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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/10/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

THOMAS SMYTH

Plaintiff/Appellant

and

MARKERSTUDY INSURANCE COMPANY LIMITED

Defendant/Respondent

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Mr Conor Cleland (instructed by JMK Solicitors) for the Plaintiff/Appellant
Mr Christopher Ringland (instructed by Murphy & O'Rawe Solicitors) for the Defendant/Respondent

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Ex Tempore

McALINDEN J

Introduction

[1] This is a Civil Bill appeal arising out of a damage only road traffic accident which occurred on 10 January 2019 on Victoria Street, Armagh. The Civil Bill in the case was issued on 19 March 2019 and served on 22 March 2019. This provoked a Notice for Further and Better Particulars which is dated 24 May 2019 and the Replies dated 28 May 2019 set out the plaintiff's claim which is a claim for £1,184.78 relating to car hire for the period between 4 February 2019 and 7 February 2019. The Replies also indicate that the plaintiff's claim for the repair cost of his vehicle which amounted to £1,915.79 had been discharged prior to proceedings being issued.

[2] The plaintiff claims the cost of hire on foot of a hire agreement which was entered into between the plaintiff and CRASH Services Limited on 21 January 2019, this agreement being a credit hire agreement. The invoice in relation to the hire dated 12 February 2019 indicates that the sum claimed is made up of £85.00 for

delivery and collection charges; £822.32 for the hire cost; £80.00 for the collision damage waiver cost; and £197.46 VAT, giving a grand total of £1,184.78.

[3] The vehicle that was hired to the plaintiff on foot of this agreement was a BMW 4 Series Grand Coupe 2 litre, registration number JGZ 8625. The plaintiff's vehicle which had been damaged in the accident was a BMW 520D vehicle. The daily rate that is set out in the hire agreement dated 21 January 2019 is the sum of £205.58. The matter came on for hearing before the County Court on 25 September 2019 and the issue which had to be decided at that stage was whether the plaintiff had failed to mitigate his loss by reason of him deciding not to avail of an offer of the hire of a car which was contained in an intervention letter directed by the defendant in this case to the plaintiff dated 21 January 2019. It is quite clear that the intervention letter is dated the same date as the date on which the plaintiff entered into a hire agreement, and, as we shall see, a number of other agreements.

[4] In essence, the defendant's case was that as of 21 January 2019, or shortly thereafter, the plaintiff would have had information to the effect that the defendant would provide him with a vehicle free of charge during the period when his car was off the road getting repaired. The intervention letter was accompanied by a booklet which was illustrative of the rates of charge that the defendant insurance company would be levied by the supplier of the vehicle in question and when one reads the intervention letter in conjunction with the booklet it is the defendant's case that a plaintiff reading that documentation would clearly be able to ascertain that a vehicle similar to his vehicle would be provided to him by the defendant and would be provided for a certain price. In this case it is alleged by the defendant that the price that was communicated to the plaintiff was the sum of £41.00 per day, whereas it is the plaintiff's case that as this case progressed on appeal, further discovery was obtained by the plaintiff which clearly demonstrated that the rate quoted to the plaintiff by means of the provision of the booklet which accompanied the intervention letter was materially different from the rate which the defendant would be charged by the supplier of the vehicle and the difference was approximately £5.00 per day. This is an issue that the court has to consider in light of the guidance contained in the relevant case law which indicates that the defendant, when making such an offer, must clearly indicate to the plaintiff how much the vehicle is costing the defendant, i.e. what the cost to the defendant is for the provision of the vehicle to the plaintiff.

[5] The issue came on for hearing before the County Court on 25 September 2019. The dispute in relation to whether the plaintiff had been provided with the correct information in relation to the applicable "P5" rate ("P5" vehicles being prestige vehicles of a type similar to the car that he owned, namely, a BMW 520D) which took up considerable time during the hearing of this appeal does not appear to have been raised at application before the County Court because the relevant information had not been disclosed and was not within the possession of the plaintiff to enable the plaintiff to raise that issue at that time. It would appear that the determination of the County Court was grounded on the basis that the plaintiff had not acted reasonably

and had failed to mitigate his loss in failing to accept the defendant's offer to provide a replacement vehicle because the decree that was granted by the County Court on 25 September 2019 was a decree in the sum of £196.80 which certainly does not reflect the plaintiff's claim for vehicle hire charges but more closely reflects the claimed cost to the defendant of the vehicle which the defendant offered to the plaintiff. It would appear that the County Court accepted the defendant's argument that the plaintiff had acted unreasonably in failing to avail of the offer of a vehicle that was contained in the intervention letter dated 21 January 2019 and, in essence, that is the substantive issue that the court has to grapple with in this appeal.

[6] Between the decree being made in the County Court on 25 September 2019 and this matter being dealt with substantively by me there were protracted hearings in relation to the issue of disclosure and discovery. Those arose out of the plaintiff seeking documentation from the defendant in relation to the availability of the vehicle which was offered by the defendant to the plaintiff and that issue of availability gave rise to two questions, namely, whether the car in question was physically available at the relevant time and whether it was available at the quoted rate. There was a protracted discovery/disclosure process before Master Bell in which the Master dismissed the plaintiff/appellant's application for discovery on 17 September 2020 and then there was a protracted discovery/disclosure appeal hearing, or a number of hearings, before me which eventually resulted in a determination by me that certain categories of documentation which should be subject to appropriate redactions on the grounds of relevance and commercial sensitivity should be disclosed if they were in existence.

[7] Subsequent to that, other disclosure issues arose in this case, issues raised by the court and issues raised by the defendant in relation to the documentation in the custody, possession or power of the plaintiff and I will discuss those other disclosure discovery issues at a later stage in this ex-tempore judgment.

[8] At this stage I have to identify the legal landscape that I must traverse during this judgment and there are a number of relevant decisions that I have to refer to. Primarily, there is the decision of *Copley v Lawn* [2009] EWCA Civ 580; the case of *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583 and the more recent case of local origin, the decision of Mr Justice Scoffield in the case of *McKibbin v UK Insurance Ltd* [2021] NIQB 27. I will say more about those decisions later.

[9] The evidence in the case consisted of the oral evidence of the plaintiff, and, for the defendant, affidavit evidence provided by Mr Daniel Taylor, with one of his substantive affidavits being dated 17 June 2021. Mr Taylor is described as the National Third Party Tech Manager of the defendant and he informed the court, in his affidavit, that the defendant was in a contractual relationship at the relevant time with the company known as Vehicle Replacement Group Ltd and that this company acted as a broker in terms of hiring vehicles to the defendant so that the defendant could, in turn, provide those vehicles to individuals who availed of offers set out in intervention letters. The clear evidence set out in Mr Taylor's affidavit is to the effect

that VRG, as I will describe this broker entity, could have provided a BMW 520 or similar vehicle for the relevant period and, in proof of that, there is a letter from VRG to that effect dated 28 August 2020. There are also relevant statistics of the vehicles obtained by Markerstudy from VRG for the years 2019, 2020 and 2021.

[10] Before dealing with the plaintiff's evidence, it is important to state that there are three legal issues that have to be addressed by the court. In terms of the claim that the plaintiff has failed to mitigate his loss because that is basically what we are dealing with here, the defendant must prove three matters. Firstly, the defendant has to prove that there is a clear offer of a replacement vehicle so that the plaintiff could make an informed choice to accept that vehicle. Secondly, the defendant must satisfy the court that there is a genuine offer capable of fulfilment at the stated rate. Thirdly, the defendant must prove that the particular plaintiff's failure to avail of the offer was so unreasonable as to constitute a failure to mitigate loss.

[11] With that legal framework in mind, I then come to consider four crucial pieces of the plaintiff's evidence, which I consider have direct bearing on the issues at the heart of this case. Those four crucial pieces of the plaintiff's evidence are as follows:

(i) I accept entirely the plaintiff's uncontroverted evidence that he had used CRASH before; that he considered that they had provided a very good one stop all-in service; that there was no hassle involved for him in using CRASH; and that they took over the complete burden of dealing with the fallout from a motor vehicle accident.

(ii) The second important part of the plaintiff's evidence was that he is a businessman. He stated that his word is his bond and he stated that he was not in the business of going back on his word or backing out of agreements that he had entered into, and this was a very relevant matter for him when considering the intervention letter which he frankly admitted that he had received.

(iii) The third crucial piece of the plaintiff's evidence was that he did raise the contents of the intervention letter with someone in CRASH Services and was told to pay no heed to the intervention letter. This is not a direct quote. It is the gist of what was said to him by a representative of CRASH Services, and I place significant importance on this piece of evidence which was given by the plaintiff. I entirely accept that the plaintiff did not bring the intervention letter to the attention of his solicitor.

(iv) The fourth crucial piece of evidence in the case which I have referred to above is that the plaintiff did read the intervention letter and he stated in his evidence that he was able to deduce a rate for a replacement vehicle which was similar to his own. He could only have done so by considering the booklet which was provided along with the intervention letter. The plaintiff's view of the quoted figure, as expressed in his evidence, was that it was "too

good to be true" and he based this opinion on his own recent experience of hiring vehicles both in relation to his business and for his private needs.

[12] Those four crucial pieces of evidence have to be carefully considered when looking at the three legal issues that the court has to consider. At this stage I have to stress that each of these cases has to be decided on its own particular facts, and, on the facts of this case, I am satisfied that the intervention letter did constitute (i) a clear offer to provide a specific vehicle and (ii) this was a genuine offer capable of fulfilment. The question which remains at large is whether the clear offer was an offer which correctly and accurately identified the rate that Markerstudy would be charged by the broker that was providing the vehicle and I have to confess that this issue is one that does cause me some concern in that there is some confusion and lack of clarity about this issue. However, if this court were to determine this case on the basis that the intervention letter did not constitute a clear offer to provide a vehicle which correctly identified the price that the defendant would be charged by the supplier of the vehicle, I think the court would be deprived of an opportunity to provide meaningful guidance in relation to what are, in the court's view, much more significant issues in this case and, therefore, for the purposes of this judgment, I am content to accept the evidence insofar as it goes as was provided by the defendant in affidavit form, as supported by the submissions set out by Mr Ringland today, that a clear offer of a replacement car which correctly identified the cost of that vehicle to the defendant was made to the plaintiff; that the plaintiff did appreciate the nature of that offer; and that the offer that was made was a genuine offer which was capable of fulfilment.

[13] That then leads the court on to consider the third legal issue in the case which is whether this particular plaintiff's failure to avail of this offer was so unreasonable as to constitute a failure to mitigate loss.

[14] Pausing there, in relation to the discovery/disclosure applications in this case; the outcome of the plaintiff's/appellant's discovery/disclosure application in this case, in other words, the order that was made at an earlier stage by this court on appeal from Master Bell should serve as a template for the defendant's disclosure obligations allowing for appropriate redaction for matters of relevance and commercial sensitivity. When the issues of the clarity of the offer of a replacement vehicle and the availability of the vehicle are specifically raised by the plaintiff in a claim of this nature, the parties must have regard to the continuing and evolving nature of their disclosure obligations as a case develops and the issues in the case are crystallised. So, it is important, I think, that this distinct issue of guidance should be contained in this decision and the discovery/disclosure order made by the court on appeal from Master Bell should guide parties and their representatives in relation to their discovery/disclosure obligations.

[15] Returning to consider the third legal issue identified above which is as I have stated whether this particular plaintiff's failure to avail of the offer was so unreasonable as to constitute a failure to mitigate loss; this is an objective test, taking

into account the individual circumstances of the plaintiff. In order to assess whether the plaintiff in any particular case has acted unreasonably in rejecting an offer of a vehicle contained in an intervention letter, it is necessary to consider all the relevant facts and circumstances of the case which have a bearing on that decision. What is abundantly clear is that the plaintiff in this case when dealing with CRASH Services availed of a number of separately provided but interlinked and complimentary services which involved him entering into a number of contractual relationships with separate but linked entities and that these contractual relationships are clearly and centrally relevant to the question of whether the plaintiff acted unreasonably in rejecting the offer contained in the intervention letter.

[16] Having regard to the relevance of these other contractual relationships, it is clear that just as the defendant's discovery/disclosure obligations have been determined to be wider than initially envisaged in this case, so too are the plaintiff's discovery/disclosure obligations and they extend to the documentation setting out the details of each of those contractual relationships, including the contractual relationship with his legal representatives in this case subject to the redactions which were considered by this court as being appropriate on the basis of lack of relevance, legal professional privilege and commercial sensitivity.

[16] Again, the final disclosure position reached in this case in respect of the plaintiff's obligations should serve as a template for disclosure in a case where the issue of failure to mitigate by reason of failing to terminate one or more existing contractual relationships is an issue in the case. In this instance there were four contractual relationships entered into between the plaintiff and various other entities. There was a hire agreement entered into with CRASH Services. This agreement also included a repair agreement whereby the repairs to the plaintiff's motor vehicle were carried out on behalf of CRASH Services by Hughes Motors. Secondly, there was an insurance agreement with Granite Insurance Services Ltd. Thirdly, there was a finance agreement with Granite Financial Ltd. Fourthly, there was an agreement for the provision of legal services with JMK Solicitors.

[17] I do not consider it necessary in a case which at its height involves a damage claim of just under £1,200.00 where a decree of just under £200 was made at first instance to engage in a detailed analysis of each of these contracts other than to highlight the interconnected nature of the same. As part of an all-in package the plaintiff agreed:

(i) to engage CRASH Services to repair his vehicle and to safely store the car prior to its repair;

(ii) to hire a replacement vehicle from CRASH Services for the period when his vehicle was off the road;

(iii) to enter into a contract for the provision of legal services with JMK Solicitors whereby they would act on his behalf to recover his uninsured losses and to

act on his behalf in respect of subrogated claims for hire, storage and repair costs;

(iv) to enter into a finance agreement under which finance would be provided to cover the costs of the repair of the plaintiff's vehicle, the hire of a replacement vehicle and storage costs; and

(v) finally, to enter into an insurance agreement which covered the plaintiff in respect of the cost of any liabilities arising out of or under any of the other agreements referred to above.

[18] It is clear from the insurance policy documentation that the premium for the insurance policy was to be paid by CRASH Services, thus creating a rather circular financial arrangement. It is clear from the terms of the hire agreement that in order to avail of the hire agreement, the plaintiff would have to enter into the finance and insurance agreements. The insurance agreement and the finance agreement are similarly interdependent. There is also a significant degree of interdependence between the agreement for the provision of legal services and the insurance agreement. All this is highly relevant to the question of whether it was reasonable for this plaintiff to reject the offer contained in the intervention letter in this case.

[19] Having regard to the provisions of the various agreements entered into by the plaintiff and again emphasising that each case must be decided on its own facts, I am satisfied that the interdependent and inter-related nature of these various contracts in this case is such that the termination of the existing hire agreement just to avail of a cheaper offer contained in an intervention letter would clearly have had a domino effect resulting in the finance and insurance agreements coming to an end. This would have had the effect of potentially exposing the plaintiff to personal liability for any costs incurred under the hire agreement by CRASH, to the costs of repair and storage, to any legal costs incurred to date and to the prospect of having to seek alternative legal representation. It is clear that all these potential deleterious consequences resulting from the termination of the hire agreement are relevant and must be taken into account by the court when considering whether the plaintiff was acting unreasonably in rejecting the offer contained in the intervention letter in this case. One further matter has to be looked at in respect of the reasonableness or otherwise of the plaintiff's actions. It is clear from the documentation relating to the agreement for the provision of legal services that the plaintiff was specifically advised to bring to the attention of his solicitor any documentation received by him from the defendant's insurer. In relation to the intervention letter, it would appear that this was not done.

[20] What was done was that the plaintiff mentioned this letter to CRASH Services and he was informed that he should pay no regard to that correspondence. That advice was clearly wrong and following the *McKibbin* decision, the plaintiff cannot avoid any adverse consequences flowing from that wrong advice. It is clear that independently of that advice the plaintiff had weighed up his options and had

concluded that he had concerns about the bona fide nature of the offer and that it was not appropriate to break an agreement which he had already entered into, especially when that agreement was with a company that he had done business with in the past and had a very positive experience of doing business with. The wrong advice given by CRASH Services which was contrary to the advice contained in the correspondence from the solicitors retained in this case, did not, in my judgment, have a significant impact upon the deliberations of the plaintiff but its impact cannot be discounted all together.

[21] Having considered all the evidence in this case and, again, emphasising the fact specific nature of my determination, I conclude that the reason proffered by the plaintiff that the offer set out in the intervention letter was too good to be true is an entirely inadequate reason in the absence of making any enquiries whatsoever about the offer. If one makes enquiries either through one's own solicitor or directly with the entity making the offer and following those enquiries one concludes with some justification, that the offer is, indeed, not all that it seems, then that would be a different matter. But, such is not the case in this instance.

[22] The second rationale put forward by the plaintiff is that he is a businessman and a man of his commercial word, and he does not go around breaking or terminating contracts with entities especially when his experience of previous transactions with those entities has been very positive just because a seemingly less costly offer for the provision of one particular service is put before him. I have sympathy for the plaintiff's position that he is a man of his word, but such a position or stance could, in some circumstances, be an unreasonable one to maintain if the existing hire contract could be terminated without any significant risks or consequences arising or occurring. If termination of the hire agreement would mean that other agreements which were intended to ensure that come what may and irrespective of the outcome of the case the plaintiff would never be liable for the cost of repair, storage or any legal fees incurred in the attempt to cover his losses, then this risk or consequence would clearly be one which it would be reasonable for a plaintiff to take into account when deciding whether to accept the offer set out in an intervention letter. Depending on the facts and circumstances of the case, it may be entirely reasonable for a plaintiff to reject an intervention offer because he is genuinely and justifiably concerned that by doing so he will lose the basket of services and protections offered by CRASH Services. However, I have to emphasise that each case depends on its own facts.

[23] The third matter relevant to the plaintiff's decision making is the advice given by CRASH Services that the plaintiff should pay no heed to the contents of the intervention letter. As I have stated above, this advice was clearly wrong, but it is far from clear to what extent this advice actually impacted upon the plaintiff's decision making. In reality this matter is related to the first issue referred to at paragraph [10] above. When an intervention letter is received it has to be carefully considered by the recipient. It should be brought to the attention of the recipient's legal representatives, if those are in place at that time, or as soon as they are in place.

If the offer contained in the intervention letter is considered to be too good to be true, there is a responsibility upon the recipient to make some enquiries from the insurance company to ascertain its bona fides.

[24] Drawing these various strands together, I conclude that I am not satisfied that, in general, the plaintiff acted unreasonably in rejecting the offer contained in the intervention letter in this case. It was entirely reasonable for him to wish to retain the basket of services and protections provided by CRASH Services and consideration of all the material documentation reveals that the withdrawal of the basket of services and protections would have been the likely outcome of his decision to terminate the hire agreement.

[25] I do consider that the advice given by CRASH Services to the plaintiff was wrong and unreasonable and that it would do a material injustice to the defendant to simply ignore this specific matter. I, therefore, consider it appropriate to only award the plaintiff 80% of the amount claimed and therefore, there will be a decree in the sum of £947.84 plus costs above and below.

[26] One final note, I wish to express my gratitude and, indeed, my indebtedness to both counsel for the quality and focus of their oral arguments and their legal submissions in this protracted matter. They are also to be congratulated upon their valuable work in the preparation of the pre-action protocol for personal injury litigation and damage only road traffic accident claims, presently in draft form. Perhaps the contents of that draft PAP dealing with discovery might be reviewed in the light of the contents of this judgment and, in particular, those passages dealing with the parties' discovery/disclosure obligations in credit hire cases.