Neutral Citation No. [2009] NIQB 69 | *Ref:* **STE7596**

Judgment: approved by the Court for handing down | *Delivered:* **29/7/09**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

CHERITH RACHEL SALT

Plaintiff/Respondent

and

JOHN HELLEY

Defendant/Appellant

STEPHENS J

Introduction.

[1] This is a defendant's appeal from a decree of District Judge Brownlie awarding the plaintiff £852.82. The appeal is by way of rehearing. The issues before the District Judge and on appeal related to the hire of a replacement vehicle used by the plaintiff whilst her damaged vehicle was being repaired following a road traffic accident in circumstances where the plaintiff was entitled to, but did not avail of, a free courtesy car under her own insurance policy.

[2] Mr O'Hara QC and Mr McGuinness appeared on behalf of the plaintiff/respondent. Mr Montague QC and Mr Bernard Fitzpatrick appeared on behalf of the defendant/appellant.

Facts.

[3] On Sunday 28 October 2007 the plaintiff, Cherith Rachel Salt, the wife of a minister and the mother of then five, now six children, parked and left her two door Peugeot 206 motor vehicle ("the vehicle") on the road outside her home. Some time later John Helley, the defendant, negligently caused his vehicle to collide with the vehicle rendering it un-roadworthy. The plaintiff hired a replacement vehicle, a four door Honda Jazz ("the replacement vehicle") for 24 days whilst the vehicle was being repaired. The daily rate for the hire was £29.20 which together with a delivery charge of £25.00 plus VAT

gave a total charge of £852.82. It is this amount which the plaintiff recovered before the District Judge.

[4] The defendant's insurance brokers trade as "Open and Direct Insurance". Prior to the accident and by letter 25 September 2007 they had sent to the plaintiff, on renewal, her certificate of comprehensive insurance for the vehicle. The letter did not comply with the requirements of Article 6(1)(a) of the Business Names (Northern Ireland) Order 1986 in that it did not identify who carried on business under the name of "Open and Direct Insurance". The letter from Open and Direct Insurance enclosed not only the annual certificate of insurance but also:-

(a) A policy schedule forming part of the plaintiff's insurance policy which schedule describes "Open and Direct Insurance Services" as an agent (but does not specify the identity of the principal).

(b) A policy summary headed "Key Facts".

(c) A card with contact details which the plaintiff put in the vehicle.

(d) A leaflet on its front page headed "Open and Direct Insurance" and "Motor Claims, Breakdown Recovery Service and Legal Expenses" ("the leaflet").

The plaintiff left the leaflet in the envelope along with the letter and the Certificate of Insurance. On its second page the leaflet also bears the logo "M.I.S. Claims" which is a reference to "Motorists Insurance Services Limited".

[5] The letter from Open and Direct Insurance stated that the insurer was "Prestige Underwriting Services". The plaintiff believed and the case proceeded on the basis that the plaintiff's insurers were Prestige Underwriting Services Limited. The exact identity of her insurer was not explored during the hearing but it may be that the policy of insurance was issued by Prestige Underwriting Services Limited but was underwritten by National Insurance and Guarantee Corporation Limited so that the real insurer was National Insurance and Guarantee Corporation Limited.

[6] The insurance premium paid by the plaintiff for her comprehensive insurance policy was £214.29. In addition there was IPT (Insurance Premium Tax) at 5% (£10.71) and a £10.00 "claim line fee". The total payment made by the plaintiff to her insurance brokers Open and Direct Insurance was £235.00.

[7] The claim line fee of £10, even though not expressed to be a premium, was in fact a premium for what transpired to be another insurance policy

("the second insurance policy") issued by Motorists Insurance Services Limited. The terms of the second insurance policy were contained in the leaflet in which it is described as a "Motor Uninsured Loss Recovery Policy". The second insurance policy only provided cover in circumstances where the plaintiff was involved in a road traffic accident which was not her fault. In those circumstances it covered her legal expenses and other losses which were not covered under her comprehensive insurance policy.

[8] The plaintiff unwittingly entered into the second insurance policy. She was unaware that she was to or had purchased it. She believed that she was purchasing one comprehensive insurance policy from Prestige Underwriting Services Limited. Indeed the plaintiff's legal representatives only became aware that there was a second insurance policy during the course of the hearing of the appeal. They were also unaware that the plaintiff had paid a £10.00 claim line fee which was the premium for that policy.

[9] The plaintiff did not have a telephone number for Prestige Underwriting Services Limited. The leaflet which contained the terms of the second insurance policy prominently provided the plaintiff with a claims helpline service telephone number together with the injunction that all potential claims must initially be reported to our claims helpline service. After the road traffic accident occurred and when the plaintiff rang that number she believed that Motorists Insurance Services Limited was a part of the same company as her insurers Prestige Underwriting Services Limited. She did not realise or have any appreciation of the separate commercial interests that were involved. That lack of appreciation was entirely understandable in circumstances where, as here,

(a) No explanation was ever given to her as to the separate companies involved or as to their separate commercial interests,

(b) Open and Direct Insurance did not comply with Article 6(1)(a) of the Business Names (Northern Ireland) Order 1986,

(c) It was not made clear to her whether Open and Direct Insurance were her agents or the agents of Prestige Underwriting Services Limited,

(d) Motorists Insurance Services Limited was introduced by the inclusion of a leaflet enclosed with a letter from Open and Direct Insurance which also enclosed her insurance certificate.

I consider that the arrangements were structured in such a way that she would not appreciate the different identities and different commercial interests of the various companies involved. I also infer that the inclusion of

the leaflet by Open and Direct Insurance was not at the instigation of her insurers, but was as a result of a separate commercial arrangement between Open and Direct Insurance and Motorists Insurance Services Limited. In fact Motorists Insurance Services Limited is a company unconnected to her insurers Prestige Underwriting Services Limited and carries on its own business as a credit hire and credit repair company.

[10] In relation to the second policy of insurance no point was taken during the course of the hearing as to whether Motorists Insurance Services Limited had been authorised to effect or carry out a contract of insurance or whether it was an exempt person, see Halsbury's Laws of England, 4th Edition, volume 25 at paragraph 22 or as to whether the premium for the second policy of insurance should have been subject to insurance premium tax, see Halsbury's Laws of England, 4th Edition, volume 25 at paragraph 831. I will for the purposes of this judgment proceed on the basis that it is a valid policy.

[11] The second insurance policy has a number of commercial functions. As far as the plaintiff is concerned, where she has a comprehensive insurance policy, the additional insurance cover that it provides is of little benefit. If she was involved in a road traffic accident for which she was not at fault, then she could recover her legal expenses and her excess in any event from the at fault driver though she would be out of pocket for a period of time. However the second insurance policy does provide the plaintiff with a one stop claims management service. If she is involved in a road traffic accident for which she is not at fault then prominent in the leaflet is a contact telephone number (which is in fact the contact number for Motorists Insurance Services Limited though the plaintiff believed that it was all a part of her insurers Prestige). All she has to do is to ring that number and thereafter Motorists Insurance Services Limited look after everything on her behalf in relation to the claim. They notify her insurers, though she is unaware that they do this. They arrange repairs for the vehicle. They appoint solicitors on her behalf to pursue the at fault driver and his insurers. They arrange hire of a replacement vehicle. They are experts in this field. They have considerable experience in undertaking all of these tasks. They have a considerable level of commercial organisation for instance they have arranged panels of solicitors, they have an automatic computer system for notifying the selected solicitor, and they have access to the computer system of "Open and Direct Insurance" on which they are able to see the brokers underwriting information in relation to the plaintiff.

[12] The commercial benefit of the second insurance policy as far as Motorists Insurance Services Limited is concerned is that it presents them with commercial opportunities including providing car hire.

[13] A practical effect of the leaflet being sent to the plaintiff is that she has been provided with a telephone number to contact in the event of a road

traffic accident. Accordingly she would notify Motorists Insurance Services Limited of any road traffic accident. If the accident was her fault Motorists Insurance Services Limited direct her to her insurance company. If she is not at fault then they proceed to arrange everything on her behalf.

[14] One of the documents sent by Open and Direct Insurance with the letter dated 25 September 2007 was a policy summary headed Key Facts. That document stated that one of the benefits included in the plaintiff's comprehensive policy was a courtesy car in the event that the vehicle was in one of the insurers recommended repairers as the result of an accident covered by the policy. The vehicle was repaired in one of the insurers recommended repairers and the accident was covered by the policy. Accordingly the plaintiff was entitled to a courtesy car. However the plaintiff stated, and I accept, that she was unaware that she was entitled to a courtesy car under the terms of her insurance policy.

[15] On Monday 29 October 2007, the first working day after the road traffic accident the plaintiff referred to the leaflet which had been enclosed with the letter dated 25 September 2007 from Open and Direct Insurance. She rang the telephone number and explained the nature of the road traffic accident and the extent of the damage to the vehicle. She stated that she was not at fault. She was asked whether she needed a car and indicated that she did. She was informed that "it would all be sorted out". That a car would be provided and the vehicle would be collected for repair. At this stage she thought that the car that was to be provided to her was a courtesy car. She was also informed that a solicitor would be arranged for her. That there was nothing that she would have to do. I find that the plaintiff appointed Motorists Insurance Services Limited as her agent. The appointment was made by the plaintiff in ignorance of the profit that Motorists Insurance Services Limited could make and of any conflict between their own commercial interests and her interests.

[16] On Monday 29 October 2007 Motorists Insurance Services Limited having assured the plaintiff that everything would be looked after notified Prestige Underwriting Services Limited. On the same day Prestige Underwriting Services Limited sent a fax to Wrights Accident Repair Centre (Belfast) giving them details of the vehicle and instructions to repair it. The fax also notified Wrights that a courtesy car was required. Prestige Underwriting Services Limited had an agreement with Wrights under which Wrights provided courtesy cars in circumstances where Prestige Underwriting Services Limited under the terms of its policy was obliged to provide a courtesy car. The plaintiff's comprehensive insurance policy entitled her to a courtesy car but did not specify the type or size of courtesy car. The instruction from Prestige Underwriting Services Limited to Wrights was "please contact our policyholder and organise repairs/courtesy car". The only courtesy cars which Wright's provided under its agreement with Prestige Underwriting Services Limited were small two door vehicles. The

evidence in this case revealed a number of inadequacies with courtesy cars which might arise in other cases, for instance the size of the courtesy car or a desire by the not at fault driver to use a repairer of his own rather than his insurers choice. However on the facts of this case a courtesy car provided by Wrights would have been the equivalent of the vehicle. The plaintiff was quite clear in her evidence that she would have accepted a courtesy car if it had been offered to her.

[17] In the meantime Motorists Insurance Services Limited had not only contacted Prestige Underwriting Services Limited but had also, on Monday 29 October 2009 contacted Wrights Accident and Repair Centre (Belfast). They instructed Wrights **not** to provide the plaintiff with a courtesy car. The plaintiff was unaware that her insurers Prestige Underwriting Services Limited had instructed Wrights to organise a courtesy car for her. She was equally unaware that Motorists Insurance Services Limited purporting to act on her behalf was countermanding that instruction to Wrights from Prestige Underwriting Services Limited. She was also unaware that the reason why Motorists Insurance Services Limited was giving that instruction to Wrights on the facts of this case was that if the plaintiff was provided with a courtesy car they would have lost the opportunity of their wholly owned subsidiary, Independent Car Hire Limited, hiring a car to her. If she had been aware of the correct factual position she would have availed of the courtesy car and would not have hired the replacement vehicle.

[18] Also on Monday 29 October 2007 and by email Motorists Insurance Services Limited notified the details of the road traffic accident to McCartan Turkington and Breen, one of its panel solicitors, so that a Letter of Claim could be sent to the defendant. A Letter of Claim was sent to the defendant by McCartan Turkington and Breen on 30 October 2007. On the same date a copy of that letter together with insurance details of the defendant were sent to Axa Insurance who was the defendant's insurers.

[19] On 29 October 2007 Wrights telephoned the plaintiff and arranged to pick up the vehicle on Tuesday 30 October 2007. When they telephoned her they did not advise her that she was entitled to a courtesy car nor did they offer a courtesy car. Similarly when they came to collect the vehicle they did not advise the plaintiff as to her entitlement to a courtesy car nor did they offer her a courtesy car.

[20] On Tuesday 30 October 2007 two people came to the plaintiff's house: one to deliver the replacement vehicle, the second driving the lorry to collect the vehicle. It was at this point that the plaintiff appreciated that the replacement vehicle was not a courtesy car not from what either of these individuals said, as they didn't say very much, but from the documents they produced. She was requested to and did sign three documents though she was given no proper opportunity to read the documents prior to the

signature. Everything took place on the doorstep of her house. The three documents were:-

(a) A vehicle hire agreement.

(b) A credit hire agreement.

(c) An "ABI General Terms of Agreement. Mitigation questionnaire/statement of truth" ("the mitigation questionnaire"). (The initials ABI being short for the "Association of British Insurers").

When the plaintiff looked at these documents she appreciated that she might have to pay something for the replacement vehicle. She stated, and I accept, that standing at her front door she found it very difficult to think of things and that she was assured that this was the way it operated. Furthermore she needed a car, the men were there, the replacement vehicle was there, they were collecting the vehicle, she was presented with a fait accompli. She thought that she had no other option but just to "go for it". The plaintiff asserted and I accept that she was very much an innocent abroad in the field of insurance policies and the hiring of a replacement vehicle, that she was relying on the personnel who attended with her to explain what she was doing.

[21] Under the vehicle hire agreement the plaintiff agreed to hire from Independent Car Hire Limited a replacement vehicle at a rate of £29.20 per day together with a delivery/collection charge of £25.00 plus VAT. Independent Car Hire Limited is a wholly owned subsidiary of Motorists Insurance Services Limited. The plaintiff had no knowledge of the relationship between Independent Car Hire Limited and Motorists Insurance Services Limited and indeed no understanding of how Independent Car Hire Limited came to be involved in the hire of a vehicle to her except that it had all been arranged by virtue of the telephone call she had made.

[22] The credit hire agreement was supplementary to the vehicle hire agreement. It provided credit to the plaintiff from Independent Car Hire Limited whilst Motorists Insurance Services Limited pursued a claim on her behalf against the at fault driver. The credit hire period was stated to expire when a claim had been concluded either by completing negotiations with a third party or by a decision of the court. At that point the plaintiff was liable to pay Independent Car Hire Limited's hire charges in full, by a single payment, but if it had been established that she was not at fault, the hire charges would be recovered by the solicitors from the third party. The hire period also expired in any event 50 weeks from the date of the credit hire agreement. At the time that she signed this agreement the plaintiff was unaware of her obligation to pay the hire charge in full for instance at the

expiration of 50 weeks. After the transaction had been completed and at some subsequent date, she read through the terms and she then appreciated that obligation which caused her concern.

[23] The agreement in *Dimond v Lovell* [2002] 1 AC 384 was a regulated agreement for the purposes of the Consumer Credit Act 1974 but was unenforceable for failure to comply with the requirements of that Act. Lord Hoffman stated at page 396 letter g that Article 3(1)(a) of the Consumer Credit (Exempt Agreements) Order 1989 exempts consumer credit agreements such as the one in that case if the total number of payments to be made by the debtor does not exceed four and;

> "Those payments are required to be made within a period not exceeding 12 months beginning with the date of the agreement."

Lord Hoffman went on to observe that the credit hire company in that case could obtain exemption from the Consumer Credit Act 1974 if they included a clause that requires that the hire should in any event be paid (if at all) within 12 months. In this case the credit hire agreement contains a clause as follows:-

> "9. The credit period extended by this agreement shall expire, in any event 50 weeks from the date of this agreement. At the expiry of the credit period you shall then become liable to pay the hire charges in full, by a single payment. You will not be allowed to pay by more than one instalment. If the charges are subsequently recovered from the third party, Independent Car Hire Limited will refund them to you."

This case proceeded on the basis that this clause led to the credit hire agreement being an exempt agreement.

[24] The mitigation questionnaire stated that the plaintiff's duty to keep her losses to a minimum had been explained to her. In fact they had not been explained. It also stated that credit hire and the cover provided by her own policy had been explained to her. They had not been. For instance it had not been explained to her that she was entitled to a courtesy car under her own insurance policy. If it had been then she would have accepted the courtesy car. She stated during cross-examination that "she wouldn't have dreamed of hiring a car." The mitigation questionnaire went on to state that if she chose to hire on credit she would be personally responsible for paying the hire costs which she would not have incurred if she had used a courtesy vehicle available to her from her own motor insurer.

[25] Motor Insurance Services Limited, when they took on the task of arranging everything for the plaintiff had arranged for the plaintiff to enter into a vehicle hire agreement under which she was personally liable. They had arranged for her to enter into a credit hire agreement under which she had potential personal liabilities. They had failed to inform her about the terms of her own insurance policy and the availability of a courtesy car which would have avoided exposing her to any of those personal liabilities in circumstances where they knew that a courtesy car was available to her and where they also had means of acquiring such knowledge through making inquiries of the plaintiff, or of Open and Direct Insurance or of Prestige as to whether the plaintiff was entitled to a courtesy car. The service provided by Motorists Insurance Services Limited to the plaintiff had exposed her to a liability to its wholly owned subsidiary Independent Car Hire Limited in circumstances where the plaintiff, if informed, would have availed of a courtesy car under her own insurance policy. The service that they provided was to arrange a car which she did not want.

Legal principles.

[26] The defendant contends that there are two separate and distinct questions which should not be conflated.

> (a) The first is whether the plaintiff does owe £852.82 or any other sum to Motorists Insurance Services Limited/Independent Car Hire Limited. I say Motorists Insurance Services Limited/Independent Car Hire Limited because the case has proceeded on the basis that they should be treated as the same and that there was no distinction between Motorists Insurance Services Limited and its wholly owned subsidiary Independent Car Hire Limited.
>
> (b) The second is, if the plaintiff does owe £852.82 or any other sum to Motorists Insurance Services Limited/Independent Car Hire Limited, then has there been a failure by her to mitigate her loss in that she did not avail of a courtesy car.

[27] In relation to the second question if a courtesy car is available to the plaintiff by virtue of her own insurance policy then, in so far as the tortfeasor is concerned, there is no obligation on her to mitigate her loss by using the courtesy car rather than hiring a replacement vehicle. In effect the plaintiff cannot be required by the tortfeasor to invoke her contractual entitlement on foot of her insurance policy to a courtesy car, see the judgment of Nicholson LJ in *McMullan v Gibney & Anor* [1999] NIQB 1 relying on the decision in *Parry v Cleaver* [1970] AC 1 at page 14 and see also *Dimond v Lovell* at page 399 letter h.

[28] Again, in relation to the second question, if the plaintiff has no obligation, in so far as the tortfeasor is concerned, to avail of her contractual rights on foot of her insurance policy to a courtesy car, then her agent, Motorists Insurance Services Limited/Independent Car Hire Limited, had no obligation, in so far as the tortfeasor is concerned, to do so on her behalf. That is however a different question than the question as to whether her agent Motorists Insurance Services Limited/Independent Car Hire Limited had an obligation to the plaintiff, which brings one back to the first question posed by the defendant, namely whether the plaintiff does owe £852.82 or any other sum to Motorists Insurance Services Limited/Independent Car Hire Limited.

[29] The obligations owed by an agent to its principal have recently been stated by Jacob LJ in *Imageview Management Limited v Jack* [2009] EWCA Civ 63 in the following terms:-

> "The law imposes on agents high standards. … An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100% body and soul, for him. You must act as if you were him. You must not allow your own interests to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client."

[30] What is the remedy if there is a breach of such a duty? Scrutton LJ in *Rhodes v Macallister* [1993] 29 ComCas 19 at page 27 said:-

> "The law I take to be this: that an agent must not take remuneration from the other side without both disclosure to and consent from his principle. If he does take such remuneration he acts so adversely to his employer that he forfeits all remuneration from the employer, although the employer takes the benefit and has not suffered a loss by it."

The remuneration under consideration in such a case was a payment by the principal to the agent of commission. The agent may have incurred expenses and accordingly not all the commission is profit. The principal may have benefited from the agents services. Still the agent is not entitled to payment of any commission. In this case the payment to the agent is not by way of commission. It is payment for the hire of a car. In his written submissions dated 9 July 2009 Mr O'Hara for the plaintiff did not seek to suggest that the outcome should be any different namely that the agent is not entitled to any

payment. I consider that once a conflict of interest is shown the right to remuneration goes.

Conclusion

[31] I consider that Motorists Insurance Services Limited was clearly in breach of its obligations as the plaintiff's agent. Motorists Insurance Services Limited had a conflict of interest with the principal. The interests of the agent was to make a financial profit by hiring a car to the plaintiff and this conflicted with her interest in adopting a course of action which did not put her at financial risk. The agent could have taken the course of disclosing its conflicting interests. It could have taken the instructions of its principal. On the facts of this case not only was there a potential for such a conflict but it in fact existed. The plaintiff, if she had been informed by her agent of the conflict, would not have dreamt of exposing herself to a financial risk. The agent did profit. If Motorists Insurance Services Limited/Independent Car Hire Limited had sued the plaintiff to recover the sum of £852.82 they would have been met with a defence by the plaintiff that they were unable to recover by virtue of their failure to act in the plaintiff's interests rather than their own commercial interests in circumstances where, as a question of fact, she would have taken a courtesy car if properly informed. Accordingly I consider that the plaintiff does not owe £852.82 or any sum to Motorists Insurance Services Limited/Independent Car Hire Limited as the agent, in such circumstances, is not entitled to any remuneration. Accordingly the plaintiff is not entitled to recover that amount from the defendant and her claim against the defendant fails. I allow the defendant's appeal.

Costs

[32] I will hear counsel in relation to the question of costs and as to whether there is any reason to depart from the principles in relation to costs set out in *Gilheaney v. McGovern and Another No 2* [2009] NIQB 46.