Neutral Citation No. [2010] NIQB 1 | *Ref:* **McCL7702**

Judgment: approved by the Court for handing down | *Delivered:* **07/01/10**
*(subject to editorial corrections)**

2009 No. 22936/A01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ON APPEAL FROM A DECISION OF THE DISTRICT JUDGE
IN THE COUNTY COURT FOR THE DIVISION OF BELFAST

_____

BETWEEN:

GERARD TURLEY

Plaintiff:

-and-

JOHN BLACK
AND
POLICE SERVICE OF NORTHERN IRELAND

Defendants:

_____

McCLOSKEY J

I INTRODUCTION

[1] This is a so-called "credit hire" case, one of a progressively increasing number of cases of this *genre* coming before the High Court.

[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.

[3] Based on an informal survey which I have conducted of a substantial number of pending appeals, it is apparent that credit hire cases come before the High Court under one of the following guises:

(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 seizzed 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.

II THE PRESENT APPEAL

[4] By reference to the Civil Bill herein, the Plaintiff's claim against the Defendant is for £1,500 for damages for loss and damage allegedly sustained by him by reason of the negligence of the first-named Defendant, as servant or agent of the second-named Defendant, in and about the driving, management, care and control of the second Defendant's motor vehicle, giving rise to an accident said to have occurred on 19th October 2008 at the Springfield Road, Belfast. The constituent elements of the Plaintiff's claim are disclosed in Replies to the Defendants' Notice for Further and Better Particulars. In short, these recite that the Plaintiff claims £705 damages "*as per Rental Advice Note of Crash Services dated 7th November 2008*", together with interest. The entity identified as "Crash Services" (hereinafter "*Crash*") is the finance company with whom the Plaintiff contracted concerning the supply of the substitute vehicle. The breakdown of the charges specified in the Rental Advice Note is as follows:

(a) Delivery and collection: £50.

(b) Hire charges: 4 days @ a daily rate of £130, totalling £520.

(c) Collision damage waiver: 4 days @ a daily rate of £7.50, totalling £30.

[5] Also appended to the Replies is a copy of the agreement executed between the Plaintiff and Crash. This identifies the parties to the agreement, the hire vehicle, the repairer and the daily rate of hire. Clause 7 addresses the issue of "***insurance cover***" in these terms:

> "*You have placed cover with the insurer detailed in Clause 6 in respect of the vehicle shown in Clause 3 and you accept liability for ensuring that cover is maintained whilst the vehicle is in your custody and control …*".

The essence of the agreement between the Plaintiff and Crash is spelled out in Clause 8.2:

> "*When your own vehicle has been damaged in an accident which is not your fault, you can hire a replacement of a similar standard from Crash. You are responsible for the cost, but Crash will finance it for a period of up to 51 weeks while the third party's insurer is pursued for the amounts due. If the hire charges have not been recovered in full by that time you will (so long as the third party is insured) be covered for the amounts owing by your indemnity policy. Your indemnity policy will also cover any legal costs incurred in pursuing the third party. Similar arrangements can be made to finance the repair of your own vehicle*".

The detailed conditions of hire include the following:

> "*10.1 When you cannot use your own vehicle as a result of an accident which in our opinion was the fault of a third party, we will hire you a hire vehicle for the rental period.*
>
> *10.2 At your request and expense we will deliver and collect the hire vehicle at the beginning and the end of the rental period …*
>
> *10.3 If during the rental period your use of the hire vehicle is interfered with to any significant extent by any defect or damage, we will repair or replace it as soon as reasonably practicable …*
>
> *11.1 You will pay hire charges together with interest without demand, in full in a single payment immediately upon the conclusion of the credit period. …*
>
> *11.2 You must take reasonable steps to keep the rental period to a minimum …*

> *13.1* ***You must make all reasonable endeavours to recover Crash's charges from the third party and must at our request instruct a solicitor approved by us to assist you and attend court if necessary.***
>
> *13.2 You must inform us if you receive any settlement proposals from the third party in respect of any part of Crash's charges and must not respond to such a proposal unless we agree.*
>
> *13.3* ***In the event that we or your solicitor receive a settlement of all or any part of Crash's charges, you authorise it to be paid to us ...***
>
> *13.5* ***We may terminate the rental period at 24 hours notice if in our opinion you will be unable to recover any of the ongoing hire charges from the third party***."

[My emphasis].

This agreement is signed by the Plaintiff and is dated 3rd November 2008. As the above clauses make clear, the contractual benefits conferred on the Plaintiff extend beyond simple use and enjoyment of the substitute vehicle.

[6] As the Plaintiff's claim progressed, an issue arose concerning a disputed witness summons. Order 24, Rule 9(1) of the County Court Rules provides:

> "*Subject to paragraph (2), where any party to any action or other proceedings desires a person to be summoned as a witness to give oral evidence at the hearing in court or to produce at the hearing in court a document in his possession or control, a Chief Clerk for any County Court Division, or other officer of the court authorised by him for the purpose, shall, on the application of the party, issue a witness summons in Form 110 together with a copy thereof*".

Rule 9(2) is concerned with frivolous or vexatious applications for the issue of a witness summons and has no relevance in the present context. The Defendant's solicitors applied to the Chief Clerk for the issue of a witness summons against Christopher McCausland of McCausland Holdings/Value Cabs. The Chief Clerk acceded to their application and issued a witness summons directed to Mr. McCausland in the following terms:

> "*You are hereby summoned to attend … (etc) … to give evidence in the above action or proceeding and to bring*

with you and produce to the court the documents specified hereunder …

1. Copies of all invoices between McCausland Holdings/Value Cabs and Crash Services in respect of Skoda Superb 1.9 TDI taxi registration VKZ 5147.

2. Details of the rate charged and any applicable receipts for documents relevant to same.

3. Copies of any other relevant documentation in relation to the hire of this vehicle or any other relevant documentation".

In short, in the present case, with reference to the introductory summary in paragraph [2] above:

(a) The Plaintiff's claim against the Defendants arose out of a road traffic accident.

(b) The Plaintiff is a taxi driver by occupation and one element of his claim relates to the hire of a substitute vehicle – in this particular case, a properly adapted taxi.

(c) The McCausland organisation supplied this vehicle to the Plaintiff.

(d) This was associated with the execution of a credit hire agreement between the Plaintiff and the finance company Crash.

Accordingly, underlying the witness summons was a suggestion by the Defendants that there existed a relevant commercial arrangement between McCauslands (*qua* supplier of the vehicle) and Crash. Furthermore, the Defendants were plainly contending that the information and documents which they were seeking to elicit from Mr. McCausland could have a bearing on the court's determination of this particular aspect of the Plaintiff's claim.

[7] Mr. McCausland's legal representatives responded by moving an application to set aside the witness summons on a number of grounds, including asserted oppression. This application was partially successful, resulting in an order by the District Judge pursuant to which a modified witness summons was to be served on Mr. McCausland. The modifications entailed the deletion of the second and third categories of documents. The first category was affirmed. It is against this order that Mr. McCausland appeals to the High Court.

[8] As the above summary demonstrates, an interlocutory diversion of some substance has been the hallmark of these proceedings to date and has delayed the listing of the Plaintiff's claim in the County Court for final determination. This does

not imply any criticism of the parties or their legal representatives. I acknowledge that the issue raised by this appeal is of some importance, not least because it appears to arise, either in it`s present guise or something comparable, in a significant number of the other credit hire cases. This judgment could, therefore, have wider repercussions.

III THE DECIDED CASES

[9] In ***Dimond –v- Lovell*** [2002] 1 AC 384 (also [2000] 2 All ER 897), 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. The terms of the hire agreement allowed the Plaintiff credit on the hire charges until completion of his claim for damages and also permitted the supplier to pursue such a claim in the Plaintiff's name. The Court of Appeal held that the agreement was unenforceable against the Plaintiff under the Consumer Credit Act 1974. The ensuing appeal was dismissed by the House of Lords. Lord Hoffmann, who delivered the leading speech, specifically addressed the issue of damages. He observed:

> "*But the Court of Appeal, in addition to dismissing the claim, expressed a firm view on the principles by which damages should have been calculated if the hiring agreement had been enforceable. Although not necessary for the decision,* ***it can be said to be the most important point on which your Lordships heard argument.***"

[P.400e/f, emphasis added].

His Lordship continued (at p. 401e):

> "*I would accept the judge's finding that Mrs. Dimond acted reasonably in going to First Automotive and availing herself of its services. I am sure that any of your Lordships in her position would have done the same. She cannot therefore be said not to have taken reasonable steps to mitigate her damage*".

This, however, did not impel to the conclusion that the Plaintiff could recover the full amount levied by the credit hire company. This was on account of the "*additional benefits*" conferred on the Plaintiff by her contract with the company:

> "*She was relieved of the necessity of laying out the money to pay for the car. She was relieved of the trouble and anxiety of pursuing a claim against Mr. Lovell or the CIS* [his insurers]. *She was relieved of the risk of having to bear the irrecoverable costs of successful litigation and the*

> *risk, small though it might be, of having to bear the expense of unsuccessful litigation*".[at p. 401f]

Lord Hoffmann noted that under English law these do not constitute compensatable losses. For his Lordship, the important factor was "***the rule*** *that requires additional benefits obtained as a result of taking reasonable steps to mitigate loss to be brought into account in the calculation of damages*" [**my emphasis**]. In other words, there must be some financial adjustment to reflect the *additional* contractual benefits secured by the Plaintiff via the arrangements which have been executed for the supply of a substitute vehicle. His Lordship continued [at p. 402f-403a]:

> "*How does one calculate the additional benefits that Mrs. Dimond received by choosing the First Automotive package to mitigate the loss caused by the accident to her car? The hiring contract does not distinguish between what is attributable simply to the hire of the car and what is attributable to the other benefits. But I do not think that a court can ignore the fact that, one way or another, the other benefits have to be paid for. First Automotive have to bear the irrecoverable costs of conducting the claim, providing credit to the hirers, paying commission to the brokers, checking that the accident was not the hirer's fault. A charge for all of this is built into the hire…*
>
> *How does one estimate the value of these additional benefits that Mrs. Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay First Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car …*
>
> *I quite accept that a determination of the value of the benefits which must be brought into account will depend upon the facts of each case …*
>
> *The equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided*".

Lord Hobhouse concurred. He stated (at p.407b/e):

> "*The sum which she paid, having regard to what she was to get was, on the evidence, reasonable. But she cannot claim the whole cost as the cost of mitigating the loss of the use of her car. The cost of that was, on the evidence, only about £24 per day.* ***The remainder of what she paid was attributable to other matters and therefore should not***

> ***be included in the cost of mitigation.*** *This is the preferred way of looking as this aspect of the dispute between the parties on this point but there are other ways which lead to the same conclusion. One is that preferred by Judge LJ in the Court of Appeal. The excess cost was not reasonably incurred* ***as the cost of hiring the substitute car****. Mrs. Dimond's right of recovery is limited to the reasonable cost, that is to say the lesser sum. Another way of looking at the matter is to say, as does my noble and learned friend that, if the whole cost is to be brought into account, then the benefits must be brought into account as well* [viz. the ***Westinghouse*** principle]".

[Emphasis added].

In Lord Hobhouse's words, the compensation was to be measured by making "*a commercial apportionment*" between the cost of hiring a car and the cost of the other benefits. This was necessary in order to avoid "*doubt counting*". Lord Browne-Wilkinson agreed with Lord Hoffmann. Lord Saville expressly declined to express any view on this issue. Lord Nicholls disagreed with the majority, concluding that the negligent driver's insurers should properly pay for the *additional* benefits secured by the Plaintiff. He stated (at p. 391a/d):

> "*The position in law is that the negligent driver, backed by his insurers, is liable to pay* ***reasonable*** *charges incurred in hiring a replacement car if this is* ***reasonably*** *necessary …*
>
> *So long as the charge for the additional services is* ***reasonable****, this charge should be part of the recoverable damages.*"

[Emphasis added].

[10] Properly analysed, the passages quoted in the preceding paragraph are *obiter*. However, it must be acknowledged that they emanate from the highest court in the land and, further, that three out of the four members of the Appellate Committee who addressed the discrete issue were in agreement with each other. It was not long before issues of a comparable nature resurfaced in the House. In ***Lagden –v- O'Connor*** [2004] 1 AC 1067, the factual matrix consisted of a credit hire agreement between the Plaintiff, whose vehicle was damaged by the Defendant's negligence and a credit hire company. Pursuant to this agreement the company supplied the Plaintiff with a vehicle at no cost to him, entailing a 26-week credit facility and allowing the company to recover its charges from the negligent Defendant's insurers, together with an insurance policy to provide payment in the event of non-recovery within the period. In consideration of these benefits, the fees levied were higher than the conventional rate for simple vehicle hire. The amount claimed was

£659, which was challenged. The determination of the issue turned on the characteristics of the Plaintiff and, in particular, his impecunious state. At every level, it was held that the Plaintiff was entitled to recover the entire cost from the Defendant. Lord Nicholls described the appeal as a "*sequel*" to the decision in ***Dimond,*** noting that the appeal formed part of "*the long running contest between motor insurers and credit hire companies*". The heart of Lord Nicholls' reasoning is found in the following passage:

> *"[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."*

What are the characteristics of the impecunious Plaintiff? Lord Nicholls offered the following test:

> *"[9] There remains the difficult point of what is meant by "impecunious" in the context of the present type of case. Lack of financial means is, almost always, a question of priorities. In the present context what it signifies is inability to pay car hire charges without making sacrifices the Plaintiff could not reasonably be expected to make. I am fully conscious of the open-ended nature of this test. But*

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

Lord Hope, the third member of the majority, stated:

> "*[61] … It is not necessary for us to say that T**he Liesbosch** was wrongly decided. But it is clear that the law has moved on **and that the correct test of remoteness today is whether the loss was reasonably foreseeable.** The wrongdoer must take his victim as he finds him …*
>
> *This rule applies to the economic state of the victim in the same way as it applies to his physical and mental vulnerability. **It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages***".

[Emphasis added. One might possibly, with due deference, add to the final sentence of this quotation the words "*on account of his impecuniosity*"].

[11] That there is scope for legitimately differing views in this vexed area, even at the level of the highest judicial tier, is amply illustrated by Lord Nicholls' dissenting views in ***Dimond*** and the later dissents of Lords Scott and Walker in ***Lagden***. Be that as it may, effect must obviously be given to the majority view in ***Lagden***, while due respect must be accorded to the *obiter* majority view in ***Dimond***.

[12] The analysis of Longmore LJ in ***Bee –v- Jenson*** [2007] EWCA. Civ 923 is noteworthy. In paragraphs [5] – [7], one finds a valuable résumé of the history of this kind of litigation. In dispute was a hiring charge of some £610, representing 21 days hire at just under £25 *per diem*. The Defendant argued that the true – and hence, recoverable – cost of the hire of the replacement vehicle was £610 reduced by a payment by the credit hire company to another insurance company which, in accordance with the Plaintiff's motor insurance policy, was obliged to arrange a substitute hire vehicle to be supplied to him by a nominated supplier. Part of the argument advanced was that the Plaintiff could not recover damages for an amount which he was not liable to pay. The court rejected this argument: see paragraph [13]. Longmore LJ continued:

> "*[18] Once the question whether* [the Plaintiff] *was personally liable for the hire charges is put on one side, the only question is whether* [he] *can recover from* [the Defendant] *what is accepted to be a reasonable hire charge reasonably incurred or whether* [the Defendant] *is entitled to submit that he is only liable for the true cost to* [the Plaintiff's] *insurers*".

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.

[13] The jurisdiction of Northern Ireland has recently made a not insignificant contribution to the jurisprudence in this field. I refer to the judgments of Stephens J in ***Gilheaney –v- McGovern*** [2009] NIQB 38, ***Kelly –v- Mackle*** [2009] NIQB 39 and ***Salt –v- Helley*** [2009] NIQB 69. In ***Kelly***, the dispute centred on the recoverability of a daily hire rate of £227 plus VAT for a period of 34 days. From the evidence the

court was aware that the hire charge actually paid by the credit hire company to the vehicle supplier was £55 per day. Stephens J stated:

> *"[20] A claim for the cost of hiring a replacement vehicle can be regarded as either a claim for general damages, in relation to which a fair approach to quantum would be to award a sum based upon the spot hire charge for a comparable vehicle or a special damage claim based upon the costs of hire. I have rejected the special damage claim based upon the cost of hire as economic folly but by doing so I do not consider that means that the Plaintiff is not entitled to any compensation for the loss of use of the vehicle during the hire period see* ***Bee –v- Jenson*** *[2007] 4 All ER 791 at paragraphs [15]-[16] and [20]-{21} and see also* ***Alexander v. Rolls Royce Motorcars Limited*** *[1996] RTR 95. Where as here the Plaintiff needed the use of the vehicle one method of calculation of general damages is that the Plaintiff is entitled to what would have been a reasonable amount for the hire of a replacement vehicle. The claimed rate was not a reasonable rate given the circumstances of the taxi business. The hire charge paid by Crash Services to Loughshore Autos Limited was £55 per day. That hire rate was not available to the public and could be viewed as a rate restricted to a limited number of trade organisations. However I take it as a reference as to the damages which ought to be paid for the unjust and unlawful withdrawal of the vehicle from the Plaintiff's use. Ordinarily the trade rate should be adjusted to a spot hire rate but I was not assisted by the Plaintiff as to what the difference should be between the trade rate and the spot rate or as to any of the costs that would have been incurred. In principle I consider that some uplift should be allowed but in the absence of evidence I can either confine the award to the trade rate see* ***Giles v Thompson*** *[1993] 3 All ER 321 at 363 or I can approach the matter in a broad way and make some adjustment to it. In this case there was a total absence of evidence as to the spot rate. I decline to make an adjustment and fix the rate at £55 per day. ".*

The outcome was an award of £1,870, representing £55 per day for a period of 34 days. The learned judge added:

> *"[23] Another potential method of assessing the Plaintiff's loss is by reference to loss of profits. A very rough estimate was given of £300 loss of gross income each weekend throughout the hire period of 34 days. There were 5 weekends during that period. Accordingly the total loss of*

gross income was £1,500. No evidence was given as to the profit levels from that gross income. There was in addition the second commercial aspect affected by the loss of use of the vehicle namely the ability to build up a fledgling business. I consider that the loss of profits taking into account the second commercial aspect very roughly approximates to the figure of £1,870 that I assess is an appropriate amount to be awarded in relation to general damages.".

[14] In ***Gilheaney –v- McGovern,*** the question of the Plaintiff's suggested impecuniosity was the most prominent issue. He claimed a vehicle hire recovery amount totalling £1,092 (at a daily rate of £42). The learned County Court Judge awarded some £796 (reflecting a daily rate of approximately £30). The evidence established that a car hire company (Reliable Cars Limited), would have charged the Plaintiff £32.75 per day. The reasoning and conclusions of the learned judge appear in the following passages:

"[20] The Plaintiff made no attempt to consider the rate of hire. He simply signed the hire agreement being indifferent as to the amount to be charged. I also find as a fact that he was indifferent, within reason, as to which company provided the replacement vehicle and that if he had made enquiries he would have selected a credit hire company on the basis of price. Accordingly if he had known of Reliable Cars Limited he would have used that company. Similarly if he ought to have known of Reliable Cars Limited through reasonable enquiries then he ought to have used that company.

[21] The Plaintiff did not know of Reliable Cars Limited. Ought he to have known? The evidence established that Reliable Cars Limited did not have a visible presence in the market place in County Fermanagh. There was no evidence from the Defendant that an internet search would have been relatively straightforward. The web page of Reliable Cars Limited was not produced by the Defendants in evidence. There was no evidence as to what sites would have been produced by a Google search for motor vehicle credit hire companies in Northern Ireland. There was no evidence as to how long such an internet search would have taken. Such evidence may be forthcoming in other cases and if it is then even for those facing exams it might be established that such a comparative search of the market place would not be particularly arduous or time consuming. However in this case, absent such evidence and with particular emphasis on the fact that the Plaintiff

was in the middle of his "A" level exams, I conclude that the Defendants have not established that it was unreasonable for the Plaintiff to use Crash Services. I accordingly allow the Plaintiff's appeal and award £1,092 plus VAT in respect of the hire charge as opposed to £795.86 plus VAT awarded in the County Court."

[15] In the third of this trilogy of decisions, ***Salt –v- Helley***, 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*** *[1993] 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 principle. 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."

As the passages quoted from these three decisions hopefully demonstrate, there is ample scope for intense factual sensitivity and variation in the collection of decided cases belonging to this sphere.

IV THE PARTIES' ARGUMENTS

[16] On behalf of Mr. McCausland, it was submitted by Mr. Dunford that the McCausland organisation has no contribution to make to the debate between the

Plaintiff and the Defendant; that McCauslands are strangers to the arrangements between the Plaintiff and Crash; that the central issue for the court of trial will be whether the amount claimed by the Plaintiff for vehicle credit hire is reasonable; and that the arrangements between McCauslands and Crash are alien to this debate. In support of these submissions, reliance was placed on ***Re Global Info/Secretary of State for Trade and Industry –v- Wiper and Others*** [1999] 1 BCLC 74 and ***Burdis –v- Livsey (and other cases)*** [2003[QB 36, paragraph [137].

[17] On behalf of the Defendants, Mr. Montague QC (appearing with Mr. Mercer) submitted that the reasonableness of the amount claimed by the Plaintiff for the vehicle credit hire will be the main issue to be determined by the court of trial. The amount thus claimed by the Plaintiff is contested by the Defendants on the ground of unreasonableness. It is contended that the Plaintiff acted unreasonably in hiring a replacement taxi and in doing so on credit hire terms. Further, the amount claimed is challenged as exorbitant. It was further submitted that the decision in ***Kelly –v- Mackle*** illustrates the importance of the trade rate viz. the amount paid by Crash to McCauslands for the supply of the vehicle. Taking into account the Plaintiff's occupation of taxi driver, it was also contended that evidence of the amount which McCauslands would have charged to a taxi driver on the basis of a simple supply of a replacement vehicle, without any recourse to the Crash credit hire arrangements, is plainly relevant. Finally, it was argued that the impugned order of the District Judge should not merely be affirmed but ought to be extended.

V <u>CONCLUSIONS</u>

[18] While the issue to be determined in this appeal is of an interlocutory nature, it falls to be evaluated, and resolved, against the backcloth of legal principle outlined above. These governing principles must operate as the touchstone by reference to which the court, at this interlocutory stage, seeks to visualise and identify the issues which may properly be explored in evidence at the substantive trial. It is important to emphasize that this is not the court of trial and, in consequence, the resolution of interlocutory disputes in these credit hire cases – whether they relate to discovery of documents, interrogatories or witness summonses – entails an unavoidable element of prediction on the part of this court.

[19] There are evident similarities linking the principles which govern the exercise of a court's power to order the issue of a witness summons, (including the power to vary or set aside same), to make discovery orders and to resolve contentious issues relating to interrogatories. Furthermore, I consider that interlocutory disputes of this kind place the spotlight firmly on the contemporary philosophy which governs the transacting and resolution of civil litigation generally. In resolving disputed issues of this kind, including those arising in the present appeal, I would draw attention to two reported decisions in Northern Ireland which, in my view, have rarely received sufficient exposure, taking into account particularly the culture of contemporary civil litigation. Each concerns discovery disputes. In the first, ***Mark – v- Flexibox Limited*** [1988] NI 58, a claim for damages for dermatitis, the Master

ordered discovery of the Defendant employer's medical records concerning the Plaintiff and the Defendant appealed, arguing that production of the documents was protected by legal professional privilege. MacDermott LJ noted how the House of Lords had formulated the "*dominant purpose*" test in ***Waugh –v- British Railways Board*** [1980] AC 521 and observed that questions of fact and degree arise in every case. Shortly before the hearing of this appeal the House of Lords had decided the Northern Ireland appeal of ***O'Sullivan –v- Herdmans*** [1987] 3 All ER 129, where Lord Mackay stated, at p. 136:

> "*Further, the early production of these documents may well affect the course of the litigation before the trial. It may lead the Defendants to consider a settlement of the action and it certainly will enable the medical advisers and the legal advisers of the Defendants to appreciate the real issues in the case when they are preparing for trial.* ***The interests of justice are, in my opinion, served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started***".

[My emphasis].

MacDermott LJ described this passage as –

> "*… indicative of current judicial opinion which is concerned with litigation being conducted openly and as free from technicality as possible. I recognise and support this ambition …*[and] *readily adopt a further passage from the speech of Lord Edmond-Davies (p. 143c):*
>
> > *'And in my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld.* ***Justice is better served by candour than suppression***'."

[At p. 91 - emphasis added].

Unsurprisingly, the Defendant's appeal was dismissed.

[20] Later that year, O'Donnell LJ gave judgment in ***Hughes –v- Law and Ulsterbus*** [1988] 12 NIJB 30. This too was an employers liability case in which discovery of certain documents was again resisted by the Defendant on the ground

of legal professional privilege. His Lordship concluded that the records in question had been generated for multiple purposes, describing them as "*routine reports procured after every accident involving a vehicle owned by the Appellants*" (p. 35). He continued (at pp. 36-37):

> "***The approach of their Lordships in Waugh's case is to encourage more candour and truthful revelation in the conduct of litigation, in the hope that this might in turn lead to the more effective administration of justice ...***
>
> ***It will, I hope, mean that litigation should become less of a game in which a premium is placed on the involvement of evidence and make it a more effective instrument for the pursuit of justice.*** *While it is important that professional legal privilege be maintained …*
>
> *it should, however, as Lord Edmond-Davies said, be rigidly confined within narrow limits*".

[My emphasis].

The philosophy enshrined in each of these decisions is self-evident and, recalling the culture within which contemporary litigation is conducted, they plainly should not be confined to their specific contexts viz. disputed claims of legal professional privilege in relation to discovery of documents.

[21] In ***Burdis –v- Livsey (and other cases)*** [2003] QB 36,, Aldous LJ stated:

> "*[136] … There was no spot rate as such* [in the evidence before the judge …]
>
> *[137] Met with this problem, the judge considered three ways of arriving at the correct measure of loss. First, to break down the charge made by the accident hire providers so as to enable the unrecoverable element to be stripped out. This was in theory an acceptable solution, but the judge rejected it as being too cumbersome and expensive in hostile litigation as it would entail detailed disclosure and analysis in thousands of small cases. The cost involved would not be proportionate and for that reason he did not favour it as a practical solution. We agree.*"

[See pp. 84-85].

This passage belongs to the context in which it was generated. But has it any broader application to other credit hire cases, including the present case? In

reflecting on this, I am obliged to consider the evidence before the court and the information available about other cases of this *genre*. Having done so, I am satisfied that the concerns expressed in this passage have no substance in the present context. A requirement, through the medium of a witness summons, that a non-party, who will receive the appropriate financial allowance (per Order 24, Rule 9(7)) bring to court, on a specified date, a defined, self-contained number of documents likely to illuminate the court's determination of the issues and which, Mr. Dunford realistically conceded, will be easily identified and recovered, does not seem to me cumbersome, disproportionate or unduly expensive. In short, in this way, the interests of justice are likely to be promoted in a proportionate manner.

[22] In ***Re Global Info*** (*supra*) the general principles identified by the learned deputy High Court Judge were that the documents sought must be specifically identified; a subpoena may not be used as an instrument to obtain discovery; a subpoena must not be of a fishing or speculative nature; production must be necessary for the fair disposal of the action or to save costs; and confidentiality might be a legitimate objection, on the ground of oppression. I am satisfied that none of these principles militates against the issue of a witness summons in the terms ordered by the District Judge. In summary, applying this template to the present case:

(a) The documents sought via the witness summons are clearly identified.

(b) The documents in question are not in the Plaintiff's possession, custody or power (this was common case) and the recipient of the witness summons, Mr. McCausland, will not be obliged to engage in any exercise of evaluating whether any particular documents are relevant to the issues in the litigation. Furthermore, I consider that the exercise of complying with the witness summons should not entail any requirement on his part to obtain legal advice.

(c) The witness summons ordered by the District Judge is not contaminated by any element of speculative enquiry or search.

(d) No issue of confidentiality arises.

(e) I am satisfied that the witness summons will not subject Mr. McCausland to inappropriate oppression. Firstly, it is acknowledged that the documents in question will be easily identified and recovered, probably by a member of secretarial or administrative staff. Secondly, I consider that the whole of the arrangements between the McCausland organisation and Crash bear the stamp of litigation from their inception. Furthermore, given the hallowed rule that litigation is conducted in public (see, for example, ***Attorney General –v- The Leveller Magazine*** [1979] AC 440, per Lord Scarman, pp. 470-471), with

all relevant cards on the table, Mr. McCausland cannot make any sustainable case of commercial confidentiality. Finally, sensible arrangements will be readily available to ensure that he is not unduly inconvenienced in having to attend court.

[23] I am also satisfied that production of the documents specified in the witness summons is necessary for the just disposal of the litigation. In my view, the overarching test to be applied is whether evidence of the likely contents of these documents will be admissible, as satisfying the fundamental criterion of relevance. In other words, could there be a sustainable objection to such evidence being adduced? Or will it be relevant, in the sense that it may have a bearing on the court's resolution of the Plaintiff's claim for the vehicle credit hire charges and the Defendant's objections, focussed primarily on unreasonableness. Having regard to the governing principles, in particular the formulations of Lord Hoffmann and Lord Hobhouse set out in paragraph [9] above, and as readily illustrated in the cases recently decided by Stephens J – see paragraphs [12] – [14] above – I have every expectation, at this forecasting stage, that the court of trial will consider this evidence relevant and will, accordingly, permit exploration of its contents and the issues which it raises. Having found that there is no sustainable objection based on oppression, I conclude that, subject to the question of scope (see paragraph [26*], infra*), the witness summons under challenge in this appeal is appropriate.

[24] I consider that the conclusion which I have reached is entirely consonant with the principles and philosophy forming the undercurrent of the decisions in ***Waugh***, ***O'Sullivan***, ***Mark*** and ***Hughes***. I would expect the prospects of consensual resolution of the Plaintiff's claim to be enhanced by the production of the documents in question. As a minimum, some reduction and refinement of the contentious issues can reasonably be anticipated. Furthermore, I regard as wholly unrealistic the Appellant's suggestion that an order of the kind under appeal – or the execution thereof - should be deferred until some unspecified stage of the trial. This runs entirely contrary to the paramountcy in contemporary litigation of full and early preparation by the parties' legal representatives, isolation of the real issues in dispute, the minimisation of costs and the reduction of contested facts and issues.

[25] Furthermore, I would strongly urge a common sense, realistic approach by all concerned. This would entail the documents in question being provided to the Defendants' solicitors by the non-party to whom the witness summons is directed, well in advance of trial. They will then become discoverable documents, to be produced to the Plaintiff's legal representatives. At this juncture, there should be rich potential for agreeing that the materials be presented as agreed documentary evidence, thereby obviating the need for the non-party to attend court. Furthermore, this will facilitate full preparation by both legal teams for the trial which will entail, *inter alia*, the isolation and reduction of the real issues in dispute. This will also facilitate adherence to what has become established practice in the High Court upon the hearing of credit hire appeals, namely the preparation of a

two-part schedule listing (in part 1) all agreed facts and (in part 2) any contentious factual issues.

[26] The final matter concerns the suggested expansion of the order of the District Judge. The parties were agreed that this court is empowered to take this course. I am satisfied that this is correct and I note, further, the endorsement of this power in ***Re Global Info,*** paragraph [6]. In my view, taking into account the principled framework outlined above and the views and conclusions which I have expressed, some extension of the terms of the witness summons permitted by the order of the District Judge is justifiable and appropriate. At present, the order is confined to the first of the three categories of documents noted in paragraph [6] above. I consider that the order should be augmented in the following manner:

(a) Firstly, by enlargement of the permitted category by varying the terms of the extant order, to be rephrased "*copies of all invoices and any other documents …*[as per existing text]".

(b) By adding a second category, in the terms "*all documents of any kind relating to charges levied to taxi drivers for the supply by the McCausland organisation of a replacement taxi vehicle, applicable to the period January to December 2008*".

(c) By adding, as a third category, "*all documents relating to the arrangements between the McCausland organisation and Crash Services for the supply, hire and payment of replacement taxi vehicles, applicable to the period January to December 2008*".

The order of the District Judge will be varied accordingly.

VI GENERAL

[27] This judgment was stimulated by a disputed witness summons. I have already commented on the overlapping principles which belong to the inter-related spheres of witness summonses (or subpoenae), discovery of documents and interrogatories. The issues determined by this judgment could, conceivably, have arisen under any of these guises. Logically, if this matter had come before the court as a contested discovery issue or disputed interrogatories, it seems likely that the judgment would have been to the same effect viz. requiring production of the documents or information in question. Accordingly, those involved in other cases belonging to the three categories identified in paragraph [3] above are strongly encouraged to take note of the terms of this judgment, with a view to determining whether it assists in the resolution of the contested issues in their individual cases, whether these be of an interlocutory or substantive nature, or both.

[28] As will be readily apparent to every reader, the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature of Northern

Ireland looms large in this judgment, a reflection of its ever-increasing influence in the transaction of civil litigation in both the County Court (where Order 58, Rule 2 has applied to every action commenced since 4 November 2002 – per SR 2002/255) and the High Court where, by clear design rather than accident, it occupies a position at the apex of the pyramid, dominating and imbuing the legions of detailed rules which follow in its wake.

The County Court Checklist

[29] During the last twelve months, a modest, but notable, modernisation of the procedures governing both County Court appeals and also Masters` appeals was introduced. It entails the completion of a simple checklist by the Appellant's solicitors following service of Notice of Appeal. At this stage, there is a directions hearing in the High Court, for the purpose of confirming that everything is in order, to enable a definitive hearing date to be allocated to the appeal. The checklist serves to concentrate all parties' minds on the procedural, practical and preparatory matters to which they should properly be alert before a hearing date is confirmed. Attached to the checklist is a sample book of appeal index. This was prepared by the High Court judiciary, in circumstances where the quality and standard of books of appeal was varying enormously and in order to address another evil viz. the complete absence of a book of appeal in certain cases.

[30] In the present case, the book of appeal, regrettably, had several shortcomings. When this was brought to the attention of the Appellants' legal representatives, they retorted that some of the missing documents were in the possession of other parties' solicitors, suggesting, by implication, that they were not responsible for their inclusion. This reflects a grave misconception which the court is anxious to correct for future reference. It is the exclusive responsibility of the Appellant's legal representatives to ensure that a properly indexed and constituted book of appeal is prepared, *in every case.* If this should entail procuring certain materials from another party's solicitor, this elementary step should be undertaken. If any difficulty of substance materialises, this can be ventilated at the aforementioned directions hearing. Practitioners will doubtless be aware that this simple new procedure, which is considered to be working well in practice, has as its overarching objects the efficient and expeditious processing and completion of County Court and Masters` appeals and the saving of costs. It is, at its heart, a manifestation of the over-riding objective.

[31] Finally, as this appeal has failed, the Defendants are, *prima facie*, entitled to their costs. I shall consider further argument on this discrete issue, if necessary.