Neutral Citation No: [2019] NIQB 69	*Ref:* COL11007
*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 25/06/2019

2017 No 124122

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(COMMERCIAL LIST)

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BETWEEN:

CARL FRAMPTON

Plaintiff

and

FINBAR PATRICK BARRY McGUIGAN AND SANDRA McGUIGAN AND CYCLONE PROMOTIONS (UK) LTD (COMPANY No 10493415)

Defendants

AND BY COUNTERCLAIM

BETWEEN:

FINBAR PATRICK "BARRY" McGUIGAN

Counterclaimant

and

CARL FRAMPTON

Defendant to Counterclaim

_____

COLTON J

[1] The defendants/counterclaimant in this action have brought 11 applications to issue writs of subpoena duces tecum and to avail of the "Khana" procedure to require the proposed respondents produce certain documents on a date prior to the trial.

[2] In relation to the first two of these applications these are being dealt with by way of affidavit through the plaintiff which should obviate the need to issue a summons, the court having made a minor change to the documentation sought.

[3] Applications in respect of 9 and 10 have been granted.

[4] Application 11 was refused. I did not consider that there was a sufficient evidential basis for issuing the summons, in particular having regard to the engagement of the Article 8 rights of a Mexican based boxer, in circumstances where making contact with him was problematic.

[5] The requests at numbers 3-8 inclusive are controversial. All of these applications involve issuing summonses outside the jurisdiction – in England.

[6] The governing provisions are Order 38 Rules 11 and 12 of the Rules of the Supreme Court (Northern Ireland) 1980 and section 67 of the Judicature (Northern Ireland) Act 1978 and the principles set out in the well-known case of *Khana v Lovell White Durrant* [1995] 1 WLR 121.

[7] Order 38 Rule 11 provides:

> "(1) At any stage in a cause or matter the Court may order any person to attend any proceedings in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.
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> (2) No person shall be compelled by an order under paragraph (1) to produce any document at a proceeding in a cause or matter which it could not be compelled to produce at the trial of that cause or matter."

[8] Section 75 of the 1978 Act permits such a summons to be served outside the jurisdiction. This is a discretion vested in the court to be exercised "if satisfied that it is proper to compel" the relevant witness.

[9] The documents sought in the disputed applications relate to the plaintiff's contractual arrangements after he parted company with the defendants in terms of the management and promotion of his boxing career. The proposed respondents are essentially connected to MTK Global Promotional Management Ltd and Queensbury Promotions Ltd.

[10] The documents sought are vast in terms of both quantity and scope. This can be illustrated by the schedule in relation to the application to subpoena Mr Frank Warren of Queensbury Promotions, who were appointed as the plaintiff's promoters (according to the defendants and not apparently in dispute) on or before 24 September 2017; the plaintiff having issued a public statement that he had parted company with Barry McGuigan and Cyclone Promotions on 21 August 2017. The schedule includes 17 requests as follows:

> "1. All phone records from 01/04/17 to 30/09/17.

2. All text messages from 01/04/17 to 30/09/17.

3. All Agreement/s as between Carl Frampton and Mr Frank Warren and/or Queensberry Promotions Ltd.

4. Remittance advices in relation to bouts against Horacio Garcia, Nonito Donaire, Luke Jackson and Josh Warrington.

5. All documents relevant to the payments into Rip Rock Ltd from Mr Frank Warren (Queensbury Promotions).

6. Signed bout agreement in relation to Horacio Garcia.

7. Signed bout agreement in relation to Nonito Donaire.

8. Signed bout agreement in relation to Luke Jackson.

9. Signed bout agreement in relation to Josh Warrington.

10. All VAT invoices in relation to bouts against Horacio Garcia, Nonito Donaire, Luke Jackson and Josh Warrington.

11. All documentation including agreements, payment documentation and communications (whether electronic or documentary) between the plaintiff and/or Rip Rock Ltd (the corporate vehicle used by the plaintiff) with ESPN, Top Rank, BT Sport or Mr Bob Arum.

12. All documentation including agreements, payment documentation and communications (whether electronic or documentary) between Queensberry Promotions Ltd, Carl Frampton and/or Rip Rock Ltd (the corporate vehicle used by the plaintiff) with BT Sport and/or Panama Cable Onda Sports in relation to Frampton v Garcia, 18.11.17, SSE Arena, Belfast, Northern Ireland.

13. All documentation including agreements, payment documentation and communications (whether electronic or documentary) between Queensberry Promotions Ltd, Carl Frampton and/or Rip Rock Ltd (the corporate vehicle used by the plaintiff) with BT Sport and/or Panama Cable Onda Sports and/or Argentina FyC Sports in relation to Frampton v Donaire, 21.4.18, SSE Arena, Belfast, Northern Ireland.

14. All documentation including agreements, payment documentation and communications (whether electronic or documentary) between Queensberry Promotions Ltd, Carl Frampton and/or Rip Rock Ltd (the corporate vehicle used by the Plaintiff) with BT Sport and/or ESPN+ in relation to Frampton v Warrington, 22.12.18, Manchester Arena, Manchester, England.

15. All documentation and correspondence in relation to any future bout which the plaintiff is presently considering, the likely purse/pay-per-view percentage payable to the plaintiff.

16. Without Prejudice to the generality of this request we specifically request all contracts (including television and radio contracts), P&L accounts, records and accounts/summaries of financial payments made to you and received by you in respect of the following bouts:

    (i) Frampton v Garcia, 18.11.17, SSE Arena, Belfast, Northern Ireland;

    (ii) Frampton v Donaire, 21.4.18, SSE Arena, Belfast, Northern Ireland;

    (iii) Frampton v Jackson, 18.8.18, Windsor Park, Belfast, Northern Ireland;

    (iv) Frampton v Warrington, 22.12.18, Manchester Arena, Manchester, England.

17. All correspondence, notes and memoranda in relation to the booking of the SSE Arena, Belfast, Northern Ireland, for boxing contests on the 18.11.17

> including the identity of the boxers scheduled to appear on the bill when discussions were first entered into between Mr Frank Warren and/or any representative of Queensberry Promotions Ltd and the SSE Arena and at all stages thereafter."

[11] The relevance of this material was the subject matter of a ruling made by the court on 10 June 2019 in the context of a specific discovery application brought by the defendants against the plaintiff. The court discussed this in paragraphs 40-62 of the judgment as follows:

> "[40] The vast bulk of the remaining requests for discovery concern documentation that relates to the relationship between the plaintiff and subsequent managers and documentation relating to subsequent bouts in which the plaintiff participated.
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> [41] Before examining some of the specific requests the application must be considered in the context of the plaintiff's voluntary affidavit sworn in response to the correspondence from the defendants of 21 March and 26 March 2019.
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> [42] It is clear from that affidavit that, although disputing relevance, the plaintiff has in fact provided much of the material sought. In relation to any outstanding material essentially the dispute relates to relevance.
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> [43] The defendants say that in general terms the material sought is relevant for two reasons. Firstly they argue that it is relevant to the plaintiff's assertion that as at paragraph 38(ii) of the Statement of Claim the first and second defendants have been guilty of:
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> > "Failing to arrange the plaintiff's professional affairs and engagements so as to secure all due and proper profit and reward on terms which are fair and reasonable and as advantageous to the boxer as are reasonably obtainable including advising the plaintiff to enter into the IPA on terms which are unfair, unreasonable and less advantageous than the terms that the plaintiff could reasonably have been expected to obtain if the first defendant was not subject to a manifest conflict of interest."

[44] In these circumstances the defendants argue that the nature and extent of the plaintiff's earnings post the breakup of the relationship under the new management arrangements are relevant to the issue of whether or not the arrangements made by the defendants were in fact reasonable. Did these arrangements differ significantly from those negotiated by the defendants? How well did he do under the new arrangements? In short the defendants say that these issues are relevant to the claim being made by the plaintiff. What better way to test the assertion made by the plaintiff than to examine the detail of the arrangements under the new management and for the fights organised by them?

[45] In determining this issue it is imperative that the plaintiff commits to the complaints he makes about the arrangements made by the defendants. This issue has arisen in relation to the adequacy of the replies to particulars in this case considered in my ruling delivered on 30 May 2019 (COL10969). That ruling was made on the basis that the plaintiff's claim is confined to the specific allegations set out in the Statement of Claim and in the ASM Report. In particular in the ruling I say:

> "However, if it is to be alleged that in fact the defendants should and could have negotiated better or more profitable arrangements than those actually secured then in my view the plaintiff should specifically make this case and particularise it fully. The defendants for example could not be expected to deal with a claim at trial for the first time that a particular arrangement could have been improved upon in the course of the management and promotion of the plaintiff's career. Thus, the plaintiff should confirm that the claim is confined to the allegations set out in the Statement of Claim and the contents of the ASM Report. The plaintiff would not be entitled to introduce evidence that a different promoter/manager would have negotiated more favourable terms or raised more monies or anything of that nature, without this being expressly pleaded or for example dealt with in an expert report served on the defendants."

As I pointed out in that ruling this has an impact on what is discoverable by the plaintiff in the action.

[46] In the related action between the plaintiff and Cyclone Promotions (Writ No: 124118) it is to be noted that I have refused a request by the plaintiff for disclosure of documentation relating to that company's management of other boxers promoted/managed by it (COL10986). The plaintiff advanced similar arguments in that application to the effect that disclosure of that documentation was relevant to the allegations being made about the manner in which the defendants conducted the management and promotion of their client. It was argued this could reveal similar practices and could lead to the identification of other accounts in which monies were lodged relating to the promotion of both the plaintiff and other fighters.

[47] I rejected this application on the grounds that the court needs to focus on the actual dispute and arrangements between the parties in the action. To engage on a detailed examination, in that application, of the defendant's management of other boxers did not in my view meet the test for disclosure. Ultimately, I took the view that to embark on an examination of the contracts of other boxers managed by the defendant or companies associated with the defendant would be entirely disproportionate and oppressive.

[48] Subject to the caveat to which I refer I take a similar view to this application. Absent allegations about the relevant merits of the deals negotiated by the defendants I do not consider that details of the subsequent arrangements entered into by the plaintiff with other managers is relevant to the claim at paragraph 38 of the Statement of Claim.

[49] The defendants argue that the material is also relevant in the context of the counterclaim made on their behalf. In the counterclaim the defendants allege that the plaintiff wrongly repudiated the contract between them and as a result the defendants have lost the opportunity to earn commission had the contract continued.

[50] It is argued by the plaintiff that the commission actually earned by those involved in the plaintiff's career

post the termination of the relationship is irrelevant to the quantification of the counterclaim.

[51] Under the plaintiff's new management the plaintiff has participated in four fights and it has been publicly reported that he and Queensbury Promotions have signed a multi-fight promotional pact with Top Rank. Further publicity refers to agreements to promote the plaintiff via ESPN and BT Sport. The defendants say that all documentation in relation to these fights and various promotional arrangements are relevant in terms of assessing the counterclaim.

[52] The starting point is a consideration of the term in the contract under which the defendants allege the relationship could have continued.

[53] The defendants say that they could have earned commission for the remainder of the 2 year period of the contract up to 14 May 2018 or for a possible extended period ending on 21 October 2019.

[54] The extended period is entirely reliant upon the assertion that the defendant would have extended the contract in the event that the plaintiff won a title "during the last 2 years of the initial period." Furthermore, the plaintiff was entitled to object to any extension of the contract.

[55] The plaintiff did not in fact win a title in the period. Against this background it is very difficult to see how the defendant would be entitled to documents and details concerning monies earned by the plaintiff after 14 May 2018, or how they would assist the court in assessing the value of the defendant's counterclaim.

[56] As to potential earnings up to the period 14 May 2018 the defendants can only advance this case arguing what they anticipate they could have achieved in this period had they continued to be responsible for the management and promotion of his career. This has to be seen in the context of a plaintiff who clearly was unhappy with the relationship.

[57] What the plaintiff has in fact earned under a different manager with a different trainer is not in my

view evidence of what he would have earned had he remained under contract with the defendants. There are simply far too many variations in the two scenarios to justify using that material as a basis for evaluating the defendants' counterclaim in the event that he establishes the relevant breaches.

[58] What the defendants claim is a loss of chance to earn commission had the contract continued. By definition this exercise will have to be conducted at a high level of abstraction.

[59] I do not consider that knowing in great detail what deals were done when the plaintiff was represented by a different manager/promoter/trainer with entirely different resources, skills, capabilities, experience and connections will be relevant to the value of the counterclaim. It is not in my view necessary for advancing the "loss of chance" case to any extent. I take the view that the documents are not relevant to the counterclaim and not necessary for the defendant to advance their pleaded case therein. To embark on a minute examination of the post-break earnings would in my view be disproportionate and oppressive.

[60] In general terms it is noted that in fact the plaintiff has provided a significant amount of detail concerning his subsequent agreements and arrangements and in the voluntary affidavit he has averred that:

> "The list of documents provides all documents retained by me relating to the finances of bouts post-termination of the contract with the defendants. I have requested my solicitor clarify with my accountant whether `remittance advices' had been provided and, if so, will discover the same."

[61] In addition the plaintiff has provided discovery of monies earned by him and the company Rip Rock from bouts post-split with defendant in the form of his accounts, bank statements and tax returns.

[62] I consider that the plaintiff has made significant and substantial disclosure of post-breakup documentation in his voluntary affidavit."

[12] Mr McCollum QC who leads Mr Philip McEvoy for the defendants makes focussed and forceful submissions in support of these applications.

[13] Firstly, he says that the ruling of 10 June 2019 is not the end of the matter and the court should keep this issue under review. I agree with this submission.

[14] Secondly, he submits that he faces a lower threshold in meeting the test for these applications than the specific discovery application. I do not agree with this submission. It seems to me the requirements of Order 38 in effect import the same considerations as an application under Order 24 Rule 7. The documents sought must be necessary. They must be documents that a party could be compelled to provide at the hearing. If the documents did not meet the test for specific discovery I do not consider that they would meet the test of necessity or documents which could be compelled to be produced at the hearing. The court has to have consideration to the test for discovery as set out in the **Peruvian Guano** and **Flynn** cases which were discussed in the judgment to which I have referred.

[15] Thirdly, and most importantly, he elaborates and develops the arguments he previously made with a focus on the relevance of the post-split arrangements on the issues of whether it is probable that the defendants would have agreed the terms of the contract the plaintiff claims he made with them. In addition the arrangements are relevant to testing the allegations of breach of fiduciary duty. Thus, the subsequent arrangements in relation to purses, expenses, VAT arrangements and other promotional arrangements are relevant. He submits that they are the only way of objectively testing the assertions made by the plaintiff. I have reflected on the submissions and I am not persuaded that this alters the view the court took in relation to specific discovery and the reasoning behind that decision which I have set out above.

[16] There remains one caveat, and that relates to the requirement of the plaintiff to commit to particulars of the criticism he makes of the purported inadequacies of the arrangements made by the defendants on his behalf. Since 10 June 2019 the plaintiff (pursuant to another ruling of the court delivered on 30 May 2019) has served further replies to particulars. In particular the replies under paragraph 38(ii) are relevant.

> "**Answer**
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> The plaintiff's case is confined to the allegations in the Statement of Claim and the ASM report.
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> But the plaintiff emphasises that the averment at Statement of Claim 38(ii) concerns failure to secure such profit and reward as a result of the manifest conflicts of interest that arose as a result of the First Defendant being

manager and promoter and the Second Defendant being actively involved in the management/promotion of the plaintiff (and the wife/business partner of the First Defendant subject as he was to a conflict of interest).

In relation to the Jeremy Parodi bout (19th Oct 2013), Hugo Cázares bout (4th Apr 2014), Kiko Martinez II bout (6th Sep 2014), and Chris Avalos bout (28th Feb 2015), the plaintiff's case is that the purses he received were not fair and reasonable and as advantageous to the plaintiff as reasonably obtainable because management operating at "arms-length" from the promoter would inevitably have negotiated a larger purse for these bouts. This is an inferential case based on the following: the Cyclone connection claims when challenged that the fights were not profitable (see above); the relatively low level of purse he received for these fights; the manifest conflict of interests referred to above; and the plaintiff case that the defendants were siphoning off/diverting promotional monies to their own benefit. The low level of purse is exemplified by Martinez II, an IBF Super Bantamweight world title fight in front of 16,000 spectators at the Titanic, for which the plaintiff received a gross purse of £162,500 and net payment of £142,500 after commission and VAT.

In relation to the Santa Cruz I and II bouts: The parties dispute what the plaintiff's "purse" was comprised of. The plaintiff denies the defendants/Cyclone Connection were entitled to siphon off monies and alleges that they had told him the "purse" was under-declared in the bout agreements. To the extent that the defendants establish that the "purse" of the plaintiff for these bouts was the sum in the bout agreement and not the revenue/profits paid over to them by the USA promoter of these bouts, then the plaintiff contends that the terms arranged for the plaintiff were not fair and reasonable and as advantageous to the plaintiff as reasonably obtainable i.e. there is again an unavoidable inference that a manager with no conflict of interest operating at "arms-length" from the promoter would have negotiated a larger purse for these bouts."

[17] Considering these replies I take the view that the defendant can and should be able to answer the inferential case made on behalf of the plaintiff; to account for monies raised by him in the course of his arrangements with the plaintiff and stand

over in particular the purses obtained – bearing in mind the defendants' expertise in these matters. It is significant that the plaintiff has not referred to any comparators nor has any expert evidence been served to put forward what purses might have been obtained. If this situation changes the question of further discovery can be revisited.

[18] The key to the preparation and presentation of this case, leaving aside factual disputes, rests on the contents of the expert reports. As a result of the multiple and ongoing interlocutory applications both parties will have received a substantial amount of information. That material should in my view be sufficient to marshal their respective cases. In this regard I refer again to the material that has already been provided by the plaintiff, the context of the discovery application to include his financial records, post-split, his accountant's records and all bout fees obtained since the split.

[19] The mutual requests for disclosure should not turn into some form of arms race between the parties. As I said when refusing an application by the plaintiff for discovery of promotional arrangements in relation to other boxers who are associated with the defendants (the Cyclone connection) the parties should focus on the dispute between them. The court should not be distracted or diverted into disproportionate inquiries into what are collateral or satellite issues.

[20] I therefore refuse to issue the Khana summonses in respect of items 3-8 in the defendants' applications.