims in conspiracy.

[53] Regarding common law conspiracy, the court's analysis gives no comfort to the appellant. Coupled with its approach to section 47A and the decisions of the English Court of Appeal in *English Welsh and Scottish Railway Limited v Enron Co Services Limited (In Liquidation)* [2009] EWCA Civ 647, the effect is that it will be a rare case where common law conspiracy is a viable cause of action in the CAT, because the infringement decision relied on will typically not contain findings sufficient to establish the intention requirement of the tort. Moreover, certain aspects of Arden LJ's reasoning cast doubt on the viability of conspiracy as a cause of action in competition cases in general.

[54] In short *Newson's* case was an entirely different scenario from the depicted in the appellant's appeal and is wholly distinguishable from the present case.

[55] The appellant seemed to concentrate his attack on the conclusion of the learned trial judge that there had been "unwise" actions on the part of the respondent on a number of occasions and that this apparently mischaracterises the nature of the actions.

[56] We see no reason to differ from the conclusion of Weatherup J in this regard. Some examples will suffice to illustrate the compelling logic and common sense of this conclusion by the learned trial judge:

(1) The taking of instructions by the respondent against the appellant, in circumstances where some years previously he had acted for the appellant, cannot of itself represent a breach of confidentiality or contract evidencing some evidence of conspiracy.

There was no plausible factual evidence and in doing so Mr Fox or his associate had breach any duty of confidence or misused any information from his previous dealings with the appellant to his disadvantage.

There was no basis to the appellant's assertion that in doing so Mr Fox's conduct was unlawful. The fact that he had previously acted for the appellant and for Roe Developments Limited failed to recognise that there is nothing unlawful or to be prohibited in such a step absent some clear evidence of breach of confidence or misuse of information. It was not therefore unlawful for example for Mr Fox subsequently to represent Mr Devine against Mr Guram or for Mr Guram against the plaintiff and Mr Guram and Mr Devine against him. The appellant seemed to think that the mere fact that he had so acted was sufficient to constitute an unlawful act. The legal authorities are clearly against this bald proposition.

(2) Similarly, going to the appellant's office with a statutory demand, while somewhat surprising in the case of professional solicitors, it is again not a matter which amounts to a breach of contract on the part of a solicitor or evidence of a conspiracy on the part of Mr Fox with others against the appellant. It is a classic case of a solicitor acting unwisely perhaps, although this is a matter presumably to be determined by the professional body if Mr McAteer pursues the matter.

(3) Similarly, the respondent writing to KPMG, again whilst understandable characterised as unwise for a professional man to so act, did not in the event have any effect on the opinion (as found by the judge at para 7) or of KPMG or lead to any damage to the appellant or his case.

Once again Mr McAteer betrayed a misunderstanding of the law in thinking that so acting per se was by itself unlawful without appreciating the need to follow this through and establish that it had some effect on the opinion expressed by the expert and/or had damaged him personally.

These matters at (1), (2) and (3) are of course all issues which we understand the appellant entertained the intention to raise with the Law Society. They clearly do not by themselves amount to unlawful acts or breach of duty or evidence of a conspiracy on the part of the respondent or the other alleged conspirators against the appellant.

(4) Insofar as the allegation of conspiracy embraced Mr Devine, the fact of the matter is that the respondent did not even act in his litigation discuss with Mr Devine at the Inn of the Cross meeting in May 2002 (see para [3] of the learned trial judge's judgment). Later that litigation was transferred to the respondent's firm only because the judge hearing the case had suggested that one firm of solicitors should act in the proceedings. The respondent of course would have had no knowledge that the judge was going to make such a suggestion and therefore could not have conspired to bring this about. Moreover Weatherup J accepted factually the assertion of Mr Devine that it was he who decided to engage the respondent because it was his preference that he should so act.

(5) A classic example of where the trial judge, having seen the witnesses and heard the evidence, rejected a specific example of breach of confidence or misuse of information was in relation to the allegation that the respondent had revealed to Mr Devine the price paid for the Hennessy Bar. The trial judge made a specific factual finding that the source of this information was Mr McVeigh and had nothing to do with the respondent. The appellant simply refused to accept this finding.

(6) Weatherup J also made a factual finding that the allegation that Ms Niblock, accountant, was a fellow conspirator with the respondent. The trial judge having considered her evidence concluded that she was simply following a conventional tracing exercise and encountered difficulties obtaining the information she required. This seems to us a perfectly rational and understandable exercise which carries no hue of unlawful conspiracy.

[57] Other examples within this genre and relevant to the ground of appeal now under consideration, have considered in the further course of this appeal.

Ground (iv) – The judgment was obtained as a result by a process which was corrupted by the defendants/respondents and their professional advisors.

[58] A navigation of corruption falls into the same category as an allegation of fraud or deceit. Allegations of fraud need only be proved to a civil standard of preponderance of probability and no more.

[59] Nevertheless, even if the standard is a civil standard, in practice more convincing evidence will often be required to establish fraud or corruption in other types of allegation. The reasoning is the straightforward one given by Lord Nicholls in *Re H (Minors)* [1996] AC 563 at 568-587 where he said:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. …"

[60] On a similar basis, the Court of Appeal will not hold a defendant guilty of fraud or corruption contrary to the view of the trial judge unless it is completely satisfied that the latter was wrong. Doubts, even grave doubts on the correctness of the judge's finding will be insufficient to persuade an appellate court to reverse it (see *Gross v Lewis Hillman Ltd* [1970] Ch. 445).

[61] This ground of appeal, whilst couched in even more serious terms, amounted to no more than a graver assertion of the earlier allegations of conspiracy and breach of contract.

[62] The trial judge found no acceptable evidence that the respondent was orchestrating events, that he had introduced any unnecessary litigation against the appellant and made no adverse finding against any of the professional advisors. He therefore rejected any assertion of corruption.

[63] We find no basis to differ from the trial judge. Once again, the bald assertion to the contrary from the appellant amounted to no more than his own bold assertion without any tangible evidence that would have amounted to the standard of proof required in order to sustain a charge of corruption.

Ground (v) – The learned trial judge erred in his analysis of the facts regarding the conduct and motive of Mr Pierce.

[64] Mr Pierce was of course not a party to this appeal. Hence, he was not represented and was not made a notice party. None of this deflect the appellant from making allegations against him.

[65] It was the appellant's case that Mr Pierce owed him and his partner a very substantial sum of money and had tried to exploit the litigation in Northern Ireland to destroy the appellant so that he would not be able to pursue him.

[66] The trial judge dealt in some detail with the allegations against Mr Pierce as appears in paras [33] and [34] of his judgment.

[67] The trial judge records that Mr Pierce gave evidence because of his belief that he could support the respondent and contradict the appellant by explaining his version of events in relation to the Kerry lands and by providing information to those alleged to be conspiring against the appellant.

[68] Once again, the learned trial judge had the benefit, denied to this court, of viewing Mr Pierce and listening to his evidence. With this advantage, the learned trial judge concluded that he was satisfied that Mr Pierce's concern in giving evidence was to express his own views of his treatment by the plaintiff and that in doing so he had not been governed by any improper conduct, action, briefing or pressure exerted by the respondent.

[69] The learned trial judge was not unaware, as he expressly stated, that Mr Pierce's evidence was given in the climate of further dissolusionment with the appellant and "no doubt **–inaudible-** to the proceedings pending in Dublin". Weatherup J concluded that Mr Pierce had co-operated with others for the reasons that he had advanced, and not simply to damage the plaintiff.

[70] We find no reason at all to differ from this conclusion and we accordingly dismiss this ground of appeal.

Ground (vi) – The learned trial judge erred in law and in his analysis of the facts in relation to the conduct of the defendants in the manner in which they attempted and in fact did influence the independence of expert witnesses.

[71] This was a further example of a wide-ranging allegation which gathered momentum in the course of the appellant's assertions.

[72] Weatherup J found no foundation to sustain this assertion and once again, we found no basis to differ from that conclusion which the judge arrived at given his close observation of the relevant witnesses over a lengthy period of examination and cross-examination. Some illustrations will suffice to illustrate why this ground of appeal has not basis.

(1) The KPMG reports were a fundamental aspect of this ground of appeal.

(2) These were drawn up in the course of the Devine litigation. It is of course a conventional approach in litigation and a firm of solicitors will instruct experts, particularly accountants. Obviously, there has to be contact and exchange between the solicitor and the expert in terms of appropriate instructions and a desire for clarification is a classic example of a solicitor acting conscientiously when that report seems to fail to address an issue or is riven with unhelpful ambiguity.

[73] It is important however that the expert's evidence is at the end of the day independently given and uninfluenced by the solicitor's opinions. Hence, experts conventionally sign a declaration of independence at the conclusion of the reports to this effect. In the instance case, the trial judge carefully considered this matter and concluded that the e-mail from the respondent dated 18 September 2007 had, in part, sought to influence a manner in which the expert's opinion was expressed. The report was changed in part as a result of the comments.

[74] Crucially however, the trial judge concluded that it had not been established that what was written finally in the reports was other than the author's own opinion on the issues discussed. This was the essential point that the appellant failed to grasp. Whilst, as the learned trial judge expressly stated it was unwise of Ms Brunton from Cleaver Fulton and Rankin and the respondent to write to the expert witness in the manner they did seeking to influence the opinion expressed by the expert, nothing that they did can provide a foundation for this ground of appeal.

[75] Once again, Mr McAteer seems to think that his case is proven by a mere assertion of unwise behaviour without recognising that he can only succeed if such behaviour has some impact or consequence. Otherwise it is entirely a matter for Mr McAteer, if he so wishes to raise this issue with the Solicitors Disciplinary Tribunal and they will then decide in the context of professional misconduct whether or not there are grounds for such a complaint.

Ground (vii) … The learned judge erred in law and in his analysis of the facts surrounding "Sandhu cheque" and the court effectively allowed Mr Hanna to rerun parts of the Guram failure to account case before the learned judge without permitting the plaintiff/appellant the proper right to challenge.

In any event the court was aware that the defendant had obtained an opinion from Mark Horner QC dated 10 March 2003 wherein he had concluded that the respondent had acquired no confidential information when he acted for Roe Developments Limited that he could use in acting for Mr Devine against the plaintiff. The only possible information which could have been used to embarrass the plaintiff, namely the price at which Roe Developments purchased the bar from Mr McVeigh, was stated to be information that was not confidential but was freely available, having been made an order of the court. It also has to be noted that

Mr McAteer was the plaintiff in this action and of course that is a separate entity from Roe Developments Limited and the fact that Mr Fox in the past had acted on behalf of that company.

In 1997/1998, the respondent did act on behalf of Mr McAteer in relation to a case involving Andy Cole's bar. Apparently, this action was settled with Mr McAteer recovering a sum of money. In 2000/2001, Mr Fox acted on behalf of Mr McAteer in a case brought against him and Mr Magill by Conor Developments Limited in relation to the Celtic Bar. Mr McAteer was unsuccessful in that case and judgment was given against him for a sum of money. In November 2000 a claim had been brought by Roe Developments Limited against a Mr McVeigh. Strictly speaking therefore, Mr McAteer was not a party to that claim and the respondent had acted on behalf of the company and not Mr McAteer.

[76] In relation to the Gurams, the evidence of the respondent was that he did not act for them in the litigation against Mr McAteer until 2005 when they asked him to take over that litigation from another firm of solicitors namely Babington and Croasdaile. It was the respondent's case that that litigation was handled mainly by Mrs Diver and that the respondent had little or any direct involvement with it, adding that he had no personal contact with either of them since 2008/2009. It was Mrs Diver's evidence that she came into contact with *Sanjee v Guram* in 2006 when she took over the litigation concerned and continued to act for him whilst an employee of Cleaver Fulton and Rankin up until June 2010.

[77] This was a case in which the Gurams had sought an account from Mr McAteer. Apparently the case did not proceed because eventually a satisfactory explanation was provided by Mr McAteer in mid-2008. Deeny J had dealt with a subsequent hearing on costs in February 2012.

[78] The ground of appeal asserted by the appellant fails to recognise the cumulative and perfectly reasonable manner in which Weatherup J dealt with this general allegation in the context of a series of actions involving disputes which Mr McAteer had with former colleagues. This included the Devines' failure to account action as well as the Gurams case.

[79] The learned trial judge summarised his approach to the failure to account Gurams case at para [59] of his judgment when he said:

> "There were similar themes in the Gurams' failure to account action. The plaintiff was the one who had the answers and should have provided the explanations but for a very long time he was unable to satisfy the others as to the propriety of all the financial dealings. It was not the case, as he supposes, that all his efforts were being sabotaged by the defendant and the others. Simply put, many of these transactions lacked transparency. Money was moved here and there through various vehicles, no doubt for good

> reason, but that reason was not always clear. If an explanation does not clarify the position it adds to the difficulty. Once suspicions are raised about such matters it can be difficult to quell those suspicions. The 'Sandhu cheque' is an example of this lack of clarity. Mr McAteer says that it was a very straightforward matter. I did not find it straightforward at all. It was never understood why the plaintiff needed to be involved in the exercise at all, nor why the money was moved around in the way that it was."

[80] In the general context of this litigation we are satisfied that this a perfectly acceptable generalisation adumbrated by the judge who made no error of law in approaching the matter this way. We see no basis for asserting that the learned trial judge failed to permit the appellant to deal with the issue and indeed the conclusion at which the judge arrived on this one aspect is unchallengeable.

Ground (viiii) … The learned judge erred in law and in his analysis of the facts regarding the conduct of Mr Love and in particular the obligation on incoming accountants to resolve any issues of an accounting nature arising out of a previous engagement with another accountant in an effective, efficient and economic manner.

[81] The first point of importance here is to recognise that the plaintiff had agreed to a stay of proceedings against John Love. He was not a party to these proceedings, he was not a noticed party and therefore was not represented at this appeal.

[82] Mr Devine had expressed a number of concerns including that £500,000 had been advanced to the plaintiff for investment purposes and Mr Devine was concerned to establish what had become of that money. He was also concerned about a payment of £675,000 for the purchase of Hennessy's Bar which, Roe Developments Limited had acquired for £437,000, and Mr Devine was expressing concern about the price he had paid. Thirdly, Mr Devine raised the transaction known as Henderson's lands involving Devine's attempts to purchase the lands with advice furnished by the appellant and had not been completed for reasons that allegedly were unclear to Mr Devine.

[83] It appears at this stage Mr Devine had lost faith in the appellant and engaged Mr Love as an accountant to advise him. Mrs Diver from Cleaver Fulton and Rankin met Mr Love in this context i.e. Mr Love was now the professional advisor to the Devines.

[84] We fail to see any basis upon which it could be contended that the judge had erred in law in considering Mr Love's conduct in this case. His role was clearly to look at these issues from an accounting basis. Whether he acted effectively, efficiently or

economically is a matter of his professional exercise of his judgment and does not in any emerge as a matter of relevance in relation to the allegations of breach of contract or conspiracy laid against the respondent. This was once again purely a matter of fact to be determined by the trial judge and we see no basis whatsoever for this ground of appeal. In particular the appellant asserted that the Devine failure to account action could have been settled by a letter from Mr Love at the beginning asking what had happened to the Devine money. As the trial judge pointed out, no doubt a meeting would have been helpful to avoid litigation, but Mr Devine and Mr Guram each thought that their money was missing and the reality is that it took years to obtain a satisfactory account of the money. We see no basis for putting the blame for this on Mr Love. If the appellant has any professional complaint against Mr Love, then it is a matter for him whether he raises this with the appropriate professional body or not.

Ground (ix) … The learned judge erred in law and in his analysis of the facts regarding the defendant's failure to make proper disclosure of documents and the learned judge failed to properly punishment the defendants regarding their breach of court orders made by His Lordship.

[85] It was the appellant's case that the respondent had withheld papers for the purposes of manipulating proceedings. The learned trial judge dealt with this at para [53] and [54] of his judgment. He made the perfectly reasonable point that the parties were represented at the hearing and there was an opportunity for all to examine all the papers at the time and to raise any issues about absent papers in the course of the proceedings. Perfectly reasonably the trial judge was satisfied that there was an opportunity for all issues to be examined during the hearing.

[86] A second issue about the withholding of papers related to the EIS case. The trial judge succinctly dealt with this point on the basis that the letter of 1 March 2001 did not address the issue of whether or not there was a qualifying transaction. The transaction was a flip property deal that did not attract tax relief and the presence of cleared funds did not determine a character of the transaction. As the learned trial judge pointed out, the absence of the letter was not to the point.

[87] As these two illustrations reveal, these were again purely factual matters where there was no error of law whatsoever on the part of the trial judge and where the conclusions he reached were well within the ambit of discretion vested in a first instance judge hearing a factual issue.

Ground (x) … The learned judge erred in law and in his analysis of the facts when he concluded that it was in order for the defendants and/or their agents in litigation to provide false and misleading information to the Legal Services Commission with the objective of damaging a party's entitlement to legal aid and therefore proper representation.

[88] We find no error of law whatsoever in the approach of the learned trial judge to this issue. He carefully examined the allegations concerning legal aid and dealt in particular with four examples. He concluded:

- The money paid in relation to the Beech Tree Bar was information furnished to the Legal Services Commission (LSC) by Mr Green of McCambridge Duffy and not by the respondent. The money had been paid by Roe Developments and not by the plaintiff. Reasonably the learned judge concluded that was a legitimate issue that warranted investigation.

- The information provided to LSC in 2006 about the Hennessy's actions and the Beech Tree Bar/Roe Development dispute was information provided in response to a request for the LSC for information, an entirely legitimate exercise.

- In 2009 Ms Diver forwarded information to the LSC in relation to Savanne Limited and Stopside Limited. The LSC were again entitled to request information from Cleaver Fulton and Rankin and further to that request he received the information in which they entitled to provide.

- The fourth matter concerned an alleged conspiracy with Mr Duffy and Mr Pierce to provide further information to the LSC in 2014. The Pierce contacts involved an on-going investigation raised by LSC and as the trial judge pointed out, those parties who have co-operated with any investigation are perfectly entitled to do so.

[89] These were perfectly rational factual findings made by the trial judge without any error of law on his part and we see no basis for this ground of appeal.

Ground (xi) … The learned judge erred in law and in his analysis of the facts in relation to a letter dated 1 March 2001 which was central to the EIS case and regarding which his Lordship concluded "the absence of the letter was not to the point".

[90] We have already dealt with this matter in Ground …. above. We reiterate that we find no reason to differ from the factual finding made by the trial judge on this issue.

Ground (xii) … The learned judge erred in law and in his analysis of the facts in relation to the position that the Devines were in 2004 regarding costs which was claimed was the reason why the Devines continued with the litigation.

[91] This matter can be dealt with in short compass. It is purely a matter of fact and judgment by the trial judge. We see no reason to differ from the analysis of the judge on this issue which he set out at para [56] when he said:

> "In 2004 Mr Devine stated that he wanted out of the litigation. I do not doubt that that was the

> case. However the costs that had been incurred to date in the litigation became an issue. That was a real issue that had to be addressed as someone would have to pay the fees. Mr Devine did not want to have to pay and if he had pulled out of the litigation he would have been at risk for substantial costs. Mr Devine was not prepared to walk away when he realised there were financial consequences."

[92] It has to be appreciated that Mr Devine's evidence had been considered in detail by the trial judge and this is another example of factual inferences and judgments drawn by a judge which was well within the remit of his broad discretion to decide factual issues at first instance. There was a factual determination comfortably within the broad ambit of discretion vested in a judge at first instance to make factual findings.

Ground (xiii) The learned judge erred in law and in his analysis of the facts regarding the use and distribution of a KPMG report that was directed by the defendants in March 2009.

[93] The trial judge dealt with this issue at paras [57] and [58] he made two points, neither of which are wrong in law or which are open to factual challenge. First, that the reports had been open in court, that Mr Devine owned the reports and was prepared to provide them to Mr Pierce and that in short Mr Devine was entitled to disclose a report to others for legitimate purposes. The judge was satisfied that Mr Devine did not agree to release the reports simply to inflict damage on the plaintiff and we can find no evidence to the contrary. The trial judge concluded that he did so because he believed the contents of the reports were accurate and that they were relevant to Mr Pierce's dispute with the plaintiff a position which the trial judge rightly considered he was entitle to hold.

[94] Secondly, there was a separate issue which the judge looked at as to whether the reports could be circulated when they were in breach of an agreement entered into between the appellant and the Devines not to continue to act against the plaintiff's interests. It transpired that the Devines had again circulated the reports notwithstanding this agreement. The trial judge was satisfied that there was a contravention of the agreement and he did not remove the stay. However where does this take the appellant? How does it contribute to the allegations of breach of contract and conspiracy on the part of the respondent? The earlier disclosure was for legitimate reasons and the subsequent contravention of the agreement plays no part in determining whether or not the appellant's case of breach of contract to conspiracy was established. We therefore find no reason to differ from the conclusions reached by the trial judge.

Ground (xiv) – The learned judge erred in law in relation to the finding that the Devines had contravened their agreement in that no sanction was imposed by the court even though the wrongdoing was acknowledged.

[95] This is a variation on the matters raised in Ground (xiii). For the reasons we have mentioned above the contravention by the Devines played no part in the case against the respondent that he had been guilty of conspiracy and breach of contract and accordingly we find no basis for this ground of appeal.

[96] It is, trite law to state that there must be a causal connection between the defendant's breach of contract and the plaintiff's claim for loss. The function of damages in contract is primarily to put the injured party as far as possible in the position in which he would have been had the contract been performed whereas the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed.

[97] As the learned trial judge pointed out at para [61] of his judgment, he was not satisfied that losses had been sustained by the plaintiff as a result of the actions of the defendant. Whilst he noted that there were extensive claims for financial loss, no evidence of loss attributable to the actions of the defendant had surfaced.

[98] The appellant did not make a ground of appeal and when confronted with this issue before this court, he seemed to consider that it was enough for details of loss to be found somewhere amongst the myriad of papers put before the court, and that the judge should have somehow searched through the papers in order to try and find facts pointing to a case. This is to totally misapprehend the nature of adversarial proceedings, which, require a plaintiff to not only plead his loss and damage specifically, but to adduce evidence before the court in a structured and reasonable fashion so that a proper determination has been made. We find no reason to differ from the conclusion of the judge that the appellant had failed to produce evidence of loss attributable to the actions of the defendant. That in itself would have been sufficient to dismiss this case.

[99] In all the circumstances therefore we reject this appeal. We will now invite the parties to address us on the issue of costs.