Neutral Citation No. [2010] NIQB 88 | *Ref:* **McCL7919**

Judgment: approved by the Court for handing down | *Delivered:* **31/08/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE DISTRICT JUDGES COURT FOR THE DIVISION OF BELFAST

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BETWEEN:

HELEN DOLOUGHAN

Plaintiff;

-and-

TERENCE MULVANNA
and
NORTHERN HEALTH AND CARE SOCIAL TRUST

Defendants.

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McCLOSKEY J

Introduction

[1] This is an appeal by the Defendants against the decree made by the District Judge whereby it was adjudged that the Plaintiff recover the following damages:

(a) £2,596.67: repair charges.

(b) £261.84: credit vehicle hire charges.

(c) £600: diminution in value of the Plaintiff's vehicle.

By their appeal, the Defendants challenge awards (a) and (b) only.

[2] This is one of a substantial number (currently around forty) of credit hire appeals to the High Court. In this particular case, the parties have responded

positively to the court's exhortation that a joint schedule of agreed material facts be prepared. Furthermore, the court had the benefit of focussed oral and written submissions from counsel, Mr. McCollum (on behalf of the Defendants) and Mr. McCombe (representing the Plaintiff). In addition, a joint bundle of authorities, of high quality, was submitted. As a result, the investment of court time in the hearing of this appeal was relatively modest, extending to approximately one-and-a-half hours. I am grateful to the parties' respective solicitors and counsel for their efforts in this exercise.

[3] Certain provisions of the Consumer Credit Act 1974 ("*the 1974 Act*") feature in this appeal. Furthermore, the central point of focus is an executed written agreement between the Plaintiff (on the one hand) and "Crash Services" (on the other). The third agency involved in what was essentially a triangular series of arrangements was "Agnew Repair Centre", which has its registered office at the premises of Bavarian Garages (NI) Limited in Belfast.

[4] Having thus identified the protagonists, it is appropriate, at this juncture, to rehearse the salient features of the agreed facts:

(a) The Plaintiff is the owner of a Volkswagen Golf vehicle (purchased from the well known commercial entity Agnews, who were also the Plaintiff's insurance brokers.

(b) On 9th March 2009, a vehicle driven by the first-named Defendant, as servant or agent of the second-named Defendant, collided with the Plaintiff's vehicle.

(c) The Plaintiff, given her previous relationship with Agnews, determined to have the vehicle repaired by Agnew Repair Centre ("*ARC*").

(d) At the request of the handling agents ("Contac Claims") of the Defendants' insurers, who contacted the Plaintiff directly, the Plaintiff obtained from ARC an estimate for the cost of repairing her vehicle.

(e) The ARC repairs estimate is dated 12th March 2009 and is in the amount of £2,303.90.

(f) On 23rd March 2009, the Plaintiff drove her vehicle to ARC, to be left there for repairs.

(g) On the same date, 23rd March 2009, the Plaintiff executed the aforementioned "Crash Services" agreement.

(h) On 24th March 2009, an engineer retained by Crash Services inspected the vehicle and prepared a repairs estimate in the amount of £2,226 plus VAT.

(i) On 27th March 2009, ARC executed a "Notice of Assignment" in favour of Crash Services, the subject matter whereof was invoice number 34591 in the amount of £2,596.67.

(j) On 31st March 2009, Crash Services received from ARC a document entitled "Account Invoice", No. 34591, in the amount of £2,596.67, including VAT.

(k) On the same date, 31st March 2009, Crash Services paid a lesser sum, £2,466.83, to ARC in consideration of the assignment of the invoice.

The Crash Services Agreement

[5] The parties to this agreement are the Plaintiff and Crash Services. It was signed by the Plaintiff on 23rd March 2009. It does not appear to be signed on behalf of Crash Services. It contains the following material particulars:

(a) Repairer: ARC.

(b) Hire vehicle: A Nissan.

(c) Daily rate: £53.

Paragraph 9 of the agreement makes clear that the contracting parties are the Plaintiff and Crash Services. The "hire charges" are defined as the aforementioned daily rate of £53. The "*repair charges*" are defined as "*the sum charged to you by a body shop for repairing your own vehicle which we will agree in a reasonable sum with the body shop …*". The term Crash Service's Charges" is defined as "*the collective term for hire charges and repair charges*". The "invoice" is defined as "*the invoice the body shop raises stating your debt to it in respect of repair costs when the repairs to your own vehicle are completed*". [I here interpose the observation that in the evidential matrix before the court no such invoice exists]. The "credit period" is defined as "*a period which expires on the earliest of (a) the date 51 weeks from the date of this agreement, (b) the date your claim against the third party is concluded by a payment which we approve as a final settlement or by a court decision or by its discontinuance or abandonment with our approval; (c) our termination of the agreement under clause 13.6;* **[or]** *(d) your death or insolvency*".

[6] Clauses 10 and 11 of the agreement detail the hire arrangements and terms of hire. The essence of this arrangement is captured in clause 10.1:

> "*Where you cannot use your own vehicle as a result of an accident which in our opinion was the fault of a third party, we will hire you a hire vehicle for the rental period.*"

The repair arrangements are detailed in clause 12. This begins with clause 12.1:

> "*At our absolute discretion, where we are satisfied that (a) the damage to your own vehicle was caused by an accident which was wholly the fault of a third party; (b) repairing it is economically viable; and (c) we authorise the body shop to repair your own vehicle for an agreed sum in repair charges, we will on completion of the repairs arrange the purchase of the invoice from the body shop on such terms as it agrees with us*".

Clause 12.3 continues:

> "*When the invoice is purchased by us or on our behalf, the repair charges will become part of Crash's charges, on which we will give you credit until the end of the credit period. At the end of the credit period you will immediately pay the repair charges together with interest without demand, in full in a single payment*".

Per clause 13.1:

> "*You must make all reasonable endeavours to recover Crash's charges from the third party and must at our request instruct a solicitor approved by us to assist you and attend court if necessary*".

The remainder of clause 13 contains other related provisions, mainly designed to ensure that Crash Services exercises full control over the relevant proceedings and recovers its hire and repairs outlays.

The Notice of Assignment

[7] While this document is signed only by a signatory on behalf of ARC, there is no dispute that, as appears on its face, the assignee is Crash Services. It identifies the "*customer*" as the Plaintiff and the assigned amount as £2,596.67 and bears a date, apparently inserted by the signatory, 27th March 2009. It states:

> "*I hereby irrevocably assign the benefit including interest of this invoice to Northern Bank Limited …*
>
> *Payment should be made to ...* [Crash Services] *... as agents for Northern Bank Factors Limited and whose receipt therefor alone is valid.*

> *I acknowledge the conditions of acceptance overleaf and that I will become liable for payment of monies not recovered after ninety days*".

While the "conditions of acceptance" are omitted from the appeal bundle, they did not feature in the parties' arguments. The words "*this invoice*" refer to Invoice No. 34591: see paragraph 4(j), *supra*.

The Credit Hire Invoice

[8] This is a Crash Services invoice, dated 31st March 2009 and also bearing the number 34591. It is addressed to the Plaintiff. It identifies the aforementioned Nissan vehicle and levies a total sum of £405.38, with the following breakdown:

(a) Delivery and collection: £50.

(b) Hire charges: £265 (representing 5 days at a daily rate of £53).

(c) Collision damage waiver: £37.50.

These three sums total £352.50. The balance is represented by VAT. The "date out" is stated to be 23rd March 2009, while the "date back" is specified as 27th March 2009. These dates represent the beginning and end of the period of hire.

Issues and Conclusions

[9] Within the evidential framework set out above, the court has considered the issues raised and arguments advanced. At the outset, it was helpfully explained to the court that, at first instance, the district judge rejected the Defendants' contention that the Crash Services agreement is a debtor/creditor agreement, holding instead that it is a debtor/creditor/supplier agreement, within the terms and meaning of the 1974 Act. Challenging this conclusion on behalf of the Defendants, Mr. McCollum maintained the argument that this is a debtor/creditor agreement since, in the language of Section 13(b) of the 1974 Act, it constitutes "*a restricted use credit agreement which falls within Section 11(1)(c)*". The latter provides:

> "*A restricted use credit agreement is a regulated consumer credit agreement … to* ***refinance*** *any existing indebtedness of the debtor's, whether to the creditor or another person*".

[My emphasis].

Section 13 provides, in material part:

> "*A debtor/creditor agreement is a regulated consumer credit agreement being …*

(b) A restricted use credit agreement which falls within Section 11(1)(c) …".

Section 9(1) provides:

> "*In this Act 'credit' includes a cash loan and* ***any other form of financial accommodation***".

[Emphasis supplied].

Section 189 contains an extensive list of definitions, whereby, firstly, "*credit*" is to be construed in accordance with Section 9. The verb to "*finance*", of particular importance in the present context, is also defined:

> "*'Finance' means to finance wholly or party and 'financed' and 'refinanced' shall be construed accordingly*".

[10] Mr. McCollum argued that the Plaintiff was in debt to ARC; this debt was purchased, via an assignment, by Crash Services; ARC then invoiced Crash Services, rather than the Plaintiff; and the Plaintiff would, but for these arrangements, have been liable to ARC for the invoice. It was submitted that upon completion of the repairs to her vehicle, the Plaintiff became indebted to ARC, who provided credit for the debt and financed the repairs by not requiring immediate payment. It was submitted that this gave rise to a refinancing agreement under Section 11(1)(c) which is not exempt from the 1974 Act and not enforceable. With specific reference to the language of Section 11(1)(c), I construe Mr. McCollum's argument as embodying the following propositions:

(a) The Plaintiff was a debtor.

(b) ARC was the creditor.

(c) When executing the Crash Services agreement, the Plaintiff had "*existing indebtedness*" to ARC.

(d) By the terms of the agreement, this indebtedness was *refinanced.*

[11] Responding on behalf of the Plaintiff, Mr. McCombe drew to the attention of the court the following passage in paragraph 25.65 of "Consumer Credit Law in Practice", Volume 2 (Goode):

> "*Typical examples of a debtor/creditor agreement are the normal bank loan and overdraft, advances made through automated teller machines (cash dispensers) … loans by moneylenders and pawnbrokers and personal loans not made pursuant to or in contemplation of arrangements*

> *between lender and supplier. Also included within the definition of debtor/creditor agreement is an agreement to refinance any existing indebtedness of the debtor, whether to the creditor or another person* [CCA 1974, Sections 13(b), 11(1)(c)]. *The CCA No. 1974 does not define 'refinancing', but in its normal usage* ***it denotes the granting of fresh credit to discharge, wholly or in part, an existing indebtedness of the debtor to the party granting the fresh credit or to a third party***".

[Emphasis added].

This is followed by some examples. These include the example of an agreement to refinance an *accruing or future indebtedness* of the debtor to the creditor, which is characterised as a debtor/creditor/supplier agreement, rather than a refinancing transaction. The correctness of this suggestion seems to me unassailable.

Conclusions

[12] I conclude as follows:

(a) The question of whether the raising of an invoice is a pre-requisite to the existence of a *debt* and, hence, the creation of "*indebtedness*" on the part of a *debtor* is an interesting one. In the factual matrix of the present case, there is no such invoice, as noted above. I doubt whether a pre-requisite of this nature exists. I consider that, as a matter of law, a debt can arise in the absence of an invoice from the creditor to the debtor.

(b) However, in the present case, the focus is clearly on the sequence of events both predating and postdating the execution by the Plaintiff of the Crash Services agreement, on 23rd March 2009. These are, respectively, the key event and key date.

(c) In my view, "*financing*" is to be accorded its natural and ordinary meaning, which is the provision of finance. I consider that the verbs "*to finance*" and "*to refinance*" are to be construed accordingly. The latter clearly denotes second, or subsequent, financing.

(d) I further consider that the concept of "*refinancing*" must entail a pre-existing financial provision, which is replaced by a new financial provision.

(e) Similarly, "*existing indebtedness*" must, in my view, denote a state of indebtedness on the part of the debtor to a creditor which has crystallized and is present.

(f) The Crash Services agreement undoubtedly entails *financing*, in the sense that it makes financial provision to the Plaintiff: this was not in dispute.

(g) However, I hold that this agreement cannot be considered a *refinancing* agreement, as there was no pre-existing financing of which the Plaintiff was the beneficiary. On the date when the Plaintiff executed her agreement with Crash Services (23rd March 2009) her vehicle was in a damaged condition and repairs had not been commenced: this is readily inferred from the fact that on 24th March 2009, a Crash Services engineer inspected the vehicle and prepared a repairs estimate. The Plaintiff was not in a debtor/creditor relationship at this stage. Furthermore, no debt of any kind arose until 31st March 2009, when ARC transmitted an invoice to Crash Services.

(h) When the Plaintiff executed the Crash Services agreement, she had no "*existing indebtedness*" to anyone. Insofar as any question of indebtedness on the part of the Plaintiff to ARC arises, such indebtedness could not have materialised – and did not do so - until completion of the repairs, an event which post dated the execution of the agreement.

In short, when the Plaintiff made her agreement with Crash Services there was no pre-existing indebtedness on her part, no pre-existing credit of which she was the beneficiary and no pre-existing financing to her benefit. In the factual matrix of this case, the only financing provided was that facilitated by the Crash Services agreement and, for the reasons explained, this did not constitute *refinancing*. Rather , it was a measure of *original financing*.

[13] I conclude, therefore, that the Crash Services agreement is not a "*restricted use credit agreement*" within the meaning of Section 11(1)(c) and, hence, is not a "*debtor/creditor agreement*" within the framework of Section 13(b) of the 1974 Act. Thus I reject the submissions on behalf of the Defendants. While the observation may be otiose, I would add that these findings and conclusions are self-evidently fact specific, being wedded exclusively to the evidential framework within which this appeal has proceeded.