Neutral Citation: [2015] IEHC 564

THE HIGH COURT

[2015 No. 85 SP]

IN THE MATTER OF AN APPLICATION BY THE ACCOUNTANT OF THE COURTS OF JUSTICE PURSUANT TO THE INSURANCE ACT 1964 (AS AMENDED BY THE INSURANCE (AMENDMENT) ACT 2011)

BETWEEN

THE LAW SOCIETY OF IRELAND

CLAIMANT (By Order of the Court)

-AND-

THE MOTOR INSURERS' BUREAU OF IRELAND

RESPONDENT (By Order of the Court)

JUDGMENT of Mr. Justice Hedigan delivered on the 4th day of September, 2015

INTRODUCTION

1.1. The applicant herein is the Accountant of the Courts of Justice ("the Accountant") and has statutory responsibility for administering the Insurance Compensation Fund ("the Fund") under the control of the President of the High Court. In the discharge of this statutory responsibility, the Accountant, and by extension the President of the High Court, must consider whether eligible claims can be met otherwise than from the Fund.

1.2. Following the liquidation of Setanta Insurance Company ("Setanta") on 30th April, 2014, approximately 1,750 claims by and against Setanta policyholders remained in existence. An issue arose as to who is liable to cover these claims and the applicant, having received legal advice that there was an arguable case that liability may rest with the Motor Insurers' Bureau of Ireland ("the MIBI"), commenced the within proceedings.

1.3. By order dated 27th April, 2015, the President of the High Court directed that the following matters be tried as a preliminary issue:

> *"(a) Whether the Motor Insurance Bureau of Ireland has a liability or potential liability to pay out in respect of claims against persons who were insured with Setanta, a Maltese registered insurance company, at the time of its entering into liquidation in April 2014*
>
> *(b) If so how any such liability or potential liability on the part of the MIBI impacts upon the power of the High Court to approve payments under section 3 of the Insurance Act 1964 (as inserted by section 4 of the Insurance (Amendment) Act 2011 authorising payment out of the Insurance Compensation Fund 'only if it appears to the High Court that it is unlikely that the claim can be met otherwise than from the Fund'."*

Kearns P. also directed that the Law Society of Ireland should act as the claimant while the MIBI should be the respondent. The Accountant has adopted a neutral position in the proceedings.

THE PARTIES

2.1. As previously stated, the applicant is the Accountant of the Courts of Justice, one of whose functions is to administer the Insurance Compensation Fund on behalf of the President of the High Court pursuant to s. 2 of the Insurance Act 1964 ("the 1964 Act"). As such, it is the role of the applicant to make an application under the Insurance (Amendment) Act 2011 ("the 2011 Act") for payment out of the Fund in respect of these outstanding claims involving Setanta policy holders.

2.2. The Law Society of Ireland is the professional body for solicitors in the State and exercises statutory functions under the Solicitors Acts 1954 to 2013 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It also performs a representative function for solicitors and represents more than 10,000 solicitors. It is in this latter role that the Society appears in these proceedings.

2.3. The MIBI is a private company set up by the motor insurance companies who operate in the motor insurance industry in the State. It was established under the Companies Acts and is limited by guarantee. Participation by motor insurance companies is not voluntary and is required by s. 78 of the Road Traffic Act 1961 ("the 1961 Act"). The MIBI is also the body through which effect is given to the State's obligations under EU Motor Insurance Directives in respect of the provision of certain compensation to road traffic victims. Following its establishment in 1955, the MIBI has entered into a series of agreements with the Minister for Local Government and later the Minister for Transport, known collectively as the "MIBI Agreements". The latest of these agreements was entered into in 2009 ("the 2009 Agreement") and the construction of this agreement is central to the matters presently before the Court.

BACKGROUND

3.1. At an EGM of Setanta Insurance Company, a Maltese registered insurance company, held on 16th April, 2014, it was decided that Setanta would surrender its insurance business licence and be immediately dissolved. A liquidator was subsequently appointed on 30th April, 2014. Setanta was a member of the MIBI as required by s. 78 of the 1961 Act and at the time it entered liquidation it had issued approximately 75,000 motor insurance policies, all of which were in respect of risks in Ireland. All of Setanta's policies were cancelled with effect from 29th May, 2014 and there now remains between 1,700 and 2,000 claims in existence by and against Setanta policy holders which are potentially eligible for payment under the Fund.

3.2. On 1st May, 2014, following the liquidation of Setanta, John Shaw, then President of the Law Society, wrote to John Casey, Chief Executive of the MIBI, stating that many solicitors had been inundated with queries from concerned Setanta customers and

persons with claims outstanding against Setanta policyholders as to the consequences of the liquidation. Mr. Shaw stated that:

> *"It seems clear to us that the Motor Insurers' Bureau of Ireland are responsible for any such undischarged judgments under the terms of the 2009 Agreement and we now call upon you to confirm that no claimant will suffer any loss as a result of this event."*

3.3. Following this letter, a large amount of correspondence ensued between the various parties as to where liability for the outstanding Setanta related claims lies. By letter dated 25th July, 2014 Mr. Casey responded, stating that the MIBI had received legal advice on the issue of liability and stated:

> *"The legal opinion obtained, which analysed the legal and regulatory framework in which the MIBI operates in Ireland, was unequivocal in its conclusion that the 2009 Agreement does not require the MIBI to satisfy awards against drivers covered by a policy of insurance where the insurer is unable to pay all or part of an award because of insolvency."*

3.4. Further correspondence from the MIBI indicates that the MIBI had contacted the Department of Transport in relation to the issue and it is indicated that the Department shared the view that the MIBI was not liable under the 2009 Agreement for claims related to insolvent insurers.

3.5. On 28th November, 2014, the Minister for Transport wrote to the incumbent President of the Law Society, Kevin O'Higgins, stating that:

> *"I have had enquiries made in the matter and the position is that my Department has received unequivocal legal advice from the Attorney General's Office regarding this matter.*
>
> *The advice clearly states that any liability for any unsatisfied claims against Setanta Insurance (in liquidation) is not a matter for my Department, or for the Motor Insurers Bureau of Ireland (MIBI).*
>
> *Plaintiffs should be advised to pursue this matter with the Liquidator of Setanta and the Insurance Compensation Fund established under the Insurance Act 1964 for the purpose of providing compensation to unsatisfied claimants"*

3.6. The letter offers an interpretation of the 2009 Agreement and refers to a recent European Court of Justice decision in *Csonka v. Magyar Allam* (Case C-409/11) which the Minister states makes clear that there is no legal obligation under the EU Motor Insurance Directives that requires the MIBI to satisfy unpaid claims made against an insolvent insurer.

3.7. Mr. O'Higgins replied to this letter on 18th February, 2015 setting out the position of the Society and an alternative interpretation of the 2009 Agreement. The positions, as set out in this letter and the Minister's letter of 28th November, 2014, are maintained by the Law Society and the MIBI in these proceedings.

3.8. Subsequently, on foot of independent legal advice it had received, the Accountant notified all interested parties, including the MIBI, the Department of Transport, Tourism and Sport, the Department of Finance, the Attorney General, and the Law Society of Ireland of his intention to commence legal proceedings on the basis that there was at least an arguable case that the MIBI, rather than the Fund, was liable for Setanta related claims.

3.9. By letter dated 23rd March, 2015, the Director General of the Law Society of Ireland confirmed that the Society would be willing to act as a *legitimus contradictor* in any proceedings if so ordered by the court. By letters dated 27th and 31st March, 2015, the Office of the Attorney General requested that all future correspondence be directed to the Chief State Solicitor's Office ("the CSSO"). The CSSO acknowledged receipt of the notification of the proposed application on 14th April, 2015. On 2nd April, 2015, the Department of Finance expressed the view that the Minister for Finance was not an appropriate party to any proceedings but would participate if so directed by the court.

3.10. On 27th April, 2015, Kearns P. ordered by consent that the matters already set out above be tried as preliminary issues and that the Law Society of Ireland act as claimant and the MIBI act as respondent.

LEGISLATIVE FRAMEWORK

4.1. The Accountant is an officer of the court and the office of the Accountant was established pursuant to the Courts Officers Act 1926.

4.2. Section 2(1) of the 1964 Act established the Fund, while sub-section (2) states that:

> *"The Fund shall, subject to the provisions of this Act and any regulations thereunder, be maintained and administered under the control of the President of the High Court acting through the Accountant."*

4.3. Up until 2011 the Fund was used to make payments to policyholders and to claimants against policyholders of insolvent insurance companies registered in Ireland. However, under the 2011 Act, insurance companies authorised in other EU member states are also covered in respect of risks insured in Ireland.

4.4. The procedure for payments out of the Fund in respect of an insolvent insurer is set out in relevant part in s. 4 of the 2011 Act, which amended s. 3 of the 1964 Act, as follows:

> *"4. The Principal Act is amended by substituting the following for section 3:*
>
> *Payments out of Fund.*
>
> *3.— (1) Subject to the provisions of this section and sections 3A and 3B, there may, with the approval of the High Court, be paid to a person out of the Fund, in relation to an insurer in liquidation, such amount or amounts as that Court may from time to time authorise in respect of any sum (other than a sum payable in respect of the refund of a premium) due to a person under a policy issued by the insurer in liquidation in respect of a risk in the State, together with the costs and expenses (if any) necessarily and reasonably incurred by the person in endeavouring to secure payment of the sum.*
>
> *(2) The High Court shall order a payment under subsection (1) only if it appears to the High Court that it is unlikely that*

the claim can be met otherwise than from the Fund.

(3) The amount that the High Court may order to be paid to a person in respect of a sum due to the person under a policy shall not exceed the amount of the difference between the sum that would have been due to the person under the policy and the sum that remains due after the assets of the insurer in liquidation have been used to satisfy a portion of the sum otherwise due under that policy.

(4) The total amount that may be paid out of the Fund under subsection (1) in respect of any sum due to a person under a policy shall not exceed (whether as one payment or as the total of a series of payments) 65 per cent of that sum, or €825,000, whichever is the less.

(5) Where any sum referred to in subsection (1) relates to the liability of the insured to a third party, the limitations prescribed by subsections (3) and (4) on payment out of the Fund apply to the sum required to meet the liability of the insured to that third party.

(6) An amount due to a body corporate or unincorporated body of persons may not be paid out of the Fund under subsection (1) unless the sum is due in respect of the liability of the body to an individual or in respect of the liability of an individual to that body.

(7) Where, in respect of a sum due under a policy, a payment equal to the whole of the sum is made by the Motor Insurers' Bureau of Ireland, a payment shall not be made out of the Fund under this section in respect of the sum, and where, in respect of such a sum, a payment equal to part of the sum is made by that Bureau, a payment out of the Fund in respect of the sum shall not exceed the amount of the sum less the amount of the payment by that Bureau.

(8) In this section 'insurer in liquidation' means an insolvent insurer or an insolvent insurer authorised in another Member State in respect of which a liquidator, or a person who performs the equivalent function to a liquidator in the Member State concerned, has been appointed."

4.5. Sub-section 3(2) as amended is of particular relevance to the present proceedings and it was on foot of the provisions of this section that the Accountant sought its own legal advice and ultimately decided to seek to have these preliminary matters addressed by the Court.

4.6. Sub-section 3B deals with the situation where an insurer in liquidation is authorised in another Member State:

"3B.— (1) Where an insolvent insurer authorised in another Member State in respect of which a person has been appointed who performs, in the other Member State concerned, the functions that a liquidator would perform in the State if the insolvent insurer authorised in another Member State were an insurer, and there is an amount payable to one or more persons under section 3, then—

(a) the Accountant may, from time to time but not more frequently than once in every 6 month period, apply to the High Court for approvals under that section in respect of those persons, and

(b) the amount of the reasonable and proper costs and expenses of the application to the High Court under that section shall be paid out of the Fund."

THE MIBI AGREEMENTS

5.1. The starting point for the MIBI agreements can be traced to the Road Traffic Act 1933 which introduced compulsory motor insurance. However, situations continued where it was not always possible to recover on foot of a judgment which had been obtained by someone who had been injured by the negligent driving of an uninsured vehicle and so, in a manner similar to an agreement entered into in the UK in 1946, an agreement was entered into between the State, in the form of the Minister, and the MIBI.

5.2. On 10th March, 1955, the Minister for Local Government and the motor insurance companies in the State entered into what is referred to in these proceedings as the "Principal Agreement". The terms of this agreement established the MIBI and the agreement remains in force. Clause 2(1) of this agreement provides as follows:

"…if judgment in respect of any liability for injury to person which is required to be covered by an approved policy of insurance under Section 56 is obtained against any person or persons in any court established under the Courts of Justice Act 1924 (No. 10 of 1924) whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgment is not satisfied in full within 28 days from the date on upon which the person or persons in whose favour such judgment was given become entitled to enforce it then the MIB of I will so far as such judgment relates to injury to person and subject to the provisions of these presents pay or cause to be paid to the person or persons in whose favour such judgment is given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable only to injury to person) or satisfy or cause to be satisfied such judgment whatever maybe the cause of the failure of the judgment Debtor to satisfy same."

5.3. Following this agreement, the MIBI was established on the 27th July, 1955 and a "Domestic Agreement" was entered into by its members and appended to the Articles of Association.

5.4. On 30th November, 1955, the first MIBI Agreement was entered into with the stated intention of giving:

"effect to a scheme to secure compensation in respect of injury to person, to third party victims of road traffic accidents in cases where notwithstanding the provisions of the Road Traffic Act relating to compulsory insurance, the victim is deprived of compensation by the absence of insurance or of effective insurance."

5.5. Section 1 of the 1955 Agreement is identical in terms to s. 2(1) of the Principal Agreement. Section 4 sets out the conditions precedent to MIBI's liability. The remaining sections deal with matters such as "Assignment of Judgments", "Offers in Satisfaction", "State Vehicles and Exempted Persons", and "Definitions".

5.6. In 1961, a new Road Traffic Act was introduced which, under s. 56, extended the obligation to be insured to include requirements to insure against injury to certain passengers. Consequently, an addendum to the 1955 Agreement was put in place on 12th March, 1962, which made clear that the liability of the MIBI to satisfy judgments under the agreement was defined by compulsory insurance under the 1933 Act only.

5.7. However, this addendum was in force for a very short period as on 30th December, 1964, a second MIBI Agreement was entered into. The liability of the MIBI under this agreement was widened to include instances where compulsory insurance was required by the 1961 Act.

5.8. In 1983 a second EU Motor Insurance Directive came into effect which required that there would be a scheme to include provision for recovery in relation to unidentified or untraced motorists. This Directive gave rise, in part, to a third MIBI Agreement being entered into on 21st December, 1988. As with the previous agreements, the preamble of the 1988 agreement purports to "extend" the scope of the MIBI's liability.

5.9. The 1988 Agreement extended the liability of the MIBI by imposing a liability to pay compensation for certain property damage caused by uninsured motorists, whereas under previous agreements the liability was one for personal injury. It also, in accordance with the Directive, imposed liability to pay compensation where the owner or user of the vehicle was unidentified or untraced. A fresh procedure for the enforcement of the agreement was also introduced under s. 2 of the 1988 Agreement which set out three methods of enforcement.

5.10. In 1993 an updated "Domestic Agreement" was entered into between the MIBI and its members.

5.11. On 31st March, 2004, the fourth MIBI Agreement was entered into. Once again, this agreement was supplemental to the Principal Agreement of 1955. The provisions relating to the enforcement of judgments was altered slightly by the substitution of the word "must" for the word "may" in s. 1 as follows;

> *"A person claiming compensation by virtue of this Agreement (hereinafter referred to as "the claimant") must seek to enforce the provisions of this Agreement by:-…"*

5.12. The three avenues of enforcement as set out in the 1988 Agreement remained unchanged and the remainder of the agreement followed a similar form to previous agreements.

5.13. The latest MIBI Agreement, the most important in the context of these proceedings, was entered into on 29th January, 2009.

THE 2009 AGREEMENT

6.1. It is common case that the interpretation of the 2009 Agreement, and the extent of the liability of the MIBI under this agreement, is fundamental to determining the preliminary issues as set out above.

6.2. Similar to the four previous agreements, the 2009 Agreement sets out that it is an agreement:

> *"between the Minister for Transport and the Motor Insurers' Bureau of Ireland, extending, with effect from dates specified in the Agreement, the scope of the Bureau's liability, with certain exceptions, for compensation for victims of road accidents involving uninsured or stolen vehicles and unidentified or untraced drivers to the full range of compulsory insurance in respect of injury to person and damage to property under the Road Traffic Act, 1961."*

6.3. Section 1 of the 2009 Agreement states that the 2004 Agreement is now determined. Section 2 relates to the enforcement of the agreement and provides as follows:

> *"A person claiming compensation by virtue of this Agreement (hereinafter referred to as "the claimant") must seek to enforce the provisions of this Agreement by:-*
>
> *2.1 making a claim directly to MIBI for compensation which may be settled with or without admission of liability, or*
>
> *2.2 making an application to the Injuries Board citing MIBI as a respondent under the terms of the PIAB Act 2003 which, pursuant to s.12(1), provides that unless and until such an application is made, no proceedings in court may be brought in respect of the claim,*
>
> *2.3 citing MIBI as co-defendants in any proceedings against the owner and or/user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced, or*
>
> *2.4 citing MIBI as sole defendant where the claimant is seeking a court order for the performance of the Agreement by MIBI provided the claimant has first applied for compensation to MIBI under the clause 2.1 and has either been refused compensation by MIBI or has been offered compensation by MIBI which the claimant considers to be inadequate and/or applied to the Injuries Board as at 2.2 and having received a release from the Injuries Board to proceed with legal action."*

6.4. Section 3 identifies the conditions precedent to the MIBI's liability.

6.5. The claimant herein places considerable reliance on s. 4 of the 2009 Agreement which relates to satisfaction of judgments by the MIBI. It is appropriate to set out this section in full:

> *"4.1.1 Subject to the provisions of clause 4.4, if Judgement/Injuries Board Order to Pay in respect of any liability for injury to person or death or damage to property which is required to be covered by an approved policy of insurance under Section 56 of the Act is obtained against any person or persons in any court established under the Courts (Establishment and Constitution) Act, 1961 (No.38 of 1961) or the Injuries Board established by the PIAB Act, 2003 whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgement is not satisfied in full within 28 days from the date upon which the person or persons in whose favour such judgement is given become entitled to enforce it then MIBI will so far as such judgement relates to injury to person or damage to property and subject to the provisions of this Agreement pay or cause to be paid to the person or persons in whose favour such judgement was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the relevant liability) or satisfy or cause to be*

satisfied such judgement whatever may be the cause of the failure of the judgement debtor.

4.1.2 Subject to the provisions of clause 4.4, the MIBI shall satisfy, as soon as reasonably possible, any judgement in favour of a person who has issued proceedings pursuant to clause 2.3.

4.2 The claimant shall not be entitled to recover legal costs or expenses for the provision of information to MIBI as may be required by virtue of this Agreement except where MIBI have interviewed the claimant pursuant to Clause 3.3 of this Agreement in which case MIBI will be liable to pay the reasonable costs of such interview.

4.3 The claimant shall not be entitled to legal costs or expenses in excess of what would be payable: 4.3.1 if the owner or user of the vehicle were covered by an approved policy of insurance. 4.3.2 by virtue of the fact that MIBI is or may be a defendant or codefendant to any legal proceedings relating to his claim.

4.4 Where a claimant has received or is entitled to receive benefit or compensation from any source, including any insurance policy in respect of damage to property, MIBI shall deduct from the sum payable or remaining payable under clause 4.1 an amount equal to the amount of that benefit or compensation in addition to the deduction of any amounts by virtue of clauses 7.2 and 7.3.

4.5 The MIBI as the Compensation Body shall take action within two months of the date when the injured party presents a claim for compensation to it but shall terminate its action if the insurance undertaking, or its claims representative, subsequently makes a reasoned reply to the claim.

4.6 Where MIBI and the claimant agree an amount in respect of compensation, MIBI shall pay such amount to the claimant within 28 days of such agreement being reached."

6.6. Section 5 of the Agreement excludes certain user and passenger claims.

6.7. Section 6 relates to unidentified or untraced vehicles. Section 7 concerns damage to property. Section 8 deals with the period of the Agreement. The remaining clauses, 9–15, deal with the following matters respectively – "Recoveries", "Offers in Satisfaction", "State Vehicles and Exempted Persons", "Information Centre and Central Body", "Domestic Agreement", "Operation", and "Definitions".

SUBMISSIONS OF THE CLAIMANT

7.1. The Law Society of Ireland, the claimant herein, submitted that the questions before the Court as set out in the special endorsement of claim and the order of Kearns P. of 27th April, 2015, reduce themselves to an issue of construction of the 2009 Agreement and s. 3 of the 1964 Act as amended.

7.2. It is submitted that the fundamental question the Court must ask is whether or not the 2009 MIBI Agreement obliges the MIBI to pay out in respect of claims against persons who were insured by an insurer which has become insolvent. In relation to the 1964 Act, it is contended that the Court must consider, in the event that MIBI is liable under the 2009 Agreement to pay out on foot of claims against an insolvent insurer, whether or not the Accountant can authorise payments from the Fund under the 1964 Act.

7.3. It is the position of the claimant that the MIBI is required to pay out in respect of the relevant claims as the very broad language of the 2009 Agreement captures claims related to an insolvent insurer such as Setanta. In particular, reliance is placed on s. 4.1.1 of the 2009 Agreement as set out above which, it is submitted, is a clause of sufficient breadth to include insolvency and which has existed in almost identical form in every MIBI Agreement since 1955.

7.4. The claimant submitted that, under clause 4.1.1, the liability of the MIBI comprises six elements, namely: (i) where there is a judgment or the Personal Injury Board ordered to pay; (ii) the liability must be one for which insurance is required under s. 56 of the 1961 Act; (iii) the liability arises whether or not the Defendant is covered by an approved Policy of Insurance; (iv) the liability arises once the judgment has not been satisfied in full within 28 days; (v) MIBI's liability is subject to the provisions of the Agreement; and (vi) it arises whatever may be the cause of the failure of the judgment debtor to satisfy the judgment.

Principles of Interpretation

7.5. The claimant submits that there is no significant dispute between the parties as to the relevant principles of construction. The Court was referred to the decision of Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 All E.R. 98 which sets out the following principles which have repeatedly been applied in this jurisdiction:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 1985 1 A.C. 191, 201:

'. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

7.6. In the case of *Igote v. Badsey* [2001] 4 I.R. 511 Murphy J. stated as follows:

"The issue between the parties concerns the proper construction of the share subscription agreement. The purpose of construing a document entered into between two or more persons is to ascertain their common intention. What 'intention' in that context means and how it is ascertained has been the subject matter of much judicial authority in respect of which no real controversy arises in the present case. Perhaps a convenient explanation of the word 'intention' in this context was provided by Lord Shaw in Great Western Railway v. Bristol Corporation (1918) 87 L.J. Ch. 414 when he said at p. 424:-

"… one hears much use made of the word 'intention', but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed shows that they did: in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean?

That, when ascertained, is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion.'"

Application of the Principles of Interpretation

7.7. It is submitted that in the present case the intent and effect of section 4.1.1 of the 2009 Agreement is clear from its express terms. Furthermore, it is submitted that nowhere in the terms of the 2009 Agreement is there an exclusion of liability in relation to insurers who become insolvent.

7.8. However, the claimant relies not only on the express terms of the 2009 Agreement, but further submits that the factual matrix of the 2009 Agreement encompasses the various MIBI Agreements since 1955 and a range of other considerations support the construction advanced on behalf of the Law Society. These various considerations can be summarised as follows:

The 2009 Agreement derives from the Principal Agreement

7.9. It is submitted that Clause 4.1.1 of the 2009 Agreement is almost identical to Clause 2(1) of the Principal Agreement entered into in 1955 and a similar provision has appeared in each of the MIBI Agreements since 1955.

7.10. It is submitted that the intention of the parties at the time the 1955 Agreement was entered into is an important consideration as, despite being free to change the agreement at any stage, very few relevant changes were introduced, particularly in relation to what is now s. 4.1 of the 2009 Agreement.

7.11. It is submitted that an examination of the Principal Agreement and of the available evidence of the intention of the parties at the time it was entered into envisages no qualification or exclusion for circumstances of insurer insolvency. The Principal Agreement does not limit or restrict the scope of such liability, thereby foreclosing an interpretation which would seek to exclude the situation of insurer insolvency, whether by reference to the conditions precedent in the 2009 Agreement or otherwise.

7.12. While unidentified or untraced vehicles were excluded from the 1955 Agreement, and indeed the subsequent MIBI Agreements until 1988, no such exclusion is expressed in respect of insolvent insurers.

The UK Position

7.13. The claimant submitted that the entire structure and reasoning behind the formation of the MIBI is very similar to that of the Motor Insurer's Bureau which was established in the United Kingdom in 1946. It is submitted that s. 4.1.1 of the 2009 Agreement is based on an almost identically worded clause in the 1946 UK Agreement.

7.14. A number of cases from that jurisdiction were opened which indicate that the UK courts have had little difficulty in observing that the MIB was liable for claims in relation to insolvent insurers. While it is accepted that these authorities are not binding on this Court, it is submitted that they are nevertheless persuasive as the language of the UK Agreement is so similar and the objective behind the agreement was the same.

7.15. The case of *Gurtner v. Circuit* [1968] 2 Q.B. 587 concerned proceedings against an uninsured driver where the MIB applied to be joined as a co-defendant. The application was successful and Diplock L.J. made the following remarks regarding the 1946 Agreement:

"This appeal illustrates once again the legal anomalies which result from the method adopted by the Minister of Transport 1946 to fill a gap in the protection of third parties injured by negligent driving of motor vehicles provided by the Road Traffic Acts of 1930 and 1934.

Under those Acts although insurance against third party risks was made compulsory and insurers made directly liable to satisfy judgments against the insured an injured person although he had recovered judgment against a negligent driver could whistle for his money if (a) the defendant was not insured at the time of the accident or (b) his policy was avoided in the circumstances specified in Section 10.3 of the Act 1934 for non-disclosure or misrepresentation or (c) his insurer too was insolvent. To fill this gap the insurers transacting compulsory motor vehicle insurance business in Great Britain, acting in agreement with the Minister for Transport, formed a company, the Motor Insurers' Bureau, to assume liability

> *to satisfy judgments of these three kinds. But instead of amending the legislation so as to impose upon the Motor Insurers' Bureau a statutory liability for the unsatisfied judgment creditor as had been done by the Road Traffic Act 1934 in respect of the liability of insurers to satisfy judgments against defendants covered by a valid policy of insurance, the matter was dealt with by an agreement of June 17 1946 between the Minister of Transport and the Motor Insurers' Bureau."*

7.16. The claimant argued that it is clear from this decision that precisely the same language as that used in the 2009 Agreement, and initially the 1955 Agreement, was construed as imposing a liability in the circumstance of an insolvent insurer.

7.17. In the UK in 1975 the Policyholders Protection Act was introduced and has since been overtaken by the Financial Compensation Act 2000 which provided a scheme for compensation for victims of all insolvent insurers. In those circumstances, the position of the UK MIB has become largely theoretical. Nevertheless, the claimant referred the Court to a relatively recent decision of the Court of Appeal in *Jacobs v. MIB* [2010] EWCA Civ. 1208 where Lord Moore-Bick set out the background and history of the MIB in the following terms:

> *"Since the passing of the Road Traffic Act 1930 it has been obligatory for the user of a motor vehicle on a road in Great Britain to be insured against liability for personal injury caused by or arising out of that use. (The legislation currently in force is that contained in sections 143-145 of the Road Traffic Act 1988.) Most users of motor vehicles could be expected to obtain insurance in compliance with the requirements of the Act, but the possibility remained that a person injured in a road accident might fail to obtain compensation because the driver was uninsured, or could not be traced or because the insurer had become insolvent. In order to avoid that consequence on 17th June 1946 the Minister of War Transport entered into an agreement with the MIB, a company limited by guarantee whose members came to include all insurers authorised to issue policies of motor insurance in the United Kingdom, under which it agreed to satisfy judgments obtained against motorists who had themselves failed to satisfy them as a result of their being uninsured or because their insurers had failed. This became known as the Uninsured Drivers Agreement. The MIB also paid compensation on an ex gratia basis to persons injured in motor accidents in cases where the driver could not be traced, a practice that was placed on a formal footing by the first Untraced Drivers Agreement dated 21st April 1969. Since that date both agreements have been modified and replaced from time to time."*

7.18. Further reliance is placed on an academic article entitled Lewis, *"Insurers Agreements Not to Enforce Strict Legal Rights: Bargaining with the Government and in the Shadow of the Law"* (1985) 48(3) Modern Law Review 275-292 wherein the author states:

> *"Today, the role of the MIB has been extended. It covers, at least in theory, not only the bankrupt insurer, but also the driver who has taken out a policy but liability under it is successfully challenged by an insurer, with the driver being left uninsured for the accident in question."*

It is submitted that there is a clear consensus in all the UK authorities and commentary that the MIB, based on a very similar agreement to that entered into in this jurisdiction, is liable in respect of insolvent insurers.

Insolvency of the Equitable Insurance Company

7.19. The claimant submitted that the MIBI has previously made payments out in respect of an insolvent insurance company, namely the Equitable Insurance Company ("the EIC"), which entered into liquidation in 1963.

7.20. In this regard, the claimant refers the Court to a Statement of Accounts of the MIBI for the year ending 31st December, 1964 and a Statement of Accounts for the year ending 31st December, 1966. The former refers to claims *"arising from the liquidation of the Equitable Insurance Company"* and references payments and provisions in respect of the same, whereas the latter refers to 65 *"Equitable Claims"*, again referring to the same company, being settled in 1966 and 16 remaining outstanding.

7.21. The 1964 accounts record a number of entries in relation to the liquidation of EIC. Express provision is made for claims *"[a]rising from the liquidation of Equitable Insurance Company"* totalling £70,400. Another entry in the accounts reads *"[e]stimated further sums exigible from Insurance Company members arising from the liquidation of the Equitable Insurance Co. Ltd. - £62,249"*.

7.22. Similarly, the 1966 accounts show entries related to EIC including *"[l]iabilities arising from the liquidation of Equitable Insurance Company"* of £14,661, and *"[e]stimated further sums exigible from Insurance Company Members arising from the liquidation of the Equitable Insurance Company"* of £8,919.

7.23. It is submitted that it is very significant that no exclusion for insolvent insurers was included in the 1964 Agreement in circumstances where during the previous year a liquidator was appointed to the EIC and the MIBI had made payments out in respect of this insolvency.

7.24. Counsel further relies on two memoranda prepared by the office of the Minister for Industry and Commerce in 1964 which were prepared for the Government of the day in relation to the EIC insolvency. In the first of these documents, numbered T.I.A. 2876/2 and headed *"[s]ummary of Memorandum for the Government"* it is stated that *"[t]he liabilities of [Equitable Insurance Company] to its policyholders are estimated at £350,000, of which £140,000 approximately will be met by the Motor Insurers Bureau."*

7.25. The second memorandum states in respect of EIC's outstanding liabilities that:

> *"The Motor Insurers' Bureau, which is representative of all companies doing business here, Irish and foreign, will, in accordance with the terms of the Agreement with the Minister for Local Government, meet certain liabilities under motor policies to the extent of £140,000, leaving a balance of £210,000 approximately."*

7.26. The second document also details that the MIBI was requested to cover all motor claims, including those which did not come within the scope of the 1955 Agreement, but refused to do so.

7.27. The claimant submitted that it is clear from these documents that the Minister for Industry and Commerce is telling the Government that MIBI will cover EIC motor claims, but only those covered by the 1955 Agreement. These documents were presented to the Cabinet, of which the Minister for Local Government, a party to the 1955 Agreement, was a member.

7.28. It is submitted that the only logical finding the Court can reach in relation to these payments out in respect of the EIC insolvency is that the MIBI did so because it believed it was required to do so under the Agreement. It is submitted that this is crucial

to determining the intention and understanding of the parties at the time the 1955 and 1964 Agreements were entered into. The relevant provisions of these Agreements carry through to the 2009 Agreement and no provision to exclude insolvent insurers was ever introduced.

The Insurance Act 1964 envisages MIBI Liability

7.29. Section 3(1), (2), and (7) of the 1964 Act provide as follows:

> *"3.- (1)Subject to the provisions of this section and sections 3A and 3B, there may, with the approval of the High Court, be paid to a person out of the Fund, in relation to an insurer in liquidation, such amount or amounts as that Court may from time to time authorise in respect of any sum (other than a sum payable in respect of the refund of a premium) due to a person under a policy issued by the insurer in liquidation in respect of a risk in the State, together with the costs and expenses (if any) necessarily and reasonably incurred by the person in endeavouring to secure payment of the sum.*
>
> *(2) The High Court shall order a payment under subsection (1) only if it appears to the High Court that it is unlikely that the claim can be met otherwise than from the Fund.*
>
> *…*
>
> *(7) Where, in respect of a sum due under a policy, a payment equal to the whole of the sum is made by the Motor Insurers' Bureau of Ireland, a payment shall not be made out of the Fund under this section in respect of the sum, and where, in respect of such a sum, a payment equal to part of the sum is made by that Bureau, a payment out of the Fund in respect of the sum shall not exceed the amount of the sum less the amount of the payment by that Bureau."*

7.30. Section 3(7), of the 1964 Act as amended, is identical in every respect to s. 3(4) of the 1964 Act as originally enacted, save for one typographical amendment.

7.31. It is submitted that this section can only be interpreted as meaning that when it was enacted the MIBI had a liability in respect of insolvent insurers. The claimant contends that the subsequent failure to alter the terms of the various MIBI Agreements is significant.

7.32. The claimant denies that, as submitted by the respondent, this section was introduced to prevent people recovering twice in respect of the EIC insolvency, having already been paid by the MIBI. Counsel submitted that there is nothing which limits the section to EIC policyholders and if the Oireachtas had intended to refer to EIC it could have, as it did in s. 4 of the Act. Furthermore, the section was re-enacted most recently in the 2011 Act when the Equitable Insurance Company insolvency was a piece of distant history.

7.33. Insofar as the respondent contends that s. 3(4) applies where there is a dispute about cover, where a driver is initially unidentified but later identified, or where a vehicle is initially untraced but later traced after the MIBI has paid out, it is submitted that this cannot be the case. If such a situation did arise there is nothing to prevent the MIBI recovering and it is unlikely that the Oireachtas would have legislated for such a remote hypothesis.

7.34. The Court was referred to an extract from Lewison, *The Interpretation of Contracts* (4th ed.) (2007), which considers, at para. 4. 06, the relevance of the legal background in interpreting contracts in the following terms:

> *"The legal background against which the contract was made may influence the construction of the contract -*
>
> *Parties do not make contracts in a legal vacuum. They always negotiate against the background of the law. It is, therefore, reasonable to suppose that they take into account the general law in reaching their ultimate consensus. And, accordingly, the proper construction of their agreement is properly influenced by the legal background against which it is made."*

7.35. In the case of *Winter Garden Theatre (London) Ltd. v Millennium Productions Ltd.* [1948] A.C. 173, the House of Lords stated:

> *"There are very few if any contracts which can be construed without taking into consideration a long background of gradual development and the implication of customary provisions, and I do not think that the meaning of a license can be reached by considering the matter, as it were, in the air: Its incidents have a long history behind them."*

It is submitted therefore that the 2009 Agreement must be constructed in the light of the 1964 Act and the assumption by the Oireachtas of MIBI liability for insolvent insurers. The relevant provisions of the 1964 Act were later re-enacted in the 2011 Act.

The Domestic Agreement and Articles of Association

7.36. The claimant referred the Court to the original Memorandum and Articles of Association of the MIBI from 1955. The Memorandum states that:

> *"3. The objects for which the Bureau is established are:-*
>
> *(a) To enter into the agreements referred to in Clause 2 of the Bureau's Articles of Association and to carry the same into effect with or without modification, and for this purpose to satisfy or provide for the satisfaction of judgments in respect of liability for injury to person required to be covered by contracts of insurance or guarantee under Part V of the Road Traffic Act, 1933, or by any other statute or at common law or otherwise."*

7.37. Clause VIII of Appendix III to the Articles of Association, which is the "Domestic Agreement" between the various MIBI members, provides:

> *"In the event of the insolvency of any Insurance Company any payments which MIB of I may as a result be called upon to make on its behalf to judgment creditors shall be contributed solely by the other Insurance Companies and in the event of the insolvency of an Insurance Underwriter all payments which MIB of I may as a result be called upon to make on his behalf to judgment creditors shall be contributed solely by the other Insurance Underwriters, in each case the*

individual contributions being in the pro rata proportion mentioned in Clause VI hereof."

7.38. This Domestic Agreement was updated on 1st January, 1993. Clause 10 of that agreement relates to the insolvency of a member of the MIBI and provides as follows:

> *"(1) In the event of the insolvency of any Insurance Company any payments which MIB of I may as a result be called upon to make on its behalf to judgment creditors shall be contributed solely by the other Insurance Companies and in the event of the insolvency of an Insurance Underwriter all payments which MIB of I may as a result be called upon to make on his behalf to judgment creditors shall be contributed solely by the other Insurance Underwriters, in each case the individual contributions being in the pro rata proportion mentioned in Clause 8 hereof.*
>
> *(2) It is agreed in the event of such payments referred to at Clause 10(1) having to be made MIB of I will have the right to make a claim for a refund of such payments on behalf of its members against such liquidator, receiver, examiner or otherwise of such insolvent Insurance Company or Insurance Underwriter."*

7.39. The updated Articles of Association of the MIBI from 2009 contain the following provision at Clause 10 which relates to "Cessation of Membership":

> *"10.1 A Member shall cease ipso facto to be a Member where such Member:-*
>
> > *10.1.1 goes into liquidation, has a receiver appointed over its assets, goes into examinership or is otherwise insolvent;*
> >
> > *10.1.2 ceases to transact or carry on motor vehicle insurance business in the State;*
>
> *No such Member, while continuing to transact motor vehicle insurance business in the State, shall be entitled to resign its membership.*
>
> *Any such Member ceasing to be a Member shall nevertheless remain liable for its or his share (pro rata or otherwise) of all obligations (including but not limited to the obligations of a Member under Article 63.3) arising prior to such resignation and during that current year in which the resignation takes effect.*
>
> *Upon the occurrence of any event listed in Article 10.1.1 or 10.1.2 any payments which the Bureau may as a result be called upon to make on a Member's behalf to any creditor shall be contributed solely by the other Members respectively."*

The claimant submits that the Memorandum and Articles of Association, and the Domestic Agreement, display a consistent understanding between the MIBI and its members in relation to situations of insolvency.

The MIBI Directors' Report of 2012

7.40. The claimant relies on the MIBI Report and Financial Statements for the year ended 31st December, 2012 as further evidence supporting the construction of the 2009 Agreement advanced by the Law Society.

7.41. This document contains the annual directors' report which states the following under the heading "Principal Activities":

> *"The principal activities of the Bureau are:*
>
> *- to make arrangements for the compensation of victims of road accidents, with certain exceptions, involving uninsured or stolen vehicles and unidentified or untraced vehicles, in compliance with Agreements with the Minister for Transport;*
>
> *- to issue green cards and to administer insurance claims arising out of accidents in the State involving foreign registered vehicles and accidents abroad involving Irish registered vehicles; and*
>
> *- to act as Information Centre and Compensation Body for Ireland under Statutory Instrument 651/2003.*
>
> *- In the event of the insolvency of any of its members, the Bureau is required, under its agreement with the Minister for Transport, to pay claims, to the extent that its insolvent member is unable to do so."*

The claimant submitted that this statement is significant as it indicates the understanding of the Bureau's Directors in relation to the 2009 Agreement and the obligations of the MIBI in 2012.

7.42. The MIBI attempts to explain this statement in the affidavit of John Casey, Chief Executive of the MIBI, in the following terms:

> *"Mr. O'Higgins refers to a coy of the report of the MIBI's Board of Directors for the year ended 31st December 2012 which refers to a statement made therein which suggests that in the event of an insolvency the MIBI is required under the 2009 Agreement to pay claims to the extent that an insolvent member is unable to do so. The statement made is clearly incorrect and appeared in error. Further, the statement did not purport, nor could it be, an interpretation of the 2009 Agreement. I say and am advised that the relevant statement is inadmissible as to the legal effect of the 2009 Agreement and cannot override the terms of that agreement."*

The claimant submitted that this explanation is entirely inadequate. It fails to explain how the error occurred, whether or not it occurred in other directors' reports over the years, or how the error was subsequently referred to in an auditors' report in 2013.

7.43. It is submitted that the only reasonable conclusion which the Court can draw is that this statement was not included in error, but rather, was included because it is what the Bureau's directors believed the obligation to be under the 2009 Agreement.

The MIBI Auditor's Report of 2012

7.44. The claimant further referred the Court to an independent auditor's report prepared by Price Waterhouse Coopers in April 2013

which contains the following in the "Notes to the Financial statements":

> *"16. Contingent liabilities*
>
> *As stated in the Report of the Board, in the event of the insolvency of any of its members, the Bureau is required, under its agreement with the Minister for Transport, to pay claims, to the extent that its insolvent members are unable to do so. No provision has been made for this contingent liability in these financial statements."*

7.45. The MIBI has failed to offer any explanation as to why this statement appears in the auditor's report. It is submitted that the statement further supports the construction of the 2009 Agreement as advanced by the Law Society.

7.46. It is submitted that the factual matrix as outlined shows that the 1955 Agreement covered situations of insolvency and the MIBI paid out following the EIC insolvency. The MIBI has failed to identify any change in the MIBI Agreements which excludes situations of insolvency.

The "Limited Class" and the Significance of the Preamble

7.47. The claimant rejects the respondent's submission that, when read in a holistic way, the liability of the MIBI under 2009 Agreement extends only to the so-called "limited class", which comprises uninsured vehicles, unidentified or untraced vehicles, stolen vehicles, and drivers who had insurance at the time of an accident but the relevant insurer repudiated the cover.

7.48. It is submitted that this construction of the 2009 Agreement cannot be correct for a variety of reasons. There is no express term in the body of the 2009 Agreement which limits liability to that class and there is no provision that s. 4.1.1 does not apply in circumstances where an insurer has become insolvent. It is submitted that the respondent has been unable to identify any extrinsic evidence to support this construction while the entire factual matrix as outlined supports the claimant's construction.

7.49. The claimant submitted that the MIBI place considerable reliance on the preamble to the 2009 Agreement in support of the construction they advance. However, it is submitted that such reliance is misplaced for a number of reasons. The first is that the preamble, and the explanation of the "limited class", does not describe all situations in which the MIBI is liable. The preamble does not refer to situations where insurance was in place at the time of the accident but has been repudiated. Therefore, it is submitted that, even on the MIBI's own case, the preamble is non-exhaustive and is of limited assistance in understanding the scope of the MIBI's liability under the 2009 Agreement.

7.50. Secondly, it is submitted that the broad language of s. 4.1.1 supports the claimant's construction and that, rather than using such broad terms, if the Agreement was intended only to cover the "limited class" as contended for by the MIBI then it would expressly state this. However, rather than any statement to this effect, section 4.1.1 states that it does not matter whether a person is covered by an approved policy of insurance and this must include situations where an insurer has become insolvent.

7.51. It is further submitted that the reference to *"whether or not such persons be in fact covered by an approved policy of insurance"* must relate to something more than the 'limited class' as the existence of an approved policy of insurance is irrelevant in relation to those categories of drivers identified in the limited class, such as unidentified or untraced drivers. If an insurer has repudiated liability, the expression "approved policy of insurance" does not apply.

7.52. The last sentence of s. 4.1.1, i.e. *"whatever may be the cause of the failure of the judgment debtor"* also undermines the contention that the Agreement relates only to the "limited class". It is submitted that if the Agreement related only to the "limited class" this sentence would not only be unnecessary but would be entirely incorrect.

7.53. In relation to the significance of the preamble, counsel referred the Court to the decision in *Young v. Smith* (1865) 1 Eq. 180 wherein it was stated that:

> *"'I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious and the recitals inofficious.'"*

It is also stated that:

> *"It is important to keep the separate parts of a deed clear and distinct. The recitals and operative parts ought to be carefully distinguished. Where they are at variance the operative part is that which is officious and the recital is ineffectual and produced no effect. A recital may explain an ambiguity in the operative part but it cannot have the effect of introducing a covenant…"*

7.54. It is further submitted that in construing the 2009 Agreement, post-event statements of subjective intent cannot outweigh the text of the agreement itself and that the submission of the respondent that both the MIBI and the Minister are now ad idem as to the effect of the Agreement is irrelevant. In any event, there is no evidence before the Court of what the Minister's current position is and the evidence relied upon by the claimant shows that the relevant Ministers have adopted an inconsistent position over the lifetime of the various agreements.

7.55. It is submitted that a legal interpretation from one's lawyers, whether correct or incorrect, is not the same as the understanding which a contracting party had at the time of entering into a contract.

EU Law

7.56. Insofar as the respondent submits that the 2009 Agreement should be interpreted as being limited by the requirements of the EU Directives, which contain no obligation to cover situations of insolvency, the claimant submitted that while the Agreement should comply with the Directives, there is nothing to prevent it going further. It is submitted that when the Directives came into effect in the 1980s it was decided that the MIBI Agreement would be the vehicle through which the State would comply with the Directives. However, the MIBI was established long before any issue of EU Law arose and there is nothing to prevent any domestic arrangement from going beyond what is required by EU law.

7.57. The claimant referred to the correspondence exchanged between the various parties prior to the commencement of these proceedings as to the issue of liability for Setanta related claims. The Court is referred to the Minister's letter dated 28th November, 2014, setting out the Department's view that, on the basis of legal advice, any liability for Setanta claims was not a matter for the

Department or for the MIBI and that the Fund was the appropriate scheme through which affected persons should seek compensation. The letter relies on a recent decision of the European Union Court of Justice decision in *Csonka v. Magyar Allam* (Case C-409/11) and states:

> *"It is clear from the Court's judgment in that case that there is no legal obligation under the Motor Insurance Directives that requires the MIBI to satisfy unpaid claims made against an insolvent insurer, since the role of the MIBI to be the insurer of last resort only exists if there is no insurance policy in place for the vehicle. This is not the case for vehicles which have existing insurance policies from an insurer, at the time of the accident, that subsequently goes into liquidation.*
>
> *The 2009 Agreement, paragraph 4.1.1, subject to the provisions of clause 4.4, expressly states that the satisfaction of judgments by the MIBI is subject to the provisions of the 2009 Agreement. In turn, only claims against uninsured or untraced drivers are covered by the MIBI per paragraph 3.6…"*

7.58. The respondent has also adopted this position in these proceedings and submitted that this is the view shared by both parties to the 2009 Agreement. The claimant submitted that this interpretation completely misunderstands the legal position and refers the Court to the letter sent by Mr. O'Higgins, President of the Law Society, on 18th February, 2015, by way of reply to the Department's letter. This letter states that the Csonka decision is not relevant to the separate question of what was actually provided for in the 2009 MIBI Agreement and rejects the Department's interpretation of s. 3.6 of the 2009 Agreement, stating that:

> *"The interpretation in favour of Clause 3.6 not being intended to limit the scope of Clause 4.1.1 is supported by the 'Principal Agreement' of 10 March 1955 between the Motor Insurers and the Minister, which (we understand) remains unamended and not terminated."*

7.59. The claimant maintains its position as set out in Mr. O'Higgins' letter in these proceedings. Furthermore, counsel stated that while the Court decided in Csonka that the obligation imposed by the Directive is limited to specific circumstances and does not include situations of insurer insolvency, it was also stated that:

> *"However, as is apparent from Article 1(7) of the Second Directive, Member States may, as regards the conditions for the payment of compensation from the national compensation fund, adopt measures more favourable to the victims than those provided for under the directives on insurance against civil liability in respect of the use of motor vehicles. In that regard, it must be pointed out that, according to the information provided by the Hungarian Government, measures designed to remedy the situation brought about by MAV's insolvency were, during the proceedings before the Court, in course of preparation before the competent Hungarian bodies."*

7.60. In light of the foregoing, it is submitted that the Court should answer question (a) as set out above in the affirmative. In particular, the MIBI has a potential liability to pay out in respect of the claims referred to, and has an actual liability to pay out depending on the circumstances of individual cases, and in particular that it has a liability to satisfy judgments or PIAB Orders to Pay to the extent that, within 28 days from the date of their having being made, they remain unsatisfied, which judgments or Orders to Pay would otherwise have been satisfied by Setanta Insurance Limited but for its going into liquidation.

7.61. It is submitted that question (b) should be answered as follows - The High Court should make payments out of the Insurance Compensation Fund to persons claiming against Setanta policyholders – for example as a *"…sum [which] … relates to the liability of the insured to a third party …"* pursuant to s. 3(5) of the 1964 Act as amended - only if, and to the extent, that such third party claimants of such policy holders have not been compensated by MIBI.

SUBMISSIONS OF THE RESPONDENT

8.1. The respondent submitted that the Court should answer the questions as set out in the Order of 27th April, 2015 in reverse order. It is submitted that the answer to question (b) is that the power of the High Court to make payments out of the Fund to persons claiming against Setanta policyholders is not impacted upon by the alleged liability or potential liability of the MIBI. Both parties to the 2009 Agreement take the view that the contract between them imposes no such obligation on the MIBI in relation to Setanta related claimants. In those circumstances, it is submitted that question (a) does not arise, or, if it does arise, should be answered in the negative.

8.2. The respondent contends that the suggestion to answer the questions in this sequence is made on the basis that, when considering whether MIBI has any obligations in respect of insolvent insurers, the Court should bear in mind the entire regime which includes the Fund which was expressly established to *"meet certain liabilities of insolvent insurers".*

8.3. It is submitted that the commercial purpose of the 2009 Agreement was to make provision for victims of uninsured driving and those members of the "limited class" as set out in the preamble, namely, victims of accidents involving uninsured or stolen vehicles or where the driver is untraced, and drivers who had insurance at the time of the accident which was later repudiated.

8.4. It is submitted that cases involving insolvent insurers, however, are not the same as "uninsured" cases or cases of "ineffective" insurance as the policy does have a value and the holder of such a policy was in compliance with the law on the day of the accident. Therefore, such "insured" drivers do not come within the scope of the 2009 Agreement.

8.5. If the construction advanced by the claimants is correct, it is submitted that the MIBI would effectively be responsible for underwriting the liabilities of every motor insurer who is writing risks in this jurisdiction, no matter from what country in the European Union they may have been passported, and without regard to what model of risk they adopted or how they priced their policies. It is submitted that had it been the intention of the parties to include such an onerous burden in the Agreement it would have been expressly stated in the terms of the Agreement. Furthermore, both parties to the 2009 Agreement, the MIBI and the Minister, reject the interpretation of the Agreement as advanced by the Society.

8.6. Aidan Hanratty, Director of Underwriting at Allianz Insurance, states in his affidavit that Allianz operates in a regulated industry and prepares an underwriting strategy which seeks to maximise returns for its shareholders. He says that Allianz has a conservative risk appetite and operates its underwriting strategy on that basis. He highlights a number of consequences which he believes will arise if the MIBI is held to have an obligation in respect of insolvent insurers under the 2009 Agreement. These consequences include shareholders being exposed to risks they had sought to avoid through their own underwriting strategy, the increased risks will affect the company's capital requirements, a finding that the 2009 Agreement covers situations of insolvency is likely to significantly alter market behaviour and would introduce liquidation as a viable option. Similar affidavits are sworn by Derek Bain, Chief Risk Officer at AXA Insurance, and George Parsons, Director of FBD Insurance Ltd. plc.

8.7. The respondent submitted that these affidavits show that the MIBI members have never conducted themselves on the basis that they have a potential liability for insolvent insurers operating in Ireland. It is submitted that, given the number of insurers operating in Ireland, such a liability is not a remote risk, yet there is nothing to indicate that MIBI members were operating on the basis that such a risk would arise. Nor were they ever required by any regulatory body to make provision for such an eventuality. It is submitted that neither the insurers nor the regulators made provision for such a liability and this is significant in terms of ascertaining the shared belief of the MIBI members after the creation of the Fund in the 1964 Act.

8.8. It is submitted that significant decisions such as imposing such an onerous liability on insurers, both existing and prospective new entrants to the Irish market, which are likely to have significant consequences, are matters for the government and not decisions to be based simply on the Law Society's interpretation of the 2009 Agreement.

Contractual Interpretation

8.9. The respondent submitted that the MIBI Agreements are commercial agreements and the usual principles of interpretation of commercial agreements apply. In this regard, the courts adopt a "business common sense approach" to interpretation of a contractual document.

8.10. It is submitted that the meaning of a document as conveyed to a reasonable man by the words it uses is not the same as the meaning of its words from a semantic and syntactical analysis. The respondent referred the Court to the dictum of Lord Hoffman in *Investment Compensation Scheme v. West Bromwich Building Society* [1998] 1 All E.R. 98, which has been approved by the Irish courts in a number of cases including *Irish Bank Resolution Corporation v. Cambourne Investments Inc.* [2012] IEHC 262, *Ickendel Limited v. Bewley's Café Grafton Street Limited* [2013] IEHC 293, and *ICDL GDCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Limited* [2012] IESC 55.

8.11. In relation to the importance of the "factual matrix" in the construction of the 2009 Agreement, the Court was referred to the decision of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 wherein it was stated that:

> *"The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations… We must… inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view."*

8.12. It is submitted that the Court must consider the purpose of the agreement as set out by Finlay C.J. in *O'Neill v Beaumont Hospital Board* [1990] I.L.R.M. 419:

> *"The terms of this sub-clause must be construed in the light of the terms if the entire contract in which it is contained and in the light of the purpose for which the contract was entered into between the parties concerned."*

This view has also been endorsed in cases such as *Hearns v. Collins* (unreported, High Court, O'Sullivan J., 3rd February 1998), *Rohan Construction v. Insurance Corporation of Ireland* [1988] I.L.R.M. 373, and *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274.

8.13. The factors relied upon by the respondent in support of its construction of the 2009 Agreement can be summarised as follows:

The "Limited Class" and the Significance of the Preamble

8.14. It is submitted that the preamble to the 2009 Agreement makes clear that the purpose of the Agreement was to provide compensation for a "limited class" of persons which did not extend to victims of road accidents involving insured vehicles but where the insurer later becomes insolvent. It is submitted that cases where insurance has been repudiated after an accident come within the scope of the word "uninsured" as mentioned in the preamble.

8.15. It is submitted that while the Society contend that the 2009 Agreement contains no exclusion in relation to insolvent insurers, nor is there such an express provision and, as the construction advanced by the claimant is not expressed in "clear and unambiguous language", then it is important to have regard to the preamble. The respondent relies upon the decision of *Leggott v. Barrett* (1890) 15 Ch. D. 306 as authority for the proposition that where the preamble or recitals are clear and the operative part of the document is ambiguous the recital will govern the construction. In that case, Brett LJ stated:

> *"If there is any doubt about the construction of the governing words of the document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or deed."*

8.16. The respondent contends that the Law Society has adopted an entirely inconsistent approach by relying on the preamble to the 1955 Agreement in support of its own position, while also stating that the reliance of the MIBI on the preamble to the 2009 Agreement is "misplaced". In any event, it is submitted that the Law Society, without any basis, seeks to extend the reference to "ineffective insurance" in the preamble to the 1955 Agreement to suggest that it is a synonym for "absence of insurance or of effective insurance".

8.17. The MIBI submitted that it is clear from a construction of the whole of the MIBI Agreements that the term "ineffective insurance" refers to a situation where insurance has been repudiated, commonly known as "insurer concerned" cases, or cases where cover was declined. An example of an "insurer concerned" case offered by the respondent is where an insurer has issued a policy to cover two persons, persons (a) and (b), to drive a particular car and this car is then involved in an accident where neither (a) or (b) was driving the car at the time, but rather person (c) was driving. In such a case, while the vehicle itself is insured, the policy did not extend to the person driving it. In such a case, the insurer would be regarded as the "insurer concerned" and would bear the entire cost of the claim, as opposed to going through the MIBI procedure in the same way a claim related to an unidentified motorist would.

8.18. The claimant submitted that situations where insurance was in place at the time of an accident but was later repudiated are very similar to situations where an insurer becomes insolvent and there is "no textual basis in the Agreement for compensating the former and not the latter". However, the respondent contends that this submission is misplaced. The 2009 Agreement makes explicit the limited number of persons captured therein who are covered by an approved policy of insurance. Section 3.8.1 deals with repudiation cases, s. 3.3 deals with untraced motorists, and s. 11 deals with State vehicles. By contrast, nowhere does the 2009 Agreement refer to insolvent insurers.

EU Law

8.19. It is submitted that the MIBI Agreements satisfy an important European obligation on the part of the State and its requirements under Directive 2009/103/EC.

8.20. Recital 14 of the Directive makes clear that Member States are obliged to make provision for *"a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified…"*. Article 10.1 of the Directive states:

> *"Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.*
>
> *The first subparagraph shall be without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident. However, Member States may not allow the body to make the payment of compensation conditional on the victim establishing in any way that the person liable is unable or refuses to pay."*

8.21. The respondent relies on the recent European Court of Justice decision in *Csonka and others v. Magyar Allam* [2013] All E.R. (D) 243 (Jul); Case C-409/11 as authority for the proposition that the obligations of a compensation body, such as the MIBI, do not extend to insolvent insurers. In that case, the Court of Justice ruled that contrary to the line of argument put forward by the applicants in the main proceedings, the payment of compensation by such a national body, as provided for under the relevant motor insurance directive, referred to as the First (Council Directive 72/166/EEC) and Second (84/5/EEC) Directives, could not be regarded as the implementation of a guarantee scheme in respect of insurance against civil liability relating to the use of motor vehicles. Rather, it was intended to take effect only in specific, clearly identified, sets of circumstances. The insolvency of an insurer did not constitute a case which could be identified as one of those sets of circumstances. In such a situation, the insurance obligation had been satisfied.

8.22. Counsel relies on the opinion of Advocate-General Mengozzi in the Csonka case, which considers Member States' obligations in relation to compensation bodies under the Directives (at paras. 28-29):

> *"The payment of compensation by that body was not intended to be automatic - being confined to two sets of circumstances – and the legislature had to some extent sought, while pursuing the objective of protecting victims, to limit the financial burden likely to be represented by the payment of compensation by that body, leaving it open to the Member States to implement more favourable measures relating specifically to the conditions governing the payment of compensation by that body.*
>
> *Consequently, if it can be inferred from Article 1 of Directive 84/5 that the appropriate measures referred to in Article 3 of Directive 72/166 include the setting up of a body 'with the task of providing compensation … for damage to property or personal injuries', it follows that the payment of compensation by that body was expressly limited to damage 'caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied', without prejudice to the right of the Member States 'to regard compensation by that body as subsidiary or non subsidiary'."*

The distinction between policies of insolvent insurers and untraceable uninsured drivers was summarised as follows:

> *"35. In those circumstances, I find it difficult to agree with an interpretation of Article 3 of Directive 72/166 along the lines argued for by the applicants in the main proceedings. That provision requires the Member States to 'take all appropriate measures to ensure that civil liability … is covered by insurance', not to take all appropriate measures to guarantee the civil liability covered by insurance. The difference is subtle but significant and the interpretation suggested by the applicants in the main proceedings seems to me to go too far in stretching, to the point of distortion, the intention on the part of the EU legislature, while the legislature's silence with respect to cases involving an insolvent insurer seems rather to reflect the reluctance of the Member States to grant a much more extensive right to compensation from the body set up for that purpose, given the financial implications of so doing, which, as we have seen, were also one of the legislature's key concerns.*
>
> *36. After Directive 84/5, the development of the EU legislation in this field did not deviate from that path. When adopting Directive 90/232, the EU legislature continued to assert the objective of guaranteeing for 'motor vehicle accident victims … comparable treatment irrespective of where in the Community accidents occur'. In doing so, it specifically extended protection to the category of persons made up of passengers other than the driver and, through the addition of a sentence to the first subparagraph of Article 1(4) of Directive 84/5, prohibited the Member States from making the payment of compensation by the body 'conditional on the victim's establishing in any way that the person is unable or refuses to pay'. There is no mention of the issue of an insolvent insurer.*
>
> *… 44. Lastly, I should also like to emphasise the important difference that exists, in my view, between a vehicle in respect of which the insurance obligation as described in Article 3 of Directive 72/166 has not been satisfied and a vehicle insured with an insolvent insurer. After all, a vehicle for which the insurance obligation has not been satisfied is an uninsured vehicle. A vehicle which was insured with an insolvent insurer has satisfied the obligation to secure insurance against civil liability in respect of the use of vehicles. The risk cover is genuine but the compensation is delayed by the financial situation of the insurer."*

The Existence of the Fund

8.23. The respondent submitted that it is important for the Court to have regard to the entire scheme which exists and in particular the demarcation as between the role of the MIBI and the role of the Fund as compensation bodies. It is submitted that both the structure which exists and the terms of the 1964 Act make clear that it is the Fund that has obligations in respect of insolvent insurers rather than the MIBI.

8.24. The long title to the 1964 Act describes it as "[a]n Act to provide for the establishment of a fund to be known as the Insurance Compensation Fund to meet certain liabilities of insolvent insurers…". Insurers who issue policies in respect of risks in the State are

required under the 1964 Act to contribute to the funding of the Fund itself.

8.25. It is submitted that the fact that claimants may receive limited compensation pursuant to the statutory scheme is not a relevant factor in determining whether liability for insolvent insurers rests with the MIBI and that such issues are a matter for the Oireachtas.

8.26. The respondent submitted that the Fund was previously used to support the administrator of PMPA Insurance plc which became insolvent and that the 2011 Act was prompted by the failure of Quinn Insurance and widened the scheme to include foreign entities in the Irish market in those who are levied in relation to the Fund.

8.27. It is submitted that there is nothing in the 1964 Act which suggests that motor insurers are to be excluded from the Fund and that it is clear, therefore, that the Fund is liable to compensate policyholders where an insurer has become insolvent, while the MIBI Agreement compensates victims involving the "limited class" only.

Memorandum of Association

8.28. The respondent contends that the Memorandum of Association of the MIBI demonstrates that the MIBI's obligations under the 2009 Agreement are confined to a limited group and do not extend to an insolvent insurer.

8.29. Object 3.1 of the Memorandum, dated July 1955, states that the principal objective of the MIBI is to enter into agreements and make arrangements for the compensation of victims of road accidents "involving either uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers."

8.30. While the Society referred to the expression in Object 3.1 relating to "in compliance with current agreements", the MIBI submitted that the authority to enter agreements and make arrangements in compliance with current agreements clearly relates only to uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers.

8.31. Insofar as the claimant relies on other provisions of the Memorandum, and in particular Objects 3.12, 3.19, and 3.27, to suggest that the MIBI is permitted to compensate in an insolvency situation, the respondent submitted that such other clauses cannot be wider than Object 3.1, the main objects clause. In this regard, it referred to the decision of *Anglo Overseas Agencies Limited v. Green* [1961] Q.B. 1 wherein it was stated that:

> *"where the Memorandum of Association expresses the object of the company in a series of paragraphs, and one paragraph, or the first two or three paragraphs, appear to embody the 'main object' of the company, all the other paragraphs are treated as merely ancillary to the 'main object', and as limited or controlled thereby."*

Articles of Association

8.32. In relation to the claimant's reliance on Article 10.1 of the Articles of Association which concerns the cessation of membership of the MIBI, the MIBI accept that Setanta has gone into liquidation, as set out in 10.1.1. However, it is denied that Article 10.1 amounts to a statement by the MIBI that it has a liability in an insolvency situation.

8.33. An explanation of what the Articles mean is set out in the affidavit of Mr. Casey. He states that Article 10.1 relates to the financing of pre-liquidation or cessation of trading liabilities of a member of the MIBI which it fails to discharge.

8.34. The respondent submitted that the process referred to in Article 10.1 is one whereby the MIBI relies upon levy calls. The MIBI takes advice from actuarial consultants who calculate the likely levy to be called and each MIBI member is notified. Every two months, a levy call is made and if an unexpectedly large payment is to be made then the MIBI may make an additional levy call.

8.35. It is submitted that the reference to "any creditor" in Article 10.1 means those creditors of the MIBI to be discharged from the relevant levy calls.

Directors' Report, Financial Statements

8.36. In relation to the references in the 2012 Directors' Report, as relied upon by the claimant, the MIBI submitted that even if the Law Society's construction is correct, which is denied, the relevant note has no probative or evidential value. Mr. Casey makes clear in his affidavit that the statement is incorrect and appeared in error.

8.37. It is submitted that the statements which appear in the financial statements are inadmissible and that it is well established that where a transaction has been reduced to or recorded in writing then extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the relevant documents. It is submitted that *Halsbury's Laws of England* (5th ed.) (Lexis Nexis, 2012) states the general rule prohibiting the admission of extrinsic evidence is subject to two exceptions, namely, the previous negotiations of the parties and their declarations of subjective intent, and evidence of the conduct of the parties after the making of the contract.

8.38. The Society contends that the evidence from the statements is admissible on an exceptional basis and rely on *Bowes v. MIBI* [2000] 2 I.R. 79, and *Chartbrook Ltd. v. Persimmon Homes Ltd*. [2009] UKHL 38 in this regard. However, the MIBI contends that a more restrictive approach was taken in *Cherry Tree Investments Ltd. v. Landmain Limited* [2012] All E.R.(D) 11 (Jun) where Longmoore L.J. stated:

> *"For my part I would respectfully approve the statement of principle at para 3.18 of Lewison on The Interpretation of Contracts (5th ed. (2011)):*
>
> *'In the case of a standard form contract, a negotiable contract or a public document evidence of background to an individual contract has a more limited part to play.'*
>
> *My Lord is able to cite numerous authorities in support of this proposition culminating in the post-Chartbrook case of Re Sigma Finance Corporation[2010] 1 All ER 571. He then says that Lord Hoffmann 'appears' to have taken a different view in para 40 of Chartbrook (where Lord Hoffmann says that ordinarily an assignee must take his chance). But it is perhaps noteworthy that that paragraph is part of a longer passage in which Lord Hoffmann is concerned to stress the attractions of (before going on to rebut) the heresy that pre-contract negotiations should be admissible as an aid to*

construction. It is part of the paragraph in which he recognised the force of Briggs J's objection to the admissibility of pre-contract negotiations that:

'it would be unfair to a third party who took an assignment of the contract or advanced money on its security'

Lord Hoffmann says this proves too much because it is an argument against the admissibility of any such background. Before he says that an assignee must ordinarily take his chance, he instances two cases where first a company's articles of association and secondly a negotiable bill of lading had to be construed. He is therefore really accepting that public and negotiable documents are different from ordinary contracts which can, of course, be assigned but are not generally negotiable like a bill of lading is. So Lord Hoffmann's 'different view' is perhaps more 'apparent' than real."

8.39. It is submitted that the financial statement is not a communication between the parties relevant to the 2009 Agreement, unlike the explanatory booklet and notes referred to in Bowes.

Equitable Insurance Company Insolvency

8.40. While it is acknowledged that it appears that certain payments were made by the MIBI in respect of EIC policies, it is submitted that prior to the enactment of the 1964 Act there was no mechanism or organisation to deal with insolvent insurers, and, in that regard, s. 4 of the 1964 Act explicitly refers to the EIC insolvency.

8.41. A publication of the Department of industry and Commerce from 1964 states as follows:

"The Insurance Act, 1964, which became law on 7 July,1964, provides for the establishment of an Insurance Compensation Fund to meet liabilities of insolvent insurers. The Fund is financed by a grant from the Minister for Finance and contributions from insurers."

8.42. The respondent submitted that the case of *Re Butler* [1970] I.R. 45 concerned an application pursuant to s. 3(3) of the 1964 Act following a road traffic accident. It is submitted that the claim related to an EIC policy and sought payment out of the Fund and there is no suggestion in the judgment that a claim could or should have been made as against the MIBI in respect of any EIC policy holder.

8.43. The MIBI submitted that, given the passage of time, it is difficult to know what occurred in the context of the EIC insolvency. However, a possible explanation is that the MIBI made certain payments on an *ex gratia* basis and that after the commencement of the 1964 Act claims related to Equitable were made against the Fund.

8.44. It is further submitted that while there have been no motor insurer liquidation events between EIC and Setanta, there have been insolvent motor insurers such as PMPA and Quinn Insurance, and the Fund was the appropriate compensatory body.

UK Law

8.45. The respondent submitted that the claimant's contention that the English MIB Agreements are intended to cover a situation in which an insurer becomes insolvent and the same applies in this jurisdiction ignores the relevant compensation scheme in the UK, which provides for certain recoveries in the context of, *inter alia*, the insolvency of motor insurers.

8.46. It is submitted that none of the UK authorities relied upon by the claimant involved an application in relation to an insolvent insurer and there were no determinations in those cases on the liability of the MIB in relation to policies of an insolvent insurer.

8.47. The claimant failed to refer in any detail to the Financial Services Compensation Scheme, which replaced a special scheme for the protection of policyholders under the Policyholders Protection Act 1975 and 1997. Under the old scheme, the Policyholders Protection Board was under a direct duty to satisfy the claims of third party victims of motor accidents entitled to sue the insurer under s.151 of the Road Traffic Act 1988.

8.48. It is submitted that a review of the relevant commentaries on the introduction of the Policyholders Protection Act shows that a view was taken that while there was a theory that the MIB covered bankrupt insurers, the Act clarified the position and the obligation to cover claims in respect of bankrupt insurers shifted to the Policyholders Protection Board.

8.49. The Policyholders Protection Acts have now been replaced and the Financial Services Compensation Scheme pays a sum equal to 100% of any liability where the policy is one which is compulsory under the Road Traffic Act.

8.50. Therefore, it is submitted that in the event of the failure of an insurer in the UK, the Financial Services Compensation Scheme makes good any outstanding claims by an insured against the insurer, rather than the MIB.

Insurance Act 1964

8.51. The claimant relies on s. 3(7) of the 1964 Act, as amended, and state that it is identical in every respect to s. 3(4) of the original 1964 Act, save for a typographical amendment. The claimant stated that it is *"highly questionable as to what purpose, if any, section 3(7) would serve"* if the MIBI Agreements do not cover situations of insolvency.

8.52. The respondent contends that the 1964 Act was enacted in response to the liquidation of the EIC and, as set out above, it is acknowledged that the MIBI discharged certain liabilities in respect of EIC claims. However, there is no evidence of the MIBI discharging any such claims after the commencement of the 1964 Act. Accordingly, it is submitted that s.3 (4) (later s. 3(7)) could be read in the context of payments to EIC policyholders and is designed to prevent double recovery by claimants.

8.53. In any event, s. 3(7) or indeed any other part of the Act, does not refer to the MIBI having any obligation in respect of an insolvent insurer, while the purpose of the Fund is expressly stated to be to "meet certain liabilities of insolvent insurers".

THE DECISION OF THE COURT

9.1 I will answer the questions posed by the President of the High Court in the Order as set out by him on the 27th April, 2015. Central to doing this is the construction of the 2009 Agreement.

9.2 The principles of interpretation are not in dispute. The Court has been referred to the judgment of Lord Hoffman in *Investors*

Compensation Scheme Limited v. West Bromwich Building Society [1998] 1 All E.R. 98 cited above. The principles he set out there have been repeatedly applied in this jurisdiction. They are set out at para. 7.5 above. I summarise them as follows:

(a) What would a reasonable person well-informed of the background consider the document meant?;

(b) The background means anything which would have affected the way in which the document would have been reasonably understood and was reasonably available to the parties. It does not include the previous negotiations of the parties nor their declarations of subjective intent;

(c) The meaning of the document is what the parties using the words therein in the light of the relevant background would reasonably have been understood to mean;

(d) Words should be given their natural and ordinary meaning;

(e) If the court concludes that the parties could not have intended what the words used indicated or if they lead to a conclusion that flouts business common sense, then the meaning must be made yield to business common sense.

9.3 The role of the MIBI is set out firstly in the Principal Agreement. At clause 2 (1) it provides as follows:

"…if judgment in respect of any liability for injury to person which is required to be covered by an approved policy of insurance under s.56 is obtained against any person or persons in any court established under the Courts of Justice Act 1924 (number 10 of 1924) whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgment is not satisfied in full within 28 days on the date upon which the person or persons in whose favour such judgment was given become entitled to enforce it then the MIB of I will so far as such judgment relates to injury to person and subject to the provisions of these presents pay or cause to be paid to the person or persons in whose favour such judgment is given any sum payable or remaining payable there under in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable only to injury or person) or satisfy or cause to be satisfied such judgment whatever may be the cause of the failure of the judgment debtor to satisfy same."

It is noteworthy that this clause contemplates a role for MIBI whether a driver is or is not covered by an approved policy of insurance. It further provides that the MIBI will pay an unsatisfied judgment creditor whatever the cause of the failure of the judgment debtor to satisfy the same. On 30th November, 1955, the first MIBI Agreement stated the intention of giving:

"Effect to a scheme to secure compensation in respect of injury to person, to third party victims of road traffic accidents in cases where notwithstanding the provisions of the Road Traffic Act relating to compulsory insurance, the victim is deprived of compensation by the absence of insurance or of effective insurance."

Section 1 of that Agreement is in the same terms as s. 2 (1) of the Principal Agreement. As set out above, a number of further MIBI agreements updated the original one. The final one with which the Court is concerned is the 2009 one.

9.4 The crucial clause of this Agreement is 4.1.1. This provides as follows:

"4.1.1 Subject to the provisions of clause 4.4, if Judgement/Injuries Board Order to Pay in respect of any liability for injury to person or death or damage to property which is required to be covered by an approved policy of insurance under Section 56 of the Act is obtained against any person or persons in any court established under the Courts (Establishment and Constitution) Act, 1961 (No. 38 of 1961) or the Injuries Board established by the PIAB Act, 2003 whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgement is not satisfied in full within 28 days from the date upon which the person or persons in whose favour such judgement is given become entitled to enforce it then MIBI will so far as such judgment relates to injury to person or damage to property and subject to the provisions of this Agreement pay or cause to be paid to the person or persons in whose favour such judgement is given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the relevant liability) or satisfy or cause to be satisfied such judgement whatever may be the cause of the failure of the judgement debtor.

4.1.2 Subject to the provisions of clause 4.4, the MIBI shall satisfy, as soon as reasonably possible, any judgement in favour of a person who has issued proceedings pursuant to clause 2.3.

4.2 The claimant shall not be entitled to recover legal costs or expenses for the provision of information to MIBI as maybe required by virtue of this Agreement except where MIBI have interviewed the claimant pursuant to clause 3.3 of this Agreement in which case MIBI will be liable to pay the reasonable costs of such interview.

4.3 The claimant shall not be entitled to legal costs or expenses in excess of what would be payable:

4.3.1 If the owner or user of the vehicle were covered by an approved policy of insurance.

4.3.2 By virtue of the fact that MIBI is or may be a defendant or codefendant to any legal proceedings relating to his claim.

4.4 Where a claimant has received or is entitled to receive benefit or compensation from any source, including any insurance policy in respect of damage to property, MIBI shall deduct from the sum payable or remaining payable under clause 4.1 an amount equal to the amount of that benefit or compensation in addition to the deduction of any amounts by virtue of clauses 7.2 and 7.3.

4.5 The MIBI as the Compensation Body shall take action within two months of the date when the injured party presents a claim for compensation to it but shall terminate its action if the insurance undertaking, or its claims representative, subsequently makes a reasoned reply to the claim.

4.6 Where MIBI and the claimant agree an amount in respect of compensation, MIBI shall pay such amount to the claimant within 28 days of such agreement being reached."

As can be seen, the key phrases are repeated from the Principal Agreement of 1955 and notably clause 2(1), i.e.

"Whether or not such person or persons be in fact covered by an approved policy of insurance".

"Whatever may be the cause of the failure of the judgment debtor".

9.5 On first reading of clause 4.1.1 and particularly the phrase *"whatever may be the cause of the failure of the judgment debtor"*, it would seem that the intention of the parties in this agreement was to ensure that the innocent victims of an uninsured driver could recover compensation to which he was entitled from a judgment debtor who had failed to satisfy his judgment *"whatever may be the cause of the failure of the judgment debtor".* The phrase would seem to cover where that failure was caused by the insolvency of the judgment debtor's insurer. It certainly seems wide enough to do so and is not limited in any such way. As is required by the principles of interpretation set out above, the Court must look, as it is urged to do by the respondent, to the background. Is there anything there that would suggest that the words used ought to be supplemented by some meaning that excluded the insurer's insolvency from the ambit of the clause?

9.6 It is clear that the background to the MIBI Agreements is the obligation to protect the innocent victims of uninsured drivers. This obligation was placed on insurers in return for the introduction of compulsory insurance in 1932. In the United Kingdom, the same scenario prevailed. It seems equally clear that the Irish approach to placing this obligation was modelled upon the British. The schemes were all but identical at their inception. The cases of *Gurtner v. Circuit* [1968] 2 Q.B. 587, and *Jacobs v. MIB* [2010] EWCA Civ. 1208, cited above at 7.15 and 7.17 together with the extract from the Modern Law Review pp. 275-292 cited at 7.18, make clear that in the United Kingdom, the MIB is liable in respect of insolvent insurers. Whilst, of course, these judgments are not binding on this Court, they are nonetheless of persuasive authority. I find it difficult to ignore their very trenchant observations on the issue which is central to this case.

9.7 The claimant has referred the Court to the fact that following the collapse of the EIC in 1963, the MIBI paid out in respect of certain claims under motor policies. It is not denied by the respondent. It does suggest that the payments may have been made on an *ex gratia* basis but there is no evidence that this is so. It is, however, accepted that the MIBI did not in fact cover all the motor claims. It refused to cover those that did not come within the scope of the 1955 Agreement. The Court is referred to certain memoranda to government prepared by the Department of Industry and Commerce in 1964. These indicate an understanding that the MIBI would cover the liabilities of the insolvent insurer. The admissibility of these memos is challenged. In my judgment, whilst they may not be admitted as proof of the truth of what they state about MIBI liability for insolvent insurers, they may be admitted to show what the understanding or conduct of the parties was at the time, whether correct or incorrect. Following these events, the 1964 MIBI Agreement did not exclude liability for insolvent insurers. The subsequent Insurance Act of 1964 explicitly recognises at s. 3(7) a liability of the MIBI to make payments in the event of an insolvency. This background, far from supporting the respondent's interpretation of the meaning, goes the opposite way in my view. It is highly suggestive that the parties to the MIBI took the same view as the United Kingdom courts in the cases cited above and accepted that the MIBI had liability for insolvent insurers as the agreements seem to state.

9.8 The respondent argued that the Fund established by the 1964 Act is the correct vehicle for dealing with the claims against insolvent insurers. Its role, the respondent claims, shows that the MIBI does not in fact have that obligation. In s. 3(7) of the Act, as amended, which is identical to s. 3(4) of the 1964 Act, provides:

> *"Where, in respect of a sum due under a policy, a payment equal to the whole of the sum is made by the Motor Insurers' Bureau of Ireland, a payment shall not be made out of the Fund under this section in respect of the sum, and where, in respect of such a sum, a payment equal to part of the sum is made by the said Bureau, a payment out of the Fund in respect of the sum shall not exceed the amount of the sum less the amount of the payment by the said Bureau."*

Clearly the Act contemplates a liability of the MIBI in respect of insolvent insurers. The argument that this provision was made to prevent double recovery arising from the EIC insolvency is unconvincing. Nothing limits the provision to EIC policy holders. Moreover, the section was re-enacted in the 2011 Act when the spectre of the EIC had long faded away. Thus, the background in this regard also leans heavily in favour of the claimant's case herein.

9.9 The respondent argues that the Memorandum of Association of MIBI confines its obligations to a limited group, i.e. victims of road accidents *"involving either uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers".* It has no power to enter agreements creating liability to other than that limited group. It is noteworthy, however, that this section of the memo also does not mention the case of repudiation. Thus, the logic of the respondent's argument of a limited group set out in the preamble does not hold up. Moreover a proper reading of the full agreement indicates an understanding that embodies a liability for insolvent insurers. Clause VIII of Appendix III to the Articles of Association (the Domestic Agreement) provides:

> *"In the event of the insolvency of any insurance company any payments which MIB of I may as a result be called upon to make on its behalf to judgment creditors shall be contributed solely by the other insurance companies and in the event of the insolvency of an Insurance Underwriter all payments which MIB of I may as a result be called upon to make on his behalf to judgment creditors shall be contributed solely by the other Insurance Underwriters, in each case the individual contributions being in the pro rata proportion mentioned in clause VI hereof."*

The updated version of that agreement of 1st January, 1993 provides at clause 10:

> *"(1) In the event of the insolvency of any insurance company any payments which MIB of I may as a result be called upon to make on its behalf to judgment creditors shall be contributed solely by the other insurance companies and in the event of the Insolvency Underwriter all payments which MIB of I may as a result be called upon to make on his behalf to judgment creditors shall be contributed solely by the other insurance underwriters in each case the individual contributions being in the pro rata proportion mentioned in clause 8 hereof.*
>
> *(2) It is agreed in the event of such payments referred to at clause 10 (1) having to be made MIB of I will have the right to make a claim for a refund of such payments on behalf of its members against such liquidator, receiver, examiner or otherwise as such insolvent insurance company or insurance underwriter."*

The updated Articles of 2009 also contain the following provisions:

> *"10.1 A member shall cease ipso facto to be a member where such member:*
>
> *10.1.1 goes into liquidation, has a receiver appointed over its assets, goes into examinership or is otherwise insolvent;*

10.1.2 ceases to transact or carry on motor vehicle insurance business in the state;

No such member, while continuing to transact motor vehicle insurance business in the State, shall be entitled to resign its membership.

Any such member ceasing to be a member shall nevertheless remain liable for its or his share (pro rata or otherwise) of all obligations (including but not limited to the obligations of a member under Article 63.3) arising prior to such resignation and during that current year in which the resignation takes effect.

Upon the occurrence of any event listed in Article 10.1.1 or 10.1.2 any payments which the bureau may as a result be called upon to make on a members behalf to any creditor shall be contributed solely by the other members respectively."

These are what may be described as the "officious" part of the document. In the event of any conflict between them and the preamble, the officious part must prevail. See Young v. Smith [1865] 1 EQ. 180. Thus, this again appears a background strongly supportive of the case made by the plaintiff.

9.10 In the MIBI Directors' Report of 2012, the following appears under the heading of the principal activities of the bureau:

"In the event of the insolvency of any its members, the bureau is required, under its agreement with the Minister for Transport, to pay claims, to the extent that its insolvent member is unable to do so."

Moreover in their report for the same year, the auditors stated in "notes to the financial statements" as follows:

"16. Contingent liabilities

As stated in the report of the board, in the event of the insolvency of any of its members, the bureau is required, under its agreement with the Minister for Transport, to pay claims, to the extent that its insolvent members are unable to do so. No provision has been made for this contingent liability in these financial statements."

No satisfactory explanation is provided for these clear statements. It is claimed that the statements are inadmissible. As with the government memoranda above, in my judgment these statements, whilst inadmissible as to the truth of what they state, are nonetheless admissible as to the understanding or conduct of the parties in relation to the MIBI's obligations whether correct or incorrect.

9.11 I do not believe that the case of *Csonka v. Magyar Allam* (Case C-409/11) has any relevance to the questions addressed to this Court. It is common case that the MIBI agreement must comply with the Directives 72/166/EEC and 84/5/EEC which require member states to make provision for victim compensation in respect of injury caused by uninsured or unidentified drivers. There is, however, nothing that prevents member states that have done so in going further and making provision that is more favourable to such victims. That is what has happened in Ireland. In the *Csonka* case this very point is made at para. 34 where the court held that:

"However, as is apparent from Article 1 (7) of the second Directive, member states may, as regards the conditions for the payment of compensation from the National Compensation Fund, adopt measures more favourable to the victims than those provided for under the Directives on insurance against civil liability in respect of the use of motor vehicles."

9.12 Thus, it seems to me that the wording of the 2009 Agreement means that the MIBI have a liability to pay out in respect of claims against persons who were insured by an insurer which has become insolvent. The background against which this agreement was made, including the conduct of the parties thereto together with their conduct post 2009, does not provide any basis for changing the meaning of what the agreement states. In my view, the liability of the MIBI in this regard has been apparent and accepted since at the very least 1964, if not indeed 1955.

9.13 The final point I must address is whether the interpretation favoured by the claimant leads to a conclusion that flouts business common sense. The argument made by the respondent in this regard is that such an interpretation would make them responsible for underwriting the liabilities of every motor insurer writing risks in Ireland without regard to what model of risk they adopted and how thus they priced their policies. Mr. Hanratty for Allianz Insurance describes his company's strategy with respect to risk as conservative. If the MIBI must take responsibility for insolvent insurers who have adopted a higher risk strategy, then that defeats their attempt to adopt a low risk one. This in turn would affect the capital requirements of Allianz and presumably other insurance companies. It would, states Mr. Hanratty, introduce liquidation as a viable option. I do not find the argument convincing. If all this was so, it was apparent after the EIC liquidation. Yet nothing was done to address the stated problem. As I find above, the liability of MIBI for insolvent insurance has been apparent since at least 1963, if not indeed 1955. If nothing concentrates a man's mind so much as the prospect of a hanging, nothing concentrates a company's mind so much as the liquidation of a competitor. Liability for the judgment debts of an insolvent insurer was front and centre for the fullest consideration at the time of the liquidation of EIC and was not denied or subsequently altered by the members of the MIBI or the Minister. It may well be that developments in the insurance market on a European level have now altered the parameters of risk contemplated by the MIBI agreements. That cannot however affect the meaning of those agreements as understood until quite recently. It may well result in their alteration to limit such liability. Prudent business strategy in the insurance market is what the respondent addresses in this argument. That however is very different from an agreement so devoid of business common sense that its wording must be held to mean something quite different from what it actually said and what it was understood for many years to have said.

9.14 The second question posed is entirely dependent on the first. The relevant section of the 1964 Act is s. 3 as inserted by s. 4 of the 2011 Act. This full amended section is set out at 4.4 above. The crucial subsection in this case is subs. 2. This provides as follows:

"(2) The High Court shall order a payment under subs. (1) only if it appears to the High Court that it is unlikely that the claim can be met otherwise than from the fund."

It is clear, thus, that if the MIBI have responsibility for the judgment debts of an insolvent insurer such as Setanta then the High Court may not order a payment under s. 1 of the 1964 Act unless it appears to it that the MIBI is unlikely to meet the claim notwithstanding its obligation to do so.

9.15 Thus, the questions posed must be answered as follows:

(a) The MIBI is liable to pay out in respect of claims against persons who are insured with Setanta at the time of its entry into liquidation in April 2004.

(b) The High Court may not approve payments under s.3 of the Insurance Act 1964 (as inserted by s.4 of the Insurance (Amendment) Act 2011 unless it appears to it that the MIBI is unlikely to meet the claim notwithstanding its obligation to do so.