

## THE HIGH COURT

2008 94 EXT

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
DARIUS TOMELLA

RESPONDENT

**Judgment of Mr. Justice Michael Peart delivered on the 27th day of November 2008**

1. The surrender of the respondent is sought by a judicial authority in Poland on foot of a European arrest warrant dated 6th December, 2007, which was endorsed for execution here by order of the High Court dated 30th April, 2008. The respondent was duly arrested on foot of same on the 1st September, 2008. As the respondent injured himself at the time of arrest, he was hospitalised thereafter for a number of days, and in due course when he was sufficiently recovered, he was, on the 11th September, 2008, brought before the Court as required by s. 13 of the European Arrest Warrant Act 2003 as amended, and was remanded in custody to await the determination of the present application for his surrender. No issue has been raised by him in relation to his arrest.

2. I am satisfied that the respondent is the person in respect of whom this European arrest warrant has been issued.

3. His surrender is sought so that he can be prosecuted in Poland in respect of a single offence described in the warrant as being fraud contrary to Article 286 (1) of the Polish Criminal Code. Minimum gravity for that offence is satisfied.

4. The facts giving rise to that offence are described as follows in the warrant:

*"On the 28th October 2005 in Czystochowa, acting with the intention to gain material benefit he has misled the owner of the [company], Ms. Renata Kozibudzka, about his intention to pay for the purchased goods in form of cement, and in this way he brought the above named to disadvantageous disposal of her property amounting to 15,552.30 zloty."*

5. Some additional information has been provided by the issuing judicial authority by letter to the Central Authority here dated 18th April, 2008 in which it is stated that:

*"He carried out business under a business name of a firm in the registered office of which nobody worked, he did not reply to correspondence sent by registered mail, did not pay for received goods, did not respond to attempts to contact him by telephone in the registered office of his firm and at his private telephone number, he was not found at his residential address or in his firm's registered office."*

6. Although the offence in the warrant has been described as being one of fraud, the offence has not been marked as an offence of fraud coming within Article 2.2 of the Framework Decision. In these circumstances the Court must be satisfied that the offence corresponds with an offence in this State under the provisions of s. 5 of the European Arrest Warrant Act 2003, as amended.

7. Melanie Greally B.L. for the applicant suggests that the facts contained in the warrant would give rise to an offence in this State under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001, namely one of making a gain or causing a loss by deception. Section 6 of that Act provides:

*"6.— A person who dishonestly, with the intention of making a gain for himself..... or causing a loss to another, by any deception induces another to do or refrain from doing any act, is guilty of an offence."*

8. I will come to the submissions made by Mr. Bowman on behalf of the respondent to the effect that the information in the warrant, and the additional information provided by the issuing judicial authority fails to show that what the respondent is alleged to have done for this offence in Poland was done "dishonestly", and that accordingly that correspondence is not made out.

9. I am satisfied that there is no reason to refuse to order surrender under sections 21A, 22, 23, or 24 of the Act.

10. Subject to reaching a conclusion in relation to correspondence, I am satisfied that the respondent's surrender is not prohibited by any provision of Part III of the Act, or the Framework Decision.

**Point of Objection – Correspondence**

11. The point made is that what is revealed in the warrant as constituting this offence is simply a contractual debt owed by the respondent, and not a criminal offence, and that therefore it falls outside the ambit of a European arrest warrant. That is the way the point of objection has been raised in the Points of Objection. However, it boils down to the net question as to whether the facts would, if done in this jurisdiction, give rise to an offence under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act") as set forth above.

12. Mr. Bowman has submitted that what is described in the warrant shows no crime, but rather a civil debt. He suggests that the Applicant is asking the Court to imply criminality by reference to the use of the word "misled" in the warrant, and that since that word is not a term of art, it must be given its ordinary meaning, and he submits that by its ordinary meaning "mislead" can be something done unintentionally or innocently, and that therefore the use of that verb cannot be assumed to impute dishonesty for the purpose of a s. 6 offence. He submits that it must not be confused with or equated to "deceive".

13. He submits also that nothing of a dishonest or otherwise criminal nature emerges from the additional information, and submits also that it is in any event clear that when the attempts to contact the respondent which are referred to in the additional information were made, the respondent was in this country, and that this explains why these attempts were unsuccessful.

14. Ms. Greally for the applicant accepts that a person can in some circumstances innocently or unintentionally mislead another person, but that it is clear from the facts contained in this warrant that what the respondent is alleged to have done was not done in such an innocent or unintentional way as to escape the dishonest meaning to be attributed to the verb "mislead".

**Conclusion**

15. The question of correspondence can in my view be disposed of by reference to what is contained in the warrant itself, and

without reference to the additional information provided by the issuing judicial authority. The question at issue is what meaning is to be given to the word "mislead" in the warrant. Unless that word can be given a meaning that reasonably includes an element of dishonesty, that dishonest intent is lacking in the warrant, and the facts would not correspond to the s. 6 offence put forward as the corresponding offence here.

16. The verb "mislead" is, as correctly submitted by Mr. Bowman, not a term of art. It has not been defined in the 2001 Act. It must therefore be given its ordinary meaning. It is not a neutral word as I found to be the case in relation to the word "took" in *Minister for Justice, Equality and Law Reform v. Dunkova*, (Unreported, High Court, 30th May, 2008) where the offence in question was one of theft. In that case I concluded that the use of the word "took" could not be taken as including or necessarily implying the element of "without the consent of the owner". But the word "mislead" is different. While that word can be used in some circumstances where what was done was done innocently or unintentionally, and not in a criminal way, it is also capable of another meaning in other circumstances where what was done was not unintentional or innocent, such as the present case. Where there are two such possible meanings, the Court is entitled to have regard to the context in which the word is used, that context to be gleaned from other facts disclosed in the warrant. In the present case it is disclosed in the warrant that he purchased cement in the amount stated without paying for it. The Court cannot read the word "mislead" without doing so in the context in which it is used, and must not simply look at the word in isolation.

17. I am satisfied that, given its ordinary meaning in the context of the other facts disclosed in the warrant in this case, the use of the word "mislead" is sufficient to include in the warrant the necessary element of dishonesty in the respondent's actions for the purpose of correspondence to an offence here under s. 6 of the 2001 Act.

18. In these circumstances, I will make the order for the surrender of the respondent to the issuing state.