Neutral Citation: [2015] IEHC 509

THE HIGH COURT

2015 No. [114] Sp

IN THE MATTER OF THE BLARNEY WOOLLEN MILLS GROUP

BETWEEN:

FREDA HAYES

PLAINTIFF

AND
PATRICK KELLEHER,
ROBERT REARDON,
FRANK KELLEHER

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 31st July, 2015.

PART I

OVERVIEW

1. Ms Hayes is the CEO of, and the largest shareholder in, The Blarney Woollen Mills Group ("Blarney"). Governance of Blarney operates pursuant to its articles of association and a shareholder agreement that its present shareholders have executed between themselves. That agreement came into existence as part of a plan whereby Ms Hayes (who left the well-known 'Blarney Woollen Mills' business in 1992 and went on to establish the equally well-known 'Meadows and Byrne' business as an independent concern) re-joined 'Blarney Woollen Mills', which was merged with 'Meadows and Byrne', with Blarney being used as the corporate vehicle through which this was achieved. As explained by Ms Hayes in her grounding affidavit of 11th May:

> *"While I readily accepted that profits would be distributed according to the amount of equity ultimately held by the respective stakeholders in the new combined business, in the light of my previous experience of how disharmony among family could hinder effective management and decision making I was adamant that I was not prepared to contemplate involvement in this venture unless I had control over 51% of shareholder voting rights and the power to nominate five out of nine directors on the board. In short I regarded my ability to control the management and overall direction of the Company free from internal wrangling as a sine qua non of my participation and this was accepted by all concerned."*

2. The share capital of Blarney is divided into different classes. The 'A', 'B', and 'C' shares are voting shares. The 'A1', 'B1' and 'C1' shares are non-voting shares. Ms Hayes is the holder of 1,813,911 'B' Ordinary Shares (comprising 66.7 per cent of those shares) and 5,441,734 'C' Ordinary Shares (comprising all the shares of that class). She is also the holder of a single so-called 'Special Share' which is provided for in Art.5 of Blarney's articles of association and cl.2.8 of a shareholder agreement of 3rd March, 2000.The balance of the 'B' Ordinary Shares is divided between Mr Reardon (the second-named Defendant) and a Mr Archie McLoughlin and Ms BrídMcLoughlin.

3. The within proceedings have been commenced because an impasse has arisen between Ms Hayes and the Defendants, all shareholders, concerning the interpretation of certain provisions of the above-mentioned shareholder agreement and of those articles of association that deal with shareholder voting rights. The issue recently came to a head as a consequence of Ms Hayes requisitioning an EGM of Blarney for the purpose of increasing the number of Blarney's directors from nine to 13 and nominating and appointing additional directors. Ms Hayes contends that, by reason of her ownership of the Special Share and ordinary shares, she enjoys 51 per cent of the voting rights on any resolution put before a general meeting of Blarney. This is denied by Mr Reardon and the other Defendants, for reasons that are detailed later below. Needless to say, Ms Hayes disputes the approach to matters that is contended for by the Defendants.

PART II

SOME PROVISIONS OF RELEVANCE

4. A large part of this judgment is concerned with the correct interpretation to be accorded to various of Blarney's articles of association, the correct interpretation to be accorded to certain provisions of the shareholder agreement, and the interaction between the two. For ease of reference, the relevant provisions are collated in Appendix A which forms a part of this judgment. They are also quoted, when and as appropriate at relevant points of the judgment.

PART III

SOME PRINCIPLES OF CONTRACTUAL INTERPRETATION

5. The court has been furnished by the partieswith an abundance of authorities concerning various principles of contractual interpretation. Those cases are considered in Appendix B hereto, which forms a part of this judgment.The courtsummarisesin Appendix C various principles of relevance that this abundance of case-lawappears to it to yield. Appendix B and C form a part of the within judgment. The court has sought to apply the various principles identified in Appendix C, when and as appropriate, throughout the within judgment.

PART IV

LIMIT ON NUMBER OF DIRECTORS?

i. Blarney's articles of association

6. It is an issue concerning shareholder voting rights that initially prompted the within proceedings. However, that issue is better understood if the court treats first the issues that have arisen concerning whether there is a limit on the number of Blarney's directors, and whether Blarney's board has exclusive control over the appointment of directors.In this regard, it is necessary to look first at the wording of Art.12(a) and (j) of Blarney's articles of association. Art.12(a) provides as follows:

"*The number of Directors shall not be less than two nor unless and until otherwise determined by the Company by ordinary resolution, more than nine*. A Director shall not retire by rotation but shall retire at an age as shall be predetermined by the Company or following eight years of service as a Director without eligibility for re-election and Regulation 110 of Table A Part I shall be modified accordingly." (Emphasis added).

7. Article 12(j) provides that:

"The Directors shall have power at any time and from to time to appoint any person to be a Director, either to fill a casual vacancy or as an addition to the existing Directors, ***but so that the total number of Directors shall not at any time exceed the number fixed in accordance with these regulations."*** (Emphasis added).

8. The shareholder agreement at no point purports to override the provisions of Art.12(a). Accordingly, it seems to the court that the starting-point is that the issue as to whether Blarney should have more than nine directors is a matter to be determined by means of ordinary resolution. As to Art.12(j), the words emphasised by the court appear to the court to signify clearly that the power of appointment given to the directors by that provision is subordinated to the power of the company in Art.12(a) to decide how many directors there should be. All of this seems to the court to comport with the ordinary and natural meaning of the words used.

ii. An immutable composition of power at board level?

9. Ms Hayes' position is that, through the operation of a 'Special Share' that she holds in Blarney, she is entitled to cause an ordinary resolution varying the number of directors to be passed. The voting rights attaching to that Special Share are considered later below. For now, the court deals solely with the issue of whether, notwithstanding the above-quoted text from Blarney's articles of association, the shareholder agreement casts an immutable composition of power at board-level that cannot be upset. In this regard, the critical provision iscl.2.2(a) of the shareholder agreement. This provides as follows:

> *"The Board shall initially comprise of six executive directors and three non-executive directors and shall be constituted in accordance with the provisions of the Articles of Association and the provisions as set out hereunder."*

10. As the court understands the Defendants' contentions concerning board composition, they are threefold. First, that as the shareholder agreement contemplates the appointment of directors at board level, the provisions in the articles as to appointment of directors fall by the way-side. Second, that as there is provision in the shareholder agreement (at cl.5.1) that the terms of the agreement prevail in the event of conflict with the articles, the arrangements in cl.2.2(a) apply. Third, that the change in composition contemplated by the use of the word *"initially"* in c.2.2(a) of the shareholder agreement is a change in the ratio of executive to non-executive directors, not a change in the total number of directors.

11. Clause 5.1 of the shareholder agreement provides as follows:

> *"Each of the Shareholders and the Company hereby agree that in the event of a conflict as between the terms of this Agreement and the Articles of Association, this Agreement (insofar as it applies to the regulation of rights between the Shareholders and without fettering any obligations of the Company under the applicable law) shall prevail and, if such a conflict should arise, each of the Shareholders shall exercise such voting rights as for the time being lies within their power to ensure the passing of an appropriate members resolution for the purpose of amending the Articles of Association so as to comply with this Agreement."*

12. As to the first of the three contentions mentioned above – that the power of appointing directors rests solely with Blarney's board – this point is addressed in the next Part of this judgment.

13. With regard, to the second of the contentions mentioned above – that the arrangements in cl.2.2(a) prevail over the articles by virtue of cl.5.1 of the shareholder agreement – it does not appear to the court that this contention advances the position of the Defendants. This is because cl.2.2(a) is concerned,on its own terms, with the 'initial' arrangements at board-level, when there were to be nine directors. There isnothing in the shareholder agreement that prohibits a subsequent increase in the initialnumber of directors or that purports to restrict Ms Hayes in seeking to have an ordinary resolution passed with this purpose in mind. Moreover, while cl.5.1 of the shareholder agreement provides that the shareholder agreement is to prevail in the event of a conflict with the articles, it does not require that one should therefore construe the articles so that they area nonsense.It is a general rule of contract law that if a detailed semantic and syntactical analysis of words in a commercial document is going to lead to a conclusion that flouts business common-sense, it must yield to business common-sense;and the most primitive business common-sense requires that commercial arrangements be construed so that they make sense, not nonsense. Article 12(a) of the articles clearly contemplates that the company may by ordinary resolution vary the number of directors, and it would require something clearer than a clause dealing with the initial configuration of the board (a power which undoubtedly contemplates that there may in the future be a different configuration) for the power granted on the shareholders by Art.12(a) to be set aside.

14. As to the third of the contentions mentioned above– that cl.2.2(a) relates to the ratio of executive to non-executive directors – the court considers this to fail for much the same reason as the second contention considered above. The natural and ordinary reading of cl.2.2(a) is that by its own terms it is dealing with the arrangements that are *"initially"* to pertain at board level. To read into a clause that makes initial provision as to board configuration that it seeks (a) permanently to cap the total number of directors, (b) subject to that cap, places no restriction on the ratio of executive to non-executive directors, and (c) seeks to do all this in the context of articles of association that expressly allow for the company to vary the number of directors, seems a contrived manner of interpretation that sits uneasily with the natural and ordinary reading of (i) the word "initially", (ii) the entirety of cl.2.2(a), and (iii) the totality of the arrangements contemplated by articles and agreement together. It makes no sense, whether common-sense or 'business sense', that something apparently so central to the arrangements between the parties would be addressed in such a manner between them as to require the most convoluted of constructions for the shareholder agreement to yield the result for which the Defendants now contend.

15. The court notes in passing that cl.2.2(e) of the shareholder agreement provides as follows:

> *"The 'B' and 'C' Shareholders shall for so long as Freda Hayes holds at least 20% of the Ordinary Shares in the Company be entitled to designate five persons as directors of the Company (and to remove and/or replace all such directors by written notice served to the Company) howsoever that the first such directors shall be Freda Hayes, Robert Reardon, Kathleen McLoughlin and two duly qualified and experienced non Executive Directors, such non Executive Directors serving for an initial term of 3 years. The 'B' Shareholders and the 'C' shareholders shall consult with Frank Kelleher and Patrick Kelleher with respect to any subsequent changes to the non Executive Directors on the understanding that any replacement non Executive Directors will be a duly qualified and experienced person and on the understanding that the final determination thereof shall at all times be made by the 'B' and 'C' shareholders."*

16. The general relief against fraudulent and oppressive behaviour that minority shareholders can seek to claim, and the protection of shareholder interests via the clause just quoted, buttress the court's sense that its reading, respectively, of Art.12(a) and (j) of Blarney's articles of association and cl.2.2(a) of the shareholder agreement, is not open to successful charge that such a reading leaves shareholders other than Ms Hayes unduly exposed and cannot therefore be the construction of those provisions that was intended and agreed; not that there is, in any event, a prohibition on shareholders reaching an agreement between themselves that

may leave some of them in a weaker position than others but which nonetheless appears to all to be, and is, a commercially sensible arrangement when viewed in the round.

PART V

DIRECTOR CONTROL OVER DIRECTOR APPOINTMENTS?

i. Overview
17. The Defendants contend that even if Ms Hayes could, pursuant to Blarney's articles, bring about an increase in the number of directors, this is of no use to her because Art.12(j) of Blarney's articles of association contemplates that board appointments fall to be made by the board. Not to put too fine a tooth on matters, the Defendants contend that Ms Hayes, if she can vary the number of board positions, can do so all she likes: only the board can appoint persons to be directors.

ii. The natural and ordinary meaning of Blarney's articles of association
18. As mentioned above,Art.12(j) of Blarney's articles provides as follows:

> "The Directors shall have power at any time and from to time to appoint any person to be a Director, either to fill a casual vacancy or as an addition to the existing Directors, ***but so that the total number of Directors shall not at any time exceed the number fixed in accordance with these regulations."*** (Emphasis added).

19. It will be recalled too that the court concluded above that the text shown in Bold format yields the conclusion that Art.12(j) must, on its own terms, be read as subservient to Article 12(a) of Blarney's articles which makes over-arching provision as to the power of the company to appoint directors, stating:

> "***The number of Directors shall not be less than two nor unless and until otherwise determined by the Company by ordinary resolution, more than nine***. A Director shall not retire by rotation but shall retire at an age as shall be predetermined by the Company or following eight years of service as a Director without eligibility for re-election and Regulation 110 of Table A Part I shall be modified accordingly." (Emphasis added).

20. More fundamentally, it is in any event well established that a company in general meeting has an inherent power regarding the appointment of additional directors. So much so that, it seems to the court, considerable certainty and clarity of wording would have to be present before a set of articles could be read as displacing this power.

iii. The decision in Blair Open Hearth
21. In support of the contention that there is no concurrent power of appointing directors in the present case, the Defendants rely on the long-ago judgment of Eve J. in *Blair Open Hearth Furnace Company v. Reigart* (1913) 108 L.T. 665.

22. *Blair Open Hearth* was a case in which an American company had a majority shareholding in an English company. The articles of association of the company provided that casual vacancies in the board could be filled by the board up to a maximum board membership of seven. At a general meeting of the company, a proxy for the American company purported to pass two resolutions, respectively increasing the total board membership to 16 and appointing additional directors. The company challenged the legitimacy of these resolutions on the basis that the express power to appoint directors vested in the board, thereby excluding any concurrent power of appointment in the company.

23. In the High Court, Eve J. granted an interim injunction against the Defendants restraining them from acting as directors of the company, stating, inter alia, at pp.669-670:

> *"…Then comes the article on which so much discussion has taken place – art 93- it reads: 'Any casual vacancy in the office of director may at all times be filled up by the board by the appointment of a director.'….The article goes on: 'The directors may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum.'*
>
> *The plaintiffs' case is that by the concluding part of that article the power to appoint additional directors is vested in the board of directors for the time being and cannot be exercised, while the article remains in force, by the company. The defendants, on the other hand, contend that the power of appointing additional directors is primâ facie a power exercisable by the corporators at large; that in order to displace that primâ facie presumption a special contract whereby the corporators at large have delegated that power to some other body must be shown to exist….I think there are serious difficulties in implying the reservation of any such power to the company. In the first place, is it a power exercisable concurrently with it or to the exclusion of the power conferred on the board by Art.93? It is suggested that this latter power only existed for the purpose of making the numerical strength of the first board up to the maximum number of seven individuals, and that when that maximum was once reached the power conferred on the directors was exhausted. I cannot so construe the article, which appears to me in terms to contemplate and provide for repeated exercise the power, and not in any way to be limited to the first board or, indeed, to contain any restriction other than this, that the power cannot be exercised so as to increase the directorate to a number in excess of the maximum for the time being fixed by the articles or determined by the company in general meeting. It follows from this that if the defendants are right…there do exist in this company concurrent powers of appointing additional directors vested in the board by Art.93 and in the company in general meeting by Art.82. As at present advised, I am not able to come to such a conclusion. I think the express power contained in Art.93 excludes the possibility of implying a concurrent power under Art.82, and in my opinion the company has by its constitution delegated to those of its members who for the moment constitute the board the sole right of appointing additional directors, and that it is so – whether such additional directors are necessary to make up the number to the maximum number fixed by the original article or to any other number which the company may from time to time determine on as the maximum. As a matter of construction, therefore, I think that the plaintiffs are right, and that it was not within the power of the company to do that which it purports to have done at the meeting…".*

24. Counsel for Ms Hayes contended at the within proceedings that the decision of Eve J. rests on the (incorrect) proposition that one cannot have a concurrent power vested in the directors and the general meeting at the same time. The court, respectfully, does not entirely agree with this contention as put. It appears to the court that Eve J.'s reasoning is more nuanced than that. He is clearly sceptical at the notion that there could be a concurrently vested power of appointment, and he concludes that in the particular case before him that there was no concurrent power of appointment. However, "[a]s a matter of construction" of the documentation before him and "[a]s at present advised", Eve J. arrives at the above-stated conclusions, but does not, despite all his scepticism,

appear to excludethe possibility that in a different case there could be a concurrent exercise of the power of appointment. ThusBlair Open Hearth appears to this Court to be not as helpful a precedent to the Defendants in the within proceedings as they would contend it to be. Subsequent case-law, as will be seen below, is decidedly unhelpful to the Defendants in this regard.

iv. Reference to learned commentary

25. The Defendants, in raising *Blair Open Hearth*, have sought to place some reliance on the proposition asserted by former Chief Justice Keane in his learned text, *Company Law* (4th ed., 2007) para. 27.29, that the decision of Eve J. supports the proposition that *"Where the Articles provide that additional directors are to be appointed by the board of directors, the company in general meeting has no power to make such appointments; it can, however, amend the articles by special resolution to give itself such power."* It seems to the court, however, that there are a number of difficulties with the Defendant's reliance on the observations of former Chief Justice Keane in this regard.

26. First, in the context of the within proceedings, Art.12(j) of Blarney's articles (which gives a power of appointment to the board) does not sit alone; it sits in a document that also contains Art.12(a) which the court construes to give a concurrent power of appointment to the company; moreover, for the reasons stated previously, the court considers that Art.12(j), when given an ordinary and natural reading must be read as subservient to Art.12(a). So the within proceedings are not an example of the situation posited by former Chief Justice Keane in which a power is vested solely in the board, and the company must agree by special resolution to give itself a like power. Here, such a concurrency of power already exists.

27. Second, former Chief Justice Keane acknowledges that there can be concurrent powers of appointment; indeed, he identifies the means whereby such concurrency can be brought about where it does not already exist.

28. Third, although former Chief Justice Keane does not consider *Blair Open Hearth* in any detail, it seems that he (in this Court's respectful opinion, rightly) does not consider that case to rest on the proposition that one can never have concurrent powers of appointment; otherwise why would he refer to it as a supporting authority in the context of text in which he identifies how to establish concurrent powers of appointment? Had former Chief Justice Keane meant to invoke *Blair Open Hearth* as an authority supporting only the first part of the above-quoted text, he would surely have placed the footnote reference to that case at the end of the first part of the quoted text and not at the very end of same, where it now appears.

v. Some English and Australian authorities

29. Even if Blair Open Hearth was authority for the proposition that one cannot have a power of appointment vested in directors and shareholders concurrently (and, for the reasons stated, the court does not consider that it is as definitive on this point as the Defendants have urged), later English and Australian case-law positively endorses the notion that there can be such a concurrency of power. The court turns now to consider three cases of relevance in this regard.

a. *Worcester Corsetry, Limited v. Witting* [1936] 1 Ch. 640

30. In *Worcester Corsetry*, the Court of Appeal considered articles of associationthat provided in Art.12 that the number of directors should be not less than two or more than seven, and also adopted certain standard articles in the Companies (Consolidation) Act, 1908 whereby, *inter alia*, (a) a general meeting could vary the number of directors, (b) casual board vacancies could be filled from time to time by the board, and (c) additional directors could, on certain terms, be appointed by the board. The action involved a challenge against the appointment of certain directors at a general meeting of the company.

31. Although the Court of Appeal did not overrule *Blair Open Hearth*, the Court placed significant emphasis on the need to consider whether the articles of association of a company go so far as to exclude the inherent power of the general meeting to appoint directors. Distinguishing the decision of Eve J. in *Blair Open Hearth*, Lord Hanworth, M.R. observed, at p.645 of his judgment, that he had *"some little difficulty in seeing that the power [of appointing directors] must be either in the one or in the other; but be that as it may, we have to interpret the articles of association as we find them"* – this last task in truth being all that Eve J. had done.

32. Lord Hanworth went on to acknowledge that the power to appoint additional directors was an inherent power of the company. Thus, at p.647 of his judgment, he describes the issue before him as being *"whether or not there is excluded from the powers of the company in general meeting a power which would otherwise appertain to the general meeting."* And he concluded his judgment by posing, at p.648, what he saw as the pertinent question, viz. *"[I]s it possible to hold that there has been a complete exclusion of the powers of the general meeting and an entrustment to the directors, and only to the directors, of the power of appointing additional directors?"* Having regard to the purpose of the articles, and the fact that they were different in form to those that were before Eve J. in *Blair Open Hearth*, Lord Hanworth concluded that the powers of the company in general meeting had not been so circumscribed as to prevent their being exercised.

33. Lawrence L.J., in his concurring judgment, indicated as follows at p.650 of his judgment:

> *"The company has an inherent power to nominate and appoint its own directors unless that is in any way restricted by the contract contained in the articles of association. Unless you can find that that inherent power has been handed over by the company to the directors, I think they retain that power as a natural result of their having the power to increase their board of directors."*

34. It will be recalled that Art.12(a) of Blarney's articles of association provides, inter alia, for such a power to increase the number of directors, stating in this regard that *"The number of Directors shall not be less than two nor unless and until otherwise determined by the Company by ordinary resolution, more than nine."*

35. Notably, Lawrence L.J. rejected the very point that the Defendants in the within proceedings seek to make, stating, at p.649 that: *"Art 83 of the Table A shows in the plainest terms that the company has the power to increase or reduce the number of its board. It is said that does not involve the nomination and appointment of particular gentlemen or ladies as directors, but it seems to me that that is necessarily implied in the provision of Art.83."*

36. As it was with *Worcester Corsetry*, so too the court concludes it must be with Blarney, save that in our, happily more egalitarian, times all suitably qualified persons are welcome to be directors, not just those who have classist pretensions to being *"gentlemen or ladies".*

37. Slesser L.J. in his concurring opinion, echoes the views of Lawrence L.J., stating, at p.654 of his judgment, that

> *"The more natural view of Art.83 [the provision whereby a general meeting could, inter alia, vary the number of*

directors] is that it is not redundant or merely introducing unnecessary machinery which is already provided for by Art.12 in dealing with the maximum and minimum, but, as Lawrence L.J. has indicated, is itself conferring a power not only to increase the number but to increase that number by itself appointing directors to the extent to which it is intended to increase the number."

b. Integrated Medical Technologies Ltd v.Macel Nominees Pty Ltd & Anor (1988) 13 ACLR 110

38. In *Integrated Medical*, the defendants were shareholders in the plaintiff public company, and sought to convene an EGM. The notice proposed appointment of three additional directors and forms of proxy were circulated. The plaintiff claimed the notice and proposed meeting to be invalid. Although the forms of proxy were found by the Supreme Court of New South Wales to be defective, the plaintiff was denied all reliefs sought as the court considered there to be no substantial injustice arising. Where the case is of interest in the context of the within proceedings is the conclusion of the Supreme Court of New South Wales to the effect that, on their proper construction, Integrated Medical's articles of association did not exclude the powers of a general meeting to appoint additional directors. Bryson J., for the court, emphasised in this regard that it would have to be shown with certainty that the power of the general meeting was excluded, stating as follows at pp.114–115 of his judgment:

"To my mind there is not sign of an attempt at any of the places where powers to appoint directors are conferred…to cover the field and state comprehensively so as to exclude other powers which might otherwise exist how directors are to be appointed. The starting point which all those provisions to my mind assume and supplement is a starting point indicated by the nature of the corporation as an incorporation of its members and by the relation between the corporation itself and its directors. Unless an article dealing with the appointment of directors provided expressly or by clear implication that the members of a company acting in the way in which they ordinarily act in a general meeting may not appoint a director to an available office as director, it ought in my view to be understood that the natural and ordinary state of affairs exists and the members of the company are to appoint the persons who are to have management and control of the business and affairs of the members in their incorporated capacity

The members and the directors are not rival versions of the true identity of the company; the directors can never lose their true nature as delegates, none the less because the delegation is very extensive, in this case taking the very extensive although common form expressed in art 106 of the company which opens by stating 'the management and control of the business and affairs of the company shall be vested in the board…'.

From this starting point the allocation of particular functions in the articles, in some case to an annual general meeting, in some cases to a general meeting and in some cases to directors carries no implication of an intention to make an exclusive prescription of what a general meeting can do; for that clear language or unmistakeable implication would be required. Merely to provide that the power to appoint additional directors is given to the directors in art 84 goes no distance in my view towards such a prescription of exclusivity. Nor does the provision of art 92 empowering a general meeting to elect a person to replace a removed director furnish ground for an implication that other than as stated in that article the company in general meeting may not elect a director….To my mind the language used is not appropriate to produce the effect and did not produce the effect that the draftsman indicated any intention that general meetings other than annual general meetings may not fill vacancies."

39. Bryson J. also saw no anomaly or difficulty as regards any overlap in powers that might be found to arise as between a general meeting on the one hand and a board of directors on the other. He dealt with an argument to this effect in the following terms, at p.116 of his judgment:

"My own opinion on the meaning and effect of the articles is that they contain no indication that the power to appoint additions to the board given to the directors by art 84 is to be exclusive of any power to be exercised in a general meeting. The various provisions which were said to support such an implication form parts of schemes of machinery which have other purposes than to spell out or in any way to indicate such exclusivity.

It was submitted that the result produced by art 84 if it were concurrent with the power of another organ of the company to fill up a vacancy would not be sensible or reasonable; it would be, it was said, strange and anomalous if two different organs of the company could fill up the same vacancy. To my mind there is no true anomaly in the existence of two sources of such power; in truth there would be no competition in filling the office as the first in order of time to act would act with effect."

c. Link Agricultural Pty Ltd v. Shanahan and Others (1998) 28 ACSR 498

40. The approach taken by the Supreme Court of New South Wales in *Integrated Medical*, and previously by the English Court of Appeal in *Worcester Corsetry*, was subsequently adopted and applied by the Supreme Court of Victoria-Court of Appeal in *Link Agricultural.*

41. This last case was concerned, *inter alia*, with certain alleged irregularities in the election of company directors. In the course of her judgment, Kenny JA (with whom Batt and Buchanan JAA concurred) observed as follows, at p.517:

"Under the [Corporations] Law, the members in general meeting retain the power to appoint a person in place of a director removed by them in accordance the [applicable] section. This reflects the position at common law that the company, constituted by the members in general meeting, retains an inherent power to appoint a director by ordinary resolution: cfWorcester Corsetry…Barron v Potter [1914] 1 Ch 895; and Grant v John Grant & sons Pty Ltd (1950) 82 CLR 1 at 22….

The other submission was that the power of the company, in general meeting, to appoint to the board was limited to the occasions specified in art 93 and art 95 and, if a place on the board fell vacant and was not filled under either of these articles, it fell to the board, not the general meeting, to fill the place, as a casual vacancy under art 79. Whilst it is convenient to confer power on the board to fill a casual vacancy, it by no means follows that the board is the only repository of the power to appoint when a vacancy arises: cfWorcester…Kraus v JG Lloyd Pty Ltd [1965] VR 232 at 234 and Integrated Medical….Article 93 confers power upon the company in general meeting to appoint to the board on the occasion specified by it, but it does not, as a matter of necessary implication, exclude the inherent power of the company in general meeting to appoint to the board when another occasion for appointment arises. Absent any express or necessary limitation in the articles upon the power of the company in general meeting to appoint a director, the company in general meeting must, it seems to me, retain such a power to appoint. The power is a usual concomitant of

the relationship which exists between the members on the one hand and the company's directors on the other. As Bryson J. said in Integrated Medical…the directors are 'the persons who are to have management and control of the business and affairs of the members in their incorporated capacity'. For these reasons, I reject the submission that Pivot's articles of association exclude the power of the company in general meeting to appoint a director, or limit its exercise to the circumstance where no other repository of the power is able to exercise it."

d. Some conclusions

42. This Court considers that:

(i) although each case will fall ultimately to be determined on its own merits by reference to rules of contractual interpretation such as those identified in Appendix C to this judgment, the persuasive line of foreign authorities represented by *Worcester Corsetry, Integrated Medical and Link Agricultural* identifies pertinent issues and represents the correct approach to be adopted when it comes to determining whether the arrangement settled upon by certain shareholders in particular articles of association and/or a related document such as a shareholder agreement allows for the concurrent exercise by the board and the body of a company of the power to appoint directors;

(ii) any general scepticism that Eve J. evinced in *Blair Open Hearth* as to the possibility of the concurrent exercise by the board and the body of a company of the power to appoint directors was misplaced; and

(iii) a proper reading of *Blair Open Hearth* suggests that Eve J. does not entirelyexclude the possibility of such concurrency of powers, albeit that he finds it not to arise on the particular documentation and facts which presented before him.

43. The court would add by way of judicial gloss to the foregoing that to the twenty-first century eye there is clear reason why that concurrency of power which meets with approval in *Worcester Corsetry*, *Integrated Medical and Link Agricultural* is not just possible but desirable. As many of the all-too-many corporate scandals of recent years have shown, a board unchecked can pose a danger both to its shareholders and to society in general. So much so that nowadays it would perhaps take much to persuade a court, in cases where there is any ambiguity within articles and/or between articles and a shareholder agreement, that shareholders intended through their arrangements to avoid the useful check on excess that ought generally to ensue when the board and the body of a company each enjoy a concurrent power of appointing directors.

iv. Application of principle to the present case

44. Where does the foregoing leave matters as regards the contention made by the Defendants in the within proceedings that the power of nominating and appointing directors rests solely with Blarney's board of directors? The court finds nowhere in the documentation before it that *"clear language or unmistakeable implication"* identified by Bryson J. in Integrated Medical as a prerequisite for finding that a general meeting has been excluded from the rôle of appointing additional directors. So, for example, it appears telling to the court that Art.12(a) of the articles of Blarney, as quoted above, expressly refers to the re-election of directors. If the intention of the articles had been to remove the power of the general meeting to elect directors, it would make no sense for Art.12(a) to make any provision dealing with re-election of directors. The reference to the re-election of directors in Art.12(a) seems to the court to be entirely consistent with Blarney qua company retaining powers as regards the appointment of directors.

45. Furthermore, the language used in Art.12(j) does not suggest that the power granted to the board of directors is exclusive. Had it been the intention to confer an exclusive power on the board to appoint additional directors, it would have been a very simple matter for the articles of association so to provide. It seems to the court that the articles in this regard fall well short of demonstrating that the intention underpinning them was that the inherent power of the general meeting to appoint directors should be removed from the general meeting and vested exclusively in the board.

46. In truth, the unrealistic nature of the proposition advanced on behalf of the Defendants, viz. thatonly the board can nominate and appoint persons to be directors, appears to the court to be exposed as entirely wrong when one has regard to Art.12(k) and (l) of Blarney's articles of association. Article 12(k) sets out a number of situations in which the office of director shall be vacated, the last of these being where s/he *"is removed from office by a resolution duly passed pursuant to Section 182 of the Act or under the provisions of the next succeeding Article hereof."* The *"next succeeding Article"* is Art.12(l) which states, that:

> *"In addition to and without prejudice to the provisions of the Act, the Company may by ordinary resolution remove any Director before the expiration of his period of office notwithstanding anything in these regulations or in any agreement between the Company and such Director may have for damages for breach of any contract of service between him and the Company. The Company may, by ordinary resolution, appoint another person in place of any Director so removed from office."*

47. It seems to the court that the combined effect of Art.12(k) and (l) yields a situation in which it is apparent that any power of appointment vested in the directors under Art.12(j) is necessarily eclipsed by the power of Blarney under Art.12(l) to remove some or all of the directors of Blarney and to appoint other directors in their stead; the contention that only the board can nominate and appoint persons as directors must therefore be wrong.

PART VI

HAS MS HAYES THE VOTING POWER THAT SHE PURPORTS TO ENJOY?

48. The 'Special Share' lies at the heart of the mechanism established to enshrine Ms Hayes' voting rights. By virtue of Art.5 of Blarney's articles of association, the rights attaching to the Special Share (to which reference is made in cl.3.1(iv) of the said articles) include the following:

> *"…(c) Voting Rights*
>
> *The Special Share shall carry such voting rights which when coupled with the Ordinary Shares held by Freda Hayes shall represent in any written resolution by a member of the Company or in any resolution before any meeting of the Company not less than 51% of all votes cast on any such written resolution or any resolution before any such meeting. The voting rights attached to the Special Share shall cease if at any time the ordinary share capital held by Freda Hayes reduces below 20% of the ordinary share capital of the Company for the time being."*

49. The key provision of the shareholder agreement, as regards the incidents and significance of the Special Share is cl.2.8(a). This provides as follows:

> *"The Special Share shall carry such voting rights which when combined with the voting rights of the Ordinary Shares held by Freda Hayes for the time being, shall represent not less than 51% of all votes cast on any resolution or on any vote taken by the Shareholders under the provisions hereofprovided that this clause shall not operate so as to give the 'B' and 'C' Shareholders more than 51% of votes cast unless they hold more than 51% of the Ordinary Shares. This proviso shall not apply to a transferee of any 'A' or 'B' shares to a person other than one of those listed in Schedule Two (unless such person is a spouse or family member of the persons listed in Schedule 2)…" (Emphasis added).*

50. The opening words of cl.2.8(a), set in Bold text by the court, appear to the court to express, in clear and simple terms, the intention that the combination of the Special Share and Ms Hayes' Ordinary Shares shall carry not less than 51 per cent of all votes cast at a general meeting. Such a reading is entirely consistent with Art.5(c) of Blarney's articles of association, as quoted above. Although the court is not required to read the two documents harmoniously (cl.5.1 of the shareholder agreement clearly indicates that there may be conflicts between the two), it appears to the court that there is nonetheless a certain comfort to be drawn from the fact that, on the court's natural and ordinary reading of the Bold text, the agreement and the articles seem logically consistent.

51. What has happened in the very recent past is that controversy has arisen, it seems for the first time, concerning the proviso in cl.2.8(a) which the court has underlined above.The Defendants have advanced a premise that turns on quantifying in percentage terms what the Special Share can contribute by looking at the actual voting power held by the 'B' and 'C' Shareholders, ignoring the Special Share, and then deducting that total from 51 per cent. Hence, because 'B' Shareholders other than Ms Hayes hold 5.5 per cent of Ordinary Share voting rights, and Ms Hayes has 43.9 per cent of total Ordinary Share voting rights, the Defendants have sought a declaration that the correct interpretation of cl.2.8(a) is to the effect that in the current circumstances the value of the Special Share is 1.6 per cent of voting rights (51 – 5.5 – 43.9 = 1.6). There is no basis – none – for this line of argument in the clear and unambiguous wording ofcl.2.8(a) of the shareholder agreement. To the extent that the Defendants seek to pray in aid the non-binding Heads of Terms that preceded the eventual execution of the shareholder agreement, the court notes that, as per the principles of contractual interpretation outlined in Appendix C hereto, non-contractually binding Heads of Terms are mere steps in pre-contractual negotiations and, as such, excluded from consideration by the court as an aid in interpretation. Moreover, as there is no doubtas to the natural and ordinary meaning of cl.2.8(a), that clause falls, as a matter of contractual interpretation, to be affordedits natural and ordinary meaning. This natural and ordinary meaningflaunts neither common-sense nor 'business sense', albeit that it may suggest that Ms Hayes enjoyed a strong hand when it came to the commercial negotiations that led to the shareholder agreement.

PART VII

CONCLUSIONS

52. For the reasons stated above, the court considers that a proper and correct interpretation of the shareholder agreement and Blarney's articles of association yields the following conclusions:

(i) Ms Hayes' Ordinary Shares and the Special Share carry not less than 51 per cent of the votes cast on any resolution put before a general meeting of Blarney;

(ii) the present upper limit of nine directors on Blarney's board may be increased by ordinary resolution of the company;

(iii) the shareholders of Blarney enjoy an inherent power to appoint directors that has not been displaced by the articles of association and/or the shareholder agreement; and

(iv) without prejudice to the generality of any of the foregoing, it follows from the preceding conclusions, and it is consistent with the shareholder agreement and Blarney's articles of association,that Ms Hayes may proceed as she presently proposes and exercise her minimum 51 per cent voting rights at a general meeting of the company so as to increase the number of directors on the board of Blarney and to appoint directors to that board.

APPENDIX A

SOME PROVISIONS OF RELEVANCE

i. Overview

53. A large part of the preceding text is concerned with the correct interpretation to be accorded to various of the articles of association of Blarney, the correct interpretation to be accorded to certain provisions of the shareholder agreement, and the interaction between the two. For ease of reference, the relevant provisions are collated in this Appendix which forms a part of the court's judgment. They are also quoted, when and as appropriate, at relevant points of the judgment.

ii. Blarney's articles of association

54. Article 12(a) of Blarney's articles of association provides as follows:

> *"The number of Directors shall not be less than two nor unless and until otherwise determined by the Company by ordinary resolution, more than nine. A Director shall not retire by rotation but shall retire at an age as shall be predetermined by the Company or following eight years of service as a Director without eligibility for re-election and Regulation 110 of Table A Part I shall be modified accordingly."*

55. Article 12(j) of Blarney's articles of association provides as follows:

> *"The Directors shall have power at any time and from to time to appoint any person to be a Director, either to fill a casual vacancy or as an addition to the existing Directors, but so that the total number of Directors shall not at any time exceed the number fixed in accordance with these regulations."*

56. Article 12(k) of Blarney's articles of association sets out a number of situations in which the office of director shall be vacated, the last of these being where s/he *"is removed from office by a resolution duly passed pursuant to Section 182 of the Act or under the provisions of the next succeeding Article hereof."* The "next succeeding Article" is Art.12(l) which states, that:

> *"In addition to and without prejudice to the provisions of the Act, the Company may by ordinary resolution remove any Director before the expiration of his period of office notwithstanding anything in these regulations or in any agreement between the Company and such Director may have for damages for breach of any contract of service between him and the Company. The Company may, by ordinary resolution, appoint another person in place of any Director so removed from office."*

57. Ms Hayes, as a shareholder of Blarney, holds, *inter alia*, a 'Special Share' by virtue of which she enjoys special rights. By virtue of Art.5 of Blarney's articles of association, the rights attaching to the Special Share (to which reference is also made in Art.3.1(iv)) are defined as follows:

> *"The rights attaching to the Special Share of €1.25 shall be as follows:*
>
> *(a) Dividend*
>
> *The holder of the Special Share shall not be entitled to the payment of any dividend.*
>
> *(b) Capital Rights*
>
> *The holder of the Special Share shall be entitled to receive €1.25 only in respect of such share other than in respect of any other class of shares held at the time of such redemption.*
>
> *(c) Voting Rights*
>
> *The Special Share shall carry such voting rights which when coupled with the Ordinary Shares held by Freda Hayes shall represent in any written resolution by a member of the Company or in any resolution before any meeting of the Company not less than 51% of all votes cast on any such written resolution or any resolution before any such meeting. The voting rights attached to the Special Share shall cease if at any time the ordinary share capital held by Freda Hayes reduces below 20% of the ordinary share capital of the Company for the time being.*
>
> *(d) Transfer Provisions*
>
> *The Special Share shall not be transferable.*
>
> *(e) Redemption Provisions*
>
> *The Company shall have the right (subject to the provisions of any and every statute from time to time in force concerning companies in so far as same applies to the Company) to redeem the Special Share at par and only if the following circumstances apply:-*
>
> *(i) the holding of Ordinary Shares in the capital of the Company held by Freda Hayes shall fall below 20% of the ordinary share capital of the Company; or*
>
> *(ii) the holding of Ordinary Shares in the capital of the Company held by Freda Hayes shall exceed 51% of the ordinary share capital of the Company."*

iii. The shareholder agreement

58. Clause 2.2(a) of the shareholder agreement provides as follows:

> *"The Board shall initially comprise of six executive directors and three non-executive directors and shall be constituted in accordance with the provisions of the Articles of Association and the provisions as set out hereunder."*

59. Clause 2.2(e) of the shareholder agreement provides as follows:

> *"The 'B' and 'C' Shareholders shall for so long as Freda Hayes holds at least 20% of the Ordinary Shares in the Company be entitled to designate five persons as directors of the Company (and to remove and/or replace all such directors by written notice served to the Company) howsoever that the first such directors shall be Freda Hayes, Robert Reardon, Kathleen McLoughlin and two duly qualified and experienced non Executive Directors, such non Executive Directors serving for an initial term of 3 years. The 'B' Shareholders and the 'C' shareholders shall consult with Frank Kelleher and Patrick Kelleher with respect to any subsequent changes to the non Executive Directors on the understanding that any replacement non Executive Directors will be a duly qualified and experienced person and on the understanding that the final determination thereof shall at all times be made by the 'B' and 'C' shareholders."*

60. When it comes to the Special Share, cl.2.8(a) of the shareholder agreement provides in this regard that:

> *"The Special Share shall carry such voting rights which when combined with the voting rights of the Ordinary Shares held by Freda Hayes for the time being, shall represent not less than 51% of all votes cast on any resolution or on any vote taken by the Shareholders under the provisions hereof provided that this clause shall not operate so as to give the 'B' and 'C' Shareholders more than 51% of votes cast unless they hold more than 51% of the Ordinary Shares. This proviso shall not apply to a transferee of any 'A' or 'B' shares to a person other than one of those listed in Schedule Two (unless such person is a spouse or family member of the persons listed in Schedule 2).*
>
> *If the Ordinary Shares of Freda Hayes reduces below 20% the Special Share shall be redeemed by the Company at par."*

61. Clause 5.1 of the shareholder agreement provides as follows:

> *"Each of the Shareholders and the Company hereby agree that in the event of a conflict as between the terms of this Agreement and the Articles of Association, this Agreement (insofar as it applies to the regulation of rights between the Shareholders and without fettering any obligations of the Company under the applicable law) shall prevail and, if such a conflict should arise, each of the Shareholders shall exercise such voting rights as for the time being lies within their power to ensure the passing of an appropriate members resolution for the purpose of amending the Articles of Association so as to comply with this Agreement."*

APPENDIX B

Section A. Overview.
62. The court has been furnishedby the parties with a large number of authoritiesconcerning various principles of contractual interpretation that are ostensibly applicable to the within proceedings. These cases are considered in greater detail in this Appendix, which forms part of the court's judgment. A summary set of principles that the court considers can be derived from the cases detailed in this Appendix B is outlinedin Appendix C.

Section B. Cases to which reference has been made by the parties.

a. Irish authorities
i. Welsh v. Bowmaker Ltd [1980] I.R. 25

63. This was a case concerned with the proper interpretation of the terms of a debenture. It is of interest in the context of the within proceedings because of the following observations of Henchy and Parke JJ.,

64. Per Henchy J., at p. 254–255 of his judgment:

> *"I consider that the primary and dominant words and expressions delineating the extent of the powers and interests vested in Bowmaker by the debenture are to be found in the charging provision rather than its attendant condition.*
>
> *The relevant rule of interpretation is that encapsulated in the maxim generaliaspecialibus non derogant['the general does not detract from the specific']. In plain English, when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation. This is but a commonsense way of giving effect to the true or primary intention of the draftsman, for the general words will usually have been used in inadvertence of the fact that the particular situation has already been specially dealt with."*

65. Per Parke J., at p.261 of his judgment:

> *"In construing a document, a court is not entitled to speculate as to what the parties intended to say; the court's task is to ascertain what is the true meaning and intention of the words used by the draftsman. If the words are free from inconsistency or ambiguity, it is not permissible to look outside the document itself or to attempt to ascribe any forced or strained meaning for such words in order to justify a particular construction. If (as in the present case) there is inconsistency between certain provisions of the document, it is necessary to consider the entire document and the facts and circumstances surrounding its execution in order to ascertain which of the conflicting expressions must take precedence in determining the true meaning of the document.*
>
> *Over the years many useful maxims have been propounded by the Courts to assist in this process but the task always remains the same whether an apt maxim can or cannot be found in any particular case. How are the inconsistencies to be overcome so that the true and dominant intention of the parties can be realised? …When a provision of such particularity is subsequently followed by a general provision which is not only inconsistent with it but is, in itself, of an unusual and unsatisfactory form, then such general provision must not be allowed either to diminish or to extend the effect of the preceding clause.*
>
> *Although the maxim generaliaspecialibus non derogant is usually applied to the construction of statutes in order to prevent an unintentional repeal of a specific provision in a prior section by a subsequent section using general words, I respectfully agree with Mr Justice Henchy in the judgment which he has just delivered that it is of very considerable assistance in the construction of documents inter partes and is particularly apt to the present case."*

ii. Grehan v. The North Eastern Health Board [1989] I.R. 422

66. This was a case concerned with a purported variation of a contract of employment following agreement of revised terms with a union of which the plaintiff was not member but whose previous standard terms of employment, as agreed between the State and the union, had formed part of the plaintiff's contract of employment. The case is of interest in the within proceedings insofar as Costello J., largely by reference to *Halsbury's Laws of England*, makes comment concerning when terms may be implied into a contract, e.g. to give it business efficacy (such as the total cap on director-numbers which it has been suggested that the court, in the within proceedings, should read into cl.2.2(a) of the shareholder agreement). Per Costello J., at pp.425–426 of his judgment:

> *"…I think I should briefly state the legal principles on the implication of terms. The legal principles applicable are not really in controversy. The debate, as so often happens, lies in their application to the facts of the case. In business transactions (and the contract between plaintiff and the board can, for present purposes, be so regarded):-*
>
> *'A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties 'What will happen in such a case?', they would both have replied 'Of course, so and so will happen; we did not trouble to say that; it is too clear'.'*
>
> *And furthermore:*
>
> *'If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; and, if the document is silent and there is no bad faith on the part of the alleged promisor, the court 'ought to be extremely careful' how it implies a term. It is not enough to say that it would be reasonable to make a particular implication; nor that it would make the carrying out of the contract more convenient; nor that it is consistent with the express provisions of the contract or with the intentions of the parties as gathered from other provisions; nor will a term be implied where a contract is effective without the proposed term.*
>
> *Whether a term will be implied is a question of law for the court. A term will not be implied so as to contradict any express term; and, in fact, a term ought not be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. The court has no discretion to create a new contract. Where a contract contains an express obligation by a party to the contract, it is*

for that party to show that there is some implied term which qualifies the obligation.'"(seeHalsbury's Laws of England, 4th ed., vil. 9 (1974), paras. 355 and 356).

iii. Carroll v. An Post National Lottery Company [1996] 1 I.R. 443

67. *Carroll* was a dispute arising from the fact that a National Lottery agent's representative had mis-fed lottery slips into a computer terminal, with the result that, per Mr Carroll, he did not get a ticket containing what later proved to be winning numbers. (In fact, it turned out in court that he had actually entered too many numbers on the purportedly winning slip). From a contract-law perspective, *Carroll* is of particular relevance as regards the enforceability of exemption clauses and the reading of terms (there statutorily informed terms) into a contract. It is in this last regard that the case has been cited in the within proceedings. Per Costello P., at p.459:

> *"The plaintiff pleaded that there is an express or, alternatively, an implied condition in his contract with the defendant company that the counterhand would use reasonable skill and care in entering his plays into the Lotto draw. Quite clearly there was no express term in that behalf in the parties' contract. I am of the opinion that the court cannot imply such a term into the contract for two reasons. The Act of 1986 provides that the National Lottery is to be held in accordance with rules approved by the Minister for Finance….The court cannot properly imply into the parties' contract a term which not only is not contained in the rules but which would be directly contrary to an express term in the rules as approved by the Minister. Secondly, the court will only imply a term in a contract if it is necessary to do so in order to give effect to the intention of the parties. In this case the defendant company quite clearly expressed the intention that it would not be liable for the negligence of its Lotto agents and so the court cannot imply a term which is contrary to the clear intention of one of the parties."*

iv. Igote Ltd v. Badsey Ltd [2001] 4 I.R. 511

68. This case concerned the proper interpretation of a share subscription agreement. On the issue of how to divine the intention of the parties to a contract, Murphy J. concluded at p.518, following a review of relevant case-law that:

> *"In my view the complicated background to the share subscription agreement is at best of a very limited value in construing the concluded agreement. At worst it provides the temptation, foreseen by May L.J. [in Plumb Brothers v. Dolmac (Agriculture) Ltd. (1984) 271 E.G. 373] of seeking to extract the subjective intention or motivation of one or other, or even both, of the parties from the history rather than construe it in the context of that history….*
>
> *In my view the judge erred in ascertaining the intentions of the parties from the evidence heard by him as well as the alterations aforesaid and documents prepared in the course of the negotiations. The intention of the parties may be gleaned only from the document ultimately concluded by them, albeit construing it in the light of surrounding circumstances but not ascertaining their intentions from such circumstances. Such a process would be justified only where one or other of the parties claimed rectification of the document executed by him: that is not the present case."*

v. Analog Devices B.V. v. Zurich Insurance Company [2005] 1 I.R. 274

69. In *Analog Devices*, the plaintiffs sustained losses arising from the negligence of an employee. They claimed under their insurance policies in respect of the losses suffered. Their insurers, the defendants, sought to rely on certain exclusion clauses. The case turned on the interpretation to be given the relevant policies. Giving judgment for the Supreme Court, Geoghegan J. made the following remarks concerning the principles of contractual interpretation, at pp.280, et seq:

> *"In Rohan Construction v. I.C.I. [1988] I.L.R.M. 373 at p.377 Griffin J. in a judgment, with which Finlay C.J. and Hederman J. concurred, said the following:-*
>
> *'It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause.'*
>
> *…Griffin J. goes on to expand on the meaning of 'surrounding circumstances' and he refers with approval to a passage from the speech of Lord Wilberforce in Reardon Smith Line Ltd. v. Hansen-Tangen [1976] 1 W.L.R. 989 at p.996:-*
>
> *'When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties….What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.'*
>
> *In modern times, these principles have received further expansion from the House of Lords. Lord Hoffman in I.C.S. v. West Bromwich B.S. [1998] 1 W.L.R. 896 considered that quite a radical change had come about, the result of which 'subject to one important exception', was to assimilate the way in which documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. He then set out the modern principles at p.912 as he saw them and which I would accept…[These principles are identified in the court's consideration of the I.C.S. case later below.]*
>
> *…A fundamental principle which appears to be particularly relevant to this case is the principle of contra proferentem. Clark in Contract Law in Ireland (4th ed.) at p.149 sets out the general principle as follows:-*
>
> *'If the exempting provision is ambiguous and capable of more than one interpretation then the courts will read the clause against the party seeking to rely on it.'*
>
> *The application of the principle to insurance contracts is treated in the same work at p.273. The author points out that two Irish cases provide clear guidance on the position to be adopted in the interpretation and construction of insurance contracts. The first passage is from Rohan Construction v. I.C.I. [1986] I.L.R.M. 419 from a High Court judgment of*

Keane J. The passage reads as follows:-

'It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting the ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is to be construed more strongly against the party who prepared it, i.e. in most cases against the insurer. It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance.'

In Cheshire Fifoot and Furmston'sLaw of Contract (13th ed.) the rule is defined as meaning that if there is any doubt as to the meaning of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it.

The second Irish case referred to by Clark is In re Sweeney and Kennedy's Arbitration [1950] I.R. 85 where Kingsmill Moore J. in his judgment in the High Court on a special case stated on a question of law arising from the award of an arbitrator said at pp.98 to 99 the following:-

'But, even if I am wrong in my conclusion that the interpretation is reasonably free from doubt, the case must be decided against the underwriters if the words are ambiguous. The wording of the proposal must be deemed to have known, what matters were material to the risk and what information they desired to obtain. They were at liberty to adopt any phraseology which they desired….If then, they choose to adopt ambiguous words it seems to me good sense, as well as established law, that those words should be interpreted in the sense which is adverse to the persons who chose and introduced them….

I would like to associate myself with the opinion of Lord Greene M.R. in Woolfall&Rimmer Ltd. v. Moyle [1942] 1 K.B. 66 at p.73, where he says:- '…if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is. They should, with the aid of competent advice, make up their minds as to the qualifications they wish to impose and should express their intention in language appropriate for achieving the result desired. There is no justification for underwriters, who are carrying on a widespread business and making use of printed forms either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language. Any competent draughtsman could carry out the intention which [counsel] imputes to this document, and, if that was really intended, it ought to have been done'.'

Kingsmill Moore J. went on to observe that what Lord Greene had to say was 'but the latest expression of a sentiment which judge after judge has uttered for nearly a century' and he goes on to cite other passages which indicate that an insurance policy ought to be framed in such a way that it can clearly be understood. The principle of contra proferentem needs be resorted to, of course, only if there is an ambiguity.

…The second important general principle in relation to the exclusions is that the onus is on the insurer to establish the application of the exclusion or exemption. Counsel for the plaintiffs cite in their written submissions to this court a passage from the judgment of Hanna J. in General Omnibus Co. Ltd. v. London General Insurance Co. Ltd. [1936] I.R. 596 which is in the following terms, at p.598:-

'The first defence depends upon the interpretation and construction of the exclusions or exceptions as stated in exemption (c). The policy starts by giving an indemnity in general terms and then imposing exceptions. The law is that the Insurance Company must bring this case clearly and unambiguously within the exception under which they claim benefit, and, if there is any ambiguity, it must be given against them on the principle contra proferentes.'

On appeal the Supreme Court took a different view on the interpretation of the policy but it was not suggested that the general principle stated by Hanna J. was incorrect. In the same written submissions there is a passage from the standard work Ivamy, General Principles of Insurance Law (6th ed.) which is worth quoting and it reads as follows, at p.286:-

'Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness. It is the duty of the insurers to except their liability in clear and unambiguous terms.'"

70. Although *Analog Devices* was concerned with interpretation of insurance policies, the general principles identified appear to be of equal applicability in the within proceedings, though care is of course required when transplanting principles from the field of insurance law into the field of general contract law, given that it is a specialist area of the law with its own nuances and niceties and is infused to a large extent with the consequences of the duty of 'uberrimaefidae' ('absolute good faith') to which insurer and insured are each subject.

vi. Ahmed v. Health Service Executive [2007] 2 I.R. 106

71. This was a case involving a dispute as to the terms of a contract between a medical consultant and the HSE. It has been cited by Ms Hayes in the within proceedings as authority for the assertion that a term cannot be implied into a contract if this would contradict an express term. Per Laffoy J., at p.127 of her judgment: *"[T]he proposition that an implied term must not contradict any express term of a contract cannot be gainsaid".*

vii. Emo Oil Ltd v. Sun Alliance & London Insurance plc [2009] IESC 2

72. This was a case concerned with the issue of when the insolvency of a company could be said to have occurred for the purposes of a particular insurance policy. When it comes to the principles of contractual interpretation, the case endorsed and followed Analog Devices. Even so, it is perhaps of interest because of Kearns J.'s rejection, at p.25 of his judgment, of a particular contention concerning the interpretation of an insurance policy on the basis that *"[T]he interpretation contended for by the plaintiff would cause significant problems in practice and would flout business common sense".*

viii. ICDL v. European Computer Driving Foundation Ltd [2012] 3 I.R. 327

73. This was a case concerning the validity of the termination of a contract and the applicability of a limitation of damages clause. When it came to the principles applicable to the interpretation of a contract, Fennelly J., for the court, referred to the judgments of Geoghegan J. in *Analog Devices*, of Lord Hoffman in I.C.S. (considered later below) and to the above-quoted dictum of Lord Wilberforce in Reardon Smith Line, and then stated as follows, at pp.350 –353 of his judgment:

> *"[66] These various dicta are notable for their emphasis on the potential admissibility of background knowledge or what Lord Wilberforce famously described as the 'matrix of fact'. Emphasis on those admissible aids to interpretation should not, however, mislead us into forgetting that a contract is, in the first instance, composed of the words used by the parties. It is of note that Geoghegan J. in his judgment in Analog Devices…cited…a passage from the judgment of Griffin J. in Rohan Construction [quoted in the extract from Geoghegan J.'s judgment above]….*
>
> *[67] Geoghegan J. went on to note that Griffin J. had explained his reference to 'surrounding circumstances' and that he had cited the [above-quoted passage of Lord Wilberforce's speech in Reardon Smith Line]….*
>
> *[68] I join with O'Donnell J. in his approbation of the statement of Lord Hoffman in I.C.S. [considered later below]….*
>
> *[69] [Having quoted the five principles in Lord Hoffman's speech to which this Court makes reference below, Fennelly J. continues as follows.] This passage, particularly para.4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover words will, as Lord Hoffman emphasises, naturally be interpreted in accordance with their 'natural and ordinary meaning…'. Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract….*
>
> *[70] Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words….*
>
> *[71] [T]he first plaintiff relies…on the contra proferentem rule. It is submitted that the agreement was prepared by and emanated from the defendant and that, if there is any ambiguity, in accordance with that rule, it must be construed against it, using the Latin maxim, 'against the party proffering it'. It cites the judgment of McCarthy J. in Brady v. Irish National Insurance Co. Ltd. [1986] I.R. 698, at p.720.*
>
> *[72] Brady…concerned the interpretation of a special warranty in a marine insurance policy. Finlay C.J., who delivered the majority judgment, with which Walsh, Hederman and McCarthy JJ. agreed, held at p.715 that the warranty should be interpreted in accordance with the 'principle which would be applicable to the interpretation of a contract proffered by one person to another'. It was said to be 'interpreted against the insurer…'. McCarthy J., at p.720, said that 'a contract issuing from one party [to another] must be construed against him, if ambiguity there be'.*
>
> *[73] As it happens, Analog Devices…is also an important authority on this point. Although the case concerned apolicy of insurance, Geoghegan J. referred at p.282 of his judgment to the general principle. He cited Clark on Contract Law in Ireland…for the proposition that:-*
>
> *'If the exempting provision is ambiguous and capable of more than one interpretation than the courts will read the clause against the party seeking to rely on it.'*
>
> *….[75] The first plaintiff, in addition, submits that the party seeking to terminate an agreement, in accordance with its terms, must prove the existence of the facts which justify the alleged right to terminate….This is not the same as the contra proferentem rule, which concerns the meaning of terms. It means that there must be precise observance of any conditions or procedures governing termination of the agreement."*

ix. Dunnes Stores v. Holtglen Ltd [2012] IEHC 93

74. This was a case in which Dunnes Stores sought to set aside an arbitral award that arose out of a development dispute. The case is of interest in the context of a consideration of the principles of contractual interpretation because, after referring to Lord Hoffman's statement of principles in the I.C.S. case as endorsed by the Supreme Court, *inter alia*, in *Analog Devices,* Kelly J. went on to observe as follows, at paras.49–52 of his judgment:

> *"49. In interpreting the commercial agreement, a court or arbitrator ought to endeavour to give it a commercially sensible construction. This is clear from the views expressed by Lord Steyn in Mannai Investments Limited v. Eagle Star Assurance Company Limited [1997] 3 All E.R. 352, where he said:-*
>
> *'In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'*
>
> *50. Lord Steyn's views having been approved of in this jurisdiction by Clarke J. in BNY Trust Company (Ireland) Limited v. Treasury Holdings [2007] IEHC 271.*
>
> *51. The question of commercial commonsense has most recently attracted the attention of the United Kingdom Supreme Court in Rainy Sky S.A. v. Kookmin Bank [2011] 1 WLR 2900. The defendant bank sought to avoid payment on foot of advance payment bonds. It did so in circumstances where it claimed that the bonds true construction did not encompass the instalments in respect of which repayment was sought. Simon J. in the Commercial Court held that the construction contended for by the bank would give rise to a non-commercial result. His decision was reversed by a majority in the Court of Appeal. His order was restored by the Supreme Court. It held that where parties have used unambiguous language, irrespective of the question of commercial sense, the unambiguous language must be applied. If, however, there is an ambiguity then the court is entitled to construe the contract in the more commercially sensible manner.*

52. Lord Clarke said:-

'The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of the construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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 would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.'"

x. Marlan Homes Ltd v. Walsh [2012] IESC 23

75. This was a case that arose out of a dispute between the parties regarding the provision of mortgage facilities over certain lands and involved the construction of two agreements by reference to which the respective rights and obligations of the parties fell to be determined. It is of relevance in the within context because of certain observations of McKechnie J. that are considered by Laffoy J. in her judgment in Ickendel(considered below).

xi. Millar v. Financial Services Ombudsman [2014] IEHC 434

76. *Millar* is perhaps a slightly unusual case for the Defendants to invoke in that it has recently been reversed by the Court of Appeal. (See *Financial Services Ombudsman v. Millar* [2015] IECA 27). Even so, there seems no reason to consider that the trial judge (Hogan J.) erred when he opined in respect of the interpretation of words that are not a specialist term of art which has a defined meaning in legal or (as was applicable in that case) financial circles. Per Hogan J., at para. 22 of his judgment: *"Given that these words are not terms of art, they must therefore be construed in the first instance by reference to the ordinary usage of these terms and how, objectively, these words would be understood by a reasonable person in the context in which they appear."*

xii. Ickendel Ltd v. Bewley's Café Grafton Street Ltd [2014] IESC 41

77. *Ickendel* is very much a case of our times, or at least of very recent times, being concerned with the interpretation of a rent-review clause in a lease, pursuant to which rent due had been increased during a period of national economic collapse and related rent deflation. In her judgment for the court, Laffoy J., at paras. 9–10 of her judgment, stated the following as regards the principles of contractual interpretation:

"9. There is consensus that the relevant principles of law as to the proper approach to how a lease should be construed. The law can therefore be set out briefly. Meaning is to be gleaned from the plain words of an agreement; where there is no doubt as to the meaning of a clause, then it should be given that meaning; what a section of the document means is to be seen in the context of the entire agreement set against the background of the factual matrix that generated it; where there is no ambiguity then it is unnecessary to consider the need to confer business efficacy on the agreement; but where the words used may reasonably bear more than one meaning then consideration as to how the agreement is to sensibly operate may allow one construction over another.

As authority for the foregoing propositions, the trial judge cited a number of authorities, for example, the decision of the Supreme Court in Analog Devices….

10. Counsel for the Landlord attached some significance to the fact that the trial judge also expressed agreement with, recognising that he was bound by, the decision of the Supreme Court in Marlan Homes Limited v. Walsh [2012] IESC 23. In fact, in his judgment the trial judge quoted, inter alia, paragraphs 48 to 52 of the judgment delivered by McKechnie J. in the Supreme Court in that case. In paragraphs 51 and 52, McKechnie J. stated as follows:

'51. It is important, however, to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly, it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.

52. The boundary between what is permissible and not in this context is captured by the following quotation from CharterReinsurance Co. Ltd. v. Fagan [1997] A.C. 313 where at p.388 Lord Mustill stated:-

'There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.'

I would respectfully agree with this passage.'"

78. *Ickendel* is perhaps most notable because it can be interpreted, rightly or wrongly, as suggesting that there has been a shift in the Supreme Court towards stricter adherence to the literal terms of agreement,and away from that 'business common-sense' to which reference has been made in various other of the cases referred to herein, including other decisions of the Supreme Court such as *Emo Oil* and *Analog Devices* (which saw a vicarious approval, via the approval by Geoghegan J. of Lord Hoffman's judgment in I.C.S., of the long-ago judgment of Lord Diplock in *The Antaios*). This is because it canbe contended, again rightly or wrongly, that both common-sense and 'business sense' recoil from the notion that landlord or tenant ever contemplated, regardless of the strict terms of a lease, that the tenant would continue to be subject to rising rents in a period of national economic collapse that saw rental rates in the applicable market fall by about 50 per cent.

xiii. Holloway and Others v. Damianus B.V. and Others [2015] IECA 19

79. This was a case concerned with the interpretation of a pension and death benefits scheme. The Court of Appeal heard argument in support of adopting the principles contained in *Forbes v. Git and Others* [1922] 1 AC 256 to the effect that if, in a deed, an earlier clause is followed by a clause that obviates the obligation created by the earlier clause, the later clause must be rejected and the earlier must prevail; however, if the later clause merely qualifies, rather than obviating the earlier obligation, the two must be read together and effect given to the intention of the parties as disclosed by the deed as a whole. This somewhat contrived manner of interpretation did not meet with much success in the Court of Appeal which considered that cases where the sequencing of clauses in a contract would be dispositive of matters in the manner contemplated by the Privy Council in *Forbes* would be rare. Per the Court of Appeal (Kelly, Hogan and Mahon JJ.), at paras. 21 et seq:

> *"21. While there may well be cases where effect should be given to the earlier rather than the later provisions by reason of the sequence of such clauses in the contract, the Court is of the view that cases where this would be an important consideration are likely to be rare. Even in those types of unusual case, which may depend on the context (including, for example, the nature of the contract and whether it was a contract in standard form offered by one party to another) and the later inconsistent clause may sometimes be readily explained as an obvious error or oversight. Yet we would nonetheless be reluctant to adopt such a principle as a general rule, not least if it were to be applied in some quasi-mechanical or artificial fashion. Such an apparently dogmatic approach would be out of line with the modern attitude to the construction of contracts prescribed by the Supreme Court. The modern approach generally favours an holistic approach to the resolution of apparently conflicting contractual provisions, often by reference to well established doctrines such as the general 'matrix of fact' principle, the parol evidence rule, the contra proferentem rule and the maxim of generaliaspecialibus non derogant; as adopted in a number of cases including Welch…Analog Devices…and ICDL….*
>
> *22. Indeed, it may be observed that the English courts have shown no subsequent real enthusiasm for the principle articulated in Forbes….*
>
> *23. …[I]n RSPCA v. Barry [2011] EWCA Civ 1474…Lord Neuberger M.R., said in the context of the construction of a will that:*
>
> *'….as a free standing point, the mere fact that one clause precedes another seems to me to be of minor potential relevance on the issue of how they inter-relate with each other.'*
>
> *24. We consider that the more relevant principles of construction are instead to be found in the judgment of Henchy J. in Welch v. Bowmaker…a case, where it happens, a later provision was preferred to an apparently conflicting earlier provision on the application of the principle generaliaspecialibus non derogant."*

Foreign authorities

xiv. Antaios Cia. Naviera SA v. SalenRederierna AB ('TheAntaios') [1985] A.C. 191

80. This was a case concerning whether there ought to have been leave to appeal granted in respect of an arbitrator's award concerning the interpretation of a charterparty. It has been cited in the within proceedings because of Lord Diplock's observation, at p.201 of his judgment that:

> *"While deprecating the extension of the expressive 'purposive construction' from the interpretation of statutes to the interpretation of private contracts…I take this opportunity of re-stating that 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."*

81. This passage met with the approval of Lord Hoffman in the I.C.S. case (considered immediately below), Lord Hoffman's judgment in this regard later receiving the endorsement of Geoghegan J. in *Analog Devices*.

xv. Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All E.R.98

82. This case, referred to generally in the within judgment as "I.C.S.", concerned the interpretation of a contract whereby certain rights were assigned by claimant investors to the United Kingdom's Investor Compensation Scheme. The principles of contractual interpretation espoused by Lord Hoffman in his speech in I.C.S. were endorsed by Geoghegan J. in his judgment in Analog Devices (considered above). Per Lord Hoffman at pp.114–115:

> *"I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law…is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.*
>
> *(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….

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense 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 Antaios Cia Naviera SA v. SalenRederierna AB, The Antaios [1984] 3 All ER 229 at 233…

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

xvi. Euro Brokers Holdings Ltd v. Monecor (London) Ltd [2003] 1 BCLC 506

83. *Euro Brokers* was a case concerned with the proper interpretation of a shareholder agreement. It is of interest in the context of the within proceedings because of the observation of Deputy Judge Leslie Kosmin QC, in the High Court, at p.527 of his judgment that:

"The shareholders' agreement is of course a commercial document agreed between businessmen and designed to regulate their affairs….Like the articles the shareholders' agreement must be the subject of constructive interpretation with a view to carrying out the intentions of the parties and enabling them to achieve their commercial purpose. In this context I would adopt towards the shareholders' agreement the reasoning of Jenkins L.J. in Holmes v. Keyes [1958] 2 All ER 129 at 138…in relation to a company's articles:

'I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable.'"

xvii. Matchbet Ltd v. Openbet Retail Ltd [2013] EWHC 3067

84. *Matchbet* can perhaps be viewed as something of an English corollary to the decision of the Supreme Court in *Igote*. In the last-mentioned case, it will be recalled that Murphy J., for the Supreme Court, held that the intention of the parties may be gleaned only from the document ultimately concluded by them (albeit construing it in the light of surrounding circumstances but not ascertaining their intentions from those circumstances).

85. *Matchbet*concerned a claim for damages for alleged breaches of a software licensing and development agreement. It is of interest in the within proceedings because of the observation of Henderson J., at para.132 of his judgment, in respect of certain Heads of Terms, that *"To the extent that the provisions of the Heads of Terms were not contractually binding, they were no more than steps in the pre-contractual negotiations between the parties and, as such, they are excluded by the exclusionary rule."*

xviii. Marley v. Rawlings [2014] UKSC 2

86. *Marley*was a case involving a contested will where a husband and wife had executed wills at the same time but each had executed the other's will in error. In the United Kingdom Supreme Court, Lord Neuberger indicated, at para.20 of his judgment, his view that the principles which underpin the interpretation of commercial contracts should also apply when it comes to interpreting wills. At para.19 of his judgment, he stated succinctly those principles of contractual interpretation as follows:

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words:

(a) in the light of:

(i) the natural and ordinary meaning of those words,

(ii) the overall purpose of the document,

(iii) any other provisions of the document

(iv) the facts known or assumed by the parties at the time that the document was executed, and

(v) common sense, but

(b) ignoring subjective evidence of any party's intentions."

APPENDIX C

SOME PRINCIPLES OF CONTRACTUAL INTERPRETATION

87. The court summarises below the various principles of contractual interpretation that it considers the case-law reviewed in Appendix B to yield. The court has sought to apply various of the principles identified in this Appendix, when and as appropriate, throughout the main text of the judgment to which this Appendix is appended and of which it forms part.

A. Some general principles

(1). The modern attitude to the construction of contracts generally favours a holistic approach to resolution of apparently conflicting provisions, often by reference to well established doctrines such as the 'matrix of fact' principle, the parol evidence rule, the *contra*

proferentem rule and the maxim of *generalia specialibus non derogant*.[1]

(2). Documents are generally interpreted by judges in a manner that accords with the common sense principles by which any serious utterance would be interpreted in ordinary life.[2]

(3). The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances.[3]

B. Intention of parties
(4). The cardinal rule of construction is that the intention of the parties must prevail.[4]

(5). When one speaks of the intention of the parties to the contract, one is speaking objectively.[5]

(6). A court is not entitled to speculate as to what the parties intended to say.[6]

(7). The court must ascertain what is the true meaning and intention of the words used by the draftsman.[7]

(8). Intention is to be looked for on the face of the agreement, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning.[8]

(9). Intention is discerned by identifying the meaning of the relevant words: in the light of: the natural and ordinary meaning of those words, the overall purpose of the document, any other provisions of the document, the facts known or assumed by the parties at the time that the document was executed, and common sense.[9]

(10). The law does not require judges to attribute to the parties an intention which they plainly could not have had.[10]

C. Subjective intent
(11). The law excludes from the admissible background declarations of subjective intent. They are admissible only in an action for rectification.[11]

(12). The parties cannot themselves give direct evidence of what their intention was.[12]

(13). What must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.[13]

D. Previous Negotiations and Heads of Terms
(14). Non-contractually binding Heads of Terms are mere steps in the pre-contractual negotiations and, as such, excluded by the exclusionary rule.[14]

(15). The law excludes from the admissible background the previous negotiations of the parties.[15]

E. Focus on words of agreement
(16). *Analog Devices*, I.C.S. and *Reardon Smith* emphasise the potential admissibility of background knowledge. But a contract is, in the first instance, composed of the words used by the parties.[16]

(17). A court will always commence with an examination of the words used in the contract.[17]

(18). Where parties commit their responsibilities to written form, in a particular manner, it must be assumed that they intended to give effect to their obligations in that way. Such is their right, commercially and under contract law.[18]

(19). If words are free from inconsistency or ambiguity, it is not permissible to look outside the document itself or to attempt to ascribe any forced or strained meaning for such words in order to justify a particular construction.[19]

F. Words bear natural and ordinary meaning
(20). Words that are not terms of art will be construed in the first instance in accordance with their natural and ordinary meaning.[20]

(21). The 'rule' that words be given their natural and ordinary meaning reflects the common-sense proposition that we do not easily accept that people make linguistic mistakes, particularly in formal documents.[21]

(22). Meaning is to be gleaned from the plain words of an agreement.[22]

(23). Where there is no doubt as to the meaning of a clause, then it should be given that meaning.[23]

(24). The court's task is to discover what the parties meant from what they have said. To force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes better. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.[24]

(25). 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 the document is what the parties using those words against the relevant background would reasonably have been understood to mean.[25]

(26). Where words reasonably bear more than one meaning then consideration as to how the agreement is to sensibly operate may allow one construction over another.[26]

G. Whole of document
(27). What a section of the document means is to be seen in the context of the entire agreement set against the background of the factual matrix that generated it.[27]

(28). If there is inconsistency between provisions of the document, it is necessary to consider the entire document and facts and circumstances surrounding its execution to ascertain which conflicting expression must take precedence.[28]

H. Sequencing of clauses
(29). While there may be cases where effect should be given to the earlier rather than the later provisions by reason of the sequence of such clauses, cases where this would be an important consideration are likely to be rare.[29]

(30). Even in those rare cases, the later inconsistent clause may sometimes be readily explained as an obvious error or oversight.[30]

I. Matrix of fact
(31). The court must not speculate as to the intention of parties, apart from their words, but may, if necessary, interpret words by reference to surrounding circumstances.[31]

(32). If one would 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.[32]

(33). The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even to conclude that the parties must, have used the wrong words or syntax.[33]

(34). Excepting previous negotiations of parties and declarations of subjective intent, the matrix of fact includes, subject to the requirement that it should have been reasonably available to the parties, anything which would have affected the way in which the language of the document would have been understood by a reasonable man.[34]

(35). What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.[35]

(36). Evidence of surrounding circumstances, but not subjective intentions, may be admitted to explain the subject-matter and even particular words used should be understood as referring to; however, such evidence will not normally be allowed to alter the plain meaning of words.[36]

J. Common-sense and 'business sense'
(37). Business people will be assumed to know what they are doing and will normally be bound by what they have signed.[37]

(38). If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must yield to business common-sense.[38]

(39). Where parties have used unambiguous language, irrespective of the question of commercial sense, the unambiguous language must be applied; there is no need to confer business efficacy on the agreement. If there is an ambiguity the court is entitled to construe the contract in the more commercially sensible manner.[39]

(40). The standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.[40]

(41). It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into an arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.[41]

K. Generaliaspecialibus non derogant
(42). When you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation.[42]

L. Contra proferentem
(43). If an exempting provision is ambiguous and capable of more than one interpretation, the courts will read the clause against the relying party.[43]

M. Shareholder Agreements and Articles of Association
(44). Like articles of association, a shareholder agreement must be the subject of constructive interpretation with a view to carrying out the intentions of the parties and enabling them to achieve their commercial purpose.[44]

(45). Articles of association should be regarded as a business document and construed to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable.[45]

N. Some points regarding insurance policies
(46). Policies of insurance are to be construed like other written instruments.[46] (This need not mean that other written instruments are to be construed like insurance policies).

(47). Words in an insurance policy must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance.[47]

(48). If insurance underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is. There is no justification for underwriters, who are carrying on a widespread business and making use of printed forms either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language.[48]

O. Implied terms.
(49) In business transactions: (i) a term can only be implied if it is necessary in the business sense to give efficacy to the contract; (ii) whether a term will be implied is a question of law for the court; (iii) a term will not be implied where a contract is effective without the proposed term; (iv) a term ought not be implied unless it is clear that the parties must have intended that there should be the suggested stipulation; (v) the court has no discretion to create a new contract; (vi) if there is any reasonable doubt whether

the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; (vii) if the document is silent and there is no bad faith on the part of the alleged promisor, the court ought to be extremely careful how it implies a term; (viii) it is not enough that it would be reasonable to make a particular implication; nor that it would make carrying out the contract more convenient; nor that it is consistent with the express provisions of the contract or with the intentions of the parties as gathered from other provisions; (ix) where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation.[49]

(50) An implied term must not contradict any express term of a contract.[50]

(51) The court cannot imply a term that is contrary to statutory rules.[51]

(52) The court cannot imply a term that is contrary to the clear intention of one of the parties.[52]

P. Termination
(53). There must be precise observance of any conditions or procedures governing termination of the agreement.[53]

88. The following cases are relied upon by the court as precedents supporting the various principles of contractual interpretation that it considers the case-law reviewed in Appendix B to yield and which it has outlined immediately above: [1]see further Holloway and Others v. Damianus B.V. and Others [2005] IECA 19; [2]see further Analog Devices B.V. v. Zurich Insurance Company [2005] 1 I.R. 274, Investor Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896; [3]see further Analog Devices, Dunnes Stores v. Holtglen Ltd [2012] IEHC 93, I.C.S., Rainy Sky S.A. v.Kookmin Bank [2011] 1 WLR 2900; [4]see further Rohan Construction v. I.C.I. [1988] I.L.R.M. 373, Analog Devices; [5]see further Rohan, Analog Devices, ICDL v. European Computer Driving Foundation Ltd [2012] 3 I.R. 327, Reardon Smith Line Ltd. v. Hansen-Tangen[1976] 1 W.L.R. 989; [6]see further Welsh v. Bowmaker Ltd [1980] I.R. 25; [7]see further Welsh; [8]see further Rohan, Analog Devices, Igote Ltd v. Badsey Ltd [2001] 4 I.R. 511, Marlan Homes Ltd v. Walsh [2012] IESC 23, Ickendel Ltd v. Bewley's Café Grafton Street Ltd [2014] IESC 41; [9]see further Marley v. Rawlings [2014] UKSC 2; [10]see further Analog Devices, Antaios Cia. Naviera SA v. Salen Rederierna AB ('The Antaios') [1985] A.C. 191, I.C.S.; [11]see furtherAnalog Devices, Igote, ICDL, I.C.S., Marley; [12]see further Rohan, Analog Devices, Reardon Smith, Marley; [13]see further Rohan, Analog Devices, Reardon Smith; [14]see furtherMatchbet Ltd v. Openbet Retail Ltd [2013] EWHC 3067; [15]see further Analog Devices, I.C.S.; [16]see furtherICDL; [17]see further ICDL; [18]see further rMarlanHomes, Ickendel; [19]see further Welsh; [20]see further ICDL, Millar v. Financial Services Ombudsman [2014] IEHC 434; [21]see furtherAnalog Devices, I.C.S.; [22]see furtherAnalog Devices, Ickendel; [23]see furtherAnalog Devices, Ickendel; [24]see furtherMarlan Homes, Ickendel, Charter Reinsurance Co. Ltd. v. Fagan [1997] A.C. 313; [25]see furtherAnalog Devices, I.C.S.; [26]see furtherAnalog Devices, Ickendel; [27]see furtherRohan, Analog Devices, Ickendel; [28]see furtherWelsh; [29]see furtherHolloway, RSPCA v. Barry [2011] EWCA Civ 1474; [30]see furtherHolloway; [31]see furtherRohan, Analog Devices; [32]see furtherAnalog Devices, The Antaios, I.C.S.; [33]see furtherAnalog Devices, I.C.S.; [34]see furtherAnalog Devices, I.C.S.; [35]see furtherRohan, Analog Devices, ReardonSmith; [36]see furtherICDL; [37]see furtherICDL; [38]see furtherAnalog Devices, BNY Trust Company (Ireland) Limited v. Treasury Holdings [2007] IEHC 271, Emo Oil, The Antaios, Mannai, I.C.S.; [39]see furtherAnalogDevices, Ickendel, Holtglen, Rainy Sky. [40]see furtherBNY Trust, Holtglen, Mannai Investments Limited v. Eagle Star Assurance Company Limited [1997] 3 All E.R. 352; [41]see furtherMarlan Homes; Ickendel; [42]see furtherWelsh, Holloway; [43]see furtherGeneral Omnibus Co. Ltd. v. London General Insurance Co. Ltd. [1936] I.R. 596, In re Sweeney and Kennedy's Arbitration [1950] I.R. 85, Brady v. Irish National Insurance Co. Ltd.[1986] I.R. 698, Rohan (High Court, Keane J.); [44]see furtherEuro Brokers Holdings Ltd v. Monecor (London) Ltd [2003] 1 BCLC 506; [45]see furtherHolmes v. Keyes [1958] 2 All ER 129, Euro Brokers; [46]see furtherRohan (High Court, Keane J.), Analog Devices; [47]see furtherRohan (High Court, Keane J.), Analog Devices; [48]see furtherWoolfall&Rimmer Ltd. v. Moyle [1942] 1 K.B. 66, In re Sweeney and Kennedy's Arbitration, Analog Devices; [49]see furtherGrehan v. The North Eastern Health Board [1989] I.R. 422;Carroll v.An Post National Lottery Company [1996] 1 I.R. 443;Ahmed v. Health Service Executive [2007] 2 I.R. 106; [50]see furtherGrehan;Ahmed; [51]see furtherCarroll; [52]see furtherCarroll; [53]see furtherICDL.