

## THE HIGH COURT

[2009 No. 4304S]

## BETWEEN

DAMIEN STAPLETON

AND

PLAINTIFF

PHILIP DORAN

DEFENDANT

**JUDGMENT of Mr. Justice Hogan delivered on the 20th December, 2011**

1. On 24th July, 2008, the plaintiff, Damien Stapleton, transferred the sum of €300,000 from his own personal bank account to the personal bank account of the defendant, Philip Doran. That sum has never been repaid. The net question which I am required to determine is whether - as Mr. Stapleton contends - the money represented a personal loan from Mr. Stapleton to Mr. Doran which is long since overdue for payment or whether, alternatively - as Mr. Doran contends - the monies represented either a loan to a company entitled Easiwrap Ltd. (a company owned and controlled by him) or were otherwise part of an overall agreement whereby Mr. Stapleton agreed to purchase 50% of the shareholding of that company for €1.7m.

2. Unfortunately, there is little by way of documentary evidence to assist me in resolving this factual dispute which, at its heart, concerns a purely verbal agreement. This makes the resolution of disputes of this kind particularly difficult, not least given the significant conflicts of fact thrown up by the evidence. Ultimately, the matter has to be resolved by reference to the oral evidence and the general surrounding circumstances.

3. In a matter of this kind, the general surrounding circumstances and the relevant factual matrix of the dispute is critical. The task of the court, after all, is to determine the intentions of the parties to the contract at the time insofar as they can be objectively ascertained. As Keane J. said in *Kramer v. Arnold* [1997] 3 I.R. 43, 55:

"...where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

4. In the case of a purely verbal contract, the examination of the surrounding circumstances assumes a particular importance. This is especially true where (as we shall see) the two parties to the verbal agreement disagree fundamentally concerning key terms of that oral contract. Of course, the general approach of the court is to confine the ascertainment of this general factual matrix to the circumstances in existence and known to the parties at the time of the entry into the contract, since as Finlay C.J. observed in *Re Wogan's (Drogheda) Ltd.* [1993] 1 I.R. 157, 170, "the mischief created by a departure from [this principle] would be in many instances considerable." In that case the Supreme Court refused to have regard to post-execution events for the purposes of construing whether a charge in a debenture deed was a fixed or a floating charge.

5. These sentiments were echoed by Keane J. in *Bula Ltd. v. Tara Mines Ltd.* [1999] IESC 17. Here the argument was that (an admittedly detailed) contract should be capable of a different construction depending on the passage of subsequent events. This was squarely rejected by the Supreme Court:-

"....in the light of what were said to be the wholly different circumstances in which the plaintiffs found themselves at a later stage when the planning permission for an open cast mine was refused, it was reasonable to give the clause a different construction. It need hardly be said that such an approach would be wholly contrary to elementary principles of our law of contract: the meaning of any agreement is to be determined by ascertaining the intentions of the parties as expressed in the agreement (subject to such extrinsic evidence as may be admissible) at the time they entered into the agreement and not otherwise."

6. My task, therefore, in the light of these two Supreme Court decisions is to ascertain in the first instance the relevant factual circumstances at the time of the making of the verbal contract in July 2008. It is, however, first necessary briefly to describe the relevant *dramatis personae* before recounting the key events which led up to the money transfer at the end of July, 2008.

**The key witnesses**

7. Damien Stapleton is a wealthy businessman who was previously both an auctioneer and a property developer.

8. Mary Doran is the sister of the defendant, Philip Doran. She is the fiancée and partner of Mr. Stapleton. She previously worked for the company at the heart of this dispute, Easiwrap Ltd. ("Easiwrap"), for the period from 2001 to 2003.

9. Philip Doran was the proprietor of Easiwrap. This was a manufacturing company which specialised in manufacturing plastic wrapping and other plastic products and which had its offices in Glasnevin Business Park in Dublin. These premises were owned by Mr. Doran personally and were subject to a mortgage with Ulster Bank. The premises were then rented by Mr. Doran to Easiwrap.

10. Fiona Peel is the partner of Mr. Doran. Jennifer Doran is the daughter of Mr. Doran. She has a BA in accounting and human relations and she played a prominent role in Easiwrap.

11. Eamon Moyles is a qualified accountant and a general business adviser. He was a trusted financial adviser to Mr. Stapleton.

12. Dylan Fitzgerald is an accountant who was first asked by Mr. Stapleton to perform a due diligence in respect of the affairs of Easiwrap in March 2009.

13. Michael Cunningham is a specialist engineer who was asked by Padraig FitzGerald & Co.- who were in turn acting on the instructions of Mr. Stapleton- to assist the management team at Easiwrap.

14. Gerry Hopkins was the auditor of the company.

15. Lynn Hogan was Mr. Doran's personal assistant and office administrator.

16. David Weir was the general manager of Easiwrap from January 2009 to September

2009. He was appointed by Mr. Doran and Mr. Stapleton.

### **The events leading up to July 2008**

17. It now seems opportune to describe some of the key events which are at the heart of this dispute. The story really begins in March 2008 when Easiwrap was experiencing cashflow difficulties by reason of an unsuccessful business venture in the United States. This venture had incurred significant financial losses and, in addition, fluctuating polymer prices were adding to these difficulties. Easiwrap was a medium size manufacturer of plastic wrapping products based in Glasnevin in Dublin. It was owned and controlled by Mr. Doran. Faced with these difficulties, Mr. Doran made overtures to Mr. Stapleton (the partner of his sister, who, in turn, was a former employee of the company) to ask him to invest in the company. Mr. Stapleton then asked his financial adviser, Mr. Moyles, to meet with Mr. Doran and to review matters.

18. Mr. Doran and Mr. Moyles met shortly thereafter to discuss the company's prospects, business methods and future funding requirements. Mr. Moyles inspected the company's premises and production facilities. He reviewed material supplied by both Mr. Doran and Mr. Hopkins concerning the company. Mr. Doran maintained that the cashflow problems were the result of the disastrous US investment, but Mr. Moyles inclined to the view that, while the business was a potentially viable one, it had more deep seated problems.

19. Mr. Moyles met with Mr. Stapleton in the middle of May 2008. He provided confirmation that the business had a significant turnover and that it operated in a niche market with few competitors. Mr. Moyles nonetheless stressed that the business was in a precarious position and that it needed to make considerable costs-savings if it were to survive. His advice to Mr. Stapleton was that the directors and shareholders should introduce their own monies first and, as he put it, "see the savings and then look at the business in the medium term."

20. The general review culminated in a meeting on 24th May 2008 between Mr. Doran, Mr. Gerry O'Halloran (of O'Halloran, Hopkins) and Mr. Moyles. Mr. Moyles met Mr. Stapleton after that meeting. The latter two agreed that the best way forward was that Mr. Stapleton should not make an investment at this stage, but that he should rather give practical assistance to Mr. Doran by enabling him to secure an equity release of the property at Glasnevin which was owned by him and which he rented to Easiwrap. As it happened, Mr. Doran had a mortgage on the property with Ulster Bank and Mr. Stapleton had a good business relationship with that bank. Mr. Stapleton and Mr. Moyles agreed that the latter would assist Mr. Doran in the discussions with Ulster Bank to see if such an equity release could be forthcoming.

21. Discussions regarding an equity release continued throughout the following weeks. It is all too well known that this period was an exceptionally difficult one for the Irish banking system as capital markets began to seize up. It is perhaps therefore not very surprising that the discussions regarding the equity release did not prove to be straightforward. The bank demanded increased security and guarantees and towards the end of July 2008 it was being envisaged as an interim solution that Mr. Stapleton should put the sum of some €750,000 on deposit with the bank. As Mr. Moyles put it in evidence, the bank would have a "quasi-lien" over these monies pending the formalisation of the necessary security release.

### **The Rosslare encounter**

22. This plan was, however, overtaken by events and, as we shall later see, it was never actually put into effect. The events in question took place in Rosslare towards the end of July 2008 and they assume a central feature of this dispute.

23. Both the Dorans and Stapletons have holiday homes relatively close to each other in Rosslare and, as it happens, both families were on vacation there towards the end of July 2008. One evening- probably on July 21st- Ms. Peel drove Mr. Doran the short distance to the Stapletons' house. While there is some confusion between the various witnesses on the point, I accept Ms. Peel's evidence that she stayed for dinner and that she then returned alone to her holiday home at about 10.30pm. I further accept her evidence to the effect that Mr. Doran stayed overnight with the Stapletons.

24. All the evidence suggests that Mr. Doran was under considerable stress that evening, doubtless prompted by the financial pressures which his company was encountering. At that stage Easiwrap owed one particular supplier some €1.2m. and the supplier in question was refusing to make further supplies unless the account was brought back more into balance. Without this particular supply the business would have closed, so the matter had become critical.

25. While I accept Mr. Doran's evidence that he had many discussions with Mr. Stapleton about a possible investment in the company during the preceding weeks, it is common case that matters came to a head that evening. After dinner, it seems that both Mr. Doran and Mr. Stapleton had a lengthy discussion after drinks, which discussions and exchanges lasted into the small hours. Since what happened next is critical to the entire claim, it seems appropriate that I should summarise the narrative of the various protagonists.

### **Mr. Stapleton's account**

26. Mr. Stapleton stressed that Mr. Doran was in an extremely distressed condition. He was supported in this by the evidence of his partner, Ms. Mary Doran, who recounted how the plight of her brother made a considerable emotional impact on her. After dinner, Mr. Doran then pressed Mr. Stapleton to invest in the company. Mr. Stapleton says that he informed Mr. Doran that he declined to go against the advice of his professional advisers.

27. At that point, Mr. Doran then asked Mr. Stapleton for a personal loan of €300,000. Mr. Stapleton said that he would have to consider this and speak with his partner, Mary about this. Mr. Doran asked whether he could stay the night and he was offered the use of a guest bedroom. The following morning as Mr. Stapleton was attending to his young daughter and having breakfast, he found himself being pressed by Mr. Doran for the loan. Mr. Stapleton asked for some space to discuss this with Ms. Doran.

28. Following such a discussion, they went to talk with Mr. Doran. Mr. Doran was again quite emotional and finally Ms. Mary Doran turned to Mr. Stapleton and said:

"Damien, will you please give my brother this loan?"

29. At this point, Mr. Stapleton relented and agreed to give Mr. Doran a loan of €300,000. Ms. Mary Doran herself gave evidence of these events- not least the circumstances of her own intervention- in very similar terms. Having thus made clear that his sister's intention was decisive, Mr. Stapleton then agreed the terms of the loan with Mr. Doran. It was to be an interest free loan, repayable in twelve months, with a significant repayment after three months. We must, however, break off the narrative at this point to give Mr. Doran's account of the meeting.

#### **Mr. Doran's account**

30. While Mr. Doran did not dissent from much of Mr. Stapleton's account, his evidence nonetheless was to the effect that the loan was to the company by way of investment. He stressed that the situation with regard to the supplier was urgent and that he could simply no longer wait for the equity release from Ulster Bank.

31. Critically, however, Mr. Doran did not see the loan as a personal loan to him. The money was rather a downpayment in respect of the ultimate transfer of 50% of the business and this is why he contends that Mr. Stapleton introduced himself to the staff as a partner of the business after July 2008.

#### **The transfer of the monies**

32. It is not disputed but that the moneys were transferred within a few days thereafter by Mr. Stapleton to Mr. Doran's own personal account. On 24 July 2008 Mr. Doran sent Mr. Moyles (Mr. Stapleton's own personal accountant and financial adviser) his own personal bank account details by e-mail. Although Mr. Doran suggested in evidence that he also supplied the bank account details of Easiwrap, this is not borne out by the terms of e-mail correspondence of 24 July 2008. On the same day Mr. Stapleton sent a fax to his own bank requesting a transfer of the sum of €300,000 from his own account to the personal bank account of Mr. Doran. Mr. Doran then in turn lent the money in various tranches to Easiwrap over the following weeks.

33. This is further confirmed by a file memorandum prepared by Mr. Moyles on July 23,

2008:

"PD advises EM that company needs cash now to keep going.

EM calls DS and DS agrees to put in €300,000 via loan to PD to be refunded from equity release from Ulster Bank."

34. In passing, it should be said that other witnesses also confirmed that Mr. Doran had acknowledged to them that the loan was a personal loan. This was, for example, the evidence of Mr. Fitzgerald and Mr. Cunningham. Other witnesses- such as Ms. Hogan and Mr. Weir had clearly been given an alternative impression.

35. It is also worth noting that at a slightly later stage in early 2009 when Mr. Doran and Mr. Stapleton were contemplating a share transfer agreement, they both went for this purpose to Mr. Doran's own legal advisers, McDowell Purcell. That firm of solicitors sent Mr. Doran a letter on 9th January, 2009, which records the terms of the previous day's discussions:

*"Firstly, you have explained that Damian has made a loan to you in the amount of €300,000 in cash and the loan was documented in a loan agreement (I would be grateful if you could let me have a copy of this agreement). You used the €300,000 to make an equivalent loan of €300,000 to the Company. Was this loan documented and, if so, can you please let me have a copy of it?"*

I am operating on the assumption that neither of the above loans are secured in any way, however, if I am incorrect about this please let me know.

Secondly, I understand it is intended that simultaneous with the execution of a Share Subscription and Shareholders Agreement in relation to the Company that Damian will invest €300,000 in cash in return for the allotment of shares in the capital of the Company." (emphasis supplied)

36. Nor can the manner in which the loan was treated in Easiwrap's 2008 accounts be overlooked. Note 15 to those accounts states:

"During the year Philip Doran advanced €891,882 in funds to the company. Expenses paid on behalf of the director and loan repayments to the director totalled €4276,512. The Director also transferred plant and machinery with a value of €309,000 to the company.

The balance owing to the Director at the year end was €980,388..."

37. Easiwrap's auditor, Mr. Hopkins, acknowledged that these accounts would not disclose to a third party that Mr. Stapleton had made a loan to the company. He stressed, however, that it was the intention of the parties to regularise the situation once- as he said had been anticipated by all parties at the time -Mr. Stapleton was made a director. For his part, Mr. Fitzgerald stated if the loan of €300,000 from Mr. Stapleton had been to the company, one would have expected to see it so treated (which it was not) in the company's accounts.

38. Perhaps the treatment of tills issue in the accounts cannot be regarded as dispositive, although it is a clear indicator of the objective intent of the parties. Nevertheless, pausing at this point, it would have to be acknowledged that if the rest of the other documentary and other extrinsic evidence is taken in isolation, it suggests very strongly - one might almost say overwhelmingly - that the loan was to be a personal loan to Mr. Doran. After all, the money was paid directly into the personal bank account of Mr. Doran and not Easiwrap. The McDowell Purcell letter further provides strong evidence that the loan was regarded by both parties as a personal loan.

39. It is only fair to say - and this should be fully acknowledged - that it is quite clear that Mr. Stapleton acted generously and altruistically at the time in response to the entreaty of his partner, Ms. Doran, given the plight in which her brother found himself.

40. Mr. Doran contends, however, that after the payment in late July 2008 Mr. Stapleton acted as if he were a partner in or, at least, had some proprietary rights in Easiwrap, so that the €300,000 payment can only be understood as in effect a form of downpayment for a share of the business. In the light of the clear statements of the law from the Supreme Court in both *Wogans* and *Bula* to the effect that a court cannot have regard to post-contractual events for the purpose of construing the contract, the events post-

dating July 2008 are thus irrelevant for the purposes of the construction of the oral contract. Rather, these post-contractual events are only relevant if it is clear from this subsequent evidence that the original verbal agreement was either expressly varied or, alternatively, tacitly waived or altered by the parties, so that the €300,000 payment had in truth been treated by them as either a payment to the company or some form of downpayment towards the acquisition of at least part of the company by Mr. Stapleton.

41. In order to evaluate that claim, it is necessary to assess what happened thereafter. It is common case that there was no express agreement to vary the terms of the loan. What has to be examined is whether the subsequent conduct of the parties admits of no other explanation save that the oral agreement to make a personal loan to Mr. Doran had been so tacitly varied or altered in some way in the manner contended by Mr. Doran.

#### **The subsequent events: August 2008 to January 2009**

42. On 14th August 2008, Ulster Bank informed Mr. Doran that it was not going to proceed with the equity release. This immediately posed problems so far as any early repayment of the loan was concerned. At that point Mr. Moyles advised Mr. Stapleton that, if he was still contemplating investing in the business, a new approach was required involving specialists who knew the type of business involved.

43. Mr. Stapleton took this advice and it is plain that even at this stage he was considering an investment in the company. Easiwrap was, after all, one of those rare Irish companies: a medium sized native-owned manufacturing business whose success was the product of entrepreneurship and innovation. It was also a company which had considerable potential for growth. But, for reasons I shall later set out, Mr. Stapleton was more than a simply passive investor and he was becoming more deeply involved in the affairs of the company. During this period he was involved in the appointment of Mr. Weir as the new general manager and attended a meeting where the option of examinership was discussed.

#### **The subsequent events: January 2009 to September 2009**

44. On 8th January 2009 both Mr. Doran and Mr. Stapleton attended a meeting at the offices of the former's solicitors, McDowell, Purcell. I have already referred to that letter insofar as it referred to the loan of July 2008 as being a personal loan to Mr. Doran. It is clear from the balance of the letter, however, that the parties contemplated a transfer of 50% of the shareholding following an investment by Mr. Stapleton of up to €1.3m. in the company.

45. At this point, Mr. Stapleton's father was gravely ill and, sadly, he was to die later that year in June 2009. I am quite satisfied that during his period much of Mr. Stapleton's attention was - quite understandably - completely taken up with the care and welfare of his father. When Mr. Doran made an approach for an investment based on what he said was a recent collapse in the price of silage wrap with the consequent possibility of significant profit opportunities, Mr. Stapleton made a snap decision to lend the company the money, possibly as he put it - at a time when his judgment was impaired. It is not disputed but that on this occasion Mr. Stapleton made an investment *in the company* by means of six separate cheques, commencing with a cheque of €150,000 on 13th January 2009 and ending with a final cheque of €16,000 in July 2009. The total sum of this investment came to €434,000.

46. Nor is disputed that Easiwrap made eight payments of €2,500 to Mr. Stapleton during this period. Mr. Stapleton maintains that this was by way of the repayment of the loans, whereas Mr. Doran contends that this was in lieu of a director's salary. Certainly, Mr. Stapleton was never formally employed - he was never assigned a P60 or P45 or given a PRSI number.

47. Matters came to a head in September 2009 when on the eve of completing the share transfer deal which was still under discussion, Mr. Stapleton's legal advisers, Byrne Wallace, discovered that a key patent held by Marmions Ltd. (a company also controlled by Mr. Doran which was vital to the protection of Easiwrap's manufacturing processes) had also lapsed in 2007. The deal at that point collapsed.

#### **The extent of Mr. Stapleton's involvement in the company**

48. Over and above this brief summary of events, there is no doubt but that Mr. Stapleton became more actively involved in the affairs of Easiwrap after July 2008. This can be seen with regard to five general areas: (i) Mr. Stapleton's presence in Easiwrap's premises between July 2008 and September 2009; (ii) the appointment of a new general manager; (iii) a potential examinership for Easiwrap in November 2008; (iv) the presence of Mr. Stapleton's advisers and (v) the role of Mr. Stapleton as co-signatory of the Easiwrap chequebook. I propose to consider these matters in turn.

#### **Mr. Stapleton's presence in Easiwrap's premises between July 2008 to September 2009**

49. So far as his supposed involvement in the affairs of the company is concerned, Mr. Stapleton tended to minimise the extent of any such role. Mr. Stapleton was cross-examined by Mr. Doran in person on this point when the following exchanges took place:

"Q. How often were you in the Easiwrap offices between July and December 2008?

A. I would have been there on a number of occasions.

Q. Would you care to put a reasonable guess on that?

A. I wouldn't know. I wasn't keeping a diary on something like that.

Q. Well, other people were - you were there every single week. You had management meetings, you had board meetings, you had meetings with people who are here today to testify to this and you were directly involved in every decision that was made in the company?

A. Well, I deny that."

50. Three witnesses called by the defence, Ms. Hogan, Mr. Doran's own daughter, Ms. Jennifer Doran, and the new general manager, Mr. David Weir, painted a somewhat different picture. Ms. Jennifer Doran stated that, from July 2008 onwards, Mr. Stapleton was present in Easiwrap's premises "one or twice every two weeks" for the remainder of 2008, but that from the start of 2009 "it could have been twice or three times a week." She also said that Mr. Stapleton and his management team "had full and total financial control of Easiwrap" during this latter period.

51. This version of events was corroborated by Ms. Hogan. She stated that she met Mr. Stapleton in Easiwrap's premises in late July 2008 and that he was introduced to her (and, indeed, to other staff members) as the "new partner in the business." She further stated that Mr. Stapleton had an active role in the appointment of the new general manager, Mr. David Weir, and that he also attended the office regularly. She also described the extent to which Mr. Stapleton's advisers - Mr. Cunningham in particular -

controlled the company's meetings from about March 2009 onwards.

52. Ms. Hogan's version of events was not, in truth, seriously challenged, save that it was put to her that her version of events so far as Mr. Stapleton was concerned was equally consistent with that of a person who had made an investment in the company being anxious to ensure that the company was efficiently run. While she accepted that this was so, she adhered to the view that Mr. Stapleton had been introduced to her as the new partner in the business.

53. For my part, I fully accept the evidence given by both Ms. Jennifer Doran and Ms. Hogan in relation to Mr. Stapleton's involvement in the company. I further accept that Mr. Stapleton was introduced to them as a new partner in Easiwrap in late July 2008, a fact which Mr. Stapleton incidentally denied. Both of these witnesses impressed me as highly reliable witnesses who gave their evidence fairly, fluently and without evasion. Insofar as Mr. Stapleton gave evidence to the contrary, I think that he must have been mistaken in his recollections.

54. I likewise fully accept the evidence of Mr. Weir. For reasons I shall set out shortly, it is quite clear that Mr. Stapleton played a key role in his appointment. I further accept Mr. Weir's evidence that Mr. Cunningham acted as *de facto* chairman of the daily management meetings in the office. While Mr. Cunningham may not have had the formal power to overrule Mr. Weir- and this was the subject of some rather nuanced exchanges during the course of the trial- in truth, it mattered little since by this stage the company was effectively being controlled by Mr. Stapleton and his advisers.

55. I further accept that Mr. Weir was told by Mr. Stapleton that he was the 50% owner of the company and that he had invested large sums of money in Easiwrap.

#### **The appointment of the new general manager**

56. It is common case that Easiwrap appointed David Weir as the new general manager sometime in early 2009 with a view to his taking up the appointment shortly thereafter. While Mr. Stapleton strongly denied having any role in the appointment of Mr. Weir, this view was disputed by other witnesses. Ms. Hogan stated as far as she was concerned, Mr. Stapleton was actively involved in the appointment of Mr. Weir, and, indeed, she recalled that Mr. Stapleton was present with Mr. Doran when he was formally introduced to her as the new general manager.

57. Ms. Jennifer Doran gave similar evidence when cross-examined as the following exchange illustrates:

"Q. Well, I put to you that there was an agreement between Mr. Stapleton and Mr. Doran that new management was needed, that it wasn't a discussion imposed by Mr. Stapleton on his own?

A. I don't understand your question.

Q. I 'm sorry. I put it to you that it wasn't only Mr. Stapleton's decision to appoint a new general manager?

A. I think Mr. Stapleton was the first person to mention it. Mr. Doran may have agreed to it, but, in my opinion, it was his push, Damien's push behind it that got Dave appointed."

58. Mr. Weir was the general manager of Easiwrap from January, 2009 to September, 2009. He gave evidence that he was interviewed for the post by Mr. Stapleton in Mr. Doran's office and that they later had a discussion about the job in the latter's jeep.

59. In my view, it is clear from the preponderance of the evidence, that Mr. Stapleton had, at the very least, a significant involvement in the appointment of Mr. Weir as the new general manager. In this respect, I accept Mr. Weir's evidence and I driven to the conclusion that Mr. Stapleton's general recollection of the events of this period in early 2009 must have been clouded by his reason of his obvious distress at his father's illness and his laudable concern for the welfare of his father.

#### **The November 2008 examinership option**

60. In November 2008 the option of examinership for Easiwrap was seriously considered. While Mr. Stapleton could not recall being present at a meeting where this was discussed, both Mr. Doran and Mr. Moyles confirmed that such a meeting did take place and that Mr. Stapleton was present. At this stage, as Mr. Moyles put it, Mr. Stapleton's team "was still working through the operations and working through the numbers" and Mr. Stapleton was actively considering an investment in the company.

61. In the light of the evidence from both Mr. Moyles and Mr. Doran, I accept that Mr. Stapleton was in fact present at that meeting. While such presence is consistent with Mr. Stapleton being a form of *de facto* partner in the business, it is equally consistent with Mr. Moyles' understanding, namely, that Mr. Stapleton was still considering investing in the business.

The presence of Mr. Stapleton's personal advisers within the company

62. It is not disputed but that both Mr. Stapleton and his advisers, Mr. Fitzgerald and (especially) Mr. Cunningham played an important role in the company after January 2009 when Mr. Stapleton commenced his investment of some €434,000 in Easiwrap by means of loans to the company.

63. Mr. Fitzgerald commenced his work with Easiwrap in March 2009. He stated that he had difficulties acquiring a copy of the debtors' list, but that he ultimately had the opportunity of going through that list in July 2009 with Mr. Weir and Mr. Doran. At this point, Bank of Scotland (Ireland)("BOSI") expressed concern about the manner in which Easiwrap's invoice discounting system was being operated and the destination of the funds so released by the Bank. For my part, I am quite satisfied that this was the sole reason why Mr. Stapleton became a signatory on the Easiwrap chequebook and that his appointment to that capacity was at the behest of BOSI. In other words, Mr. Stapleton's role as co-signatory was to ensure that the monies so released by Bank of Scotland were correctly disbursed.

64. It is nonetheless significant that during this period Mr. Stapleton and his team of advisers were present at discussions with Easiwrap's bankers regarding the continued supply of funding to the company. Mr. Fitzgerald reviewed the list of debtors prior to submission of the relevant invoices to BOSI and effectively made recommendations to BOSI as to whether such payments should be made or not. Mr. Cunningham effectively chaired regular daily (or almost daily) meetings within the company. While he may have had no formal official role within the company, there seems to be little dispute but that he was there at Mr. Stapleton 's behest and that his voice was a hugely influential one.

65. While it may well be true that, as Mr. Fitzgerald suggested in evidence, the task of the advisers was simply to ensure that the

company was run efficiently and to conduct a full due diligence prior to a formal decision by Mr. Stapleton as to whether he should invest further in the company, it is also true to say that by the middle of July 2009, Mr. Stapleton and his advisers had achieved at least a form of *de facto* control of the company, whether this was his intention or otherwise.

### **The role of Mr. Stapleton as co-signatory of the Easiwrap chequebook**

66. I have already described the events which led up to Mr. Stapleton becoming co-signatory on the Easiwrap chequebook. By this stage the company was completely dependent on the release of funds from BOSI. BOSI in turn was unwilling to release the funds to the control of Mr. Doran alone without the further safeguard provided by the presence of Mr. Stapleton and his team. As I have already stated, this was the sole reason why Mr. Stapleton became a co-signatory.

### **Assessment of the post-July 2008 evidence**

67. Taking all the evidence in the round, it is perfectly clear that Mr. Stapleton's role in Easiwrap deepened appreciably after July 2008 to the point where by the middle of July 2009 he was a shadow director, certainly in all but name. A shadow director is described by s. 27(1) of the Companies Act 1990 as being:-

"...a person in accordance with whose directions or instructions the directors of a company are accustomed to act (in this Act referred to as 'a shadow director') shall be treated for the purposes of this Part as a director of the company unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity."

68. Certainly by July 2009 no decision of note was being taken by the company without reference to Mr. Stapleton and his advisers. The very fact that BOSI insisted that Mr. Stapleton become a co-signatory on the chequebook merely underscored a progression towards deeper involvement in the affairs of the company which had been gathering pace since July 2008 and which had accelerated throughout the early and middle parts of 2009. I accept that neither Mr. Stapleton, nor, indeed, Mr. Fitzgerald or Mr. Cunningham, may have realised that this was the consequence of their involvement on Mr. Stapleton's behalf and I fully accept their bona fides in their regard. But rather in the fashion of Moliere's character, M. Jourdain, who belatedly discovered that he had been speaking prose all his life without realising it, the same can be broadly true of the position of a shadow director. In these matters, subjective intent and beliefs are largely irrelevant- what counts is whether the shadow director has effective and *de facto* control of the company. A person may thus have become a shadow director without realising it or even- and, indeed, this may possibly be one such case- without ever really wanting to be in that position.

69. There is, however, no necessity for the purposes of this case to tease out any of the difficult questions which may arise as to the distinction between *de facto* directors and shadow directors, for which see, e.g., the judgment of Laffoy J. in *Fyffes Plc. v. DCC Plc.* [2005] IEHC 477 and that of McKechnie J. in *Re Hocroft Developments Ltd.* [2009] IEHC 580. Nor do any legal consequences necessarily flow from this conclusion so far as the present case is concerned.

70. I nevertheless mention these considerations simply to show the extent of Mr. Stapleton's involvement post July 2008. All of this has given me some anxiety so far as a credibility assessment of the witnesses' evidence is concerned. (I should stress here that I am using the term "credibility" in the legal - and not in the popular- sense of that word). So far as the events leading up to the transfer of the money in late July 2008 is concerned, I found Mr. Stapleton to be a credible and convincing witness. But so far as the events which occurred after that date, I found his evidence to be generally unreliable (in the legal sense of that term) and I generally prefer the account tendered by Mr. Doran so far as the events which took place after July 2008 are concerned.

71. Can it, therefore, be said that there is clear and unequivocal evidence that the contractual arrangement of July 2008 was accordingly tacitly varied or altered by the parties by reason of subsequent events? Before arriving at any conclusion on this, let us review the evidence for such a contention.

72. First, there is the fact there is no evidence that Mr. Stapleton ever demanded repayment of the €300,000 loan before September 2009 and the demand was made only after negotiations between the parties had irrevocably broken down. This might suggest that Mr. Stapleton was content to leave that sum indirectly (and I stress "indirectly" advisedly) in the company as part of a general negotiating strategy whereby this money might prove to be useful bargaining counter so far as any share acquisition was concerned.

73. Second, I am satisfied that Mr. Stapleton either described himself as a partner or investor in Easiwrap or, at any rate, allowed himself to be so described to other interested parties without protest. Thus, for example, contrary to Mr. Stapleton's own account, I am satisfied that he was so described and introduced to various witnesses such as Ms. Jennifer Doran, Ms. Hogan (in late July 2008) and Mr. Weir (in January 2009). These witnesses could certainly be forgiven for thinking and assuming that Mr. Stapleton was now an equity investor in Easiwrap and had become a co-partner with Mr. Doran. On other occasions, however, Mr. Stapleton (as, indeed, was Mr. Doran) was somewhat more careful. Thus, for example, it is plain that Messrs. McDowell Purcell clearly understood that the payment in July 2008 was simply a loan to Mr. Doran personally.

74. Third, it is plain that from the middle of 2009 (if, not, indeed some months earlier) Mr. Stapleton and his advisers enjoyed *de facto* control of the company. While this was frequently explained as being part of a due diligence operation or, alternatively, the actions of a concerned investor anxious to ensure that his money was repaid, it seems to have gone rather further than that.

75. All of this is consistent with an interpretation of the €434,000 loan to Easiwrap as being effectively a downpayment by way of a form of *de facto* deposit in respect of the ultimate acquisition of an equity stake in the company if all went well. Given Mr. Stapleton's entrepreneurial talents, it was perhaps only natural that he was led deeper and deeper into involvement with the company. Mr. Doran was content to play second fiddle since he realised that Mr. Stapleton had the prospect of being the ultimate white knight who might come to the aid of the company with further investments.

76. Coming now to the central issue in the case, can it be said that the evidence *unequivocally* shows that the post-July 2008 conduct of the parties is consistent *only* with a conclusion that the parties must have tacitly varied, waived or otherwise altered the terms of the July 2008 verbal contract?

77. Not without some hesitation, I am driven to find that the evidence is sufficiently ambiguous to admit of the conclusion that the parties must have tacitly waived or altered the terms of the July 2008 verbal contract. I accept, of course, that by the early months of 2009 Mr. Stapleton was wading knee deep in the affairs of the company. This, however, was after the commencements of his loans to the company in January 2009 and his conduct thereafter is also consistent with a desire to protect that particular investment.

78. It does not inevitably mean, however, that the July 2008 personal loan had been retrospectively converted into a *de facto* loan to the company. I agree that at times Mr. Stapleton may have been ambiguous on this question and may have said different things to

different people, possibly as the exigencies of the occasion required. But there is also clear evidence from the McDowell Purcell letter that as late as January 2009, Mr. Doran acknowledged that the loan was a personal loan. The evidence, moreover, after January 2009 is as consistent with a desire by Mr. Stapleton to protect his *de facto* equity investment in the company- the first of these loans having commenced in January 2009 - as it is with the suggestion that the parties had tacitly agreed to convert the July 2008 loan into a loan to the company.

79. It is for these reasons that I am driven to the conclusion that there is insufficient evidence to show that the parties must have tacitly agreed to vary the terms of the July 2008 loan. The subsequent conduct of the parties certainly admits of that interpretation, but, as I have endeavoured to show, it is not the only possible interpretation of that evidence. It is for that sole reason that Mr. Doran's defence to this claim fails.

### **Conclusions**

80. In summary, therefore, I have concluded as follows:-

A. The loan of €300,000 given by Mr. Stapleton at the time in July 2008 was intended to be a personal loan and not a loan to the company.

B. While a court is entitled to have regard to the factual matrix surrounding the making of the contract, it is clear from the Supreme Court's decisions in both *Wogans* and *Bula* that it is not entitled to have regard to subsequent events as a guide to ascertaining the intentions of the parties.

C. The events which post-date the July 2008 loan are thus irrelevant unless it could be shown unequivocally from that conduct that the parties had thereby tacitly waived or otherwise altered the terms of that verbal agreement, such that it admitted *only* of the interpretation that Mr. Stapleton was *subsequently* content to treat the July 2008 loan as either a loan to the company or as an investment in the company.

D. Contrary to the general tenor of Mr. Stapleton's evidence, I accept the evidence of Mr. Doran, Ms. Jennifer Doran, Ms. Hogan and Mr. Weir to the effect that he became more centrally involved in the running of the company to the point where by mid-July 2009 he ultimately became a shadow director of Easiwrap and such that he and his advisers were in *de facto* control of the company.

E. Not without hesitation, I have concluded that the evidence does not unambiguously show that through his subsequent conduct Mr. Stapleton must have regarded the July 2008 loan as either a loan to the company or as an investment in the company. The evidence here rather is ambiguous, since his deepening involvement in the company is equally consistent with a desire to protect the investment in the company of €434,000 which he did make in the early months of 2009 onwards as it is with the suggestion that the July 2008 loan was to be retrospectively converted into a loan to the company.

F. For these reasons, I will declare that the loan of €300,000 represented a loan made by Mr. Stapleton to Mr. Doran personally and falls to be repaid by him.