Docket: CA 161820
Date: 20000726

NOVA SCOTIA COURT OF APPEAL

[Cite as: Horn Abbot Ltd. v. Reeves, 2000 NSCA 88]

Roscoe, Hallett and Bateman, JJ.A.

BETWEEN:

DOUGLAS ARTHUR REEVES

Appellant

- and -

HORN ABBOT LTD., CHARLES SCOTT ABBOTT, CHRISTOPHER HANEY, JOHN HANEY and EDWARD MARTIN WERNER

Respondents

REASONS FOR JUDGMENT

Counsel:	Kevin A. MacDonald for the Appellant John C. Cotter for the Respondent, Horn Abbot Ltd. William L. Ryan, Q.C. and John E. MacDonell for the Respondents, Abbott, Haney, Haney and Werner
Appeal Heard:	June 15, 2000
Judgment Delivered:	July 26, 2000
THE COURT:	The appeal is allowed with costs as per reasons for judgment of Roscoe, J.A.; Hallett and Bateman, JJ.A., concurring.

ROSCOE, J.A.:

[1] In an action, commenced in 1994, (the Wall action) against the respondents on this appeal, David Wall claims that he invented the game Trivial Pursuit. He says that he discussed his idea with Christopher Haney in December 1980; that Haney stole his idea for the game; and that Haney and others, who are respondents on this appeal, developed and marketed the game. That action has not yet been scheduled for trial.

[2] The respondents herein, who are the defendants in the Wall action, commenced two separate actions in June 1999; one against Douglas Reeves, the appellant herein; and one against Donald Campbell, claiming that they each conspired with Wall to fabricate a story that Wall invented the game for the purpose of fraudulently depriving them of the ownership and profits derived from the game.

[3] The appellant seeks leave to appeal and, if granted, appeals an interlocutory decision made by Justice Suzanne Hood, dismissing the appellant's application to strike out the respondents' statement of claim pursuant to **Civil Procedure Rules** 14.25(1)(b) and (d) or alternatively, to either grant a stay of proceedings pursuant to **Rule** 37.10(a) and s. 41(e) of the **Judicature Act**, or to order that the matter be tried after the Wall action, further to **Rule** 37.14.

[4] The Reeves action was commenced on June 18, 1999. The factual allegations in

the Reeves statement of claim include:

> 12. The Plaintiffs state that the Defendant, while he was living in Nova Scotia, along with an individual named David H. Wall ("Wall"), an individual named Donald Joseph Campbell ("Campbell"), and others, the identities of whom are best known to the Defendant (collectively the "Conspirators"), agreed to and did fabricate a story wherein Wall and the Conspirators falsely claim that Wall is the true inventor of the game "Trivial Pursuit®", in an attempt to defraud the Plaintiffs of some or all of their income from the game "Trivial Pursuit®" and Horn Abbot of its ownership of the game (the "Fraud").
>
> 13. In furtherance of the Fraud, the Conspirators through Wall sought to obtain moneys from the Plaintiffs on the basis of the false claims described above, and when that was unsuccessful, the conspirators through Wall commenced an action against the Plaintiffs in the Supreme Court of Nova Scotia, by filing a Statement of Claim and two Amended Statements of Claim containing false allegations to support the Fraud. This was done in order to extract a settlement from the Plaintiffs, and failing that, to obtain a judgement based on the false allegations as aforesaid (and as are more particularly set out in the Amended Statement of Claim in Nova Scotia Supreme Court Action S.H. No. 101331). Also, in furtherance of the Fraud, Wall has made the aforementioned false assertions to various individuals in Nova Scotia and elsewhere.
>
> 14. Also, in furtherance of the Fraud, the Defendant agreed to corroborate, and has corroborated, the Fraud by agreeing to give and giving false statements and testimony in support of the Fraud.
>
> 15. In exchange for their participation in the Fraud, the Defendant, Wall and the other Conspirators agreed that Wall would receive Fifty Percent (50%) of the proceeds from any judgment or settlement arising from the Fraud, and that the Defendant and the other Conspirators would split the remaining Fifty Percent (50%).
>
> 16. In addition to the foregoing, particulars of the Defendant's participation in the Fraud include the following:
>
> (a) giving false statements to solicitors for Wall;
>
> (b) giving false and perjurious [sic] testimony, under oath, at an examination for discovery at Edmonton, in the Province of Alberta, on February 3, 1998;
>
> (c) such other particulars as may appear.
>
> 17. On or about March 28, 1998, Campbell, whom the Defendant knows to be one of his co-Conspirators as aforesaid, admitted, in writing, that the Fraud, and Wall's corresponding action in the Supreme Court of Nova Scotia, are a "scam" from which he and others intended to profit at the expense of the Plaintiffs.

[5] On the application to strike out the statement of claim before Hood, J., she struck

out portions of the affidavits filed by Mr. Reeves and Mr. Wall in support of the application, on the basis that they purported to prove or disprove allegations in the statement of claim, contrary to this court's decision in **Sherman v. Giles** (1994), 137 N.S.R. (2d) N.S.R. (2d) 52. That ruling has not been appealed.

[6] The application was advanced on the basis of **Rules**14.25 (1)(b) and (d) which state:

> 14.25.(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> . . .
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> . . .
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[7] In her decision, the Chambers judge referred to the list of indicators of frivolous and vexatious actions itemized in **Re: Lang Michener et al. and Fabian et al.** (1987), 59 O.R. (2d) 353, adopted by this court in **Sherman v. Giles**, ***supra***, and concluded that there was no indication of duplicitous conduct, delay or failure to comply with the **Rules**, on the part of the respondents. Nor did the Chambers judge accept the assertion by the appellant that the action was an attempt to intimidate him from giving evidence in the Wall action, and therefore brought for an improper purpose or for other than the assertion of legitimate rights. The action, she determined, was not one of the clearest of cases that was absolutely unsustainable.

[8] The appellant had also submitted that the action against him arose entirely from his discovery evidence given in the Wall action, and that therefore it should be barred as a result of the operation of the implied undertaking rule as adopted by this court in **Sezerman v. Youle** (1996), 150 N.S.R. (2d) 52, at para. 6 therein:

> (1) . . .
>
> There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.
>
> (2) There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.

[9] The Chambers judge found that the implied undertaking rule should not prevent the continuation of the Reeves action because, based on the evidence before her, she was:

> . . . satisfied that it is more probable than not that the role of Douglas Reeves in David Wall's lawsuit was in the public domain or could have been found out otherwise than through the evidence he gave on discovery in the **Wall** proceeding.

[10] Justice Hood denied the application to stay the Reeves action until after the completion of the Wall action, after concluding that the extent of the claim in the Reeves action is not dependant on the outcome of the action by Wall, that the action was not an abuse of process, and that Mr. Reeves would not be prejudiced if the action proceeds. After hearing further submissions from counsel, she also declined to direct, pursuant to **Rule** 39.02, that the two actions be tried together, or that the Reeves action be tried following the Wall action.

[11] The appellant states the issues for determination on appeal as:

> Did the Learned Chambers Justice err in law or give no or insufficient weight to relevant evidence in finding that the appellant had failed to meet the burden to strike or alternatively stay the within action pursuant to:
>
> (i) The Witness Immunity Rule;
>
> (ii) The Implied Undertaking Rule;
>
> (iii) Civil Procedure Rule 14.25;
>
> (iv) **Judicature Act** Section 41(e);
>
> (v) Civil Procedure Rule 39.02.

The Standard of Review

[12] All counsel agree that the standard of review applicable in this case which involves interlocutory orders of a discretionary nature is that as set out in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, that is, that we will interfere only if a wrong principle of law has been applied or a patent injustice would result.

[13] While in the Supreme Court, the appellant based the application to strike on **Rules** 14.25(1)(b) and (d) on appeal, he primarily asserts that the statement of claim discloses no reasonable cause of action, and should be struck pursuant to **Rule** 14.25(1)(a).

[14] On the application to strike a statement of claim pursuant to **Rule** 14.25(1)(a), the applicant has the burden of proving that the plaintiff's claim is obviously unsustainable or devoid of all merit, (**Sherman v. Giles**, ***supra***), or "plain and obvious" that it discloses no

reasonable cause of action, (**Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959). The facts alleged in the statement of claim are, for the purposes of the application, assumed to be true (**Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323).

The Witness Immunity Rule

[15] After the hearing of the application before Justice Hood, the appellant sent her a copy of this court's decision in **Martini v. Wrathall** (1999), 180 N.S.R. (2d) 38, and submitted a new argument, that is, that the evidence given by Reeves on discovery was protected by an absolute privilege. In the **Martini** case, this court approved of the following statement of the witness immunity rule in **Dooley v. Weber (C.N.) Ltd. et al.** (1994), 19 O.R. (3d) 779:

> ... an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process. The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution.

[16] Hood J., distinguished the **Martini** case on the basis that it dealt only with an affidavit filed by a solicitor in a previous action. The appellant cites several other authorities in support of the argument that witnesses are not liable to be sued for evidence given in the course of a judicial proceeding or for statements given to counsel in preparation for his testimony: **Turner** v. **Cuttler et al**, 1997 BCTC Uned 597; **Mackenzie v**. **Chilliwack (District)**, 1997 BCTC Uned E84; **Piercey v. Newfoundland (Attorney General)** (1999),

177 Nfld. & P.E.I.R. 87 (NFTD); **Crossan v. Mortgage and Appraisals Ltd. et al.** (1998), 164 Nfld. & P.E.I.R. 319 (NFTD); **R.G-H. and W.G-H. v. Christison et al.**, 150 Sask. R. 1; **Watson v**. **M'Ewan**, [1905] A.C. 480 (H.L.); and **Halls v. Mitchell,** [1928] 2 D.L.R. 97; [1928] S.C.R. 125. There can be little doubt that if the action by the respondents against the appellant claimed only that he gave false evidence on his discovery or at trial, and false statements to Wall's solicitor, the application to strike should have succeeded.

[17] The feature which distinguishes this case from the authorities listed in the preceding paragraph is that here there is an allegation of conspiracy as noted by the personal respondents in their factum:

> The Respondents allege, in their Statement of Claim, that the Appellant, David Wall, Donald Campbell and others (the "Conspirators") fabricated a story about Mr. Wall being the true inventor of the game *Trivial Pursuit*, in an attempt to defraud the Respondents by either forcing the Respondents to settle with them for a sum of money to avoid the initiation of a legal action, or failing such settlement, to proceed with a legal action against the Respondents in an attempt to obtain a judgment based on the false story. The Respondents allege that the Appellant, having participated in concocting the fraudulent story, agreed to corroborate this fraudulent story, and has corroborated it by giving false statements and testimony in support of it.

[18] The appellant argues that any plea of conspiracy is merged in the tort of fraud and cannot stand alone, citing as the primary authority **Ward v. Lewis**, [1954] 1 All E.R. 55 (C.A.) where at p. 56, Denning L.J. said:

> . . . It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort . . .

[19] The English doctrine of merger however, at least as so stated in 1954, is not currently applicable in Canada. In **Hunt v. Carey**, ***supra***, the Supreme Court of Canada dealt with the issue of merger of a conspiracy claim in the context of whether there was a reasonable cause of action, in the following passage: (p. 991)

> Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.
>
> In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.
>
> This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[20] The respondents rely on **Surzur Overseas Ltd. v. Koros et al.**, [1999] 2 Lloyd’s

L.R. 611, a decision of the English Court of Appeal, in support of their argument that because they also allege a conspiracy to defraud not dependant upon the giving of false testimony in addition to the agreement to give false testimony, the action should not be struck out on the basis of the witness immunity rule.

[21] The facts of the **Surzur** case are rather complex, but I will summarize them since an understanding of the context is helpful in determining its applicability to this case. The plaintiff, Surzur Overseas Ltd., had obtained a Mareva injunction against Mr. Koros which prevented him from selling his possessions and required him to disclose all of his assets. In compliance with the order, Koros swore and filed an affidavit disclosing his assets, but failed to show his beneficial interests in three ship-owning companies. Koros then entered into warehousing contracts purporting to sell the three ships, but on terms which allowed him to retain control of the vessels and to share in their earnings. Next, Koros entered into false memorandums of agreement (the “MOA’s”) which recited the terms of ostensible sales of the three ships. Surzur became aware of the dealings respecting the ships and obtained an amendment to the injunction adding the interests in the ships. Koros then sought Surzur’s consent to the sales of the ships. Surzur refused to consent. Koros made an application to the court for permission to sell the ships. On the application, Koros introduced the false MOAs portraying arms-length transactions which would realize little, if any, surplus for Koros after the payment of encumbrances. The application to amend the injunction to permit sale of the ships was denied at that stage. After Koros filed supplementary false affidavits attaching false documents verifying the encumbrances, the injunction was varied to permit the sales.

[22] Surzur brought an action against Koros and several others claiming conspiracy to defraud and cause injury by unlawful means including:

> . . . (particularly:
>
> (i) concealing assets of Mr Koros with intent to assist him in deceiving and defrauding his creditors (including aiding and abetting him in the concealment of those assets from Surzur and from the court after he had been ordered by it to make disclosure)
>
> (ii) making fraudulent and misleading statements intending them to be relied and acted upon by Surzur (among others)
>
> (iii) forging documents intending that Surzur (among others) should accept them as genuine
>
> (iv) giving fraudulent and misleading instructions to solicitors intending the solicitors to act upon them:
>
> (a) by making false and misleading statements to Surzur such that Surzur would act and rely upon them and
>
> (b) by making false and misleading statements to others including (if necessary) to the court, thereby perverting the course of justice
>
> (v) making unfounded dishonest and malicious applications to the court such applications constituting abuses of the process of the court and contempts of court and
>
> (vi) the procuring and deployment in and out of court of false evidence)
>
> so as to deceive Surzur into believing that the three vessels had been sold at arms-length and, if necessary, to deceive the court in order to persuade it to permit the sale of the three vessels.

[23] The decision sets out ten further particularized allegations describing the history of the previous court proceedings, and continues:

> (11) Surzur ultimately obtained judgment against Mr. Koros in the sum of U.S. $36m. The essence of Surzur's claim for damages is that by virtue of the conspiracy they have suffered damage. They assert:
>
> > Surzur has been deprived of the opportunity of obtaining security for its claims by arresting the three vessels or

> taking other conservative measures in appropriate jurisdictions and in executing its judgment against Mr. Koros's beneficial interest in the three vessels . . .

[24] On a preliminary motion to determine whether the English court should exercise jurisdiction over some of the defendants who were domiciled in Greece, which required that the plaintiff satisfy the court that it had a “good and arguable” case, the defendants argued that the claim disclosed no serious issue to be tried because of the witness immunity rule. At the trial level, the judge agreed with the defendants. On appeal, after allowing amendments to the claim, (the particulars quoted above), the Court of Appeal summarized the plaintiff’s claim as:

> Thus, on a true analysis, it seems to me that the plaintiffs are alleging a conspiracy to injure the plaintiffs by a number of unlawful means, those unlawful means including, as matters developed, the giving of false evidence before the court. It is in that context that the witness immunity rule needs consideration.

[25] Commencing at p. 618, Waller, L.J. for the Court of Appeal itemized the “central principles” that are instructive for this case, and which can be summarized as follows: (citations omitted)

(1) The witness immunity rule is a fundamental rule of law which provides that no action lies against parties or witnesses for anything said or done, even if maliciously and falsely, in the ordinary course of a court proceeding.

(2) There are two public policy purposes underlying the immunity rule: one, to protect persons who are acting bona fide from defending vexatious actions; and two, to

avoid a multiplicity of actions in which the truth of a witness's evidence would be tried over again.

(3) The immunity rule applies in criminal proceedings only where the statement or conduct is such that it is part of the investigation of a crime or possible crime. The rule does not extend outside the relevant proceedings.

(4) The rule does not apply to proceedings in respect of malicious abuse of process, or malicious arrest.

(5) The immunity rule is not to be circumvented by alleging a conspiracy between witnesses to make false statements.

(6) The immunity rule should extend only so far as strictly necessary, that is, immunities conferred in respect of legal proceedings need always to be checked against a broad view of the public interest.

(7) The witness immunity rule applies in civil proceedings as well as in criminal matters and is applicable to affidavit evidence, oral evidence, and to the preparation of evidence.

[26] In conclusion, Waller, L.J., referred to Lord Morris' decision in **Roy v. Prior**, [1971] A.C. 470, and concluded that

> . . . **if the action is not brought simply in respect of evidence given or supplied but is brought in relation to some broader objective during the currency of which it may well be that evidence was given witness immunity should not apply.**
>
> In my view the conspiracy here had a broader objective and it was not a necessary ingredient that false evidence should be given. It so happened that in the way matters turned out it was given. It is of assistance to test the matter in this way. **It seems clear that in this case the plaintiff could have recovered damages in respect of the conspiracy to hide**

> **assets, by the bringing into being of false documents, if the defendants had succeeded in doing that without bringing the matter before the Court.** The suggestion has to be that because of Surzur's diligence, by virtue of which they achieved an amendment to the *Mareva*, did not accept the false MOAs at their face value, and forced an application to the Court, in some way their action for conspiracy is defeated. That would be absurd.
>
> ...If the conspiracy is correctly characterized as a conspiracy to hide assets and cheat Surzur by the manufacture of false documents, then it seems to me it is not a cause of action to which the witness immunity rule applies. It is understandable, having regard to the way that the plaintiff pleaded their case originally, that Mr. Justice Longmore should have thought that the appropriate characterization of the conspiracy was as one of deploying false evidence, but a proper appreciation of the facts as pleaded demonstrates that that was a wrong characterization of the conspiracy.
>
> (emphasis added)

[27] It is the fifth principle identified by Waller, L.J. that is of particular importance to this case. On the facts of **Surzur**, it was determined that the action was brought in relation to a “broader objective” of which the giving of false evidence was not a necessary ingredient. Surzur could have succeeded in recovering damages in respect to the other numerous elements of the conspiracy standing alone without the false testimony.

[28] The issue in the present case is then, whether there is a broader objective, or any elements of an alleged conspiracy for which the respondents could recover damages, in the absence of false testimony or the agreement to give false evidence.

[29] One of the English authorities cited in **Surzur** for the fifth principle is **Marrinan v. Vibart**, [1963] 1 Q.B. 528. Marrinan was a disbarred lawyer. Vibart and the other defendant were police officers who had made a report to the DPP and given evidence before a disciplinary board and in a criminal trial, all in relation to an allegation that Marrinan had obstructed justice. Marrinan sued the police officers alleging that they had conspired

together and with another person to injure his reputation and standing as a barrister by making false and defamatory statements about him, and that by reason of their actions he had been greatly injured and suffered damage. It was held, on an application to determine if there was a reasonable cause of action, that the statement of claim should be struck. Lord Justice Diplock summarized the argument of counsel for the plaintiff as follows:

> It is conceded by Mr. Lewis that the occasion on which each of those statements was made was absolutely privileged; but he says that he is not relying upon those statements as constituting a cause of action but upon the antecedent agreement which must be inferred from the statements that the defendants conspired together to injure the plaintiff; and he points out that a conspiracy to injure a plaintiff is an actionable conspiracy irrespective of whether the means employed are in themselves tortious or not. It follows, therefore, if he is right, that an action will lie against witnesses, counsel, juries, the judges of this court itself, for actions which they have taken in the course of the administration of justice during the hearing of cases, provided that that action was taken with the primary intention of injuring the plaintiff . . .

[30] In dismissing the appeal from that ruling, the Court of Appeal agreed completely with the trial judge, Salmon J., who said: [see [1963] 1 Q.B. at p. 238]

> The main contention on behalf of the plaintiff is that the gist of this action is not the defamatory statements made to the Director of Public Prosecutions, nor their repetition in evidence, but the antecedent combination or agreement to defame. It is argued that there is no authority for extending any immunity to such an agreement or combination. **If, contrary to my judgment, the contention were correct that the gist of the tort of conspiracy is the conspiratorial agreement alone, it may be that the plaintiff would be entitled to succeed on this preliminary issue. In my view, however, this contention is plainly wrong; the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff.** Accordingly, the acts done in pursuance of the agreement are an integral part of the tort: *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435.
>
> It follows, therefore, that the plaintiff relies for part of his cause of action upon the report of the defendants to the Director of Public Prosecutions and the evidence which they subsequently gave. And these matters, by reason of the principles laid down in the authorities

> to which I have referred, cannot properly be made part of any cause of action.
>
> (emphasis added)

[31] In my opinion, the action brought in this case against Reeves is more similar to the conspiracy alleged in **Marrinan** than to that in **Surzur** and should likewise be struck. In this case, the respondents make an argument similar to that of Marrinan's counsel, that is, that their action against Reeves is based on the antecedent agreement with Wall to cause them harm by fraud. Here, the overt acts alleged against Reeves specifically, are that he conspired in the fabrication of a story that Wall was the inventor of the game and agreed to corroborate Wall's claim against the respondents by giving statements to Wall's solicitor and testimony under oath. As in **Marrinan**, it follows that since the respondents rely for part of their cause of action on the evidence that Reeves has agreed to give, that there is no proper foundation of any cause of action.

[32] The respondents also allege that Reeves as a co-conspirator with Wall is liable for all of Wall's actions in furtherance of the conspiracy, which would include the allegations of the attempts by Wall to defraud the respondents by whatever means, including the bringing of a court action. I do not accept that these assertions comprise what Justice Waller in **Surzur** described as "a broader objective during the currency of which it may well be that evidence" would be given. Here Reeves' function in the conspiracy, even if all accusations made by the respondents are substantiated, is to "corroborate", a role that is inextricably tied to his role as a witness. The fabrication of the story is in itself not harmful to the respondents, unless it is defamatory, in which case it is the same as the harm to

reputation claimed by the plaintiff in the **Marrinan** case. The impact of the fabrication comes from the effect of the lawsuit to claim the ownership rights in the game. Wall's alleged initial attempt to obtain money from the respondents before commencing the lawsuit was unsuccessful and did not result in damage to the respondents. The alleged conspiracy to defraud could therefore not succeed without the lawsuit and the false evidence. This is in contrast to the **Surzur** situation where it was found that Surzur could have recovered damages in respect to the conspiracy to hide Koros' assets and the creation of the fraudulent documents. There the conspiracy was characterized as one with a purpose to hide assets, not one to acquire money through the giving of false evidence. Here the latter characterization is more apt.

[33] In addition to the parallels to the **Marrinan** cause of action, another feature distinguishing this case from those cited by counsel, is that, here, the action against the witness is brought before the completion of the trial of the main action. This is a preemptive strike against an intended witness, not a claim after the fact against a person who allegedly conspired in a scheme to defraud the plaintiffs. In Surzur's case, his action was allowed to proceed against the alleged co-conspirators after he had a judgment for several million dollars against Koros. In this case, the action against Reeves was commenced within a couple of months after his discovery evidence in the Wall action. The public policy purpose underlying the witness immunity rule of avoiding a multiplicity of actions in which the truth of a witness's evidence is assessed, would surely be greatly offended if a witness's evidence could be first assessed in a collateral action against the witness personally.

[34] The conspiracy action against Reeves, being based solely upon his discovery evidence and his anticipated trial evidence, should be struck out pursuant to **Rule** 14.25 since it is in violation of the witness immunity rule. The allegations that Reeves has given and has agreed to give false statements and evidence to corroborate Wall's fabrication, do, therefore not disclose a cause of action. The witness immunity rule cannot be circumvented by claiming a bare conspiracy between witnesses to make false statements.

[35] The appeal should be allowed. It is not necessary to deal with the other issues raised on appeal. The appellant should have costs on the application payable by the respondents, in the amount of $1,250.00, plus disbursements, and costs of the appeal in the amount of $2,000.00, plus disbursements. The order of Justice Hood dated February 2, 2000 is set aside.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.