Neutral Citation No: [2019] NICA 54 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* McC11082 *Delivered: 15/10/2019*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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BETWEEN:

JOHN STEWART AND JONATHAN STEWART

Plaintiffs/Appellants:

and

ADRIAN MARTIN AND ROBERT MARTIN

First and second Defendants/Respondents:

and

BARRY P FINLAY AND OTHERS, PRACTISING AS MURLAND SOLICITORS

Third Defendant/Respondent.

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Before: McCloskey LJ, Maguire J and Sir Richard McLaughlin

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] In this judgment, to which all members of the court have contributed, the parties are described in the following terms:

(a) John Stewart and Jonathan Stewart: "*the Plaintiffs*".

(b) Adrian Martin and Robert Martin: "*the first and second Defendants*".

(c) Barry Finlay and six others, practising as Murland Solicitors: "*the solicitors*".

[2] By writ of summons issued on 12 March 2013 the Plaintiffs sought the following relief:

(a) Rescission of a contract said to have been made between the Plaintiffs and the first two Defendants relating to the investment of monies.

(b) A declaration that the contract was of no legal effect.

(c) Repayment of £600,000.

(d) Further, or alternatively, damages for loss and damage sustained by reason of the alleged breach of fiduciary duty, conversion, breach of contract, misrepresentation and negligent misstatement by the first two Defendants; fraud, negligence and breach of contract on the part of the third named Defendant; and the negligence and fraud on the part of a further Defendant against whom the Plaintiffs did not ultimately proceed.

[3] The Plaintiffs succeeded at first instance. Judgment was entered in their favour in the following terms:

(a) An award of £245,000 against the first and second Defendants, together with simple interest at the rate of 4% per annum from the date of accrual of the cause of action, 06 July 2007.

(b) An award of £49,000 against the solicitors plus interest at the same rate.

(c) An award of costs against the aforementioned three Defendants.

The Plaintiffs succeeded against the first and second Defendants in the tort of deceit and against the solicitors in negligence, with a reduction of 80% contributory negligence.

The Plaintiffs' Case

[4] The following is distilled from the final amended incarnation of the Statement of Claim:

(i) The Plaintiffs are self-described as business men with "*no relevant experience in property speculation or development*".

(ii) The first Defendant is "*a property speculator and developer*".

(iii) The second Defendant, the uncle of the first Defendant, was a director and shareholder in a development company and had full knowledge of all transactions involving the Plaintiffs' monies.

(iv) The solicitors (the third Defendant) at all material times acted on behalf of the first and second Defendants in their personal capacity and the aforementioned development company.

(v) In 2006 the first Plaintiff and the first Defendant made a verbal agreement whereby they would purchase a development site ("*Ballygowan Site 1*") for £900,000 for the purpose of a residential development and would share in the resulting profits.

(vi) This was followed by the formation of Stewart Martin Developments (NI) Limited ("*SMD*"), a registered company having equal share subscriptions on the part of the first Plaintiff and the first Defendant.

(vii) The verbal agreement between the first Plaintiff and the first Defendant was that Ballygowan Site 1 would be purchased by equal contributions of £300,000 with the balance financed by borrowings.

(viii) In March 2007 the first Defendant informed the first Plaintiff that Ballygowan Site 1 had been sold, the proceedings of sale were held by the solicitors, who were acting on the first Plaintiff's behalf and the first Defendant informed the first Plaintiff that "*… he would credit the first named Plaintiff with £110,000 in relation to the future investment proposed to be made by the first named Plaintiff*".

(ix) In March/April 2007 the first Defendant's proposal to "*credit*" the first Plaintiff in the amount of £110,000 was repeated.

(x) A possible investment in a different development site ("*Ballygowan Site 2*") was proposed, entailing equal payments of £600,000 by the first Plaintiff and the first and second Defendants.

(xi) This developed into a financing arrangement whereby the one third contribution of £600,000 would be shared equally between the first and second Plaintiffs. There would be a pro-rata share holding in the company BMD. The company SMD would not be involved. BMD was a property development company incorporated on 15 April 2005. Its directors were the first and second Defendants, who owned all of its 100,000 ordinary shares.

(xii) Following an extraordinary general meeting of BMD on 22 June 2007 this company's authorised share capital was increased from £100,000 to £1.9 million, its articles of association were amended and redeemable preference shares were allocated to the first and second Plaintiffs.

(xiii) Taking account of the aforementioned "*credit*" of £110,000, the amount due from the Plaintiffs was £490,000. This was raised almost fully by the mechanism of re-mortgaging their respective homes.

(xiv) The Plaintiffs were represented by their own solicitor at this stage. On 06 July 2007 their solicitor authorised the release of £490,000 which was transferred to the solicitors' (third Defendant's) client account. The Plaintiffs believed that this payment was in consideration of the aforementioned redeemable preference shares and had an expectation of receiving share certificates evidencing their investment in BMD. They further had an expectation of an executed contract, an exchange of letters or written undertakings.

(xv) The solicitors proceeded to release the monies of £490,000 to the first and second Defendants and BMD without securing any commitment to apply the monies for the purpose for which the Plaintiffs had advanced them. The redeemable preference shares were not "*paid up*".

(xvi) In October 2008 the Defendants informed the first Plaintiff that two development sites other than Ballygowan Site 2 had been purchased for £1.6 million with the assistance of the Plaintiffs' monies. The Plaintiffs thereupon determined to sell their shares in the company. The first Defendant undertook to the first Plaintiff that the Plaintiffs' monies would be repaid in full by the end of March 2009.

[5] At this juncture it is appropriate to reproduce in full the following passage in the final amended Statement of Claim:

> "*The Plaintiffs have since learned that the acquisition of 62 Gilnahirk Road, Belfast took place in July 2007, very shortly after the monies were advanced to the first and second Defendants. That in those circumstances, it is an irresistible inference that the third and fourth Defendants provided advice to the Plaintiffs and discharged professional services for the benefit of BMD and its directors in the express knowledge that the monies advanced by the Plaintiffs were actually to be used by the first and second Defendants for a purpose other than the express purpose for which they were advanced and which was known expressly by the third and fourth Defendants.*"

This is followed by:

> "*The Plaintiffs have also learned that, contrary to the representations made by the first and second Defendants, no purchase price or agreement to sell was ever entered into between BMD and its directors and the* [Ballygowan site 2 owner]."

[6] To summarise, the Plaintiffs (it was claimed) parted with a total of £600,000, comprising a payment of £490,000 and the aforementioned "*credit*" of £110,000. They received nothing in return. The company BMD subsequently went into administration.

The proceedings at first instance

[7] At the trial the Plaintiffs, the first and second Defendants and the solicitors were represented by three separate teams of senior and junior counsel. The fourth Defendant had initial participation, with legal representation, ending when the Plaintiffs' claim against this party was formally discontinued with the leave of the court. There was an agreed detailed chronology of material dates and events, reproduced in the judgment at first instance at [10].

[8] The trial began in June 2017, proceeded intermittently and ended in December 2017, having occupied 12 hearing days. Evidence was given by four of the parties, namely the first and second Plaintiffs, the first Defendant and Mr Kirkpatrick on behalf of the solicitors. Judgment was reserved and promulgated on 05 November 2018. An addendum to the judgment was provided on 30 January 2019.

Judgment of Keegan J

[9] At [9] of her judgment the judge provided the following useful digest:

> *"The Plaintiffs had retained solicitors, McCoubrey Hinds, who acted for them and facilitated the money transfer of £490,000. The case comes down to what the money was for. The plaintiffs say it was to be applied to a development called Ballygowan to allow them to share in the profit of that. Ultimately, the money was applied to another development called Kingsway by way of funding a related house purchase at Gilnahirk. The Ulster Bank foreclosed relatively shortly after this investment process in and about 2008 and so by the time the plaintiffs sought their money back the company was in administration. This is but a brief summary of the facts in the case. There are a number of factual disputes which I will come to but in essence there are really four core questions for determination:*
>
> *(i) What did the plaintiffs actually invest in?*
>
> *(ii) What duties were owed by the respective defendants to the plaintiffs?*
>
> *(iii) If duties were owed were they breached?*
>
> *(iv) Was there a trust which was breached/dishonest assistance in relation to this?"*

[10] The judge, having summarised the oral testimony of the four aforementioned witnesses, at [11] – [48], then turned to consider certain aspects of the documentary evidence, devoting some 11 pages of text to this. At [50] one finds the first of the judge's conclusions:

> "*In my view this case is really about whether the Plaintiffs should be compensated for their loss. I consider that the height of the claim is for £490,000. I am not satisfied that the Plaintiffs should be able to recover for the additional £110,000 they claim. That is because of the nature of that arrangement and the lack of any formalities or consideration ……*"

One interposes here the observation that this conclusion is not under challenge in this appeal.

[11] At this juncture it is appropriate to rehearse the specific findings identifiable in the judgment:

> (i) The document dated 12 June 2007 was of the mere "*heads of agreement*" species and did not constitute a legally binding contract.

(ii) The Plaintiffs believed that their funds were to be invested in the "*Ballygowan Site 2*" development.

(iii) The Plaintiffs were led to believe that the first and second Defendants had £1.2 million available to invest as joint participants in the said venture.

(iv) The Plaintiffs did not fully appreciate or understand the complicated commercial transaction in which they were becoming involved.

(v) It was represented to the first Plaintiff that he was investing in *Ballygowan Site 2* and he relied thereon. He was told by the first Defendant that there was pressure to provide the necessary money. He did not immediately discover that his monies had been invested in something else. He did not agree to the heads of agreement changes put forward in October 2008.

(vi) The "*heads of agreement*" document was unclear and ambiguous.

(vii) What the parties actually agreed was equally uncertain and imprecise.

(viii) The payment of £490,000 by the Plaintiffs was made against the advice of their solicitor to first engage in the processes of due diligence and the formalisation of appropriate contractual terms and warranties: see [62].

(ix) The meeting on 14 June 2007 was attended by the Plaintiffs, the first and second Defendants and Mr Kirkpatrick of the solicitors. During this meeting the letter of 12 June 2007 from the fourth Defendant to Mr Kirkpatrick was discussed. This meeting "*…. highlighted the development of Ballygowan rather than Kingsway/Gilnahirk*": see [64].

(x) At this meeting Mr Kirkpatrick did not make any express representation that "*… the transaction was going to fall through if the money was not paid*".

(xi) There was no contractual relationship/retainer between the solicitors and the Plaintiffs. Mr Kirkpatrick expressly advised the Plaintiffs to seek their own legal advice.

(xii) However, Mr Kirkpatrick stated at the meeting that he would "*give effect to the deal for all of them*", with reference to the heads

of agreement of 12 June 2007, and the Plaintiffs "*… subsequently relied upon him to do that*".

(xiii) The first Defendant clearly represented to the Plaintiffs that "*… they would all be investing in the Ballygowan* [No 2] *project and that they needed to get their money in right away ……* [and] *… he knew that this was wrong and that the Stewarts* [Plaintiffs] *would rely on him …….. he also made a representation that he and his uncle were joint investors and that they would provide £1.2 million. This was false and yet it was the core part of the agreement.*"

[12] At this stage of the judgment the learned judge, having made the first of her conclusions noted in [10] above, proceeded to make the following further conclusions:

(i) Given the findings that the first Defendant had made two key representations during pre-contractual discussions, namely that the Plaintiffs' monies were needed immediately and that the first and second Defendants would raise their share of the £1.8 million investment, the Plaintiffs' case in deceit/false representations against the first and second Defendants was established and their resulting loss was the £490,000 invested by them: see [76].

(ii) The first and second Defendants "*… would also have been liable in negligence and/or breach of fiduciary duty if deceit had not been proven.*"– see [77].

(iii) The first and second Defendants "*… are jointly and severally liable*".

(iv) "*There is no common law defence of contributory negligence in relation to fraudulent misrepresentation and so even though the Plaintiffs may have discovered the issues had they made the necessary enquiries this issue does not arise so far as the first and second Defendants are concerned*". See [77].

(v) There was no trust: see [80].

(vi) The Plaintiffs' case against the solicitors based on "*dishonest assistance*" was not sustained: [82] – [83].

(vii) Mr Kirkpatrick of the solicitors assumed responsibility (or a duty of care) to the Plaintiffs via his statement/advice that he would "*… effect the share purchase transaction once agreed*" and he "*… should have realised that the Martins may have misled the*

Stewarts", with the result that he was liable in negligence to the Plaintiffs: [85] – [94].

(viii) The loss resulting to the Plaintiffs from the solicitors' negligence mirrored that flowing from the torts of the first and second Defendants ie £490,000: [95].

(ix) The damages recoverable by the Plaintiffs from the solicitors should be reduced by 80% to reflect their contributory negligence in the following respects: they made their payment of £490,000 against the advice of their solicitor, without first obtaining and considering BMD's audited accounts for the year ended 31 December 2006, without any due diligence investigation of BMD and in the absence of any shareholder agreement or share purchase agreement vis-à-vis BMD. The judge concluded at [96]:

> "*Accordingly, I am of the view that there is a high level of contributory negligence and that it would be just and equitable to reduce the damages recoverable from the solicitors by 80%*".

The judge later provided an addendum to her judgment, which is addressed *infra.*

Notice of Appeal

[13] It is appropriate to highlight three particular features of this appeal. First, the Plaintiffs are the only Appellants. Second, there is no cross-appeal by any of the Defendants. Third, the first and second Defendants have elected not to participate in the appeal.

[14] There are five grounds of appeal. These embrace the several contentions that the learned trial judge erred in law -

(i) "*… in reducing the amount of the judgment in favour of the first and second Plaintiffs/Appellants against the first and second Defendants/Respondents from £490,000 to £245,000 …..*"

(ii) "*…. in failing to find that the* [solicitors] *owed and was* [were] *in breach of a fiduciary duty to the first and second Plaintiffs …..*"

(iii) "*… in finding that the first and second Plaintiffs were guilty of contributory negligence*".

(iv) *"… in finding that the first and second Plaintiffs were guilty of contributory negligence to the extent of 80%"*.

(v) *"… in reducing the amount of the judgment in favour of the first and second Plaintiffs by 50% …"*

The ultimate goal pursued by the Notice of Appeal is a final order whereby the Plaintiffs have judgment against all three Defendants in the amount of £490,000, with simple interest thereon at the rate of 4% per annum from 06 July 2007, together with costs above and below.

Our Conclusions

[15] The issues in this appeal have narrowed very considerably. The main reason for this is that settlement has been achieved as between the Plaintiffs and the solicitors. This will entail a payment of £200,000 damages by the solicitors to the Plaintiffs. The main significance of this is that the first two Defendants do not appear to be a mark for damages. This represents the first basis upon which the appeal will be allowed.

[16] There remains the Plaintiffs' appeal against the judge's resolution of their claim against the first and second Defendants. This relates solely to the issue of apportionment of liability and can be outlined in the following compact terms.

[17] The judge's evaluation and determination of the Plaintiffs' claim against the first and second Defendants is found at [73] – [81] of her judgment. As [73] – [77] make clear the judge was, in substance, considering the tort of deceit and the language of "*fraudulent misrepresentation",* reflecting the linguistic formulation of the Plaintiffs' case in the pleadings (see [4] – [6] *supra*) is to be thus construed.

[18] At [76] the judge made the clear finding that the first Defendant made two "*key representations*" to the first Plaintiff during what she describes as "*pre-contractual discussions*", namely that –

> *"… the money was needed immediately otherwise Ballygowan may be lost and also that he and his uncle would raise their share of the £1.8 million investment."*

The judge further found that the Plaintiffs –

> *"… clearly relied upon these representations as they entered into the contract on the basis of them."*

The final component of this discrete equation is the further finding that the Plaintiffs "*… suffered loss as a result of this namely the £490,000 they invested*".

[19] This is followed by, in [77]:

> "*This finding is sufficient to deal with the Plaintiffs' case against the first and second Defendants. However for the avoidance of doubt my view is that they would also have been liable in negligence and/or breach of fiduciary duty if deceit had not been proven. Accordingly, the Plaintiffs can recover against the first and second Defendants on the basis of fraudulent misrepresentation …*
>
> *The Plaintiffs are entitled to recover the £490,000 they speculated on the basis of the representations made. The first and second Defendants are jointly and severally liable for that. There is no common law defence of contributory negligence in relation to fraudulent misrepresentation …*"

The 'joint and several liability' conclusion is unambiguous. In the paragraphs which follow the judge rejects that aspect of the Plaintiffs' case relating to an equitable trust.

[20] As regards the solicitors the judge made a separate conclusion, equally unambiguous, at [94] – [95] - rehearsed at [12] above – that they were guilty of negligence causing the same loss to the Plaintiffs namely £490,000.

[21] The judgment at first instance was delivered in two stages. The substantive judgment having been promulgated on 05 November 2018, the judge invited the parties' further written submissions on certain issues consequential upon and ancillary to her findings and conclusions. This stimulated an "*Addendum*" to the judgment, delivered on 30 January 2019: see [99] – [103]. As appears from [99], one of the issues raised in the parties' further submissions was that of "*apportionment between Defendants or contribution*". At [100] the judge states:

> "*On the facts I have found, the relationship between the first and second Defendants and third Defendant is several as opposed to that of joint tortfeasors. I have not found a common design between them … as such it is appropriate to apportion liability …*
>
> *The outcome of any apportionment depends on the facts of this case. Having considered all of the circumstances I consider that a 50/50 apportionment is appropriate to reflect the different torts which occurred at different times.*"

This must be considered in conjunction with the final paragraph of the judgment, [103]:

> "*In summary, the Plaintiffs are entitled to recover £245K against the first and second named Defendants on a joint and severable* [sic] *basis plus costs and interest on that amount. They can recover £49K plus costs and interest on that amount against the third named Defendants. This takes into account apportionment between the Defendants and the reduction for contributory negligence which applies against the third Defendants only.*"

[22] There is clear disharmony between [77] of the main judgment and [100] and [103] of the Addendum as regards the outcome of the Plaintiffs' claim against the first and second Defendants. The same disharmony applies to the juxtaposition of [94] – [95] and [103]. For the reasons elaborated briefly below, the effect in law of the judge's unequivocal conclusion at [77] that the first and second Defendants are jointly and severally liable for the amount of damages assessed, namely £490,000, is that this liability cannot be diluted or modified by apportionment, or contribution as among these three Defendants. *Ditto* the liability of the solicitors to the Plaintiffs in the same amount, £490,000, subject (in their case only) to the 80% contributory negligence reduction. .

[23] Significantly the judge, in her careful findings, made no distinction between the damage caused by the different torts of the first and second Defendants (on the one hand) and the solicitors (on the other). As a matter of well-established principle, where several tortfeasors cause different damage to the plaintiff, each is liable only for the damage he has actually caused (see for example *Performance Cars v Abraham* [1962] 1 QB 33): that, however, is not this case having regard to the judge's findings. Quite the contrary: the first and second Defendants were held jointly and severally liable in deceit for the whole of the Plaintiffs' financial loss, while the solicitors were held severally liable in negligence also for the whole of the same loss. Thus, logically and in principle no question of contribution *inter se* arose and resort to the Civil Liability (Contribution) Act 1978 was not appropriate.

[24] Furthermore, the genesis of the "Addendum" evidently was the judge's understandable wish to be assisted by further submissions in order to formulate the outworkings of her substantive findings and conclusions, as a prelude to a final order. The "Addendum" is in effect a draft order of the court. It is axiomatic that the order of every court must give effect to the principal findings and conclusions of its substantive judgment. The error which has crept in here is the disharmony noted in [22] and [23] above.

Omnibus Conclusion

[25] The Plaintiffs' appeal is, therefore, allowed to the extent set forth in [15] – [24] above. The details of this conclusion can be discerned from the final order, reproduced in the Appendix, which the court has drawn up having considered the helpful draft provided by the Plaintiffs' legal representatives.

APPENDIX

FINAL ORDER

Whereas by its judgment delivered on 05 November 2018 and 30 January 2019 and ensuing Order dated 14 October 2019 the High Court (Commercial List) at first instance made the following awards in favour of the Plaintiffs/Appellants, being:

(1) £245,000 against the First and Second Named Respondents;
(2) £49,000 against the Third Named Respondent:
(3) Simple interest on the said amounts at 4% per annum from 06 July 2007 to the date of judgment:
(4) Costs, to be taxed in default of agreement,

AND WHEREAS the Plaintiffs/Appellants, being dissatisfied with the Order of the Court below, have appealed,

UPON hearing Counsel on behalf of all parties on 08 and/or 10 October 2019,

AND upon the solicitors on record for the First and Second Named Respondents informing the Court by correspondence dated 07 October 2019 that their clients would not be participating in this appeal and counsel for the said Respondents reiterating this to the Court on 08 and 10 October 2019,

IT IS HEREBY ORDERED THAT:

The Appellant's appeal against the said judgment and Order shall be allowed and the same shall be varied in the following respects:

(1) With the Consent of the Third Named Respondent:
    (i) the Appellants shall have judgment against the Third Named Respondent in the sum of £200,000 damages.

(ii) there shall be a six week stay of execution from the date hereof in respect of the amount specified at (i).

(iii) the Third Named Respondent shall pay the Appellants' reasonable costs, expenses and outlays, to be taxed in default of agreement, as have been incurred by the Appellants before the Court at first instance and on this appeal.

(2) The Appellants shall have judgment against the First and Second Named Respondents in the sum of £490,000 damages, together with simple interest thereon at 4% per annum from 06 July 2007 (as per [101] of the judgment at first instance) and costs above and below, to be taxed in default of agreement, the enforcement whereof shall be subject to any appropriate credit adjustment pursuant to (1) above.

(3) AND FURTHER, whereas the Second Named Appellant was legally assisted before the Court at first instance, those costs shall be taxed in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as amended.

(4) AND FURTHER, whereas the First Named Respondent was legally assisted before the Court at first instance, those costs shall be taxed in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as amended.

(3) AND there shall be liberty to apply.