Neutral Citation No. [2010] NIQB 89

Ref:	**McCL7926**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**06/09/10**

IN THE HIGH COURT OF JUSTICE
IN NORTHERN IRELAND

———

QUEEN'S BENCH DIVISION

———

ON APPEAL FROM THE DISTRICT JUDGES FOR
VARIOUS DIVISIONS

———

BETWEEN:

1. Scott Foot

Plaintiff/Appellant;

and

Denise Quinn

Defendant/Respondent;

2. Malachy Cunningham, trading as
AV Taxis

Plaintiff/Respondent;

and

Homecare (NI) Limited

Defendant/Appellant;

3. Andrew McMenamin

Plaintiff/Appellant;

and

Lindsay Chillingworth

Defendant/Respondent;

and

4. Michael Latimer

Plaintiff/Appellant;

and

Moira Canning
and
Archibald Canning

Defendants/Respondents.

McCLOSKEY J

I Introduction

[1] These are conjoined credit hire appeals, with certain features in common, in which various contentious issues relating to interrogatories and discovery of particular documents arise for determination. They are a mixture of interlocutory appeals from orders of district judges and original interlocutory applications brought for the first time in the forum of the High Court in the context of substantive appeals against decrees of district judges. In all of these interlocutory appeals and applications the Defendant is the moving party. The main question arising in all four cases is whether it is fair, reasonable and proportionate to subject the Plaintiff to the burden of answering on oath extensive interrogatories and/or making discovery of particular documents. Some discrete issues of relevance also arise.

II The appeals and applications

Foot –v- Quinn

[2] The twin components of this Plaintiff's claim are (a) £833.01, representing the cost of hiring a replacement vehicle (the "credit hire" dimension of his claim) and (b) £750, representing the written down value of his vehicle. The latter element is not in dispute. The district judge made a decree in the Plaintiff's favour in the amount of £1,177.35. The Plaintiff appeals against this decree.

[3] Interlocutory applications and orders were did not feature in of the County Court proceedings. However, after the Plaintiff's appeal to this court had been lodged, the Defendant brought the following separate interlocutory applications:

(a) An application seeking leave to serve 14 interrogatories on the Plaintiff.

(b) An application for discovery of particular documents.

By direction of the court, these applications were heard in this forum, rather than by the Master. The Plaintiff's substantive appeal remains pending.

<u>Cunningham –v- Homecare (NI)</u>

[4] The district judge made a decree in this Plaintiff's favour in the amount of £4,061.80, representing "credit hire" costs only. The Defendant appeals against this decree. In the course of the County Court proceedings, the Plaintiff was ordered to make discovery of (a) his bank statement spanning the period of hire, 5th September to 29th October 2008 and (b) his "most recent" profit and loss accounts. There is some debate between the parties about whether the Plaintiff complied fully with this order. Following service of the Notice of Appeal, the Defendant has brought two separate interlocutory applications, seeking the following relief:

(a) An order requiring the Plaintiff to make discovery of the 15 types of documents itemised in a schedule.

(b) An order requiring the Plaintiff to answer on oath 29 interrogatories.

By direction of the court, these summonses also were referred by the Master to this forum. The Plaintiff's substantive appeal has not yet been heard.

<u>McMenamin –v- Chillingworth</u>

[5] This is a pure interlocutory appeal. The twin elements of this Plaintiff's claim are (a) £641.59, being vehicle repair costs and (b) £1,455.73 in respect of "credit hire" costs. The Plaintiff's substantive claim has not yet been determined. In the course of the County Court proceedings, the Deputy District Judge ordered the Plaintiff to reply on oath to 26 interrogatories served on behalf of the Defendant. This is the order under appeal to the High Court.

<u>Latimer –v- Canning</u>

[6] This is also a pure interlocutory appeal, with the result that this Plaintiff's substantive claim has not yet been determined. The twofold elements of the Plaintiff's claim are (a) £1,465.70, representing vehicle repair costs and (b) £439.30 in

respect of "credit hire" costs. The Plaintiff appeals to this court against an interlocutory order of the district judge requiring him to make discovery of specified documents.

III Rules of Court

<u>County Court Rules</u>

[7] Interrogatories did not feature in the County Court Rules until 1983, when they were introduced by SR 1983 No. 164. This added a new Part II to Order 15. The scheme of the new rules is that interrogatories may be served on another party only with the permission of the court. The threshold requirement for any interrogatory is that it must relate to some matter in question between the parties. This is enshrined in Rule 12(1)(a) and reiterated in Rule 12(4):

> "*A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1)* [viz. a matter in question between the parties] *shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness*".

The criteria to be applied by the court upon the hearing of an application of this kind are spelt out in Rule 12(3):

> "*On the hearing of an application under this Rule, the judge shall give leave as to such only of the interrogatories as he considers necessary either for disposing fairly of the proceedings or for saving costs; and in deciding whether to give leave the judge shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question*".

Thus the requirement of *relevance* features prominently throughout the Rules.

[8] The party against whom interrogatories are ordered must answer them by a duly sworn affidavit: see Order 15, Rule 12(6). There are possible sanctions for a failure to answer adequately or at all (per Rules 16 and 17) and objection on the ground of privilege may be raised (per Rule 15). The topic of deployment of answers to interrogatories at the trial is regulated by Rule 18:

> "*A party may put in evidence at the trial of the proceedings, or of any issue therein, some only of the answers to interrogatories, or part only of such an answer, without putting in evidence the other answers or, as the case may be, the whole of that answer, but the judge may look at the whole of the answers and if of the opinion that*

> *any other answer or other part of an answer is so connected with an answer or part thereof used in evidence that the one ought not to be so used without the other, the judge may direct that that other answer or part shall be put in evidence*".

[9] The subject of discovery of documents is governed by Order 15, Rules 1-11. The overarching requirements are twofold viz. the document in question must be, or have been, in the possession, custody or power of the party concerned and must relate to some matter in question in the proceedings: see Rule 1(1). As regards discovery of particular documents, Rule 5(1) provides:

> "*The judge may, on the application of any party to proceedings at any time and whether a list of documents has or has not already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or class of documents specified or indicated in the application is or has at any time been in his possession, custody or power and if not then in his possession, custody or power when he parted with the document or documents and what has become of it or them*".

A pre-requisite to the making of such an order is an affidavit expressing the belief of the deponent that the other party has, or at some time had, possession, custody or power of the document in question *and* that it relates to a matter in question in the proceedings: per Rule 5(2).

Rules of the Court of Judicature

[10] The principal difference between the procedures in the County Court and the High Court is that, in the latter forum, it is possible to serve interrogatories without order of the court, by virtue of Order 26, Rule 1. Notwithstanding this expanded facility, Order 26 expressly preserves the option of applying to the court for leave to serve interrogatories: see Rule 1(2). Furthermore, the court will be required to adjudicate where the receiving party applies for an order varying or withdrawing the interrogatories under Rule 3(2). The touchstones by which the propriety of any interrogatories are to be adjudged are set out in Rule 1(1):

> "*A party to any cause or matter may in accordance with the following provisions of this Order serve on any other party interrogatories* ***relating to any matter in question between the applicant and that other party in the cause of matter which are necessary either –***
>
> ***(a) for disposing fairly of the cause or matter, or***

> ***(b) for saving costs*"*.

[Emphasis added].

Rule 1(3) continues:

> *"A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1) may not be administered notwithstanding that it might be admissible in oral cross-examination of a witness"*.

[11] In adjudicating on the propriety of interrogatories, there are certain factors which the court must take into account, by virtue of Rule 4(2):

> *"In deciding whether to give leave to serve interrogatories, the court shall take into account any offer made by the party to be interrogated to give particulars, make admissions or produce documents relating to any matter in question and whether or not interrogatories without order have been administered"*.

The provisions in the Rules relating to any failure to answer interrogatories, any failure to comply with an order of the court, the adequacy of answers and the deployment of answers at the trial are contained in Rules 5(7) and mirror the corresponding provisions in the County Court Rules, set out above.

[12] As regards discovery of documents, the regulatory regimes in the County Court and the High Court are closely comparable. By virtue of Order 24, Rule 1, a document is discoverable if two criteria are satisfied. The first is that the document is, or has been, in the party's possession, custody or power. The second is that it must relate to some matter in question in the action. The court's powers to order discovery of documents are contained in Rules 3, 7 and 8. Each of these rules is governed by Rule 9, which provides:

> *"On the hearing of an application for an order under Rule 3, 7 or 8 the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs"*.

Thus the overarching twin criteria are repeated.

[13] Discovery of particular documents is regulated by Order 24, Rule 7 in these terms:

> "***Subject to Rule 9,*** *the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class or document so specified or described is, or has at any time been, in his possession, custody or power and if not then in his possession, custody or power when he parted with it and what has become of it".*

[My emphasis].

Rule 7 is a mirror image of its County Court counterpart in Order 15, Rule 5(1). This applies also to the stipulations for the necessary grounding affidavit: see Order 24, Rule7(3) and compare County Court Order 15, Rule 5(2).

IV Guiding Principles

<u>The Over-riding Objective</u>

[14] Where the court is required to adjudicate in any contentious discovery or interrogatories context, it must seek to give effect to the over-riding objective which, in the High Court, is framed in Order 1, Rule 1A in the following terms:

> *"1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.*
> *(2) Dealing with a case justly includes, so far as is practicable -*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate to -*
> *(i) the amount of money involved;*
> *(ii) the importance of the case;*
> *(iii) the complexity of the issues; and*
> *(iv) the financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.*
> *(3) The Court must seek to give effect to the overriding objective when it -*
> *(a) exercises any power given to it by the Rules; or*
> *(b) interprets any rule.*

> *(4) Paragraph (3) above shall apply subject to the provisions in Order 116A, rule 2(1) and Order 116B, rule 2(1). ".*

It has been observed that this rule dominates and influences all of the remaining provisions of the Rules: see ***Turley –v- Black and Another*** [2010] NIQB 1, paragraph [27]. In the County Court, the equivalent provision is contained in Order 58, Rule 2.

Interrogatories

[15] In ***Eastwood –v- Channel 5 Video Distribution and Another*** [1992] 2 NIJB 45, Carswell J laid emphasis on the importance of the criteria enshrined in Order 26, Rule 1. Simultaneously, he highlighted the significance of the question of whether "*other means of information or proof are available*", while underlining the basic requirement that "*a sufficient case for administration of interrogatories*" must be established: see p. 47. His Lordship also reflected on the scope of the general principle that interrogatories may (not must) be disallowed where they seek to elicit admission of some fact which will be proved by a witness who will in any case testify at the trial (at p. 49) and continued (at p. 50):

> "*I think that one must always come back to asking whether an interrogatory is necessary for disposing fairly of the cause or matter, or for saving costs and all other principles expressed have to be seen in the light of this governing principle. One views the principle in the light that interrogatories are not to be encouraged and that their administration has to have positive justification as being necessary*".

I consider that these formulations are, at least in part, a reflection of the requirement of *necessity*, to be contrasted with, for example, *desirability.*

[16] Interrogatories are permissible only if they have a demonstrable concrete basis and justification. This requirement is sometimes expressed in the proposition that "*fishing*" interrogatories are impermissible. See the discussion in The Supreme Court Practice 1999, Volume 1, paragraph 26/4/9 and the following commentary in particular:

> "*It is an important function of interrogatories to gain information not within the knowledge of the party applying; but they should be confined to facts which there is some reason to think true and interrogatories will not be allowed which are designed to prove a cause of action or defence not as yet pleaded*".

Other well established principles in this sphere are that interrogatories will generally be disallowed if they invite an expression of opinion on the part of the

responding party or are oppressive or burdensome. In paragraph 26/4/12 of the aforementioned work one finds the following commentary:

> "*This is one large general principle underlying the whole law of the matter, namely that* ***interrogatories will not be allowed if they exceed the legitimate requirements of the particular occasion …or put on the opposite party a burden out of all proportion to the benefit to be gained by the applicant***."

[Emphasis added].

In summary, interrogatories must always be proportionate to (a) the demonstrable litigious purpose to be served by them and (b) the additional costs and delay which they will generate.

[17] The stringency of the test of necessity and the need for a positive justification feature in the decision in ***Hall –v- Sevalco Limited*** [1996] PIQR P344, where the Master of the Rolls stated, at p. 349:

> "*The guiding principle in this field must be that laid down in RSC Order 26, Rule 1(1) that interrogatories must be necessary either for disposing fairly of the cause or matter or for saving costs. Necessity is a stringent test. It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit …*
>
> *Interrogatories should not be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle.* ***The interrogator must be able to show that his interrogatories, if answered when served, will serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action***".

[My emphasis].

As the conclusion reached by the court demonstrates, interrogatories are unlikely to satisfy these requirements where the information which they seek to elicit is, or is likely to become, available from other sources. These, in my view, include pleadings, medical reports, further particulars, admissions, open letters and sworn evidence.

Discovery of Documents

[18] As the test enshrined in Order 24, Rule 1 (and its County Court equivalent) makes clear, the supreme test for determining whether a given document qualifies as discoverable is that of *relevance*: the document *must relate to a matter in question in the action*. The essence of this overarching requirement is expounded in the oft quoted judgment of Brett LJ in ***Compagnie Financiere du Pacifique –v- Peruvian Guano Company*** [1882] 11 QBD 55, at p. 63:

> "*It seems to me that every document relates to matters in question in the action which not only would be evidence upon any issue but also which it is reasonable to suppose contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because as it seems to me a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary; if it is a document which may fairly lead to a train of inquiry which may have either of those two consequences*".

[19] In the specific case of applications for discovery of particular documents, it is incumbent on the moving party to make out a *prima facie* case of (a) relevance and (b) possession, custody or power. In ***Berkeley Administration –v- McClelland*** [1990] FSR 381, two of the governing principles were formulated by the court in the following terms:

(i) An order should not be made under this rule unless (a) there is sufficient evidence that the documents pursued exist; (b) the documents relate to some matter in issue in the action; and (c) there is sufficient evidence that the documents are in the possession, custody or power of the other party.

(ii) These are pre-requisites to the making of an order. Where they are satisfied, the order does not follow as a matter of course. Rather, the court exercises a discretion.

[Per Mustill LJ, at p. 382].

As Rule 7(3) makes clear, the contents of the moving party's grounding affidavit are of obvious importance. This must contain averments sufficient to establish a *prima facie* case in the terms explained above. In order to discharge this onus, the deponent might depose to certain facts. Alternatively, the thrust of the affidavit might be directed to probabilities, or inferences. There might also be relevant

correspondence or other material documents to exhibit. A further variation is that the affidavit might contain a mixture of all of these ingredients, duly augmented by oral argument. The pleadings will invariably be of fundamental importance. The affidavit must not contain sworn argument, as this is impermissible. What is abundantly clear is that there is a threshold to be traversed, with the onus resting on the moving party. If the grounding affidavit does not pass muster, the application will fail.

[20] If the court is satisfied that the threshold is overcome, it must still give effect to Order 24, Rule 9, which provides that the court *shall* decline to make the order sought where of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. It is incumbent on the court to be alert to these fundamental considerations in every case. Further, I consider that the express terms of Rule 9 clearly contemplate the possible influence of factors such as oppression, undesirable delay, inappropriate cost and want of proportionality.

VI Conclusions

[21] I consider that in determining these appeals and applications, the court must have regard to the context in which they are brought. An essential feature of this context is the proliferation of credit hire litigation throughout the United Kingdom. The Court of Appeal was clearly alert to this factor in ***Clark –v- Artington Electrical Services*** *(and other appeals)* [2003] QB 36, per Aldous LJ:

> *"**136** Although the House of Lords gave guidance as to the principles to be applied in arriving at the correct measure of damage for loss of use, their application has proved difficult. As the judge said, hire rates are in constant flux and different companies' hire charges vary considerably. For example Mr Mainz, the expert called by the insurers, found that the daily rate applicable to the period when Dr Sen required a hire car varied from about £25 to £40. Thus there was no spot rate as such.*
>
> ***137** Met with this problem, the judge considered three ways of arriving at the correct measure of loss. First, to break down the charge made by the accident hire car providers so as to enable the unrecoverable element to be stripped out. This was in theory an acceptable solution, but the judge rejected it as being too cumbersome and expensive in hostile litigation as it would entail detailed disclosure and analysis in thousands of small cases. The cost involved would not be proportionate and for that reason he did not favour it as a practical solution. We agree.*
>
> ***138** The judge's second approach was to apply a "reasonable discount" to the rate charged which would by*

its nature be somewhat arbitrary. We understand that this approach has been adopted in a number of cases. Even so, we do not believe it appropriate in the absence of agreement between the parties or without cogent evidence as to what the discount should be. Further, as the judge pointed out, once the courts start applying a particular discount the total charge may be increased. For those reasons we do not favour this approach

147 *The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car. He can go round to the nearest car hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances.*

148 *We do not anticipate that the application of the correct legal principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. What is reasonable and whether a loss is avoidable are questions of fact, not law, which district and county court judges regularly decide. It can arise in many different types of cases, ranging from damage to chattels to a failure to take action. We do not believe that a decision on such issues in respect of car hire charges will be any more difficult than in respect of car repair charges."*

Some echo of these sentiments is detectable in the opinion of Lord Nicholls in ***Lagden –v- O'Connor*** [2004] 1 AC 1067, at paragraph [9]:

*"**9** There remains the difficult point of what is meant by "impecunious" in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make. I am*

> *fully conscious of the open-ended nature of this test. But fears that this will lead to increased litigation in small claims courts seem to me exaggerated. It is in the interests of all concerned to avoid litigation with its attendant costs and delay. Motor insurers and credit hire companies should be able to agree on standard enquiries, or some other means, which in practice can most readily give effect to this test of impecuniosity. I would dismiss this appeal."*

It is well known that, in Northern Ireland, credit hire cases constitute a substantial proportion of the business transacted daily by District Judges and County Court Judges. The *forum* in which most of these cases are heard in this jurisdiction is a second feature of the context within which these appeals and applications are determined. The proposition that the County Court is designed to be a forum where civil disputes can be processed and determined quickly and inexpensively is unexceptional.

Foot –v- Quinn

[22] In this case, the stance adopted by Mr. Fitzpatrick on behalf of the Defendant was that discovery of the specific documents sought and replies to the interrogatories served are necessary for the purpose of establishing in minute detail the Plaintiff's assets and resources, with a view to determining whether the amount claimed by the Plaintiff for "credit hire" is reasonable and whether the Plaintiff took reasonable steps to mitigate his loss. I agree that these are two permissible areas of enquiry in many credit hire cases and can, hence, fall within the ambit of relevant issues. However, in my view, to require the Plaintiff to make the discovery sought and answer the interrogatories on oath would be manifestly disproportionate to the amount in dispute between the parties, which is £833. I consider that neither discovery of the specified documents nor a sworn reply to the interrogatories is necessary for disposing fairly of the proceedings or for saving costs. Both would be oppressive, giving rise to a disproportionate burden, increased delay, unwarranted complexity and unjustifiable additional cost. Furthermore, they could result in a protracted and inappropriately wide ranging hearing, increasing the court's burden in a sphere of litigation which is already voluminous, demanding and resource intensive. This is the primary basis upon which I dismiss the Defendant's applications.

[23] Secondly, I consider that the Defendant's applications suffer from the following additional infirmities:

(a) The Plaintiff having already testified on oath at first instance, it is undesirable that he be interrogated at this appellate stage.

(b) The Defendant has availed of the opportunity to cross-examine the Plaintiff at first instance and, in so doing, has explored such issues as were considered appropriate.

(c) It is not disputed that in both examination-in-chief and cross-examination, the Plaintiff has already provided information and explanations bearing on the Defendant's requests for discovery and interrogatories. In this way, the Defendant is now in possession of much of the information sought. In particular, all information bearing on the credit hire agreement and the Plaintiff's account of his conduct post-accident has already been provided, *under oath*.

(d) The Defendant has not put in issue any alternative vehicle hire rate or rates.

(e) Those interrogatories directed to the Plaintiff's subjective state of mind immediately following the subject accident and his *current* resources are plainly inappropriate.

Cunningham –v- Homecare (NI)

[24] In this appeal, the amount in dispute between the parties is just over £4,000. I reject the Defendant's applications for specific discovery and interrogatories [29 in total], giving effect to the same reasoning as in ***Foot,*** set out in paragraph [22] above. This fundamental objection impels to a dismiss of both summonses. I further find the applications to suffer from the following additional shortcomings:

(a) Relevant documents and items of information were disclosed by the Plaintiff's solicitors in pre-hearing correspondence.

(b) In compliance with the first instance discovery order, the Plaintiff discovered the specified bank statements and business accounts, together with a credit card statement.

(c) There was no challenge to the adequacy of the Plaintiff's compliance with the discovery order at first instance.

(d) These applications are brought in circumstances where the Plaintiff has already testified under oath at first instance and the Defendant has availed of the opportunity to cross-examine him (often described as the "*spot rate*" in this field of litigation).

(e) The enlarged pre-accident and post-accident periods to which the Defendant's renewed discovery request relates are plainly excessive.

(f) Any previous credit hire agreements between the Plaintiff and Crash Services do not constitute a matter in issue between the parties.

(g) It was conceded on behalf of the Plaintiff that his solicitors must, by letter, address the contents of a letter dated 14th June 2010 from the Southern Education and Library Board (relating to a pre-accident school transport contract) and, post-hearing and pre-judgment, the Plaintiff's solicitors did so by letter.

McMenamin –v- Chillingworth

[25] In this case, the Deputy District Judge ordered that the Plaintiff reply on oath to a total of 26 interrogatories, in a litigation context where the sum claimed for the Plaintiff marginally exceeds £2,000. Giving effect to the reasoning set out in paragraph [22] above, I conclude, firstly, that these interrogatories are manifestly oppressive and disproportionate. Accordingly, they are not necessary for disposing fairly of the Plaintiff's claim or for saving costs.

[26] Secondly, I find that the interrogatories do not relate to a matter in issue between the parties. This finding flows inexorably from the formulation of the Defendant's application and associated arguments. In short, the thrust of the Defendant's case is that there *might* be an agency issue comparable to that which arose in ***Salt –v- Helley*** [2009] NIQB 69 and, based on this purely speculative premise, the Defendant wishes to explore this through the medium of interrogatories. I conclude that this is one of the clearer illustrations of a pure fishing expedition. The Defendant's application has no ascertainable foundation and, resting as it does on mere assertion and conjecture, falls to be dismissed accordingly. To borrow the statement of the English Court of Appeal in ***O –v- M*** [1996] 2 Lloyds Reports 347, the information which the Defendant's interrogatories seek to elicit lies beyond or, at its absolute zenith, belongs to the outer limits of the spectrum of materiality and is pursued for purely speculative investigation, in the hope that something of substance might be yielded.

[27] In addition, certain of the Defendant's interrogatories suffer from the following discrete infirmities:

(a) Realistically, the rental agreement and rental advice note, already discovered, disclose the essence of the arrangements between the Plaintiff and Crash Services. Interrogatories

numbers 5-13 inclusive are inappropriate on this additional, freestanding ground.

(b) It is conceded, correctly, that the Plaintiff cannot answer interrogatories numbers 14-16, which relate to the profits of Crash Services or any associated agency.

(c) It was represented to the court on behalf of the Plaintiff, without any real challenge by the Defendant, that taxis are almost invariably the subject of third party, fire and theft insurance policies which make no provision for so-called "courtesy" replacement vehicles: this undermines interrogatories numbers 17-20.

(d) The question of any advice provided by Crash Services to the Plaintiff does not surpass the relevance threshold [interrogatory number 21].

(e) It has been expressly stated in correspondence that the Plaintiff is not asserting impecuniosity: this will bind the Plaintiff at the trial and renders inappropriate interrogatories numbers 22 and 23, the latter being objectionable on the further freestanding ground of vagueness and oppression.

(f) The Defendant knows from the letter dated 8th September 2009 from the Plaintiff's solicitors that the Plaintiff did not "*carry out searches for alternative credit hire providers*": thus interrogatories numbers 24 and 25 are improper.

(g) Interrogatory number 26 is also improper as the Defendant is aware from the Plaintiff's discovery of his possession of a credit card at the material time.

[28] For the reasons elaborated above, I allow the Plaintiff's appeal.

Latimer –v- Canning

[29] The sole issue in this appeal is the propriety of the District Judge's order against the Plaintiff for discovery of specific documents. I conclude that on the grounds of threshold requirement and purely speculative venture (as both are understood in the terms explained above), the Plaintiff has made good his appeal. In short, the documents ordered to be discovered do not sound on any matters in issue between the parties. The Defendant's purported justification for seeking the documents in play mirrors precisely that proffered in the case of ***McMenamin*** and, logically and consistently, must founder on the same rock: I refer to, but do not

repeat, the reasoning in paragraph [26] above. In short, the requirement that the documents in question *prima facie* relate to a matter in issue between the parties is not satisfied. Furthermore, the written agreement executed between the Plaintiff and Crash Services and the associated rental advice note, coupled with the accident repair centre's invoice, have all been discovered. These are the core documents in every case of this kind. The Defendants, in my view, have established no basis for going behind or beyond the arrangements disclosed in these documents. The grounding affidavit, which is crucial in applications of this kind, is bland, formulaic and insubstantial. I find that it does not traverse the necessary threshold.

[30] Accordingly, I allow the Plaintiff's appeal.

VII General

[31] The determination of these appeals and applications has entailed a balancing exercise by the court. In each of the four cases the court has struck the balance, striving to achieve a fair, realistic and proportionate outcome. I consider that any other outcome would give sustenance to the so-called "unholy trinity" of disproportionate cost, increased delay and unwarranted complexity. Having thus concluded, I acknowledge that there is an obvious public interest in pre-trial settlement of cases belonging to this sphere of litigation. A reasonable, sensible and professional approach on the part of the representatives of the parties should ensure that this is possible in the vast majority of cases. The *inter-partes* correspondence which features in all of these cases demonstrates that both sides are alert to this. Litigation in the County Court must not become dogged by excessive formality or over elaboration in the pre-trial phase. Where this occurs, there is a disproportionate increase in costs and the parties tend to concentrate their minds and efforts on confrontation rather than compromise, with resulting polarisation. While contemporary litigation remains adversarial in nature, there is an increasing emphasis on transparency and informality, associated with balanced judicial case management I consider that properly and reasonably composed letters and responses thereto should, in most cases in this field, suffice to yield the quantity of information deemed necessary and desirable by Defendants' insurers to enable informed settlement discussions and decisions to be pursued and made.

[32] A proliferation of interlocutory applications and orders and the outworkings thereof are plainly inimical to the overriding objective in both the County Court and the High Court. In the County Court, the fixed costs regime and the limited provision for additional or extraordinary remuneration are further considerations of significance. Furthermore, County Court appeals are designed to be a rehearing of the proceedings at first instance: thus the High Court may be reluctant to permit the form, shape and substance of an appeal to differ markedly from the first instance hearing. If otherwise, the thorough and complete preparation and presentation of cases in the County Court could be discouraged. This would be manifestly undesirable. Furthermore, the essential character of an appeal to the High Court *viz* a rehearing of the case at first instance would be altered. Thus, in County Court

appeals where interlocutory applications are mounted for the first time in the High Court, these are likely to attract particular scrutiny and circumspection.

[33] The outcome of these appeals and the approach exhorted above does not leave Defendants unarmed or without remedy. In those cases where pre-trial correspondence yields inadequate, suspect or otherwise unsatisfactory replies, there will be ample material for cross-examination of the Plaintiff and the court will be at liberty to make such inferences and conclusions as it considers appropriate in the particular litigation. The principal merits of appropriately composed correspondence are to put the Plaintiff on notice of questions which will be raised and issues which will be explored at the trial *and* to afford an opportunity to provide a sufficient quantity of information and/or documents to facilitate informed pre-trial settlement discussions and decisions. Unco-operative or defaulting Plaintiffs will pay the price accordingly.

VIII Disposal

[34] To reflect the conclusions set out above:

(a) In ***Foot –v- Quinn*** the Defendant's interlocutory applications are dismissed.

(b) In ***Cunningham –v- Homecare***, the Defendant's combined interlocutory application is dismissed.

(c) In ***McMenamin –v- Chillingworth***, the Plaintiff's interlocutory appeal is allowed.

(d) In ***Latimer –v- Canning***, the Plaintiff's interlocutory appeal is allowed.

[35] *Prima facie*, the successful parties are entitled to their costs. The court will entertain further argument on this discrete issue, if requested to do so.