

**Geo. Cluthe Manufacturing Co. Limited et al. v.
ZTW Properties Inc. et al.;**
The Advocates' Society, Intervenor *
**[Indexed as: Geo. Cluthe Manufacturing Co.
v. ZTW Properties Inc.]**

23 O.R. (3d) 370
**Ontario Court (General Division),
Divisional Court**
Southey, White and Fedak JJ.
May 15, 1995

* Note: By order of the Court of Appeal for Ontario (McKinlay, Catzman, and Abella JJ.A.) dated September 12, 1995, the defendant Feldman was granted leave to appeal the following judgment of the Divisional Court. The Advocate's Society was granted leave to intervene in the appeal by the order of the Chief Justice of Ontario dated September 18, 1995. On November 26, 1997, by a consent endorsement of the Court of Appeal for Ontario (Morden A.C.J.O., Abella and Rosenberg JJ.A.), the appeal was deemed abandoned as moot, without costs. The Court's endorsement read: "Order granted in terms of minutes of settlement filed." See 38 O.R. (3d) 319 in this database for the minutes of settlement.

Civil procedure — Certificate of pending litigation — Registration of certificate of pending litigation against lands not covered by order granting leave to issue certificate being a slander of title.

Evidence — Privilege — Solicitor and client — Solicitor and client privilege being privilege of client — Court not having jurisdiction to order solicitor to disregard solicitor and client privilege.

Torts — Libel and slander — Slander of title — Registration of certificate of pending litigation against lands not covered by order granting leave to issue certificate being slander of title — Solicitor's statement in registered certificate may be slander of title.

The plaintiff G Ltd. and the plaintiff TNGR Corp. were corporations with the same principals. On March 17, 1989, a numbered company mortgaged lands to G Ltd. The lands included 109 single-family residential lots (the residential lots) and also lands described as part of Lots 9 and 10 West Side of Oak Avenue (the Oak Avenue lots). In July 1989, the numbered company signed an agreement to sell the residential lots to the defendant ZTW Inc. In October 1989, G Ltd.'s mortgage went into default and it commenced power of sale proceedings.

In May 1990, ZTW Inc. retained the defendant FF, a solicitor, to bring an action for specific performance of the agreement with the numbered company or, in the alternative, for a return of a \$300,000 deposit and damages. In its action, ZTW Inc. obtained a certificate of pending litigation for the residential lots. The certificate, however, was registered against both the residential lots and also against the Oak Avenue lots.

In 1992, under its power of sale, G Ltd. sold the Oak Avenue lots to TNGR Corp. In January 1993, TNGR Corp. signed an agreement to sell a portion of the Oak Avenue lots to K Ltd., and TNGR Corp. asked ZTW Inc. to remove the certificate of pending litigation. This request was refused, and ZTW's response was to have G Ltd. and TNGR Corp. added as defendants to its action against the numbered company based on allegations that they had conspired to injure, breached the fiduciary duty of mortgagee, and were parties to a fraudulent conveyance. Then, as an added defendant, TNGR Corp. moved to have the certificate of pending litigation discharged. Sills J. granted the motion in part and on terms that TNGR Corp. mortgage certain lots to ZTW Inc. as security. The decision was embodied in a formal order made on consent. Despite this order, the sale to K Ltd. did not close.

In February 1994, G Ltd. and TNGR Corp. commenced the immediate action against ZTW Inc., its principal BS, and FF, claiming, among other relief, damages, declarations, a discharge of the certificate of pending litigation, and a discharge of the mortgage granted under the order of Sills J. Four causes of action were alleged: slander of title, intentional interference with contractual relations, abuse of process, and negligence. The first, second, and fourth causes of action were based on the registration of the certificate of pending litigation; the abuse of process action was based on G Ltd. and TNGR Corp. having been made parties to the first action. G Ltd. and TNGR Corp. also alleged an unlawful scheme to pressure them to repay the deposit.

ZTW Inc., BS and FF moved to strike out the statement of claim as not disclosing a reasonable cause of action and, among other grounds, as an abuse of process and attempt to relitigate the issue about the registration of the certificate of pending litigation. The motion was dismissed, and, in his reasons for judgment, the motions court judge directed that the defendant FF was free to disclose privileged information received from other parties. Leave being granted, ZTW Inc., BS and FF appealed. On the appeal, the Advocates' Society was granted standing as an intervenor.

Held, the appeal should be allowed in part.

The action for slander of title was untenable in so far as it was based on statements contained in the certificate of pending litigation; these statements were absolutely privileged. The privilege, however, did not attach to the registration of the certificate against the Oak Avenue lots, which were not included in the order granting leave to issue the certificate. The registered statement that these lands were affected by the order was a slander of title. A solicitor who knowingly participated in the registration of the slanderous instrument or who advised against it being removed may be liable as a joint tortfeasor. Thus, part of the slander of title claim was viable and, in these circumstances, there was no practical benefit striking any part of this claim.

It was not clear that the claims based on intentional interference with contractual relations and abuse of process should be struck. If the commission of either was proved, then FF could be liable as a tortfeasor even if he acted only as a solicitor for ZTW Inc. There was no basis, however, for the claim in negligence; no authority supported the proposition that a litigant or his or her solicitor owes a duty of care to an opposing party. The pleading of unlawful scheme seemed a plea of conspiracy and would add nothing to the other four causes of action.

Finally, the motions court judge erred by making his order about solicitor and client privilege. It is fundamental that the privilege attaching to confidential communications between solicitor and client is the privilege of the client. No authority was cited that the court may authorize a solicitor to disregard the privilege.

Cases referred to

Al-Kandari v. J.R. Brown & Co., [1988] 1 All E.R. 833 (C.A.); Business Computers International Ltd. v. Registrar of Companies, [1987] 3 All E.R. 465, [1987] B.C.L.C. 621 (C.A.); Chatelaine Homes Ltd. v. Miller (1982), 39 O.R. (2d) 611, 140 D.L.R. (3d) 319, 26 R.P.R. 68 (C.A.); Greenwood v. Magee (1977), 15 O.R. (2d) 685, 4 C.P.C. 67 (H.C.J.); Montgomery v. Scholl-Plough Canada Inc. (1989), 70 O.R. (2d) 385, 40 C.P.C. (2d) 128 (H.C.J.); Ontario Industrial Loan & Investment Co. v. Lindsey (1884), 4 O.R. 473 (H.C.J.) [vard (1883), 3 O.R. 66 (C.A.)]; Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd. (1985), 5 C.P.C. (2d) 97, 37 R.P.R. 157 (Ont. H.C.J.); Ross v. Caunters, [1979] 3 All E.R. 580, [1979] 3 W.L.R. 605, 123 Sol. Jo. 605 (Ch. D.); Tersigni v. Fagan, [1959] O.W.N. 94 (C.A.); Ward v. Lewis, [1955] 1 All E.R. 55, [1955] 1 W.L.R. 9, 99 Sol. Jo. 27 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106(3)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 25.11, 62.02(4)

Authorities referred to

Fleming, The Law of Torts, 8th ed. (1992), p. 623 Irvine, J., The Resurrection of Tortious Abuse of Process (1989), 47 C.C.L.T. 217

Appeal with leave from an order dismissing a motion to have an action dismissed as showing no reasonable cause of action or on grounds of being an abuse of process.

William E. Pepall, for appellant, Frank Feldman.

J.G. Hodder, for appellants, ZTW Properties Inc. and Bruno Schickedanz.

Irwin A. Duncan and William Poulos, for respondents.

Ronald J. Rolls, Q.C., for intervenor.

The judgment of the court was delivered by

SOUTHEY J.: — These are appeals with leave from the dismissal by Crane J. of motions to strike out the statement of claim and dismissing or staying the action on the ground that the statement of claim discloses no reasonable cause of action.

The motions were also based on the ground that the statement of claim is frivolous, vexatious and an abuse of process and an attempt to relitigate the issue respecting the registration by ZTW of a certificate of pending litigation ("CPL") raised by the defendant the Nith and Grand River Corp. ("Nith Corp.") in an earlier action (the "first action") in which ZTW is plaintiff and Nith Corp. and the Geo. Cluthe Manufacturing Co. Limited ("Cluthe Ltd.") are defendants. The proceedings in the first action respecting the discharge of the CPL will be described later.

ZTW and Schickedanz also based their motions to strike out the statement of claim on the ground that there is another proceeding pending in the Ontario courts between the same parties in respect of the same subject matter. ZTW and Schickedanz alleged breaches of the rules of pleading in respect of a large number of paragraphs in the statement of claim and claim relief on all the grounds given in rule 25.11 of the Rules of Civil Procedure for striking out or expunging all or part of a pleading.

Lofchik J. granted leave to the Advocates' Society to intervene as a friend of the court because he was satisfied that the issue raised respecting the responsibilities and duties of solicitors and solicitor-client privilege were of great importance to solicitors and the public in general.

The Nature of the Two Actions The first action was one commenced by ZTW on May 16, 1990 claiming specific performance of an agreement of purchase and sale between ZTW and 799374 Ontario Limited ("799 Ont.") dated July 13, 1989, for the purchase from 799 Ont. of 109 single-family residential lots for \$5,559,000. In lieu of specific performance, ZTW claimed the return of a deposit of \$300,000, alleged to have been paid to 799 Ont. with interest, and damages of \$10 million. On May 16, 1990, ZTW obtained leave on an ex parte motion to issue a CPL in respect of the lands set forth in the statement of claim. The CPL was registered on May 17, 1990 against those lands, and on August 2, 1990 against other lands that were said to be affected but not included in the order granting leave to issue a CPL or in the CPL itself. Such other lands are described in part as Lots 9 and 10 west side of Oak Avenue.

All of the lands aforesaid, including Lots 9 and 10 (the "lands in question"), were subject to a mortgage from 799 Ont. and related corporations to Cluthe for \$4,500,000, registered March 17, 1989. Cluthe Ltd. had alleged default and had commenced power of sale proceedings under the mortgage in October 1989. The lands in question were sold by Cluthe Ltd. on January 31, 1992, to Nith Corp. under the power of sale for \$4,500,000. The lands were conveyed to Nith Corp. by deed dated February 3, 1992, and Cluthe Ltd. took back a mortgage for \$4,500,000.

On January 8, 1993, Nith Corp., as vendor, entered into an agreement of purchase and sale to sell a portion of the lands in question to K.J. MacKay Construction Ltd. for \$1,350,000. Nith Corp. requested ZTW and Feldman, who had been retained as solicitor for ZTW to recover the deposit of \$300,000, to remove the CPL. The request was refused. Nith Corp. moved for an order vacating the CPL. Before the motion was heard, ZTW and Feldman obtained an ex parte order on May 5, 1993, adding Cluthe Ltd. and Nith Corp. as defendants in the first action, and adding a

claim for punitive damages of \$150,000. The allegations by ZTW against the added defendants were that they and 799 Ont. had conspired to injure ZTW by avoiding the contractual obligations between ZTW and 799 Ont. and thereby attempting to obstruct the return to ZTW of its deposit money of \$300,000. ZTW also sought to set aside the sale from Cluthe Ltd. to Nith Corp. as a fraudulent conveyance, as a sale by the mortgagee to itself (because both parties had the same principals), and as a sale in breach of the fiduciary duties of Cluthe Ltd. as a mortgagee.

A motion by Nith Corp. under s. 106(3) of the Courts of Justice Act, R.S.O. 1990, c. C.43, for an order discharging the CPL registered by ZTW was granted by Sills J. as to part of the lands in question. In his reasons for judgment, dated August 12, 1993, he referred to the factums filed by both counsel as showing that ZTW was really seeking the return of its deposit of \$300,000 and possibly damages for loss of opportunities as well as punitive damages. He said it was clear from the submissions of counsel for ZTW that ZTW was mainly concerned that the land be available for enforcement of a judgment for the return of the deposit and any other monetary claims. He said it was also clear that the claim for return of the deposit was only enforceable, if at all, against 799 Ont.

He reached his decision as follows:

Section 103(6) of the Ontario Courts of Justice Act provides:

103(6) The court may make an order discharging a certificate,

- (a) where the party at whose instance it was issued,
 - (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
 - (ii) does not have a reasonable claim to the interest in the land claimed, or,
 - (iii) does not prosecute the proceeding with reasonable diligence;
- (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
- (c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

Pursuant to the said s. 103(6)(a)(i), I find that I have the discretion to make an order discharging the certificate of pending litigation since, indeed, the plaintiff has claimed a sum of money in place of or as an alternative to the interest in the land claimed. Further, since counsel for Nith has indicated that he only wants a partial discharge of the certificate of pending litigation with respect to the lands described in para. (b) of the amended notice of motion and the certificate would then remain registered against the balance of the lands in question, the interests of the plaintiff are adequately protected by that remaining security.

I have reviewed the criteria considered by Master Donkin in *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 and I have come to the conclusion that since it appears that Cluthe had the right to exercise its power of sale against Ontario,

since there is an alternative claim for damages or return of the deposit and in any event damages would be a satisfactory remedy and since significant harm will accrue to the defendant Nith if the certificate is allowed to remain in light of an impending sale of the part of the lands requested to be discharged from the effect of the certificate of pending litigation, an order should issue for a partial release of the certificate of pending litigation.

The decision of Sills J. was embodied in a formal order, dated October 29, 1993, made on consent in which the certificate of pending litigation was discharged against certain lands upon the registration of alternate security in the form of a first mortgage from Nith Corp. as mortgagor to ZTW as mortgagee in the principal amount of \$500,000 to be registered against 10 lots. Upon the sale by Nith Corp. of any of those 10 lots, the sum of \$50,000 is to be paid into court or otherwise secured by an agreement in return for a partial discharge of the mortgage on a lot-by-lot basis.

The appeals before this court arise out of motions brought in a second action that was commenced by Cluthe Ltd. and Nith Corp. as plaintiffs by a statement of claim issued on February 23, 1994. The defendants in that action are ZTW, Bruno Schickedanz ("Schickedanz"), the president and principal shareholder of ZTW, and Frank Feldman, a solicitor who is alleged to have acted as solicitor for ZTW and Schickedanz "at all material times". The plaintiffs claim the following:

- (1) Declarations impugning the obtaining and registration by ZTW of its CPL, and as to the knowledge of the defendants in April, 1993.
- (2) An order requiring the defendants to discharge the CPL registration relating thereto.
- (3) An order requiring the defendants to discharge the mortgage given to ZTW as alternate security under the decision and consent order of Sills J.
- (4) An injunction restraining the defendants from launching any further motions for a CPL against any lands owned by Cluthe Ltd. and Nith Corp. without prior notice to Cluthe Ltd. and Nith Corp.
- (5) Damages of \$5 million.
- (6) Special damages of \$1 million.
- (7) Punitive damages of \$100,000.

The claims for relief are based on four causes of action alleged in the statement of claim:

- (1) Slander of title by registering and refusing to remove a CPL and declaration relating thereto containing false and malicious statements relating to the plaintiffs' title.
- (2) The tort of intentional interference with contractual relations by registering and refusing to vacate in a timely fashion the CPL obtained by ZTW and the declaration relating thereto, which caused the plaintiffs to lose the sale to K.G. MacKay Construction Ltd. despite the partial discharge order of Sills J.
- (3) The tort of abuse of process by adding Cluthe Ltd. and Nith Corp. to the first

action on the strength of frivolous and unsubstantiated allegations, and by delaying proceedings in the first action and in Nith's motion to vacate the CPL of ZTW with the improper motive of extracting from Cluthe Ltd. and Nith Corp. the alleged missing deposit of \$300,000.

- (4) Negligence in registering and failing to remove when demanded the CPL of ZTW and declaration relating thereto, when they knew or ought to have known that ZTW did not have an interest in the lands and that Cluthe Ltd. had priority, thereby causing damage to the plaintiffs.

The plaintiffs also allege that the defendants in the second action entered into an unlawful "scheme" to maintain on title the CPL of ZTW and declaration relating thereto to delay the hearing of Nith Corp.'s motion to vacate the CPL and to commit the alleged acts of slander of title, interference with contractual relations and abuse of process to pressure the plaintiffs to pay to ZTW its alleged loss of deposit of \$300,000.

The Orders Below

The orders under appeal resulted from the decision of the learned motions court judge dismissing the motions to strike out the statement of claim. In the endorsement containing his reasons for that decision, after referring to the heavy onus on the moving party, he said:

This court has a jurisdiction to supervise the conduct of solicitors of this Province. Mr. Feldman is one of those solicitors. Allegations are made in the statement of claim if found to be factual, may cause a trial judge to intercede. This action with action 49482/90 [the first action] constitutes wrongful conduct alleged by each party against the other. I direct that the action when set down for trial be placed on the same trial list and be subject to order of the trial judge as to how and when these actions be tried.

Should it be necessary in law, I direct that the defendant Frank Feldman may raise matters relevant to these actions which would otherwise be privileged communication with other parties in these two actions.

The defendants will have 30 days to deliver statements of defence.

The costs of these motions are in the cause. There will not be a stay of either action as all alleged wrongful conduct between these parties is best dealt with as an entirety and the actions of each party is interwoven with the dealings and actions of the others.

In allowing this action to proceed I make no findings on the merits of the action other than I am not convinced that it cannot possibly succeed, although novel, for example an actionably wrongful exercise of a legal right, under certain circumstances.

On the motion for leave to appeal, Lofchik J. found that grounds existed for leave to appeal under both cls. (a) and (b) of rule 62.02(4).

I now turn to consider each of the four causes of action alleged in the statement of claim.

Slander of Title

The allegation of slander of title based on statements in the CPL is not valid in law, in my opinion, because of the decision of the Court of Appeal in *Tersigni v. Fagan*, [1959] O.W.N. 94, that such statements are issued in and part of the process of the court and are absolutely privileged. *Tersigni v. Fagan* was followed by *Anderson J. in Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd.* (1985), 5 C.P.C. (2d) 97, 37 R.P.R. 157 (Ont. H.C.J.).

The decision of the Court of Appeal in *Chatelaine Homes Ltd. v. Miller* (1982), 39 O.R. (2d) 611, 140 D.L.R. (3d) 319, which was based in part on *Ontario Industrial Loan & Investment Co. v. Lindsay* (1883), 4 O.R. 473 (H.C.J.), one of the cases referred to by Crane J., did not, in my judgment, overrule *Tersigni v. Fagan*, or cast doubt on the proposition laid down therein. *Chatelaine Homes v. Miller* did not involve the registration of a CPL. At issue there was the registration of agreements of purchase and sale containing a clause prohibiting registration. It was accepted in *Chatelaine Homes v. Miller* that a valid cause of action for slander of title had been pleaded. The issue was as to the liability of a solicitor acting on the instructions of his client. No reference was made to *Tersigni v. Fagan* in *Chatelaine Homes v. Miller*, either in the judgment of the Court of Appeal or in the judgment at first instance.

Although the statements in the CPL are absolutely privileged, I can see no reasons why the privilege would attach to the declaration registered by ZTW on August 2, 1990, against Lots 9 and 10, west side of Oak Avenue.

That declaration was made by a solicitor, Ronald Birken, stating that he had obtained an order granting leave to ZTW to issue a CPL "with respect to the lands and premises described in the Statement of Claim and in Schedule 'A' to the said order". The "said order" is the order of Master R.B. Linton, dated May 16, 1990. The lands in respect of which that order granted leave to issue a CPL did not include Lots 9 and 10, west side of Oak Avenue. The Birken declaration went on to state baldly that the instrument registering Master Linton's order "also affects" Lots 9 and 10, west side of Oak Avenue, despite the fact that Lots 9 and 10 were not included in the said order.

The statement in that declaration that Master Linton's order affects Lots 9 and 10 might, in my opinion, constitute slander of title. The statement is not privileged because it is not in the CPL and is not part of the process of the court.

Slander of title is a tort. When the alleged slander is contained in a registered instrument, it is a continuing tort. It would seem reasonable to me that the failure to remove the alleged slander from the registry might constitute an aggravation of the tort, and that a solicitor who knowingly participated in the original registration, or who advised against its removal from the registry, might be liable as a joint tortfeasor. Such liability would be similar to that of a servant who knowingly commits a tort during the course of his employment on the instructions of his master. The master and the servant are both liable as joint tortfeasors.

For the foregoing reasons, I am not satisfied that the claim for slander of title should be struck out as against Feldman or the other defendants in relation to the registration of the declaration and the refusal to remove it from the registry. That being so, I do not think it would be

appropriate to strike out the part of the claim for slander of title relating to the registration of the CPL. There would be no practical benefit in striking out that part of the claim only: see *Montgomery v. Scholl-Plough Canada Inc.* (1989), 70 O.R. (2d) 385, 40 C.P.C. (2d) 128 (H.C.J.).

Mr. Pepall raised before us a new point, namely, that the consent order of Sills J. barred the plaintiffs from maintaining a further action arising out of registration of the CPL. He argued that the plaintiffs were seeking to relitigate in this action the very question that had been settled before Sills J. If that argument is valid, and I make no comment one way or the other, it is a matter that should be raised as a defence. It does not impeach the legal validity of the plaintiffs' claims in the action, and it is not a reason for striking out the statement of claim.

Intentional Interference with Contractual Relations and Abuse of Process

It is not clear to me that the pleading of the torts of intentional interference with contractual relations and abuse of process should be struck. If the commission of one or both of those torts is proved, Feldman could be liable as a tortfeasor, even if he acted only as solicitor for ZTW.

Counsel referred to my decision in *Greenwood v. Magee* (1977), 15 O.R. (2d) 685, 4 C.P.C. 67 (H.C.J.), in which I stated that the cause of action for malicious abuse of civil proceedings is not complete until those proceedings have been dismissed. That rule is not applicable to the tort of abuse of process, a different tort, which is the cause of action asserted in the case at bar. A plaintiff in an abuse of process action need not show that the proceedings of which he complains were determined in his favour: see *John Irvine, The Resurrection of Tortious Abuse of Process* (1989), 47 C.C.L.T. 217, and *Fleming, The Law of Torts*, 8th ed. (1992), p. 623.

If the action complained of need not have been completed, it follows, in my opinion, that the existence of the first action, which is the other proceedings between the same parties in respect of the same subject matter, is not a valid ground for striking out the statement of claim in the second action, as was argued by counsel for ZTW and Schickedanz.

Negligence

The plea of negligence is not valid in law and should be struck out. There is no authority to support the proposition that a litigant, or his solicitor, owes a duty of care to an opposing party. Ordinarily, to state the obvious, the interests of opposing litigants are in conflict. I adopt the following statements in English authorities cited by Mr. Rolls:

The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd.

(Per Scott J. in *Business Computers International Ltd. v. Registrar of Companies*, [1987] 3 All E.R. 465 at p. 472, [1987] B.C.L.C. 621 (Ch. D.))

In broad terms, a solicitor's duty to his client is to do for him all that he properly

can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his client. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he has served his client.

(Per Sir Robert Megarry V.-C. in *Ross v. Caunters*, [1979] 3 All E.R. 580 at p. 599, [1979] 3 W.L.R. 605 (Ch. D.))

A solicitor acting for a party who is engaged in "hostile" litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent (see *Business Computers International Ltd. v. Registrar of Companies*, [1987] 3 All ER 465). This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby that person is without a remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation (see *Myers v. Elman* [1939] 4 All ER 484).

.

I would go rather further and say that, in the context of "hostile" litigation, public policies were usually required that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless relitigation of disputes (see *Rondel v. Worsley* [1967] 3 All ER 993, [1969] 1 AC 282).

(Per Lord Donaldson of Lynton M.R. in *Al-Kandari v. J.R. Brown & Co.*, [1988] 1 All E.R. 833 at p. 835 (C.A.).)

Scheme

Almost at the end of their statement of claim, at p. 42, paras. 122 and 123, the plaintiffs allege that the defendants entered into an unlawful scheme in 1990, 1992 or 1993. The objects of the scheme were alleged to be maintaining the CPL and declaration on title, delaying the hearing of the motion of Nith Corp. to vacate the CPL and committing all other acts of slander of title, interference with contractual relations and abuse of process as earlier pleaded to pressure the plaintiff to pay ZTW its alleged lost \$300,000 deposit money.

The pleading of unlawful scheme looks like a plea of conspiracy. A plea of conspiracy would add nothing to the pleas that the defendants committed the four torts alleged. The prior agreement merges in the tort (per Denning L.J. in *Ward v. Lewis*, [1955] 1 All E.R. 55 at p. 56, [1955] 1 W.L.R. 9 (C.A.).)

Counsel for the plaintiffs, Cluthe Ltd. and Nith Corp., stated that the allegation of a "scheme" was not intended to be the allegation of a cause of action.

In my judgment, the plea of "scheme" may prejudice or delay the fair trial of the action and is vexatious. It should be struck out.

The Role of the Solicitor

Turning to the points addressed by Mr. Rolls, I consider the comment by Crane J. regarding the court's jurisdiction to supervise the conduct of solicitors as too vague and general to justify any review in depth. It does not form part of the orders resulting from the endorsement. It is those orders, not the reasons contained in the endorsement, which are the subject of the appeals.

While I recognize the importance of a bar that is sturdily independent in the face of excessive interference from the bench, I also recognize the necessity of judges maintaining some control over the manner in which proceedings are conducted. Whether an acceptable degree of control can properly be described as "supervision" should not be decided in this case.

Of greater importance, in my view, is the provision in each order that Feldman, the solicitor, may "raise matters relevant to these actions which would otherwise be privileged communications with other parties in these two actions". Two of the other parties in the actions are persons for whom Feldman acted as solicitor, namely, ZTW and Schickedanz.

The provision in question purports to free Feldman from his duty to maintain secrecy with respect to confidential communications, and to disclose matters that otherwise would be the subject of privileged communications between him and his clients. It is fundamental that the privilege attaching to confidential communications between solicitor and client is the privilege of the client. That privilege can be waived only by the client, not by the solicitor. No authority was cited for the proposition that the court may authorize a solicitor to disregard the privilege, absent waiver by the client. With the greatest deference to the learned motions court judge I find that he erred in so ordering, and that the provision must be deleted from each order.

Stay

Cluthe Ltd. and Nith Corp. have moved for summary judgment dismissing the first action as against them. That motion is still pending. All parties agreed that the second action should be stayed until a decision has been given on the motion for summary judgment, and I so order.

Result

The appeals are allowed. The orders below will be varied in each case by striking out paras. 1 and 3 thereof, and by adding a paragraph striking out paras. 119 to 124 of the statement of claim. There will also be an order on consent staying the second action pending determination of a pending motion by the defendants Cluthe Ltd. and Nith Corp. in the first action before Lissaman J. for summary judgment dismissing the action as against them.

As success has been divided, there will be no costs on the motion for leave or in this court.