Neutral Citation No. [2011] NIQB 131

Ref: McCL8391

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **21/12/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF ARDS

BETWEEN:

BARRY MATCHETT

Plaintiff/Appellant:

and

HEATHER HAMILTON

Defendant/Respondent:

McCLOSKEY J

[1] The general framework of what has become known as credit hire litigation is more than familiar to those who practice in this field. In ***Turley –v- Black*** [2010] NIQB 1, this court sought to describe it in the following terms:

> *"[2] (a) The Plaintiff claims damages against the Defendant tortfeasor arising out of a road traffic accident, in which the Plaintiff's vehicle is damaged.*
>
> *(b) An element of the Plaintiff's claim relates to the hire of a substitute vehicle following the accident in question.*
>
> *(c) There is a commercial supplier of vehicles, who provides the vehicle in question to the Plaintiff during the relevant period.*

(d) *The supply arrangement has a financing dimension, involving a credit hire company, with whom the Plaintiff contracts.*

(e) *There is usually a commercial relationship between the vehicle supplier and the credit hire company.*

(f) *The Plaintiff normally obtains, pursuant to his contract with the credit hire company, benefits over and above the basic use and enjoyment of the substitute vehicle –to be contrasted with a simple hire arrangement.*

(g) *In most cases, the Plaintiff's claim in respect of the substitute vehicle is not one for out of pocket losses actually sustained as a result of making payments for the service. This is the normal scenario. In such cases, if the court determines to make any award to the Plaintiff in respect of the vehicle hire, the ultimate beneficiary of such award will be the credit hire company, by virtue of the agreement which it has struck with the Plaintiff. Sometimes the credit hire company itself can pursue the claim, by virtue of subrogation rights acquired under the financing contract.*

(h) *In virtually every case, the amount claimed by the Plaintiff in respect of vehicle hire is strongly contested by the Defendant, on the ground that it is excessive and unreasonable.*"

This court has heard and determined a substantial number of credit hire actions and appeals during the past two years. The company trading as Crash Services Limited ("*Crash*") has featured in all of these cases. The present case is no exception in this respect.

[2] The Plaintiff claims damages arising out of a road traffic accident. Liability is admitted. By virtue of the post-accident events and the claim for monetary loss which duly ensued, the present case fits comfortably within the general framework set out above and may be described as typical, or routine, in nature. It is, however, possessed of one particular, distinguishing feature. This arises in the form of a dispute between Crash and the Defendant's insurance company (Allianz) relating to the recoverable hourly rate for the labour element of the Crash accident repairs invoice. This is the main issue to be determined by the court.

[3] The particularised Crash invoice, duly analysed, has three components. These are parts, labour and painting and sundry materials and services. All of these

are duly itemised and costed in the invoice. The claim for labour is £1,120 plus VAT. This is based on 32 hours work and involves a "charge" of £35 per hour. At first instance, the Deputy District Judge awarded damages on the basis of an hourly rate of £26. This gives rise to the main contentious issue to be determined by this court on appeal. There are two further, minor issues in dispute arising out of the lower court's refusal to award damages for either the Crash delivery and collection charge (£50) or the additional driver insurance charge of £40, computed at a daily rate of £5 in respect of an 8-day period.

[4] In ***Stokes –v- McAuley*** [2010] NIQB 131, where a different issue fell to be determined by the court, I reviewed the relevant authorities in paragraphs [9] – [16] and, having done so, formulated the governing principles in the following terms:

> *"[17](a) The guiding principle is that of* ***restitutio in integrum.***
>
> *(b) As a general rule, the appropriate measure of damages is the cost of repairing the damaged goods. In common with every general rule or principle, this is not absolute or universal in character.*
>
> *(c) Whether the general rule applies will depend on the evidential matrix in the particular case.*
>
> *(d) The general rule contains a discernible element of objectively assessed reasonableness.*
>
> *(e) In tort proceedings, the onus of establishing his entitlement to damages rests on the Plaintiff and the standard of proof is the balance of probabilities.*
>
> *(f) The court's resolution of disputed issues in litigation belonging to this sphere must give full effect to the burden and standard of proof, while acting on evidence, as opposed to judicial instinct or suspicion. Furthermore, it seems to me that there is limited scope for the operation of the doctrine of judicial notice in this sphere.*
>
> *(g) In any litigation context where a Defendant bears an onus of proof, this can be discharged by a variety of media: cross-examination of the Plaintiff, the adduction of agreed documentary evidence, resort to the Civil Evidence (NI) Order 1989 and the calling of witnesses – singly or in combination.*

> *(h) It is conceivable that in a particular case the general rule, as formulated above, will be displaced without any evidence on behalf of the Defendant. However, in practice, the more likely scenario is that both parties will adduce evidence and the court will be required to resolve any conflict (as in the present case).*"

These principles were not in dispute in the present appeal.

[5] Fundamentally, the main issue to be determined by the court is whether, having regard to all the evidence adduced, the hourly rate of £35 for labour services specified in the Crash invoice satisfies the requirement of reasonableness. Both in the lower court and in this court the Plaintiff has acknowledged, and assumed, the burden of establishing the reasonableness of this rate. In both courts, the Plaintiff sought to do so through the evidence of a motor engineer/assessor. At first instance, the Defendant did not adduce any evidence on this issue. Upon the hearing of this appeal, the Defendant led evidence from two motor engineers/assessors. As a result, the framework of the appeal differed significantly from that of the hearing in the lower court. The Plaintiff's case was presented and argued by Mr. O'Donoghue QC (appearing with Mr. Cleland) on the basis that the rate of £35 per hour for labour and painting was reasonable. The Defendant's case was presented and argued by Mr. Montague QC (appearing with Mr. Babington) to the contrary effect, namely that this rate is excessive and, as a matter of law, unreasonable. I remind myself that the burden of proof rests on the Plaintiff, who must prove his case on the balance of probabilities. I should also make clear that no issue of failure to mitigate the Plaintiff's losses - as correctly understood in this sphere of litigation [cf., ***Turley*** and ***Stokes***)] - was canvassed.

[6] In every claim for the cost of repairing damaged goods, the requirement of reasonableness operates to prevent the Plaintiff from recovering excessive damages. Secondly, it protects the Defendant against unfounded and extravagant claims. Fundamentally, it serves to give effect to the overarching principle of *restitutio in integrum,* which promotes the twofold purpose of providing the Plaintiff with fair and reasonable redress for the Defendant's tort and, simultaneously, limiting the Defendant's liability. In short, the common law, through the vehicle of this principle and others [such as remoteness of damage and the duty of mitigation], has consistently sought to ensure, in its quest for just solutions, that a tortfeasor's liability is not unlimited.

[7] Of course, common law principles do not entail or reflect matters of exact science, either in their formulation or in their application. Thus, where, as here, the court is required to adjudicate upon the reasonableness of a sum of money claimed, there is no single correct solution. Rather, it is incumbent on the court to decide whether the amount claimed by the Plaintiff exceeds the bounds of what is recoverable in law. In its adjudication, the court does not apply some arithmetical scale. As a result where, based on all the evidence, the differences between

competing figures are relatively slight, involving margins of modest dimensions, the court is less likely to conclude that the marginally higher amount claimed is unreasonable and to measure damages on the basis of a lower competing rate which is deemed to be reasonable. This dimension of the legal principles in play may also be viewed as a reflection of the truism that the common law consistently deals with the realities of life. One of these realities is that market forces and profit making activities give rise to differing costs to the consumer for the same product or service. Furthermore, in any given market or industry, there may be a range, or band, of rates or charges composed of differing money amounts which, depending on the context, may satisfy the legal requirement of reasonableness. Thus the common law will not invariably and inevitably condemn as unreasonable a money rate or amount which is higher than a competing rate or amount.

[8] In the present case, Crash stands in the shoes of the Plaintiff. The question for the court is whether *this Plaintiff* is entitled to recover the amount in dispute. Of course, by virtue of the Plaintiff's contractual obligation to Crash (per paragraph 11.1 of the written agreement) he will not be the beneficiary of the damages awarded by the court and will have to account to Crash. However, this does not undermine in any way the correctness of the proposition that the court is not concerned with the question of whether *Crash* has any legal entitlement to recover the amount in dispute. The focus is, rather, exclusively on *the Plaintiff*. The Defendant's common law duty of care was owed to the Plaintiff, not Crash. Thus Crash has no cause of action in tort against the Plaintiff. This analysis exposes a material fallacy in the submissions advanced (purportedly) on behalf of the Plaintiff, which focussed strongly on the commercial activities and interests of Crash. As Crash was not the victim of the tort in question and is not the Plaintiff in this litigation, I hold that, as a matter of law, these considerations are irrelevant. Thus the court must disregard entirely the mechanisms and contractual arrangements which have given rise to a litigation matrix in which *the Plaintiff* is seeking to establish the reasonableness of an hourly labour and painting rate of £35. The sole issue for the court is whether this rate is reasonable. How the rate came to be claimed is legally irrelevant and merely serves to distract from the fundamental task of the court.

[9] In the present case, Crash exercised its contractual entitlement to arrange for the Plaintiff's damaged vehicle to be repaired. The repairs were duly effected pursuant to an arrangement between Crash and a vehicle repairer. The latter, in its invoice, charged Crash a total sum of £832 (plus VAT) for labour. This equates to a rate of £26 per hour. In its invoice to the Plaintiff, Crash levied a charge of £1,120, equating to a rate of £35 per hour. I consider that the issue to be decided by the court has nothing to do with the commercial activities or interests or profit making of Crash. Rather, the question to be determined is whether £35 is a reasonable hourly rate for labour. The evidence on this issue was conflicting. Ultimately, properly analysed, this was a conflict of *opinion evidence*, upon which the court will have to adjudicate. The testimony of the Plaintiff's automobile engineer was, in my view, undermined by his strong and undisguised commercial links with Crash, his unacceptable failure to acknowledge the true nature and reality of his "report", his

acceptance that the range of commercially available labour rates in the car repair industry ranges from £23 to £35 per hour and the marked paucity of the documentary evidence (in the form of actual paid invoices) which he presented in support of his endorsement of an hourly rate of £35. The evidence of this witness was further weakened by his persistent and unsustainable assertion that he "*agreed*" an hourly labour rate of £35 with Crash; the inescapable fact that the specification of this rate in his report was pre-ordained, entailing no exercise of professional judgment or expertise; and the true and only function served by his report, which was to support the claim levied subsequently by Crash (in the legal footwear of the Plaintiff) against the Defendant's insurance company. Finally, this witness's evidence foundered in the face of the unchallenged evidence relating to the comparatively minor position occupied by credit hire companies such as Crash in the car repairing industry. The evidence of the Defendant's witnesses was manifestly more balanced and persuasive. Based on all the evidence adduced, I find as a fact that Crash is the only operator in the car repair industry which claims a labour rate of £35 per hour. I further find that, as contended by the two motor engineers who testified on behalf of the Defendant, the "going" rate averages at £25/£28 per hour and did so at the material time viz. in April 2010 **and** is available to all 'players' in the car repair industry

[10] The "going" rate, as found by the court, is not automatically determinative of whether the higher rate claimed on behalf of the Plaintiff is reasonable. However, where (as explained above) the differences, or margins, are not insignificant, this will be influential in the court's determination of this question. The effect of the above findings is that in these proceedings the Plaintiff is claiming an hourly labour rate for vehicle repair approximately 25%/30% in excess of the rate charged by a substantial majority of repairers in the motor industry and available – perhaps with the aid of some modest determination and haggling – to every victim of a tortfeasor's negligence. I take into account finally the striking absence of any suggestion in the evidence that the "going" hourly rate is not financially viable for vehicle repairers and I infer that this yields an appropriate level of profit. Giving effect to the findings of the court, I conclude that the Crash hourly rate of £35 is plainly unreasonable.

Conclusion and Disposal

[11] Giving effect to the analysis and findings rehearsed above, I conclude as follows:

(a) The deputy District Judge was correct to hold that the Plaintiff's recoverable damages in respect of the labour element of the repairs to his damaged vehicle are £832 (based on an hourly rate of £26).

(b) The judge correctly disallowed the claim for collection and delivery of the replacement vehicle since, as a matter of fact, no collection or

delivery service was actually provided. Thus this discrete "loss" was purely fictitious.

(c) There is no dispute that the Plaintiff's personal insurance policy, which extended to additional drivers, applied to the replacement vehicle supplied by Crash. It follows that the claim in the Crash invoice for an additional driver charge at the daily rate of £5 for a period of eight days founders for the same reason as in (b). Thus I concur with the judge's refusal to compensate the Plaintiff for this aspect of his claim also.

[12] In the result, I concur fully with the deputy District Judge. It follows that I affirm the decree in all respects, including costs, and dismiss the appeal. The Defendant is entitled to recover the costs of the appeal from the Plaintiff, to be measured by taxation in default of agreement between the parties.

[13] This judgment will hopefully provide the guidance necessary to further the public interest of resolving disputes without recourse to litigation and the related interest of early resolution of those disputes extant within the litigation system without judicial adjudication.