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Judgment: approved by the Court for handing down | *Delivered:* **17/06/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ON APPEAL FROM THE DISTRICT JUDGES FOR VARIOUS DIVISIONS

_____

BETWEEN:

1. THOMAS JAMES SMYTH

Plaintiff/Appellant:

and

LAWRENCE DIAMOND

Defendant/Respondent:

_____

2. NEVILLE PHILLIPS

Plaintiff/Appellant:

and

ELSIE RITCHIE

Defendant/Respondent:

_____

3. HENRY JAMES TORRENS

Plaintiff/Appellant:

and

MAJELLA TALLY

Defendant/Respondent:

_____

4. KATHLEEN TERESA McCABE

Plaintiff/Respondent:

and

RICHARD MOFFETT

Defendant/Appellant:

McCLOSKEY J

I INTRODUCTION

[1] These are four conjoined appeals to the High Court from the District Judges for various County Court Divisions in Northern Ireland. They were deliberately grouped together for hearing on the basis that they possess certain common features. Furthermore, it is the aspiration of the court that its judgment in this group of these cases might encourage consensual resolution in some of the other members of this ever expanding category.

[2] As these appeals demonstrate, there is still no sign of a truce in the continuing battle between insurance companies and credit hire companies in this sphere of litigation. The general backcloth to these appeals is understood by reference to the following passage in ***Turley –v- Black and Another*** [2010] NIQB 1:

> *"[2] Cases belonging to this group typically have the following features:*
>
> > *(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.*
>
> *As will be readily apparent, the agencies who are really doing battle in these cases are the credit hire company and the Defendant's insurers, rather than the Plaintiff and the Defendant."*

With reference to subparagraphs (c) – (e) above, the factual matrix of these appeals – a typical one, it would appear – entailed the Plaintiffs executing *separate* contracts with the credit hire entity and the vehicle supplier. Furthermore, the latter is a wholly owned subsidiary of the former.

[3] The three, distinct types of appeal which are routinely generated are described in ***Turley*** in the following terms:

> *"a) **A substantive appeal**. In this category, the High Court becomes seized of an appeal by a dissatisfied Plaintiff or Defendant against the decree of the District Judge or County Court Judge. In most of these cases, the only aspect of the decree seriously under appeal is that relating to the vehicle hire claim.*
> *(b) **Interlocutory appeals**. In this category, the High Court becomes seized of appeals against interlocutory orders made by the District Judge or County Court Judge. These orders are typically made in the context of applications relating to (i) discovery of documents, (ii) the service of interrogatories or (iii) the service of a subpoena on some person other than the Plaintiff or Defendant or any servant or agent of either.*
> *(c) **Interlocutory appeals from the Master**. Cases belonging to this distinct category reach the High Court initially by means of a simple appeal against the substantive decree of the District Judge or the County Court judge. Thus, at the outset, they belong to category (a). However, having reached the High Court, one of the parties (normally the Defendant) decides to pursue an interlocutory application, for the first time, usually of the type described in (b) above. This generates a ruling by the Queen's*

Bench Master which is challenged by an appeal to the High Court Judge.

At this point in time, there are cases of all three varieties pending before the High Court."

The four appeals with which this judgment is concerned are substantive appeals against the decrees of District Judges. While there were two related interlocutory appeals, these were resolved consensually. At present, there are approximately forty "credit hire" appeals in the High Court system.

II THE APPEALS

Smyth –v- Diamond

[4] In this case, the District Judge made a decree of £164 to compensate the Plaintiff for loss of earnings and disallowed in its entirety the "credit hire" claim of £1,744.38. The Plaintiff appeals accordingly.

Phillips –v- Ritchie

[5] In this case, the only amount claimed by the Plaintiff was £522.88 in respect of "credit hire" charges. The case was dismissed and the Plaintiff appeals accordingly.

Torrens –v- Tally

[6] The district judge awarded this Plaintiff £600 in respect of insurance excess (£100) and depreciation in value (£500). The "credit hire" claim for £364.26 was dismissed and this is the subject of the Plaintiff's appeal. Thus, the feature common to the first three appeals is that the Plaintiffs' "credit hire" claims were dismissed in their entirety.

McCabe –v- Moffett

[7] This appeal differs from the first three appeals. In this particular case, the Plaintiff succeeded in full and, at this stage, the Defendant is the Appellant, challenging a total decree in the sum of £1401.68, which incorporates £1,270.18 in respect of "credit hire". Furthermore, while the first three appeals share certain issues in common, those raised by this appeal differ.

Representation

[8] In each of these appeals, the parties are represented by senior and junior counsel. The Plaintiffs' solicitors are instructed by the credit hire company concerned, while the Defendants' solicitors are instructed by the insurance company involved.

III FACTUAL MATRIX

General

[9] The factual résumé which follows in respect of each of the appeals reflects a mixture of uncontested facts and findings of fact by the court, applying the standard of the balance of probabilities, having heard the evidence of each of the Plaintiffs.

Smyth –v- Diamond

[10] This Plaintiff was involved in a road traffic collision on 18th December 2007. He works for a well known taxi firm by occupation. Due to damage, his vehicle was unfit for use as a taxi. His insurance brokers ("Open and Direct") referred him to MIS Claims Service ("*MIS*") informing that they would deal with his claim and arrange to provide a vehicle to him. They in turn referred him to Wright's Accident Repairs, Springfield Road, Belfast where he collected his replacement vehicle. He made use of this for a period of twenty days, until his own vehicle had been repaired.

[11] Upon taking possession of the replacement vehicle from Wrights, this Plaintiff executed three separate instruments. Each of these is in standard form and they feature, in the same terms, in all four appeals. They are the following:

(a) The first was a "vehicle hire agreement" to which parties were Independent Car Hire Limited ("*ICH*") and the Plaintiff. The terms of this standard form agreement are unremarkable and were not ventilated by any of the parties in their arguments.

(b) The second was a "credit hire agreement", executed by the same parties and bearing the same date. In contrast with (a), the terms of this standard form agreement featured in the arguments canvassed by the parties and call for careful scrutiny. This agreement is described as "*supplementary to a vehicle hire agreement between you and Independent Car Hire*". It contains the following material provisions:

> "*1. Provided that you are not found to have caused or contributed to the accident, you are entitled to a replacement vehicle, whilst yours is unroadworthy or being repaired, at the expense of the driver at fault or his insurers ('the third party').*
>
> *2. The ICH hire scheme enables you to hire a vehicle from an approved car hire company on credit. The credit is provided whilst MIS Limited, your legal expenses provider, pursues a claim on your behalf against the third party. This will be done by the appointed panel solicitor* [who]

will be instructed by you and will act for you and in your best interests.

3. Subject to conditions 7 and 9 the credit period expires when the claim has been concluded either by completing negotiations with the third party or by a decision of the court. At that point you shall be liable to pay ICH's hire charges in full, by a single payment, but if it has been established that you were not at fault, the hire charges will be recovered by the solicitors, from the third party. …

5. The panel solicitors will also seek to recover from you (if instructed by you) any other losses that you have suffered as a result of the accident …".

Clause 6 states that the provision by ICH of "*credit for the hire vehicle*" is subject to four conditions, namely that MIS may instruct solicitors to pursue the Plaintiff's claim; the Plaintiff must then confirm such instructions; he will co-operate fully in the matter of the claim; the solicitors may inform MIS of the progress of the claim; and in the event of the hire charges being paid direct to the Plaintiff for any reason, he will account for them to ICH immediately. Clause 7 provides:

"*You will pay the whole of the hire charges, in full, by a single payment, immediately if demanded by ICH and also pay the solicitor's legal costs and expenses should any of the following occur:*

(i) It becomes clear to MIS Limited that it has been misled by you about how the accident happened or in some other important way.

(ii) You instruct a non-panel solicitor to act for you in bringing a claim for damages or losses arising out of the accident, even if these do not include the hire charges.

(iii) You tell MIS Limited or the solicitors that you do not wish them to continue to act for you in bringing the claim.

(iv) Your debt, bankruptcy or inability to give instructions about the case or for any other reason".

Finally, Clause 9 states:

"*The credit period extended by this agreement shall expire in any event fifty 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 hire charges are subsequently recovered from the third party, ICH will refund them to you."

(c) The third formal document is a "Form of Authority" on "MIS Claims" headed notepaper, signed by the Plaintiff, bearing the same date and stating the following:

> "*I … hereby authorise the third party's insurance company NIG to make the cheque payable to MIS Limited for the amount due in respect of my insurance excess and car hire*".

[12] The agreed documentary evidence also includes an invoice levied by ICH, addressed to NIG, (apparently the Defendant's insurers), dated 15th January 2008, seeking recovery of the hire of the replacement vehicle at a daily rate of £66 for twenty days, in the amount of £1,320 plus VAT, coupled with a delivery/collection charge of £25. The Plaintiff did not read any of the aforementioned documents and did not understand what he was signing. From his perspective, the sole purpose of these formalities was to secure a replacement vehicle to enable him to work during the lucrative Christmas period. He did not know what his insurance policy entitlement was. He assumed that the cost of the replacement vehicle would be paid by the Defendant's insurance company. While the insurance broker used the words "*courtesy car*", his response was "no", he needed a replacement taxi. He had not heard of ICH and was unaware of any ICH/MIS relationship.

Phillips –v- Ritchie

[13] This Plaintiff was involved in a road traffic accident on 22nd May 2009, following which he made direct contact with both his insurance broker and Wrights, who employed someone with whom he was acquainted. This Plaintiff also had dealings, by telephone with a representative of the Defendant's insurance company shortly after the accident. He was informed that the insurance company dealt with Wrights and that he would be able to secure a replacement vehicle. He was further informed that as he had fully comprehensive insurance, Wrights would provide this vehicle and he would not have to pay for it. He did not appreciate that the source of the replacement vehicle subsequently provided was a credit hire company, rather than his own insurance company.

[14] The Plaintiff duly initiated dealings with Wrights who, in turn, approached MIS. While all of the Wrights Accident Repair Centres are approved MIS repairers, only two of them are recommended repairers of the Prestige Insurance Company, the Plaintiff's insurers. While this was the evidence of the Wrights' witness (Mr. Mullan), it is not consistent with the "Service Standards Agreement" between Wrights and Prestige, which does not discriminate among the various Wrights Accident Repair Centres. Furthermore, Wrights is a single, composite commercial

entity. Prestige instructed Wrights, in writing, to repair this Plaintiff's vehicle and supply a replacement vehicle, under the insurance policy. However, in pursuance of the then extant company "policy", Wrights did not comply with the second of these instructions and, instead, facilitated the provision of a replacement vehicle through MIS. In consideration, Wrights received a referral fee from MIS. Wrights now accept that this Plaintiff should have received a Wrights replacement vehicle, rather than a MIS replacement vehicle, unless the entire Wrights fleet had been in use at the material time. There is no evidence that this was so.

[15] This Plaintiff had to wait a period of some three weeks until a replacement vehicle became available for him. It would appear that while a vehicle from the Wrights' fleet could have been supplied to him immediately, nothing from the MIS fleet was available. He is a bricklayer and, in the interim, relied on lifts from friends. Wrights duly supplied this Plaintiff with a replacement vehicle. He executed the same three documents as the first of the four Plaintiffs (Mr. Smyth – *supra*), involving ICH and MIS. These were all signed by him at the premises of Wright's on the same date, 14th May 2008. He did not understand anything regarding ICH or MIS. In his words, he was "*just getting a car …* [and] *… just signed forms*". The replacement vehicle was provided to him for a period of two weeks. On 10th June 2008, ICH levied an invoice specifying (*inter alia*) a claim for fourteen days car hire at a daily rate of £30, totalling £420 (plus VAT) and submitted this invoice to "Santam Europe", who appear to have been the Defendant's insurers or insurance brokers.

Torrens –v- Tally

[16] This Plaintiff was involved in a road traffic accident on 14th October 2008. He contacted his insurance broker ("Open and Direct") who referred him to MIS, intimating that they would make appropriate arrangements. He did so, whereupon MIS informed him that they dealt with two approved repairers, Wrights and Hursts. MIS further indicated that the Plaintiff could have a replacement vehicle of a standard similar to his own damaged vehicle. He thereupon dealt with Wrights, who provided him with a replacement vehicle for three days.

[17] The formal documents executed by this Plaintiff were the same as in the cases of the first two Plaintiffs (*supra*). They all bear the same date, 21st October 2008. In common with the other Plaintiffs, this Plaintiff did not study the fine detail of the documents. Nor was any explanation of their terms and conditions afforded to him. His understanding was that, in signing, he was acknowledging receipt of a replacement vehicle. From his perspective, it was a matter of signing on the dotted line and then driving the vehicle away. On 28th October 2008, ICH invoiced Prestige Underwriting Services for (*inter alia*) £285 (plus VAT) representing a daily rate of hire to this Plaintiff of £95 for three days.

McCabe –v- Moffett

[18] The first three appeals whose facts are summarised above have been presented and argued on the basis that, factually, they are materially indistinguishable, subject to a discrete causation issue in the ***Phillips*** case (see especially paragraphs [37] and [43] *infra*). However, there is a particular feature of the factual matrix in the fourth appeal which does not apply to the other three. This relates to the timing and sequence of the execution of the formal contractual instruments.

[19] Following the collision in which she was involved, on 30th July 2008, this Plaintiff contacted her insurance broker, who advised her to telephone MIS, as they would deal with the claim. Having done so, she drove her vehicle to Halliday's Citroen dealers premises in Bushmills. She left her vehicle there for repairs and they supplied her with an equivalent replacement for a period of some three weeks, from 12th August to 3rd September 2008.

[20] The evidence includes an agreed transcript of a telephone conversation which this Plaintiff had with a MIS employee, on 4th August 2008. This communication was stimulated by MIS and its subject matter was the "*possibility of getting a replacement vehicle organised for*" the Plaintiff. The MIS employee stated that "*… we can organise something for you whenever your own vehicle would be going in for repairs … under what's called the credit hire agreement … this would mean that we would cover the costs of the hire up front and then recover it from the third party's insurance company*". The MIS employee further stated:

> "*The only other thing then I would advise is because you've got a comprehensive policy what we would be doing is taking your vehicle off cover and then putting one of the hire cars on cover …* [at] *£15.75 per week … you would have to … pay this up front to them but … that money can be reclaimed by the solicitor who is on board for you*".

The arrangement struck was that this Plaintiff would contact MIS at the stage when her vehicle was being garaged for repair.

[21] The formal documents executed by this Plaintiff were the same as those pertaining to the first three Plaintiffs. She signed them all on 4th September 2008 which, according to the ICH invoice addressed to this Plaintiff, was the day following the final date of the period during which she had a replacement vehicle. The Plaintiff's evidence was that she signed no documents at Hallidays premises when she took possession of the substitute vehicle and did not receive any documents for signature until they arrived by post, when she signed and dated them immediately, returning them by post to their sender. She was unsure whether her own insurance policy entitled her to the use of a replacement vehicle. She treated the documents as a formality and did not claim to have either studied them

in detail or understood their full purpose and scope. Neither ICH nor MIS meant anything to her.

[22] This Plaintiff's evidence was supplemented by that of Trevor White, a director of MIS, who also swore an affidavit at the interlocutory stage of this appeal. Mr. White describes MIS as the largest motor claims management company in Ireland, providing services which include so-called "*credit hire*" of replacement vehicles to the company's clients. MIS has "*delegated authority*" from a number of substantial insurance companies. In some instances, the client's insurer is some other company. In all "delegated authority" cases, the client can secure a replacement vehicle. This is facilitated by MIS under its "Approved Repairer Scheme", which entails referring the client to an approved repairer, who repairs the vehicle and supplies a replacement vehicle during the period of repair. The approved repairer pays a "referral fee" to MIS in every such case, in accordance with a contract which is comprehensive in nature, embracing matters such as labour rates, parts, prices and so forth. There is no separate referral fee for the supply of a replacement vehicle. The MIS approved repairers include several of the Wright's Accident Repair Centres. In those cases where MIS facilitates a replacement vehicle, this entails the execution of a hire agreement between the client and ICH, which is a wholly owned subsidiary of MIS and the owner of a substantial fleet of vehicles purchased by itself.

[23] According to Mr. Wright, in a very small percentage of cases – less than one percent - MIS bring proceedings against their own clients seeking recovery of the costs associated with the provision of a replacement vehicle. In the year 2010, there have been three such claims to date. One of these claims has been initiated by the MIS solicitors in the name of "MIS Debt Recovery". Following the decision of the Northern Ireland High Court in ***Salt –v- Helley*** [2009] NIQB 69, MIS altered its procedures substantially, with a view to making them more accessible and transparent for clients. As a result, clients now receive very fulsome explanations of the various arrangements by letter, as exemplified by the letter dated 20th August 2009 from MIS to the Appellant Mr. Torrens. Previously, clients were simply told, at most, that they were getting themselves involved in a "credit hire agreement". Rather than seeking to appeal, MIS accepted the criticisms of its practices and procedures in the ***Salt*** judgment. Where there is a delegated insurer involved and the accident is the fault of the client, any replacement vehicle is supplied under the insurance company's policy and there is no credit hire arrangement. In such cases, the financial benefit to the vehicle supplier is secured in the charges levied for the repairs to the client's vehicle. In contrast, where the client is not at fault, the replacement vehicle is provided pursuant to a credit hire agreement.

IV GOVERNING PRINCIPLES

[24] In ***Giles –v- Thompson*** [1994] AC 142, there were two conjoined appeals in which blameless Plaintiffs, following collisions, had secured the use of substitute vehicles pursuant to agreement conferring on the supplier the right to pursue claims

against the Defendant tortfeasors in the Plaintiffs' names. The Defendants contested the claims on the ground that these agreements were champertous and unlawful. This argument was rejected at every judicial tier. Lord Mustill, with whom the other members of the House concurred, laid stress on the precise terms of the supply/hire agreement. He noted that the law on maintenance and champerty had evolved in response to changing times (at p. 164A) and continued (at p. 164B):

> "*… I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants …*
>
> *All the aspects of the transaction should be taken together for the purpose of considering the single question whether … there is wanton and officious intermeddling with the disputes of others in which the meddler has no interest whatever and where the assistance he renders to one of the parties is without justification or excuse*".

There must also be a division of the spoils (see p. 161C). Lord Mustill continued (at p. 164F):

> "*The question must be looked at first in terms of the harmfulness of this intervention, which in turn calls for separate consideration of the risks to the administration of justice and to the interests of the motorist. Is there any realistic possibility that the administration of justice may suffer, in the way in which it undoubtedly suffered centuries ago? None.*"

Next, Lord Mustill considered the separate question of whether, within the ambit of "*broader considerations of public policy*", the supply agreement exposed the innocent motorist to risk (at p. 165C):

> "*Do the standard terms of Forward Hire create such an imbalance of rights, such a risk of exploitation, that the courts ought to treat the hiring contract as outlawed, incapable of creating any rights as between the motorist and the company?*"

Answering this question, his Lordship, while recognising that the innocent motorist could incur liability for the hiring charges, stated (at p. 165E/F):

> "*But these are reflections of the fact that the agreement is, to my way of thinking, a real hiring and not a sham. Is it then so wholly outrageous that the law should turn its back on it? I cannot say so. On the contrary, the balance of advantage is overwhelmingly in favour of those who receive professional and financial assistance to recover a valid claim which would otherwise go unsatisfied.*

> *Moreover … any potential abuse which may exist is much better tackled through the consumer protection legislation …*
>
> *The company makes its profits from the hiring, not from the litigation. It does not divide the spoils, but relies upon the fruits of the litigation as a source from which the motorist can satisfy his or her liability for the provision of a genuine service, external to the litigation.* ***I can see no convincing reason for saying that as between the parties to the hiring agreement, the whole transaction is so unbalanced, or so fraught with risk, that it ought to be stamped out. The agreement is one which in my opinion the law should recognise and enforce.***"

[My emphasis].

[25] In ***Giles –v- Thompson***, the Defendants also canvassed the argument that the Plaintiffs had suffered no recoverable loss, as they had been able to make use of substitute vehicles free of charge. Rejecting this contention, Lord Mustill stated (at p. 166D/E):

> "*In my judgment the motorists do not obtain the replacing vehicle free of charge. If the motorist had simply persuaded a garage to hire her a substitute on credit, without any of the superstructure of the present transaction, it would be no answer to a claim for damages equivalent to the sums due to the garage that these sums would not in practice be paid until a judgment in the motorist's favour had provided the necessary funds …*
>
> *The liability for the car hire, although suspended as regards enforcement, rests upon the motorist throughout. It is a real liability, the incurring of which constitutes a real loss for the motorist … the provision of the substitute car was not 'free'".*

Giles also decided that there must be a proven need for the replacement vehicle: see p. 167B/G. The final pronouncement of note in Lord Mustill's speech is the proposition that any shortcomings in the relevant documentary materials pertaining to the vehicle supply arrangement and any possible abuse by the commercial entities concerned should be remedied through the vehicle of consumer protection legislation rather than invoking the principles of champerty [see p. 169D/E].

[26] In ***Dimond –v- Lovell*** [2002] 1AC 384, the Plaintiff, whose vehicle was damaged in a road traffic accident caused by the Defendant's negligence, hired a replacement vehicle from an accident hire company. By the terms of this agreement the Plaintiff secured credit in respect of the hire charges until completion of his claim for damages, while the supplier acquired a right to pursue such a claim in the Plaintiff's name. It was held that the agreement was unenforceable against the Plaintiff under the Consumer Credit Act 1974, as it was a "regulated agreement"

which did not contain the requisite statutory particulars. As a result, it was unenforceable against the Plaintiff who, therefore, suffered no loss. The House also considered the argument canvassed on behalf of the credit hire company that their arrangement with the Plaintiff was *res inter alios acta*. Lord Hoffmann observed, initially, that the authorities, in particular ***Parry –v- Cleaver*** [1970] AC 1 and ***Donnelly –v- Joyce*** [1974] QB 454 provided "*very respectable support*" for this argument. Next, he noted that in a case closely analogous factually, ***McCall –v- Brooks*** [1984] RTR 99, the Court of Appeal had applied the general principle that benefits provided by third parties are *res inter alios acta. This decision he described as "the high water mark of authority*" supporting the argument. He continued (at p. 399):

> "*The courts have realised that a general principle of res alios acta which assumes that the damages will be paid by 'the wrongdoer' out of his own pocket is not in accordance with reality. The truth is that virtually all compensation is paid directly out of public or insurance funds and that through these channels the burden of compensation is spread across the whole community through an intricate series of economic links. Often, therefore, the sources of 'third party benefits' will not in reality be third parties at all. Their cost will also be borne by the community through taxation or increased prices for goods and services.*"

Next, Lord Hoffmann noted that in ***Hunt –v- Severs*** [1994] 2 AC 350, the House of Lords over-ruled ***Donnelly –v- Joyce*** and declined to create another exception to the rule against double recovery, holding that in cases where the Plaintiff sues for the reasonable cost of necessary services the relevant damages are recoverable not for the Plaintiff's own benefit, but *qua* trustee for the provider of the services. Lord Hoffmann's conclusion on this issue was that it would be impermissible for the Plaintiff, *qua* trustee for the "credit hire" company, to recover the relevant hiring charges from the Defendant, as the effect would be to confer legal rights on the company by virtue of an agreement which, per the principal conclusion of the House, was unenforceable. He stated:

> "*The policy of the 1974 Act is to penalise First Automotive for not entering into a properly executed agreement*".

[At p. 400D].

For his Lordship, if, as a result, this was of benefit to a debtor (here, the Defendant's insurers), so be it: this was a necessary consequence of how the legislation is formulated.

[27] In ***McMullan –v- Gibney*** [1999] NIJB 17, Nicholson LJ adverted to "*the well known legal principle that a tortfeasor cannot require the injured party to invoke his contract with his insurers in order to mitigate his loss*": see p. 18A. His Lordship noted how the *Court of Appeal* in ***Giles –v- Thompson*** had determined this issue, quoting in

particular from the judgment of Sir Thomas Bingham MR, [1993] 3 All ER 321, at p. 349:

> "*As a general principle it is of course true that a Plaintiff's claim for special damage can only succeed to the extent of losses he has actually sustained and liabilities he has actually incurred. But the rule is not absolute: the proceeds of private insurance and charitable benevolence are, for differing reasons, disregarded. Nor, in my view, does it relieve the Defendant of liability if the Plaintiff's liability to pay charges to a third party is contingent on his recovery against the Defendant.*"

Lord Mustill's consideration of this discrete issue on appeal is set out in paragraph [25] *supra*. The issue of the enforceability of a replacement vehicle by agreement under the 1974 Act arose in a different guise and was considered by the Northern Ireland Court of Appeal in ***O'Hagan –v- Wright*** [2001] NI CA 26: see especially per Carswell LCJ, at paragraph 31:

> "*The consequence of our conclusions is that by virtue of Section 127(3)* [of the 1974 Act] *the court cannot make an enforcement order under Section 65(1). The further consequence is that the agreement is unenforceable in its present form against the Appellant and accordingly the amount provided for in the agreement cannot form part of the damages payable by the Respondent to the Appellant.*"

In thus concluding, the court gave effect to the philosophy of ***Dimond –v- Lovell***.

[28] Next, in ***Lagden –v- O'Connor*** [2004] 1 AC 1067, the House of Lords considered the position of the impecunious Plaintiff. In that case, pursuant to a credit hire agreement, the Plaintiff secured the use of a vehicle at no cost to him, involving a twenty-six week credit facility and allowing the supplier to recover its charges from the Defendant, coupled with an insurance policy to provide payment in the event of non-recovery within the specified period. It was held that the Plaintiff was entitled to recover the entire cost. A notable feature of the main speech, delivered by Lord Nicholls, is its emphasis on certain attributes of the common law:

> "*[6] My Lords, the law would be seriously defective if in this type of case the innocent motorist were, in practice, unable to obtain the use of a replacement car. The law does not assess damages payable to an innocent Plaintiff on the basis that he is expected to perform the impossible. The common law prides itself on being sensible and reasonable. It has regard to practical realities. As Lord Reid said in* ***Cartledge v E Jopling & Sons Ltd*** *[1963] AC 758, 772, the common law ought never to produce a wholly unreasonable result. Here, as elsewhere, a negligent driver must take his victim as he finds him. Common fairness requires that if an innocent Plaintiff cannot afford to pay car hire charges, so that left to himself he*

> *would be unable to obtain a replacement car to meet the need created by the negligent driver, then the damages payable under this head of loss should include the reasonable costs of a credit hire company. Credit hire companies provide a reasonable means whereby innocent motorists may obtain use of a replacement vehicle when otherwise they would be unable to do so. Unless the recoverable damages in such a case include the reasonable costs of a credit hire company the negligent driver's insurers will be able to shuffle away from their insured's responsibility to pay the cost of providing a replacement car. A financially well placed Plaintiff will be able to hire a replacement car, and in the fullness of time obtain reimbursement from the negligent driver's insurers, but an impecunious Plaintiff will not. This cannot be an acceptable result.*"

This passage resonates to some extent in certain arguments deployed on behalf of the Plaintiffs in the present appeals.

[29] The main significance of the decision in ***Bee –v- Jenson*** [2007] EWCA. Civ 927, in the present context, is its consideration, and rejection, of the argument that the Plaintiff could not recover damages for the hiring charge in question, around £610, as he was not liable to pay the hire charges, such liability being imposed exclusively on the legal expenses insurer: see paragraphs [3] – [4] and [11] – [14]. Longmore LJ stated:

> "*It is, in any event, necessary to say that it does not follow from the fact that* [the Plaintiff] *was not liable for the hire charges of the replacement car that he cannot recover damages for the deprivation of his use of his car. It may be a question of what the appropriate amount of such damages will be but if he has in fact reasonably made arrangements for a hire car, there is no reason why he should not recover the cost of hire, whether or not he has rendered himself liable for the hire charges and whether or not the actual cost has been paid by him or somebody else such as an insurer (or indeed any other third party). In so doing he may in legal jargon be recovering general damages rather than special damage but there is no significance in that.*"

His Lordship continued:

> "*[21] But if (as here) the claimant needs a car while his own car is being repaired and that is due to negligence of the Defendant and the cost of hiring such a car is reasonably incurred, there is, in my judgment, no reason why the tortfeasor should not pay the reasonable cost of that hire …*

> *[22] … In this case where* [the Plaintiff] *did actually make use of a hire car, there is every reason why his general damages should be assessed by reference to what Lord Scott referred to as the spot hire charge for a comparable vehicle …*
>
> *[23] That is particularly so where the only reason why* [the Plaintiff] *has not himself paid for the use of the hire car is that he has paid a premium to his insurers to cover precisely the events that have happened viz. that his own car has been negligently damaged and that he needs to have his car repaired and to hire another car while such repair is being effected. The fact that he is insured should be irrelevant to his claim …*
>
> ***But the tortfeasor is always protected by the requirement that the claimant can recover no more than the reasonable cost of hiring the necessary replacement***".

[Emphasis added].

The unanimous decision of the court was to dismiss the appeal. As the passages quoted above demonstrate, two of the main features of the court's reasoning were a relatively orthodox application of the *res inter alios acta* principle and the constraint of reasonableness in respect of any damages recoverable.

[30] The most recent contribution to the ever expanding jurisprudence in this sphere of litigation is the decision of the English Court of Appeal in ***Copley –v- Lawn*** [2009] EWCA. Civ 580. There, in two conjoined appeals, the Court of Appeal considered the common issue arising out of a refusal by the Plaintiff motorist to avail of an offer by the Defendant's insurers of a cost free vehicle during the repair period. At first instance, it was held that the rejection of such an offer constituted an unreasonable failure by the Plaintiffs to mitigate their losses, rendering the hire costs recoverable. The Court of Appeal allowed the appeals. Their reasons for doing so emerge in the following passages from the judgment of Longmore LJ:

> *20. In that case the comparative cost was clear from the beginning and the claimant could make an informed choice. In the present cases no such informed choice was available to either the claimants or their advisers and I do not see how they can be said to have acted unreasonably in not accepting the offer in the form it was presented to the claimants. The claimants and their advisers need to know the true cost to the defendant and his insurers since it might, as Mr Butcher pointed out, be the case that the cost of the defendants' insurers hiring the replacement car was actually the same as (or more than) the cost of hiring a replacement from Helphire. If that were the true position it could scarcely be said that it was unreasonable for the claimants to pay the Helphire cost.*

> *21. Mr Walker submitted that the cost to the defendants' insurers was entirely irrelevant. If they were prepared to bear that cost in its entirety (whether for good commercial reasons or completely altruistic ones) that was of no concern to the claimants. Judge Langan agreed with the submission but I cannot accept it. The present dispute is an ordinary commercial dispute and the court cannot close its eyes to the obvious fact that hiring cars is a profitable business from the point of view of the supplier and a cost–incurring exercise from the point of view of the hirer. A claimant who has been deprived of the use of his car by the negligence of a tortfeasor only has to take reasonable steps to mitigate his claim for that loss of use and he cannot, in my judgment, be said to act unreasonably if he makes (or continues) his own arrangements with his own hire company, unless he is made aware that this commercial enterprise can be undertaken more cheaply by the defendant than by his own arrangements.*
>
> *22. It follows from this that, if a defendant or his insurers does make an offer of a replacement car to an innocent claimant and he makes clear that he is going to pay less for such a car than the claimant is intending to pay (or is paying) for a car from a company such as Helphire, then (other things being equal) it may well be the case that a claimant should accept that lower cost replacement.*
>
> *23. Mr Walker also submitted the decisions of the judges below were "findings of fact" and should not be interfered with by this court. There is no question of any interference with any finding of primary fact; questions of mitigation are however, questions of evaluation and judgment and there is no reason why this court should not interfere, if the judge's conclusions are, in its considered opinion, wrong.*
>
> *24. For the reasons given, I do not think that Mrs Copley or Captain Maden (whether by themselves or through their agents) acted unreasonably in failing to accept KGM's offers or in failing to explore them further. I would, therefore, allow these appeals.*

Thus, while the Defendants' principal contention won some favour *in principle*, it failed *on the facts*. The court's primary conclusion was that, having regard to the particular facts, there had been no failure by the Plaintiffs to mitigate their losses.

[31] In ***Copley,*** the Court of Appeal also considered, *obiter*, the separate question of whether the Plaintiffs could recover any damages in the teeth of a finding by the court that they had failed to mitigate their losses. Longmore LJ stated:

> *"In principle, it cannot be correct that a claimant who rejects a defendant's reasonable offer is entitled to nothing. The claimant*

has still suffered a loss. If a defendant makes an open monetary offer of a sum of money to which the claimant is entitled and it is rejected, the usual result is that the claimant will still make recovery but will not recover the costs of the proceedings. It should not make any difference if the defendant's offer is not monetary but is an offer in kind or an offer to perform a service which will enable the claimant to avoid his loss."

The omnibus conclusions of the court are expressed in the following terms:

> *"32. I would therefore conclude*
>
> *i) that, looking at the matter objectively, it is not unreasonable for a claimant to reject or ignore an offer from a defendant (or his insurers) which does not make clear the cost of hire to the defendant for the purpose of enabling the claimant to make a realistic comparison with the cost which he is incurring or about to incur;*
>
> *ii) that, following Strutt v Whitnell, if a claimant does unreasonably reject or ignore a defendant's offer of a replacement car, the claimant is entitled to recover at least the cost which the defendant can show he would reasonably have incurred; he does not forfeit his damages claim altogether.*
>
> *If this is correct, the general rule that the claimant can recover the "spot" or market rate of hire for his loss of use claim is upheld, unless and to the extent that a defendant can show that, on the facts of a particular case, a car could have been provided even more cheaply than that "spot" or market rate.*
>
> *33. Since there is no evidence that the defendants' insurers could, in fact, have hired replacement cars more cheaply than the claimants did or that the claimants' hire rates were any other than market rates, I would allow these appeals and enter judgment for the sums claimed."*

Thus, in the realm of the quantum of damages, there was a reaffirmation of the so-called "spot" (i.e. market) rate as the normal barometer for quantification of awards.

[32] It is necessary to consider the third of a trilogy of recent decisions in Northern Ireland belonging to this sphere of litigation, ***Salt –v- Helley*** [2009] NIQB 69, upon which reliance is placed by the Defendants in these appeals. There, the Plaintiff claimed some £853 for the hire of a replacement vehicle used by her while her damaged vehicle was being repaired in the wake of a road traffic accident, notwithstanding that she was entitled to a free courtesy car under her own insurance policy, a benefit of which she declined to avail. The District Judge awarded the full amount claimed. On appeal, this was reversed. Stephens J stated:

"[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*** *[1893] 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 principal. 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.*"

This decision features prominently in the arguments advanced on behalf of the Defendants in the present appeals.

[33] The attention of the court has also been directed to the reserved judgment of District Judge Wells in ***Jamison –v- Ellison and Another*** [2008] NI. CTY2, where the court considered, and determined, on the particular facts of the instant case, the question of whether the Plaintiff was entitled to recover the cost of a hire vehicle in circumstances where she had failed to avail of a courtesy vehicle under insurance policy. District Judge Wells concluded:

> "*The practical reality in this case is that there was an arrangement and facility for the Plaintiff to get a courtesy car* [under her own insurance policy]. *It made no sense and was unreasonable for the Plaintiff to get a hire car* [from a credit hire company] …
>
> *I am satisfied that the use of a courtesy car by the Plaintiff as opposed to a credit hire car would not have involved any sacrifice on her part. MIS, being aware of the likelihood that the Plaintiff had cover for a courtesy car, were under an obligation to check with her and advise her as to the differences between the two vehicles (every bit as much as they were under an obligation to check if she could readily afford to privately hire). Their failure to do so led to the perverse position that the Plaintiff had, unknowingly, added to the costs of the claim, with absolutely no need to do so…*
>
> *I am not satisfied that the Plaintiff is entitled to recover the cost of the credit hire vehicle …*"

The rationale of this decision appears to focus on the acts, omissions and state of knowledge of the claims handlers, MIS and it is not harmonious with the *res inter alios acta* doctrine. Finally, while I have noted, post-hearing, the most recent contribution to this ever expanding sphere of jurisprudence, ***Beechwood Birmingham Limited –v- Hoyer Group UK Limited*** [2010] EWCA. Civ 647, it is evident that this does not sound on the issues raised in the present appeals.

V THE PARTIES' ARGUMENTS

The First Three Appeals: Smyth, Phillips and Torrens

[34] What follows is a condensed outline of the principal arguments ventilated by the parties' respective counsel which, helpfully, became increasingly focussed as the hearings progressed.

[35] The centrepiece of the submissions advanced by Mr. O'Donoghue QC on behalf of all Plaintiffs was that provided that the "credit hire" agreement in question is enforceable within the framework of the Consumer Credit Act 1974, the Plaintiff is entitled, in principle, to recover the relevant financial charges, the only constraints being a demonstrated need for a replacement vehicle, the reasonableness of the period of use and the reasonableness of the charge levied. It was argued that this omnibus proposition is supported by the leading authorities in both England and this jurisdiction – ***Giles, Dimond, O'Hagan, Bee, Copley*** and ***McMullen***. It was submitted that the principles and philosophy identifiable in these situations are based in part on an acknowledgement of the commercial reality that the Plaintiff is normally not at risk of enforcement action by the credit hire company, coupled with the operation of the principle *res inter alios acta*. The decision in ***Salt*** was criticised on a number of grounds – the commercial reality factor noted above; the fact that neither of the parties to the credit hire agreement had sought to avoid it, leaving the agreement extant and enforceable at the time of the trial; the undesirability of the court becoming embroiled in investigating the enforceability of a contract in circumstances where one of the contracting parties was not a litigant; the resulting impact on the evidential framework before the court; the absence of any mutual legal rights and obligations vis-à-vis MIS and the Defendant; and the lack of any litigation nexus between the same two parties.

[36] On behalf of all Defendants, Mr. Ringland QC highlighted that MIS was the credit hire company involved in ***Salt*** and did not seek to challenge the judgment on appeal. It was suggested that the court in ***Salt*** had clearly received the benefit of careful argument from the parties. The "commercial reality" submission was countered, on the basis of the evidence adduced that, in a very small proportion of cases, recovery proceedings are brought by credit hire companies against Plaintiffs. The enforceability enquiry conducted by the court in ***Salt*** was supported by reference to the analogy of employers' liability cases, where issues sometimes arise about whether the Plaintiff can recover wages paid to him by his employer (a third party) during periods of absence. The position adopted by the Defendants in these appeals simply entails the court giving effect to the fundamental requirements of any valid contract. None of the Plaintiffs had any real appreciation of the terms and details of their commercial hire agreements. The correctness of the decision in ***Salt*** was robustly asserted.

Phillips

[37] Finally, in the particular case of ***Phillips*** it was submitted that there is an additional ground of defence, based on the doctrine of *novus actus interveniens*, arising out of the conduct of Wrights in sourcing the replacement vehicle from MIS, rather than this Plaintiff's own insurers (Prestige).

The Fourth Appeal – McCabe

[38] The position adopted by both parties was that while the arguments summarised above (with the exception of the last-mentioned argument) apply to all four appeals, the further and freestanding ingredient in the ***McCabe*** appeal is that of *past consideration*. As rehearsed in the findings set out in paragraph [21] above, this Plaintiff did not execute the relevant contractual documents until following expiry of the period during which she had benefited from the use and enjoyment of a replacement vehicle. On behalf of the Defendant/Appellant, it is submitted that the credit hire agreement is not enforceable as the consideration which it entailed was past consideration, thereby nullifying the Plaintiff's contractual promise/obligation to make payment to the supplier. On behalf of the Plaintiff/Respondent, the riposte is that the agreement made provision for other continuing mutual rights and obligations on the part of the parties. These included, in particular, the obligation on MIS to pursue a claim on the Plaintiff's behalf against the Defendant; the provision for instructing solicitors to this end, who would act in the Plaintiff's best interests; the Plaintiff's entitlement to have any other losses claimed by her incorporated in the proceedings pursued by the panel solicitors; the facility of a credit period which would endure until completion of negotiations or a judgment of the court; and the fifty weeks credit period expiry contractual term.

VI CONCLUSIONS

The First Three Appeals

[39] The main argument canvassed on behalf of the Defendants was that the "credit hire" agreements in these appeals are unenforceable, as they are not compliant with the fundamental legal requirements for any valid contract. The court has found that, in one way or another, none of the Plaintiffs fully appreciated the import, significance and consequences of the various contractual documents executed by them: see paragraphs [12], [13], [17] and [21]. However, in my opinion, these findings do not operate to invalidate any of the relevant contracts. At their zenith, they establish that, in executing the documents in question, the Plaintiffs were somewhat careless and/or naive. It was not suggested that the documents were in any way incomprehensible and there was nothing, in particular no conduct on the part of the other contracting party, to prevent the Plaintiffs from reading and understanding their contents. The essential legal requirements for any valid contract are offer, acceptance, capacity and consent. There is no real suggestion – and no basis for finding – that any of these requirements was absent in respect of

any of the agreements under scrutiny. Furthermore, insofar as a mutual intention to create legally binding relations is properly considered a further and freestanding requirement of any valid contract, I am satisfied that this was present in all cases. In my view, it was evident to all Plaintiffs that they were executing formal legal documents of a contractual nature which would govern their relationship with other parties. None of the Plaintiffs protested to the contrary.

[40] The main argument advanced on behalf of the Defendants seems to me tantamount to contending that the contracts are rendered unenforceable by the principle of *non est factum*. However, I cannot accept this. Traditionally, this defence was available to persons who did not sign contractual documents or deeds and those unable to read through blindness or illiteracy but induced to sign deeds whose contents had been read to them incorrectly and who did not act negligently. The defence was reviewed comprehensively in the House of Lords in ***Gallie –v- Lee*** [1971] AC 1004. There it was held that the defence of *non est factum* is available to a party who signs a legal instrument or agreement labouring under a fundamental misapprehension about the substance of the document, provided that the party takes all due care. Significantly, it was highlighted that the defence will very seldom be available to a literate adult in full possession of his faculties. The essential requirement is a fundamental mistake as to the character or effect of the document, it being necessary to establish that the disparity between the document actually executed and the document supposedly executed must be radical, essential, fundamental or very substantial [see pp. 1017, 1022 and 1026]. Lord Reid stated, at p. 1016:

> "*The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy …*
>
> ***The plea cannot be available to anyone who was content to sign without taking the trouble to find out at least the general effect of the document ...***
>
> ***But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had***

> ***taken steps or been given information which gave him some grounds for his belief ...***
>
> *Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change.*"

[Emphasis added].

As emphasized by Viscount Dilhorne, mere carelessness on the part of the signatory of the document will not suffice: see p. 1023. The speech of Lord Wilberforce places emphasis on the doctrinal requirement of *consent* in the realm of legally binding contracts: see p. 1026. While noting that Mrs. Gallie was a lady of advanced age, there was no evidence of significant mental or physical incapacity, prompting Lord Wilberforce to observe that –

> "*… she fell short, very far short, of making the clear and satisfactory case which is required of those who seek to have a legal act declared void and of establishing a sufficient discrepancy between her intentions and her act*".

[At p. 1027H].

The philosophy underpinning all of the speeches of their Lordships was to confine the plea of *non est factum* within narrow boundaries: see especially per Lord Pearson, at p. 1034A/B. His Lordship continued:

> "*In my opinion, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed.*"

The general principle is neatly expressed in ***Chitty on Contracts*** (30th Edition), Volume 1, paragraph 5-101:

> "*The general rule is that a person is estopped by his or her deed and although there is no such estoppel in the case of ordinary signed documents, a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not.*"

Based on my evaluation of the evidence of all Plaintiffs in the present cases, I am satisfied that this general rule applies to all of them. The defence of *non est factum* is of narrow scope and does not, in my view, begin to arise in any of these cases.

[41] The MIS credit hire agreement which features in these appeals is dominated by clause 1, which provides the innocent motorist (viz. the present Plaintiffs) with a strong assurance of a cost free replacement vehicle during the relevant period. The corresponding obligations imposed on the motorist are, in my view, balanced and modest in nature. In short, the motorist is to co-operate with the instructed solicitors in their conduct of the legal proceedings; to testify in court if necessary; and to act honestly. Viewed in context, I consider that these were not onerous obligations. I take into account also the provisions addressing the contingency of death or bankruptcy. On the reverse side of the coin, the benefits to the motorist are substantial: the cost free replacement vehicle is provided throughout the relevant period; there is no need to instruct solicitors; all losses, including any personal injuries, are included in the claim; there is no insurance or road tax liability; and the credit period has a potential duration of fifty weeks. I consider that the standard MIS credit hire agreement bears comparison, in principle, with the agreement under scrutiny in ***Giles –v- Thompson***: see per Lord Mustill at p. 157 of the report. His Lordship noted that the agreement subjected the motorist to a real liability, entailing certain risks (at pp. 165-166). However, given the advantages conferred on the motorist, the conclusion reached was that the agreement was sufficiently fair and balanced to qualify for legal recognition and endorsement. In my view, the same analysis and conclusion apply to the agreements under consideration in these appeals. While I take into account that the standard MIS Agreement exposes the motorist to the risk of recovery proceedings by the supplier, the cornerstone of all such agreements is that the motorist concerned is not at fault, while the other motorist is insured, thus rendering this risk negligible. This may be considered one of the "*practical realities*" in play, to borrow the expression of Lord Nicholls in ***Dimond –v- Lovell***. Secondly, I consider that the terms of the agreement itself create a relatively small risk of recovery proceedings materialising at a later date. Thirdly, and finally, the evidence adduced in these appeals is that such proceedings eventuate in less than one percent of all cases. Thus the risk is properly described as miniscule.

[42] I am satisfied that the agreements arising for consideration in these appeals do not have the kind of attributes which Stephens J found to be so negative and disadvantageous for the innocent motorist in ***Salt –v- Helley***. In this respect, I refer to, but do not repeat, my analysis in paragraph [41] above. The very distinctive factual matrix in ***Salt***, rehearsed exhaustively in paragraphs [3] – [25] of the judgment, is not replicated in any of the present appeals. Furthermore, the agency issue, which would inevitably be intensely fact sensitive in nature, was not explored extensively in the evidence adduced in the present cases and was not the subject of any agreed facts. Nor was it developed in argument. In contrast, the position of MIS as agent of the Plaintiff appears not to have been in dispute in **Salt**. In these circumstances, I am unable to make concluded findings on the agency issue based on the evidence adduced.

[43] I note further that the analysis and reasoning of Lord Mustill in ***Giles –v- Thompson*** (at pp. 164-166 especially), which I am adopting and applying in these appeals, do not feature in ***Salt***, presumably because they were not canvassed in argument. Finally, as appears from the recitation of the governing principles in ***Salt***, non-disclosure by the agent was considered by the court to be an integral feature of a breach of the agent's duty to the principal. In this respect, see Halsbury [5th edition], Volume 1, paragraph 90. The non-disclosure and obfuscation which clearly arose on the peculiar facts of ***Salt*** and patently exercised the learned judge – see paragraph [9] especially - are not, in my view, replicated in the present appeals. On any reasonable and careful reading of the standard MIS agreement, the Plaintiffs would have appreciated fully where the two contracting parties stood. The mutual rights and obligations of both were clearly spelled out. There were no concealed machinations. Furthermore, on the particular facts in ***Phillips***, subject to my earlier observation in paragraph [43], I doubt whether either MIS or Wrights can be said to have been acting as the Plaintiff's duly appointed agent, bearing in mind that the Plaintiff did little more than to present herself at the premises of Wrights for the purpose of securing a replacement vehicle there, giving instructions to no-one, and there was no evidence of any active MIS or ICH involvement at this stage. For these reasons, I distinguish the decision in ***Salt*** and it is unnecessary to consider the further submissions developed on behalf of the Plaintiffs, summarised in paragraph [35] above.

Phillips: the *novus actus* argument

[44] In the particular case of ***Phillips***, the Plaintiff's own insurance policy made provision for a replacement vehicle. However, this entitlement was not activated, in the circumstances set out in paragraph [13] – [15] above. It is clear that Wrights knowingly sourced a replacement vehicle for this Plaintiff from a supplier with whom they had commercial arrangements, rather than the Plaintiff's insurance company. This matrix gives rise to the Defendant's argument that the conduct of Wrights constituted a *novus actus interveniens*, thereby absolving the Defendant from any liability for the credit hire dimension of the Plaintiff's claim. In ***The Oropesa*** [1943] P.32, where a significant human tragedy occurred in the wake of, but detached in time and place from, a collision between two vessels it was argued that the conduct immediately precipitating the deaths constituted a *novus actus*. Lord Wright stated (at p. 36):

> "*Certain well known formulae are invoked, such as that the chain of causation was broken and that there was a* ***novus actus interveniens****. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other. … I find it very difficult to formulate any precise and all embracing rule.*"

In a later passage, Lord Wright observed (at p. 37):

> "*There are some propositions which are beyond question in connection with this class of case. One is that human action does not per se sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer …*
>
> [P. 39] ***To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous, or extrinsic***."

[Emphasis added].

Finally, Lord Wright adopted the linguistic formula employed by Lord Haldane in ***Canadian Pacific Railway –v- Kelvin Shipping Company*** 138 LT 369, at p. 370, which speaks of "*… such a consequence as in the ordinary course of things would flow from the situation …*" created by the tortfeasor as being recoverable damage.

[45] The factual matrix to which these principles are to be applied must now be considered. The conduct of Wrights (the intervening party, in this juridical context) did not merely consist of taking steps to ensure that they secured for themselves a financial benefit. Rather, it extended to defying a written instruction from this Plaintiff's insurers to supply him with a replacement vehicle (described as a "*courtesy car*") under his policy. Such conduct was plainly unsavoury, a fact tacitly acknowledged in the evidence of the Wright's witness. However, in my opinion, the Defendant's argument, with which I have some sympathy, is defeated by the *res inter alios* principle. The operation of this principle is, in the language of Nicholson LJ in ***McMullen*** [*supra*] that "*… a tortfeasor cannot require the injured party to invoke his contract with his insurers in order to mitigate his loss*". Furthermore, the conduct of Wrights might properly be regarded as one of the commercial or practical realities which feature in the reasoning of some of the leading judgments in this sphere of litigation. Finally, the loss in question – the cost of securing a replacement vehicle – is, in my view, adopting the language of Lord Haldane [at p. 370] –

> "*The natural and reasonable result of the negligent act … such a consequence as in the ordinary course of things would flow from the situation …* [created by the tortfeasor]."

While the conduct of Wrights was unattractive, it nonetheless savoured of foreseeable commercial reality and did not, in my view, partake of the qualities necessary to sever the chain of causation. For these reasons, I reject this discrete line of defence in the ***Phillips*** appeal.

McCabe: The Past Consideration Argument

[46] The general principle is stated on Chitty on Contracts (30th Edition), Volume 1, paragraph 3.026 in these terms:

> "*The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to 'past consideration'; and such past acts or forbearances do not in law amount to consideration for the promise*".

In a later passage, the authors observe that it is not necessarily appropriate to apply a strictly chronological test [paragraph 3-027]:

> "*In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.*"

Simultaneously, the potential significance of "*some consideration other than the past service*" provided by the promisee is acknowledged: see paragraph 3-026. I consider that the effect of these passages is to exhort examination of the totality of the consideration, all material events and the full context in question. I have listed in summary form, in paragraph [41] above, the benefits secured by this Plaintiff both before and after the execution of the relevant contractual documents. I consider that the benefits postdating execution of the formal written agreement were substantial in nature and clearly formed part of the consideration for the Plaintiff's contractual promises. In my view, this analysis suffices to resolve this discrete issue in the Plaintiff's favour.

[47] Furthermore, I consider that the essence of the agreement had already been concluded verbally between the parties, prior to formal execution of the corresponding contractual documents, as rehearsed in paragraph [20] above. In this respect, the present case is analogous with ***Carson –v- Tazaki Foods*** [unreported, 25th August 2005], where the past consideration argument succeeded at first instance but was upset on appeal, where Judge Mackie QC made the following observations:

> "*A contract is formed, of course, when one party makes an offer which the other accepts …*
>
> [The motorist] *did not object to these terms (although I appreciate that she probably did not read this material with much care, if she did read it at all) …*

> *It is very likely that* [the motorist] *spoke to someone with a careful script and the surrounding circumstances show that she had no quarrel with the terms. She probably entered into a contract by telephone on standard terms to be sent to her as consumers do daily. …*
>
> *These disputes would benefit from the application of commercial common sense. Parties regularly enter into agreements the terms of which at least one party misunderstands, but that party remains liable nonetheless.*"

I concur with this approach .The matrix in this particular appeal [McCabe] may also be viewed as an illustration of the proposition contained in Chitty, paragraph 2-124:

> "*The parties may begin to act on the terms of an agreement before it has contractual force. When it is later given such force, the resulting contract may then, if it expressly or by implication so provides, have retrospective effect so as to apply to work done or goods supplied before it was actually made.*"

Bearing in mind the well established principle that contractual terms may properly be implied for the purpose of importing business efficacy to the relevant transaction [Chitty, paragraph 13-005], it seems to me that this proposition is tailor made for the ***McCabe*** appeal.

VII DISPOSAL

[48] To reflect the conclusions expressed above:

(a) I allow the appeals in the first three cases viz. ***Smyth, Phillips*** and ***Torrens***, and I substitute, in each of those cases, a decree in the amount agreed between the parties.

(b) In the fourth case, ***McCabe***, I dismiss the Defendant's appeal and affirm the decree of the County Court.

(c) In the two interlocutory appeals, given the consensual resolution which has materialised. I make orders of dismiss.

Finally, it is to be expected that the legal representatives of the parties in all of the appeals which remain outstanding before the High Court will absorb carefully the terms of this judgment, with a view to ascertaining whether consensual resolution of the contentious issues in each case is possible.