**THE HIGH COURT**

**Record Number: 2001 No. 344 SP**

**BETWEEN**

**SHANE EGAN**

**PLAINTIFF**

**AND**

**PATRICK O'TOOLE**

**RESPONDENT**

**Judgment of Mr Justice Michael Peart delivered on the 13th day of December 2005**

1. On the 30th July 2001 an order was made by the District Judge under s. 47 of Part III of the Extradition Act, 1965, as amended for the surrender of the applicant to the appropriate police authority in the United Kingdom.

2. On the same date, as he was entitled to do, the plaintiff issued a Special Summons in the High Court in which the relief claimed is for an order for his release pursuant to s. 50 of that Act which provides, as relevant, the following:

> *"A direction under this section may be given by the High Court where the Court is of the opinion that -*
>
> *… (bbb) by reason of lapse of time since the commission of the offence specified in the Warrant…and other exceptional circumstances, it would, having regard to all the circumstances, be unjust, oppressive or invidious to deliver him up under section 47, or*
>
> *(c) the offence specified in the Warrant does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months."*

3. The plaintiff makes submissions under both (bbb) as to lapse of time, and under (c) as to correspondence. I shall deal with the application made in relation to lapse of time first and thereafter in relation to correspondence.

**Lapse of time**

4. In order to succeed in his application under s. 50(2)(bbb) of the Act, the plaintiff must demonstrate not only that there has been a lapse of time which is itself exceptional, but that in addition there are other exceptional circumstances, which having regard to all the circumstances would make it *unjust*, *oppressive or invidious* to deliver him up to the UK authorities. The onus is upon the plaintiff to satisfy the court in this regard, and in order to discharge this onus the plaintiff has sworn a grounding affidavit in which he has traced the history of events leading to the making of the said order for his delivery. He states that he is married with three young children and that they all reside at a stated address in Co. Dublin since "in or about 1990". However, in a subsequent affidavit he clarifies this averment by saying that while he was domiciled in Ireland and his address here was at that time the address stated, and at which his wife and children were living, he himself was living in Luxemburg between November 1999 and December 2000, and that his wife and children would join him in Luxemburg from time to time during that period. He states that he had taken up a position in Luxemburg as Client Services Manager with bankers, Brown Brothers Harriman in November 1999 and worked with that organisation until December 2000 when he returned to Ireland to take up a similar position with the same bank's operation here.

5. He goes on to say that on the 21st December 2000 he was arrested at his home on foot of a warrant issued in England on a charge that he allegedly between the 18th December 1996 and 22nd January 1999 within the jurisdiction of the Central Criminal Court for England and Wales, conspired with another named person "dishonestly to obtain money transfers from the Department for Education and Employment by deception, by allegedly falsely representing that certain organisations would provide training for service industries" contrary to Section 1(1) of the Criminal Law Act 1977. Following his arrest here on foot of that warrant the application for the s. 47 order eventually came on for hearing in the District Court on the 30th July 2001 when the said order was made.

6. The plaintiff points to the fact that the English warrant is dated the 10th December 1999, and that according to the evidence of Sgt. Michael Heffernan given at the hearing in the District Court, this warrant was transmitted here and received by An Garda Siochana on the 17th December 1999. But he complains that same was not executed until just over one year later, inspite of the fact that an inquiry at any time to his wife living in Dublin would have revealed his whereabouts without difficulty, And he states that no inquiry in that regard was made by either the English police or An Garda Siochana. He makes that point also that in Luxemburg he had to register his name in a number of ways which would have made it easy for him to be found, if any attempt had been made in that regard. It also appears that before the plaintiff returned to this country at the end of the year 2000 his wife had written a letter to the Extradition Unit, Garda Headquarters dated 19th October 2000 in which she asked if there was an extradition warrant out for the plaintiff or if they were working on one, and she asked if they would like him to attend on them for questioning. She has averred that she received no response to that letter, but has averred that she had a telephone conversation with an officer at Garda Headquarters on the 3rd November 2000, although Sgt. Heffernan avers that this conversation was on the 25th October 2000. Nothing turns on that or even the conversation.

7. An affidavit sworn by Det. Constable Kilpatrick of Devon and Cornwall Police on the 9th June 2003 reveals that he was not aware for certain that the plaintiff was residing in Luxemburg and that he had no more than a belief that he was working there or in one of the "Benelux countries". He had no exact information in that regard. But in an earlier affidavit he has stated that he was aware of the plaintiff's Dublin address which was the address communicated to the Gardai here when the warrant was sent over for backing and execution on the 17th December 1999. He says that he believes that at that time attempts were made by the Gardai to arrest the plaintiff but that he had left Ireland at that time. He states that since they did not have a precise address for him in Luxemburg enquiries could not be made there about him, and neither had the Gardai been able to obtain any information from the plaintiff's wife. He goes on to state that the Gardai were requested to retain the warrant here so that the plaintiff could be arrested should he return to Ireland.

8. Sgt. Heffernan has averred in his affidavit that the warrant was received here on the 17th December 1999, and that it was endorsed for execution by the Assistant Commissioner on the 11th July 2000. He avers that no attempt was made to arrest the plaintiff until he was in fact arrested on the 21st December 2000, but that he had been informed by Devon and Cornwall Police in

August 2000 that the plaintiff was in Luxemburg. He states that it was believed that the plaintiff might return to this country for Christmas 2000 and that that situation was monitored by the Gardai. He says that as soon as the Gardai became aware that the plaintiff had returned to this jurisdiction he was duly arrested.

9. In relation to the lapse of time argument, David O'Neill BL on behalf of the applicant points to the fact that the delay or lapse of time to be taken account of is from the date of commission of the alleged offence, the earliest date for which is December 1996. At its highest he submits that the period to be taken account of is a period of ten years from the earliest date for the commission of the offence according to the warrant issued, up to the date of hearing of this application. However, Patrick McCarthy SC for the defendant submits that the relevant period of time is from the earliest date for the commission of the offence – namely December 1996 up to the date of issue of the Special Summons herein, namely the 30th July 2001. I am completely satisfied from the affidavit evidence in this case that this is the appropriate period of time to be reckoned for the purpose of the section. It is true that an extraordinary/exceptional period of time has elapsed *from the date of issue of the said summons until the hearing of this application*. This is a truly unreasonable period of time, notwithstanding that there was an opposed application for discovery of documents, the contest for which went on appeal to the Supreme Court. However, it is the period up to the issue of the special summons which is to be looked at rather than in this case the period thereafter while this application was being prepared for hearing before this Court.

10. It appears from the affidavit of the plaintiff sworn on the 8th January 2004 that a request for voluntary discovery was made by letter dated 15th February 2002 to which a reply was received by letter from the Chief State Solicitor dated 22nd August 2002 which indicated that a claim of privilege would be made over the documents sought. First of all, it is unacceptable that a period of eight months could be allowed to elapse before a request for voluntary discovery is made, followed by a further period of six months before a response is given indicating that a claim of privilege would be made, and that it would take yet another period of almost a year before the defendant would file affidavits of discovery. It appears that thereafter a motion was issued in relation to the claim of privilege and that the matter then dragged on thereby causing a delay until the case was finally listed before this court for hearing. This period of delay is intolerable and unacceptable in an extradition matter. Applications relating to extradition are to be dealt with expeditiously, and in the present case matters have been allowed to proceed in a dilatory manner which is not in keeping with the requirement for expedition, and I sincerely hope that in the future those in a position to exercise some control over the pace at which applications of this kind proceed through the judicial process will ensure that matters are progressed in a manner commensurate with their importance. I would express the desire that the Master of the High Court would on the earliest possible date transfer into the Extradition List in the High Court such cases as still remain in the system under s. 50 of the 1965 Act, as amended, even where all procedures such as the filing of replying affidavits and the pursuit of discovery have not been completed, so that the Court itself can be in control of the time such applications take from the date of issue of the Special Summons until the date of the eventual hearing. A period of four years in the Master's List awaiting completion of procedure is simply unacceptable at the present time. There is no reason why the plaintiff should have the benefit of that delay as part of the lapse of time contended for in relation to the application under s. 50 of the Act, no matter what the cause.

11. It follows that the lapse of time to be considered in the present case is from December 1996 until July 2001. In that regard, Det.Constable Kilpatrick has sworn that statements of complaint in this case were sworn against the plaintiff and a proposed co-accused person during 1998, and that these persons were invited to a meeting in January 1999 to discuss issues in relation to the matter of the complaint. It appears that the co-accused person was arrested, and was committed for trial on the 28th April 1999 and that he was released on conditional bail. The intention is, according to this deponent that if extradited by this Court the plaintiff herein would face trial with that co-accused. Det.Constable has averred that following the committal of that cop-accused, there were a number of case conferences with Counsel and it was decided that the extradition of the plaintiff should be sought since there appeared to be no likelihood of his returning to the United Kingdom. He avers also that in October 1999 papers were sent by the Plymouth Branch of the Crown Prosecution Service to the CPS Casework Directorate which is the section of the CPS which has responsible for the preparation of applications for extradition from this country, and that in due course a warrant for the arrest of the plaintiff issued on the 10th December 1999 and forwarded to the Garda authorities here in December 1999. I have already referred to the fact that upon the receipt of this warrant here the plaintiff was known to be living abroad, and that the warrant was retained by the Gardai so that if the plaintiff returned he could at that stage be arrested, and that it was anticipated that he may return to this jurisdiction for Christmas 2000, as in fact happened.

12. I am satisfied that in the circumstances of the delay in the present case there was no lapse of time such that would merit the invocation of the relief enabled by s. 50(2)(bbb) of the Act. There is no evidence of any lapse of time which was not a reasonable lapse of time given the nature of the investigation and the steps required to be taken before the Garda authorities here would be enabled to act upon a warrant for the plaintiff's arrest. One can point in almost any case to situations in which some step or other prior to an arrest being made could have been done in less time. But it is another matter altogether to say that a lapse of time has occurred which is to be regarded as exceptional. There is certainly nothing exceptional about the time it took in the present case leading to the arrest of the plaintiff. It is quite clear that the principal cause of the passage of time from the date of the warrant to the date of the arrest was the plaintiff's unavailability for arrest at his home in Dublin since he was abroad in Luxemburg.

13. Upon the arrival of the warrant in this jurisdiction, the fact is, and it is not contested by the plaintiff, he was out of the country even though it was known where his wife and family were living. It is completely acceptable that the authorities would not necessarily make enquiries of the plaintiff's wife in order to notify to her, and through her to him presumably, that a warrant was in existence since that could reasonably give rise to a decision on his part not to return to this jurisdiction thereby frustrating attempts to apprehend him on foot of the warrant. It was reasonable to await the possibility that he would return to this jurisdiction at Christmas 2000 when he could be arrested, as in fact happened.

14. In my view there has been no lapse of time which is in itself exceptional, and in these circumstances I do not have to take the next step under the section and consider whether there are other exceptional circumstances to have regard to. If I was so required, I would not however be prepared to regard as sufficient the matters submitted by the plaintiff to constitute exceptional circumstances. These are set forth in his affidavits as that he was living openly so that his whereabouts was something which could easily have been ascertained, that his career has suffered greatly as a result of the proceedings, that he has been forced to "change his job on a regular basis to avoid being extradited and disappearing without any explanation". These are not such as to amount to exceptional circumstances in any event. I am of the view that the case on lapse of time must fail.

15. It remains, in view of the terms of s. 50 of the Act, to determine whether the offence with which the plaintiff is charged in the warrants under consideration, corresponds with an offence in this jurisdiction as of the date on which the warrant was produced to the Assistant Commissioner of An Garda Siochana for endorsement. This is a requirement upon this Court even though the matter was the subject of a determination in favour of correspondence by the learned District Judge in the District Court hearing on the 30th July 2001.

**Correspondence**

16. The net question is whether the offence set forth in the warrant, namely that the plaintiff conspired with another person dishonestly to obtain money from the Department… by deception, namely by falsely representing that certain organisations would provide training for services, would, if committed in this State on the 11th July 2000, have constituted an offence of the necessary gravity. Section 42(3) of the 1965 Act, as inserted by s. 26 of the Extradition (European Union Conventions) Act, 2001 ("the 2001 Act") provides:

> *"42.—(3) For the purposes of this Part, an offence specified in a warrant corresponds with an offence under the law of the State if –*
>
> *(a) the act constituting the offence so specified would, if done in the State on the day the warrant is produced under section 43(1)(b), constitute an offence under the law of the State, or*
>
> *(b) in the case of an offence so specified constituting of one or more acts including any act committed in the State, such act constituted an offence under the law of the State on the day on which it was committed or alleged to have been committed."*

17. It is therefore the date on which the warrant is produced to the Assistant Commissioner for endorsement which is the date in question, and while there has been no evidence of the precise date on which the warrant was in fact produced to the Assistant Commissioner, it was at latest on the 11th July 2000 since that is the date of the endorsement itself on the warrant. One way or another it clearly was before the coming into operation of the Criminal Justice (Theft and Fraud Offences) Act 2001, and accordingly correspondence cannot be established by reference to any offence appearing in that act.

18. Interestingly, in the District Court the District Judge was satisfied that the act alleged in the warrant would if done in this State on the relevant date correspond with the offence here of *conspiring to obtain money by false pretences*. It had been submitted, according to Mr O'Neill for the plaintiff, that this was not a corresponding offence because, according to authority cited, an allegation that an accused person made false representations with regard to something that would happen in the future would not amount to a false pretence under s. 32 of the Larceny Act, 1916. For example, Lord Goddard C.J. in the English Court of Appeal in *R v. Dent* [1955] 2 QB. 590 at 595 stated the following:

> *"…we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law."*

19. Even though Mr McCarthy is no longer contending that the act complained of in the warrant corresponds to conspiring to obtain money by false pretences, Mr O'Neill submits in any event that it cannot so correspond because the allegation relates to a future event, namely that "certain organisations *would* provide training for service industries."(my emphasis)

20. Mr O'Neill has also submitted in this regard that the warrant fails to refer anywhere within it to the plaintiff conspiring *with intent to defraud*. He submits that it would be necessary for the allegation to specifically allege an intention to defraud, and in this regard has referred to the judgment of Fennelly J. in *A.G v. Scott Dyer* [2004] 1 I.R. 40. Mr O'Neill refers to a passage from the judgment at p.45 in which the learned judge states:

> *"1. The crucial point about each of those provisions [i.e. s. 32 of the Larceny Act 1916, and s. 10 of the Criminal Justice Act, 1951] is, of course, that the proscribed acts must be committed 'with intent to defraud'. It is not disputed on behalf of the applicant that an indictment grounding a prosecution for such an offence must allege 'intent to defraud'. The specimen form of indictment for a charge under the first of these provisions as set out in the schedule to the Criminal Justice (Administration) Act 1924 contains the words 'with intent to defraud'."*

21. The learned judge also emphasises in his judgment that correspondence is to be analysed by reference to the factual elements of the offence alleged against the suspect, and not by reference to the definition of the general crime in the law of the requesting state. He also stated that in this task words must be given their ordinary meaning in Irish law unless the evidence adduced suggests that they had a relevantly different meaning in the law of the requesting state or the term was unfamiliar to Irish law, or is ambiguous.

22. In this regard also, Mr O'Neill has referred the Court to the judgment of Walsh J. in the Court of Criminal Appeal in *The People v. Thompson* [1960] *1 Frewen 201*. That was a case where the appellant had been convicted of engaging in a *conspiracy to obtain a motor car by fraud, and to have obtained it by false pretences*, the suggestion being that he obtained the car by paying for it by writing a cheque on his bank account when he knew there were insufficient funds in the account to meet it. In allowing the appeal, the learned judge stated:

> *"Intent to defraud is an essential ingredient of the offence although there are many cases in which it may be inferred from the facts of the case. Generally speaking it may be said that where money is obtained by false pretences there is a prima facie case of an intent to defraud but unless the intent is clear from the facts a jury must be told that an essential element in the case is an intent to defraud. Except in the very clearest of cases a count of false pretences requires a careful direction to the jury and it is of the utmost importance that the jury should understand that it is not enough that the false pretence did obtain the money or the thing in question but that it must have been made with the purpose of obtaining and obtaining by defrauding."*

23. Mr O'Neill also referred to *Quinn v. Wren* [1985] I.R. 322 and to the fact that in that case the alleged offence was of by deception dishonestly obtaining money from a bank with the intention of permanently depriving the bank of the money. The particulars contained in the warrant alleged that the accused did "by deception with a false pretence made with intention to defraud, dishonestly obtain [the money]".

24. All of the judgments referred to by Mr O'Neill appear to point to the necessary requirement that for an action by an accused to give rise to an offence of obtaining money by false pretences, it must be alleged not only that there was a false pretence made, but also that it was made with the intention to defraud. In addition, as Mr O'Neill has pointed out the false pretence must not relate to a future event, but to a present or past fact. The conviction in *The People v. Thompson* already referred to above was quashed on the basis that the evidence did not clearly establish "the intent to defraud essential to sustain a charge of obtaining by false pretences", and that the judge had not adequately directed the jury in relation to the possibility that the defendant at the time he wrote the cheque may have honestly believed that there would be funds in the account by the time the cheque was presented to his bank for payment. In other words, he may have been acting without any intent to defraud at the time he wrote the cheque and handed it

over in exchange for the car, having no reason to believe that the cheque he expected to be able to lodge to his account would be 'stopped'.

25. I agree that the offence of conspiring to obtain money by false pretences is not the offence in this jurisdiction to which the alleged act alleged against the plaintiff in the present case would give rise to. The false pretence, if it be such, would be in relation to a future event. I leave over for the moment the other question of whether the phrase "dishonestly to obtain money" equates to the verb "to defraud" for the purpose of the alternative charge now offered by the defendant as a candidate for correspondence, namely conspiracy to defraud.

26. It is helpful to look carefully at the warrant and see again exactly what it is being alleged that the plaintiff did in order to give rise to the charge set forth in the English warrant, because there can be no doubt that it is the alleged factual components of the act itself and not any label by which the English offence is known which is of importance as far as correspondence is concerned. Mr McCarthy has submitted that the facts giving rise to the offence charged in the English warrant would if committed in this jurisdiction on the relevant date give rise to an offence of conspiracy to defraud contrary to Common Law.

27. The alleged facts appearing in the warrant and apparent from the other documents filed herein are that on some date or dates between 18th December 1996 and 22nd January 1999 the plaintiff conspired with another man dishonestly to obtain money by a deception. The warrant goes further and specifies the nature of that deception – namely that he falsely represented that certain organisations would provide training for service industries. The only other information which can be gleaned from the affidavit of Det. Constable Kilpatrick in relation to the charge against the plaintiff is that the plaintiff and the other man were invited by the Department of Education and Employment to a meeting in Plymouth on the 21st January 1999 "to discuss issues in relation to submitted accounts and to claim an instalment of their grant from that Department." In addition to this, we know also from a copy of the committal warrant against the alleged co-conspirator that that person is charged that he *"dishonestly obtained from the Department the sum of £21,600 by deception namely "by falsely representing that the Tourism and Cultural Training Institute was to provide training for the Tourism Industry assisted by funds from the Reinsurance Institute of Ireland of which he was President."* That offence however is one contrary to s. 15A of the Theft Act 1968, whereas the charge proffered against the plaintiff is one contrary to s. 1(1) of the Criminal Law Act, 1977.

28. Returning to the facts alleged in the English warrant it is said firstly that the plaintiff conspired *"dishonestly to obtain money transfers…by deception".* Mr McCarthy says that this is enough to constitute the offence of conspiracy to defraud, since an accusation that a person conspired to obtain money dishonestly by deception, equates by reference to the ordinary meaning being given to words, to conspiring to defraud. Mr McCarthy refers to the comments of Geoghegan J. in *Myles v. Sreenan* [1999] 4 I.R. 294 as follows:

> *"The ingredients of the offence of conspiracy to defraud and the meaning of 'defraud' have been so clearly established over the centuries that the question of uncertainty does not arise and I see no reason why the common law offence of conspiracy to defraud would not have been carried over under the Constitution."*

29. The learned judge considered that the best definition of the offence of conspiracy to defraud was to be found in Scott v. Metropolitan Police Commissioner [1975] A.C. 819 wherein it was defined in the following way:

> *"an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be entitled and an agreement by two or more by dishonesty to injure some proprietory right of his, suffices to constitute the offence of conspiracy to defraud."(my emphasis)*

30. In Mr McCarthy's submission the contents of the charge in the English warrant that the plaintiff *"conspired with…dishonestly to obtain money transfers…"* equates exactly to *"an agreement by two…by dishonesty to deprive a person of something which is his…"* and that correspondence is therefore made out. He also refers to another passage from the said judgment of Geoghegan J. where he stated as follows:

> *"One must read the warrant as a whole and if on any reasonable interpretation of the particulars as given they are intended to convey a set of facts which would be an offence in Ireland there is sufficient correspondence, I do not find it necessary therefore to consider whether, as a matter of perfect draftsmanship, a word such as 'dishonestly' ought to have been inserted…because I am satisfied that upon reading the entire charge under the heading 'alleged offence' it is perfectly obvious that dishonesty is what is alleged. While of course I accept…the submission that the label given to an offence is irrelevant and that therefore the mere fact that the offence alleged might be called in England 'conspiracy to defraud' is not material. But that does not mean that I cannot apply an ordinary dictionary meaning to the verb 'conspired' where it appears in the warrant and even more to the point to the words 'to defraud' where they appear in the warrant."*

31. Mr McCarthy has also referred to the fact that in a case of Corcoran v. Fitzgerald, unreported, High Court, 12th May 2005, I adopted with approval the statement of Geoghegan J. in Myles v. Sreenan that the offence of conspiracy to defraud had been carried over by the Constitution, and that in that case the facts as disclosed in the warrant would if done in this jurisdiction constitute the offence of conspiracy to defraud.

32. While all the above seems to point to a correspondence between the offence charged in the warrant and the common law offence of conspiracy to defraud, Mr O'Neill has very ably, if I may say so, raised a substantial argument that it does not do so. He submits that the defendant is attempting to escape the problems presented by the fact that the false representation or false pretence (as he would prefer to call it) referred to specifically in the warrant is concerning something which is in the future, and as such is not something which can be the subject of a false pretences charge, as I have already set forth. He submits that for Mr McCarthy to succeed in establishing that the offence charged corresponds with the offence of conspiracy to defraud, it would be necessary for the word "dishonesty" to be taken on its own and without reference to what follows thereafter, namely that the nature of the dishonesty is actually set out in the warrant, thereby limiting the otherwise wide meaning of the word. By way of clarification, Mr O'Neill has referred the Court to the judgment of O'Dalaigh C.J. in *The People (Attorney General) v. Paul Singer [1961] 1 Frewen 214* in which that learned judge stated that where the means of fraud are stated to be false pretences (as in the present case) then the elements of false pretences, rather than any other form of dishonesty must be proved in order to secure a conviction for conspiracy. In other words it is impermissible to simply refer to dishonesty as the basis for conspiracy to defraud, since a person can act dishonestly in a number of different ways, such as by making a false misrepresentation or pretence. Mr O'Neill has referred to a passage from the said judgment, appearing at pp. 226-227:

> *"In all three types of offence were charged. Conspiracy to cheat and defraud, fraudulent conversion, and obtaining*

*money by false pretences. In this Court Counsel for the Attorney General has conceded that the three charges of conspiracy (Counts 1 to 3)were, except for the time factor, identical and the conspiracy was to defraud by (stripped of unessentials) obtaining money by false pretences. It was also conceded here by counsel for the Attorney General that the conspiracy was not directly evidenced but was to be inferred from the evidence of the substantive offences, alleged to have been committed, which were laid in the indictment. But the substantive offences, as to all save two, are charges of fraudulent conversion of moneys alleged to have been entrusted to the applicant……Moreover it has been said on more than one occasion in this Court that conspiracy should not be charged when the evidence relied upon to establish it is the evidence of substantive offences also laid in the same indictment. This course is not merely undesirable but is one fraught with danger in a case such as this, where the type of fraud alleged in the conspiracy differs fundamentally from the type of fraud alleged in the substantive offences charged."*

33. Mr O'Neill points to the fact that the accused could only have been convicted of conspiring to defraud where the means of that fraud was alleged to be false pretences as opposed to fraudulent conversion, if and only if the jury was satisfied that he had used false pretences. He submits that the same applies in this case, namely that in order to convict the plaintiff for 'conspiracy to defraud' contrary to Common Law in this State, a jury would have to be satisfied that he conspired to defraud by means of a proven false pretence, and in that regard the same difficulty presents itself given that the pretence alleged relates to a future event as already explained, and therefore is not a corresponding offence.

34. It has been submitted by Mr McCarthy that it is sufficient that the charge contained in the English warrant refers to "dishonesty" and that this equates to the concept behind the words "to defraud". But in this regard Lord Devlin stated in R. v. Dent (supra) at p.594:

*"dishonesty is not per se a criminal offence; and the point that has been argued before us and which is the subject of the deputy chairman's certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purpose of the criminal law."*

35. The strongest authority to which Mr McCarthy has referred is undoubtedly Scott v. Metropolitan Police Commissioner to which Geoghegan J. referred in Myles v. Sreenan. I think that it is relevant however that in the English warrant the plaintiff is not charged with conspiracy to defraud. He is charged that he conspired by dishonesty to obtain money transfers by falsely representing that certain organisations would provide training. The meat of the charge in the English warrant must be regarded as being the alleged false representation (or pretence) that certain organisations would (i.e. in the future) provide training for service industries. That is the specified nature of the dishonesty alleged.

36. The weakness in the submission by Mr O'Neill is that it tends to confuse the offence of obtaining money by false pretences, and thereby a conspiracy so to do, with the offence alleged to constitute correspondence in this case, namely a conspiracy to defraud. In this regard it is useful to recall and note that the English warrant does not refer to conspiring to obtain money by false pretences. It refers to a conspiracy to obtain money transfers "by deception namely by falsely representing…" etc.

37. Mr O'Neill, as already indicated, has referred to the fact that a false pretence cannot be in respect of a future event, and has referred to authorities in that regard as I have already set forth. He has suggested that the defendant has realised the problems arising from its submission in the District Court that the offence charged corresponds with obtaining money by false pretences, and for that reason has now changed its ground on correspondence to the offence of conspiracy to defraud. He has submitted that this does not improve the defendant's position because, as he submits, where the means used to defraud is alleged to be by false pretences, the prosecution will still be in the difficulty that the pretence relates to a future event and a charge of conspiracy to defraud by such a means therefore does not lie. The situation would, in his view, be different if the alleged pretence was in relation to a past or present fact.

38. The confusion as I see it arises from the fact that the offence of conspiracy to defraud contrary to common law is to some extent sui generis. The conspiracy to defraud does not need to be reliant upon the means of the defrauding itself constituting a criminal offence. In other words, a conviction for the offence of conspiracy to defraud contrary to common law can be obtained even where the means used to 'defraud' falls short of a criminal act, and can be in the general nature of dishonesty - dishonesty being not in all instances a crime. If one resorts, for example, to *Halsbury's Laws of England*, 1909 ed. Vol 9 at page 268, one can find the following passage:

*"A conspiracy to cheat and defraud is criminal, even though the act which it is agreed to do is not criminal if done by one person."*

39. In the same volume at page 709, the following appears under the heading "Conspiracy to defraud":

*"If two or more persons conspire together to cheat or defraud another or others, the confederates commit an indictable common law misdemeanour, whether the act which they agree to do is or is not itself criminal."*

40. A footnote to each of these statements is to the case of *R. v. Warburton* [1870] L.R. 1 C.C.R. 274 at 276, but I located the same judgment more conveniently in Cox's Criminal Law Cases, Vol XI, 1876-71 at page 584. At page 587 of that report, Cockburn C.J. with whom all the other judges concurred states as follows:

*"…… A conspiracy is an offence when two or more persons combine to injure another by fraud. It is enough if the object is unlawful and a wrong done. In this case the only doubt that could arise is whether the conspiracy had reference to the division of the partnership property on the dissolution of the partnership, and to the share of the assets which each partner had then a right to expect. It is clear that there was a wrong intended by the prisoner against his partner, and that he intended to deprive him of his share of the partnership property to which he was entitled according to the partnership agreement. The case, therefore, falls within the definition of conspiracy -- a combination of two or more persons for the purpose of injuring another. In the case referred to by my brother Brett, Lord Mansfield laid it down that, although an act when done by one man alone might not be indictable, yet when two combine to do it, it might become the subject of conspiracy…"*

41. Also footnoted to these statements in *Halsbury is R. v. Aspinall* [1876] 2 Q.B.D. 48. At page 59 of the judgment in the Court of Appeal Brett J.A. states at p.59:

*"..It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to*

*accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy: see Reg. V. Warburton. There may be and probably are others."*

42. In passing I note the following in Criminal Law, by Charlton, McDermott and Bolger at para. 4.83:

> *"…In the nineteenth century the crime of conspiracy was extended to agreements to commit all misdemeanours and felonies. There was no generalised doctrine whereby a conspiracy to commit a non-criminal act was an offence. The exception was a conspiracy to defraud, which, in itself, possibly arise from the general common law doctrines relating to fraud and cheating. Arising from the dictum by Lord Denman in Re Jones's case that a conspiracy indictment must 'charge a conspiracy, either to do an unlawful act or a lawful act by an unlawful means' the doctrine of conspiracy was broadened whereby this statement could apply literally to any statement……."*

43. Looking again at the allegation contained in the English warrant, namely that the plaintiff herein "*conspired with Desmond Henry Guerins dishonestly to obtain money transfers by falsely representing [a certain matter]*, it is, I suggest, easy to see how the elements of the offence of conspiracy to defraud are present, if these facts are proven. Firstly, there is a conspiracy with another person. Secondly it is a conspiracy to defraud in the sense of depriving another of something which is his or to injure some proprietory right of a person. It so happens that the means by which these persons are alleged to perpetrate the defrauding is also specified in the warrant, namely by means of a false representation about what certain organisations would do. It is not appropriate or correct to consider that representation as a "false pretence" in the criminal sense. For that reason, as I see it, the submission which Mr O'Neill makes related to the future nature of the pretence and the reliance upon the Singer case has no relevance. I have no difficulty accepting that a false pretence for the purpose of an offence of obtaining money by false pretences must relate to a past or present fact. But that is not relevant to the present case. In this regard it is worth noting the statement by Viscount Dilhorne in Scott at p. 839 of his judgment that *"one must not confuse the object of a conspiracy with the means by which it is carried out."*

44. In addition, the other matter to which O'Dalaigh C.J. refers in his judgment in Singer, namely that a charge of conspiracy should not be laid where the means adopted to achieve the objective of the conspirators is itself a substantive criminal offence which can be laid, has no relevance to the present case. As has been shown, even if the means by which the defrauding was planned to occur was not itself a criminal offence, the offence occurs where two persons conspire dishonestly to deprive somebody of something which is rightfully theirs. So the fact that the false representation referred to in the charge herein may not itself have amounted to a criminal offence does not take this offence outside an offence of conspiracy to defraud. In this regard I refer to the 4th edition (1990) of Halsbury's Laws of England where in Vol 11(1) thereof at page 57, para. 61 it states:

> *"Conspiracy to defraud. A person who agrees with one or more other persons by dishonesty (1) to deprive a person of something which is his or to which he would be or might be entitled; or (2) to injure some proprietory right of a person, is guilty of conspiracy to defraud at common law."*

45. For a meaning of "defraud" a footnote refers to the judgment of Lord Radcliffe in *Welham v. Director of Public Prosecutions* [1961] AC 105 where at p. 123 he states the following regarding the meaning of "to defraud":

> *"Now, I think that there are one or two things that can be said with confidence about the meaning of this word "defraud". It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning…… Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by "to defraud". It may mean to cheat someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right."*

46. Lord Radcliffe went on to find no distinction between "a person" and "a public authority". It is worth referring to that in the context of the facts of the present case.

47. As I have already referred to, Mr McCarthy for the defendant has referred to the definition of the common law offence of conspiracy to defraud in Scott v. Metropolitan Police Commissioner [supra] which was approved of by Geoghegan J. in his judgment in Myles v. Sreenan [supra]. There is no need to set out that definition again. He also referred to the necessity to read the entire charge laid and see on any reasonable interpretation of the particulars set out therein if the facts disclosed would if done in this State constitute an offence, and that in that task the ordinary meaning of words should be applied.

48. I am therefore satisfied that the acts alleged in the warrant would if done in this State on the date on which the warrant was produced to the Assistant Commissioner for endorsement, have given rise to an offence of conspiracy to defraud.

49. I therefore refuse the relief sought by the applicant under s.50 of the Act.