THE COURT OF APPEAL

Ryan P.
Finlay Geoghegan J.
Hogan J.

Appeal No. 2015/522

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

BETWEEN/

THE LAW SOCIETY OF IRELAND

APPELLANT

- AND –

THE MOTOR INSURERS' BUREAU OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of March 2016

1. Is the Motor Insurers' Bureau of Ireland ("MIBI") liable, whether under the terms of clause 4.1.1 of a January 2009 agreement made between it and the Minister for Transport or otherwise, to pay unsatisfied claims in motor accident cases arising from the insolvency of an insurance company? This is the essential issue which arises on this appeal from the decision of the High Court, where Hedigan J. ruled that the MIBI was liable in principle in the case of insurer insolvency: see *Law Society of Ireland v. MIBI* [2015] IEHC 564. As well as being an issue of immense practical importance, this appeal raises questions of interpretation one of very considerable difficulty.

2. The issue arises because of the fact that the well known motor insurer, Setanta Insurance (itself a Maltese registered insurance company), went into liquidation in April 2014. This gave rise to the practical problem as to whether potential or actual claimants who sought to recover as against motorists who had insured with Setanta prior to the date of the liquidation could recover as against the MIBI or whether, alternatively, such

claimants could apply to the High Court pursuant to the provisions of s. 3(4) of the Insurance Act 1964 (as amended) for payment out (subject to certain statutory limits) from the Insurance Compensation Fund administered by the Accountant of the Courts of Justice.

3. By order of the President of the High Court two questions were set down for hearing:

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

4. At that hearing the Law Society appeared as *legitimus contradictor* to oppose the arguments of the MIBI. The Accountant of the Court of Justice was also represented, but he took a largely neutral role (both in the High Court and before this Court) in relation to the all important first question.

5. At the outset it is only appropriate to record the impressive manner in which the materials have been assembled and presented to the Court. We have also had the benefit of hearing advocacy of superlative quality from all sides on the complex and difficult issues of interpretation presented on this appeal, for which the members of the Court are indeed truly indebted.

6. I have also had the opportunity of reading in draft the judgment which Ryan P. has just delivered. I gratefully adopt the helpful statement of the background facts and

materials contained in that judgment and I now propose to address directly the major question posed in this appeal, namely, whether the MIBI is liable in principle for judgments in motor cases where the judgment remains unsatisfied by reason of insurer insolvency. It is, however, first necessary to say something about the background to the various MIBI agreements.

The origins of the MIBI Agreement

7. The MIBI Agreement has its origins in a memorandum of agreement between the Minister for Local Government and representatives of the insurance industry dated 10th March 1955. In that agreement ("the Principal Agreement") the parties recorded that it was desired to establish the Motor Insurers' Bureau of Ireland for certain defined purposes. The Principal Agreement also recited that the insurers promised to enter into binding agreements with the MIBI and to ensure that it was properly funded. Clause 2 of the Principal Agreement dealt with the MIBI's obligations in the case of unsatisfied judgments in terms. Clause 4 of the Principal Agreement dealt the conditions precedent to the MIBI's liability and provided for the assignment of any judgment to it.

8. The MIBI was established later that year and the first of a number of supplementary agreements was promulgated in November 1955. The Principal Agreement is still in force, but it has been supplemented by a series of later Agreements, the latest of which dates from January 2009. The agreements which are currently in force are, therefore, the Principal Agreement and the January 2009 Agreement.

9. It is important to stress that participation in the MIBI is not voluntary on the part of the motor insurers. Section 78(1) of the Road Traffic Act 1961 ("the 1961 Act") provides that such insurance undertaking may not carry on the business of motor insurance unless they are members of the MIBI and there is in force an undertaking that it "will deal with

third party claims in respect of mechanically propelled vehicles" insured by it on terms similar to those agreement from time to time between the Minister and the Bureau.

10. It is not easy to understand why the arrangements with the MIBI took this peculiar form of an agreement between the Minister for Local Government (now the Minister for Transport) on the one hand and the insurance industry on the other. One would have expected that a matter of this kind presenting major public policy questions which potentially impact on the rights of individuals would have been regulated by statute. This is especially so given that membership of the MIBI on the part of insurance undertakings offering vehicle insurance is made compulsory by statute. (This is a matter to which I will return later in this judgment).

11. It is worth noting, however, that the first agreement of this kind was negotiated in the United Kingdom in the immediate aftermath of the Second World War. It would seem that the Atlee Government, already committed to a heavy legislative programme which faced considerable and determined parliamentary opposition, was prepared to accept an agreement of this kind as a satisfactory alternative to legislation which might have proved difficult to devise: see generally Lewis, "Insurers' Agreement not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow the Law" (1985) 48 *Modern Law Review* 275, 280.

12. For reasons which are presently unclear, the British example served as the model for the Irish versions of the MIBI Agreements from 1955 onwards, even though the constitutional background of this jurisdiction was entirely different. Nor could it be said that the political exigencies which prompted the adoption of the MIB Agreement as an alternative to legislation at the time in the UK in 1946 were present in Ireland in 1955. But adopt it we did and it is these Agreements – or, more precisely, the 2009 iteration of the Agreement – which have presented this difficult problem of interpretation.

The true nature and status of the MIBI Agreements

13. Although both parties to the appeal proceeded on the basis that the 2009 Agreement was a contractual agreement, this view is open to question. While the 2009 Agreement is, of course, expressed in contractual form, it is nonetheless a contract with very special features. Since the earliest days of the MIBI in 1955, the various agreements reached between the Minister and the MIBI have either been officially published by the Government Stationery Office or have been otherwise widely circulated in the public domain. The essence of a contract, of course, is that it defines the rights of the parties to that contract, yet by the very fact of official publication in this fashion the parties seemed to be just as concerned with the rights and entitlements of persons who are, in fact, not parties to the Agreement.

14. The Court, moreover, was informed during the course of the appeal that, as a matter of invariable practice, the MIBI will not plead or object to a claimant seeking to enforce the Agreement on the ground of a lack of privity of contract. As Kearns J. observed in *Campbell v. O'Donnell* [2008] IESC 32, [2009] 1 I.R. 133 such claimants are, in effect, beneficiaries of an agreement between the insurance industry and the Minister for Transport and may (subject to claims with the terms of the Agreement) sue to enforce an agreement to which they are not a party.

15. Leaving to one side for the moment any exceptions to the rule, privity is at the heart of any form of consensual arrangement governed by private law. It is, after all, the parties to the contract who have mutually defined their rights *inter se*. Once (as here) the privity requirement completely disappears so that the world at large can in principle invoke its terms, then an agreement of this nature begins to shed the defining feature of a private law agreement and instead begins to take on a quasi-public law character.

16. The nature of the MIB agreement in the United Kingdom has been the subject of much judicial and academic comment. In *Handy v. MIB* [1964] Q.B. 745, 757 Lord Denning M.R. observed that while these agreements "are as important as any statute", yet a claimant cannot sue upon them as if they are in fact a statute. In *Gurtner v. Circuit* [1968] 2 Q.B. 587, 598 Diplock L.J. referred to the 1946 Agreement in the UK, saying:

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

17. In *Silverton v Goodall and Motor Insurers' Bureau* [1997] PIQR 451, 453-454, Ralph Gibson L.J. called the MIB agreements "a novel piece of extra statutory machinery." And in his seminal work, *Accidents, Compensation and the Law* (London, 1980) Professor Atiyah described the MIB "as an extraordinarily anomalous institution partly in and partly outside the legal system."

18. The plain fact of the matter is that the 2009 Agreement is not really a contract at all in any conventional sense of the term. It is rather in substance a piece of quasi-legislation which is the product of a private agreement between the Minister and the insurance industry. This Agreement is in turn designed to regulate the rights of the public so far as certain categories of insurance claims are concerned, almost if it were a public general statute duly enacted by the Oireachtas. It must remain an open question whether executive quasi law-making of this far-reaching character could be regarded as compatible with fundamental constitutional principles. After all, the whole premise of Article 5, Article 15 and Article 16 of the Constitution is that the State is a rule of law based democracy, with the Oireachtas enjoying exclusive legislative powers (Article 15.2.1).

19. The Oireachtas has provided for compulsory motor insurance since 1933. The issues of policy presented by the cases of motorists with either no insurance, inadequate insurance or ineffective insurance are pre-eminently bound up with this legislative regime of compulsory insurance, not least the fundamental question of who should bear the losses associated with an insolvent motor insurance company. All of these concerns are further underscored by the fact that the 2009 Agreement is also designed to give effect to various EU Directives dealing with insurance against civil liability in respect of motor vehicles.

20. Other fundamental questions are also presented: what, for example, should be the procedure for claims in cases of this kind? At what stage should the MIBI be notified and when is it appropriate that they should be joined to the proceedings? Should any special limitation period apply to claims involving the MIBI and, if so, at point should time run in its favour? Should different procedures apply in the case of, say, unidentified drivers as distinct from cases where the policy has been repudiated? These are the type of issues affecting the general public which the Constitution envisages will normally be regulated by a public general statute enacted by the Oireachtas and not by means of a private contract made by a member of the Government with a specific sector.

21. While I consider it important to draw attention to these questions and to reflect upon the strange and anomalous status of the MIBI agreements, given that these issues were not the subject of any argument before the Court, it would be inappropriate to express any view on these questions. I will accordingly proceed on the basis that the 2009 Agreement is, in fact, a commercial agreement between the parties, albeit one with special and unusual features.

The construction of clause 4.1.1 of the 2009 Agreement

22. It is clear – and it was not disputed by either party to the appeal - that the 2009 Agreement must be interpreted in a holistic fashion and that regard must be had to the

Agreement as a whole. Clause 4.1.1 of the 2009 Agreement may nevertheless be taken as the appropriate starting point since it deals with the MIBI's obligation to pay, provided, of course, the precursors to liability contained in clause 2 and clause 3 of the Agreement have otherwise been satisfied by the potential claimant. Clause 4.1.1 provides:

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

23. Clause 4.4 provides for a set-off of any sum received by a claimant by way of "compensation or benefit from any source."

24. While allowing, of course, that the Agreement must be read holistically, it seems to me that the words of clause 4.1.1 cannot realistically be read otherwise than as including cases of insurer insolvency. The clear import of these words is that the MIBI has assumed

an obligation to pay in an appropriate case "whatever may be the cause of the failure of the judgement debtor." If language is to have any meaning at all, then these words admit of no construction other than that the actual reason for the failure to pay is irrelevant.

25. One of the obvious grounds by which a judgment might not be satisfied by the judgment debtor is that his or her insurer is insolvent. If the drafters of the 2009 Agreement had intended to exclude insurer insolvency from its scope, then it would have to be stated that they made a pretty poor job of the drafting of clause 4.1.1.

26. It is, moreover, difficult to grasp why clause 4.1.1 also states that the obligation applies "whether or not such person or persons be in fact covered by an approved policy of insurance", if it does not apply to the case of the insolvent insurer. One might, indeed, fairly ask in the context of an unsatisfied judgment: to what category of persons do these words apply if they do not capture the case of the motorist who is "in fact" covered by an approved policy of insurance, but whose insurer is insolvent?

27. Counsel for MIBI, Mr. Gallagher S.C., advanced several possible explanations for the existence of this wording by suggesting circumstances in which these words might apply *other* than in the case of insurer insolvency.

28. First, it was suggested that these words applied to the circumstance of the insurer who subsequently repudiates the insurance policy which was in place at the time of the accident. It must nevertheless be observed that clause 4.1.1 is directed the point at which judgment is obtained. Accordingly, even on Mr. Gallagher's own case, where the policy has been repudiated, there is in fact no insurance in place. It follows that the repudiated policy example cannot be the explanation for the words "whether or not such person or persons be in fact covered by an approved policy of insurance".

29. Second, it was contended that the words in question were designed to cover the position of the untraced driver. Provision for the case of an unidentified or untraced driver

was, however, first made in December 1988: see clause 6 of the 1988 Agreement. Yet, the operative words relied on by Mr. Murray S.C. for the Law Society ("whether or not such person or persons be in fact covered by an approved policy of insurance…") are to be found not only in clause 4.1.1 of the 2009 Agreement, but are also recited in clause 2(a) of the Principal Agreement of March 1955, which latter agreement is, as I have already noted, still in force. These very words were accordingly employed by the drafters of both the original March 1955 Principal Agreement and of every supplementary agreement (November 1955, March 1962, December 1964, December 1988, March 2004 and January 2009) since then.

30. It would indeed have been strange if the drafters of the March 1955 Principal Agreement and the subsequent supplementary agreements of 1962 and 1964 had used language which was designed to apply to a state of affairs which was not actually captured by an MIBI agreement until some 33 years later in December 1988 with the entry into force of the 1988 Agreement. It follows, therefore, from this historical context that the untraced driver example cannot completely explain this wording.

31. Third, it was submitted that the wording was designed to cover the case of where there is insurance in place for the vehicle, but that the driver involved in the accident was not himself or herself personally covered by that policy. The immediate answer to this is that clause 4.1.1 applies to *persons* - and not to *vehicles* - who for whatever reasons are uninsured.

32. Fourth, it was argued that these words reflect the special position of State vehicles. But the MIBI agreement has always made special provision for State vehicles (see, *e.g.*, clause 11 of the 2009 agreement), so that this example cannot be regarded as a dispositive or compelling one.

33. One is left, therefore, in the position that the only real explanation for the words "whether or not such.... persons be in fact covered by an approved policy of insurance" as they were used in the original Principal Agreement of 1955 and every agreement since that date is that, viewed objectively, they covered the case of insurer insolvency. I agree that the wording is also apt to cover the case of the untraced driver, but since this wording has been in use since 1955 – several decades before the MIBI assumed any obligations in the case of the untraced driver - one is left with the clear impression that insolvency was covered from the start, as these words would otherwise have had no meaning in 1955.

34. For my part, therefore, I find the arguments to the contrary advanced by the MIBI on this point ultimately unconvincing for the reasons I have just ventured to state.

The context of clause 4.1.1

35. It must, of course, be observed that clause 4.1.1 expressly makes this obligation to pay "subject to the provisions of this Agreement." The MIBI contend forcefully that the general words of clause 4.1.1 cannot bear the broad interpretation contended for by the Law Society because such a construction would be at odds with other provisions of the 2009 Agreement. The argument of the MIBI is, in effect, to urge the application of the principle of *noscitur a sociiis* ("a word is known by its companions"), so that what it submits are the general words of Clause 4.1.1 must be read in the light of the context of the rest of the rest of the 2009 Agreement and, specifically, in the light of specific provisions which, it is said, negative what might otherwise be regarded as the natural meaning of these general words.

36. This, of course, is a wholly appropriate method of construction of any document, whether it be a statute or a contract. This approach was well expressed by Black J. in *The People (Attorney General) v. Kennedy* [1946] I.R. 517, 536:

> "A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.
>
> If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of *ejusdem generis* and *noscitur a sociis* utterly meaningless: for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning, must be given a quite different meaning when viewed in the light of its context."

37. While the underlying legal issues presented in *Kennedy* – involving as they did the jurisdiction of the Supreme Court to hear a criminal appeal - are remote from the present case, the principles of interpretation illustrated by that decision are not. In fact, *Kennedy* illustrates perfectly the contention urged by MIBI in the present appeal in that it provides an apt example of where the general – and "perfectly clear" - words of one part of a document are cut down by what Black J. described as the process of checking those words with reference to the context of other parts of the document. In essence, therefore, the principle of construction upon which the MIBI has relied is that the (apparent) meaning of the general words of one part of a document cannot prevail if such an interpretation is would either be incongruous or inconsistent with the remainder of the document when read as a whole.

38. If one applies these principles of interpretation to the present case it can be seen that there are certainly strong grounds to support the MIBI's arguments of textual incongruity

of this kind. Thus, for example, clause 3.11 provides for the assignment in favour of the MIBI of any judgment debt. This in itself suggests that the object of the Agreement was to ensure that the innocent claimant's right to compensation is not defeated by the *culpably uninsured* driver.

39. This is certainly at odds with the idea that insolvency is captured by the 2009 Agreement because it would mean that the motorist who happened to insure with an insolvent insurer would still face the prospect that he or she might ultimately be liable to pay the award. Thus, for example, if the plaintiff obtained a judgment for €150,000 against the driver of a vehicle who was insured with an insolvent insurer, then, if the Law Society's argument is correct, this means that while the MIBI is obliged to pay the plaintiff, the MIBI can then nonetheless seek recourse for this sum against the insured driver.

40. I agree that if this stood alone, this might well have presented an instance of textual incongruity which would argue strongly for the application of the principle of *noscitur a sociis* and, consequently, the narrower interpretation of clause 4.1.1 of which the MIBI urge. Critically, however, there are also other and additional features of the 2009 Agreement which point in the opposite direction and which, so to speak, counter-negative the MIBI's argument based on textual incongruity. In this regard, the unconditional and unqualified nature of the language of clause 4.1.1 is striking. Thus, clause 4.1.1 is not content to state simply that the obligation of the MIBI to pay is triggered where there is an unsatisfied judgment, but it also provides that the obligation to pay in that context arises "whatever may be the cause of the failure of the judgement debtor." Clause 4.1.1 likewise applies whether or not such persons be in fact covered by an approved policy of insurance, wording which – certainly when it was used in the original agreements in 1955 – was consistent only with the application of the agreements to insolvent insurers.

41. The emphatic and all-embracing nature of these words cannot, therefore, be ignored or brushed aside by resort to the argument based on contextual incongruity. It is, of course, true that it can readily be said that any interpretation of clause 4.1.1 which allows for recovery in the case of insurer insolvency produces results which are to some extent incongruous and inconsistent with the remainder of the Agreement, not least the provisions of clause 3.11 providing for the assignment of the judgment to the MIBI. Yet it can equally be said that, for the reasons just stated, the remainder of the Agreement does not consistently and unambiguously negative the insolvency argument.

42. Just as importantly, the all-embracing nature of the wording of clause 4.1.1 ("whatever may be the cause of the failure of the judgment debtor") itself rebuts the contextual ambiguity argument. These are express and particular words which go beyond the simple generality of other words describing the failure to satisfy a judgment. Indeed, they all but positively state that the obligation to pay includes the case of an insolvency, since, *ex hypothesi,* this could be one of the principal causes of the failure to satisfy the judgment debt.

The historical argument

43. While it is true that each successive agreement determined the earlier one (with the exception of the March 1955 agreement), it is nonetheless unrealistic not to have regard to the sequence and context of each successive agreement. This is especially so given that the MIBI agreements grew organically and changed in response to different problems and issues, even if the all successive agreements have been expressed to be supplemental to the original agreement. There was, however, always a reason for the changes proposed.

44. In *Rohan Construction Ltd. v. Insurance Corporation of Ireland Ltd.* [1988] I.L.R.M. 373, 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." (emphasis supplied)

45. The historical evolution of the Agreements is, therefore, part of the "surrounding circumstances" in the sense understood by Griffin J. in *Rohan Construction.*

46. It may well be that the prospect of insurer insolvency was not within the contemplation of the drafters when the 1955 Agreement was first formulated. Nevertheless, as Griffin J. stressed in *Rohan*, the courts may not legitimately speculate as to the intention of the parties, but must instead look objectively to the words of the document and, where appropriate, interpret the words by reference to the surrounding circumstances.

47. In this vein, it is, I think, legitimate to have regard to the circumstances leading up to the enactment of the Insurance Act 1964 ("the 1964 Act") following the collapse of the Equitable Insurance Co. Ltd. ("Equitable"). Equitable had offered motor insurance in the State and had gone into liquidation in 1963.

48. There is no doubt but that the MIBI subsequently paid some IR£100,000 in satisfaction of the claims made by injured parties against motorists who had been covered by Equitable. At the hearing of this appeal there was much debate as to whether these payments were made *ex gratia* or whether MIBI had assumed or was advised that it was under a legal obligation to pay under the terms of the 1955 and 1962 MIBI Agreements (these being the Agreement which were then in force). The records from this period are

sketchy and the Law Society sought to rely for this purpose on the terms of a memorandum for Government from April 1964 which had been obtained from the National Archives under the 30 year rule. Although the admissibility of this memorandum was strongly contested, it is fair to say that the memorandum stated that the MIBI had such a legal liability.

49. For my part, I do not think that it is necessary to rule on whether the memorandum was admissible as a historical record of what the understanding of that the legal position of MIBI in 1964 may have been. In many respects, it is immaterial whether the payments were made by MIBI *ex gratia* or as a matter of (presumed) legal liability. What matters instead is that such payments were made in the wake of the Equitable insolvency, so that the question of whether the MIBI had a potential liability in the case of an insolvent insurer must then have been firmly in the minds of all of the parties to the 1955 Agreement, as amended by the 1962 Agreement.

50. It is clear from the language of the 1964 Act that it was intended to address the position of insurer insolvency arising from the Equitable collapse. Section 4 of the 1964 Act obliged the Minister for Finance to make a payment of IR£30,000 to the liquidator of Equitable. Section 2 of the 1964 Act provided for the creation of the Insurance Compensation Fund ("the Fund"). Section 3(1) of the 1964 Act provided that there may be paid out of the Fund to the liquidator of an insolvent insurance company a sum "which is due to a person under a policy issued by the insurer in the State and is in respect of a contingency the insurance of which is required…to be effected by an insurer." Motor insurance is included in this provision.

51. Section 3(4) of the 1964 Act then provided:

> "Where, in respect of a sum due under a policy, a payment equal to the whole of the sum is made by the Motor Insurers' Bureau of Ireland, a payment shall not be made

out of the Fund under this section in respect of the sum, and where, in respect of such a sum, a payment equal to part of the sum is made by the said Bureau, a payment out of the Fund in respect of the sum shall not exceed the amount of the sum less the amount of the payment by the said Bureau."

52. It may be noted in passing that the Oireachtas seems to have assumed – if only tacitly – that such payments as were made by the MIBI following the Equitable collapse were made as a matter of legal obligation under the MIBI Agreement. If the Oireachtas had considered that such payments had been made on an *ex gratia* basis, it seems likely that language to this effect would have been found in the sub-section, for example, adding words such as "whether *ex gratia* or otherwise" after the reference to payment by the MIBI.

53. As it happens, s.3 of the 1964 Act was repealed by s. 4 of the Insurance (Amendment) Act 2011. The new version of s. 3 of the 1964 Act replicates much of the earlier provisions, save that payments out are capped at a level of 65% to a maximum of €825,000. The new s. 3(7), however, replicates *verbatim* the earlier version of s. 3(4). While it would be not permissible to rely on an event which post-dates the 2009 Agreement – namely, the subsequent enactment of the 2011 Agreement – in order to construe that Agreement, the appropriate inferences can nonetheless be drawn from the immediate aftermath of the 1964 Act.

54. At the hearing of the appeal Mr. Gallagher S.C. contended that s. 3(4) of the 1964 Act was in the nature of a transitory provision designed to deal with an historical state of affairs where, prior to the 1964 Act, payments – whether *ex gratia* or otherwise - had in fact been made by the MIBI. For my part, I do not think that s. 3(4) of the 1964 Act should be read in this fashion. If that had been the case, then the Oireachtas would have used

words such as "Where, prior to the commencement of this Act...." a payment "was made by the Motor Insurers' Bureau of Ireland."

55. It is, however, unnecessary to express a final view on this because what really matters for this purpose is the historical fact that these payment were made by the MIBI arising from the Equitable collapse and that s. 3(4) of the 1964 Act was designed to address this state of affairs by preventing double recovery. What is significant is that both the fact of the Equitable collapse and the enactment of the 1964 Act must have alerted both the Minister and the MIBI to the reality that insurers can fail and become insolvent. After all, the collapse of Equitable and the obligations (if any) of the MIBI following this collapse must have been major issues for both the Minister and the insurance industry throughout 1963 and 1964.

56. One might have thought in the wake of these events that if the MIBI were of the view that there was no liability under the Agreement in respect of insolvent insurers and that any payments which had been made in respect of the Equitable collapse had been simply *ex gratia* only, this would have been precisely the time to have said so. What is striking, however, is that although new version of the Agreement came into force on 1st January 1965 which extended the MIBI's liability to cover cases involving the use (and not simply the driving) of a vehicle, it did not address any of the questions which had just arisen in relation to insurer insolvency. Nor has any subsequent Agreement sought to alter the pre-existing wording so as to exclude the question of insurer insolvency.

57. The irresistible inference, therefore, is that MIBI were content to continue with an Agreement even though the wording of clause 4.1.1 gave rise to the real possibility – to put matters absolutely no lower – that it might be liable in the case of an insurer insolvency. This wording was continued unaltered in 1988, 2004 (save for a minor and immaterial change) and 2009. If, therefore, as Mr. Gallagher S.C. argued, the decision in the High

Court came as a shock to the insurance industry, one is obliged to respond that after a major wake-up call in 1964 the industry itself went back to sleep for another fifty years and never bothered to scrutinize closely the terms of the very important agreements with considerable commercial implications it had entered into.

The commercial reality argument

58. It is clear from the case-law that the courts will lean against an interpretation of a contract which brings about a result which is at odds with the commercial good sense: see *Investor Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 *per* Lord Hoffman and *Analog Devices BV v. Zurich Insurance Co.* [2005] IESC 12, [2005] 1 I.R. 274, 281 *per* Geoghegan J. This jurisprudence was invoked by Mr. Gallagher S.C, in support of his argument that this construction of the 2009 Agreement was at odds with commercial realities and common sense. He submitted that it would have been remarkable if the insurers had agreed to a cross-guarantee in respect of the liabilities or potential liabilities of other insurers without this having been expressly stated or confirmed in the MIBI agreement itself.

59. I agree that the fact that the MIBI agreement does not directly address the insolvency question one way or the other is itself unusual. But it does not follow that the members of the insurance industry cannot be assumed to have accepted a cross-guarantee of the liabilities of other members or that such would be so counter to business sense that a construction of the Agreement providing for such a result would have to be rejected in the absence of the clearest and plainest language.

60. It seems to me that this is all a matter of degree. After all, some element of cross-guarantee of mutual liabilities has, in any event, existed since at least 1964, inasmuch as s. 6 of the 1964 Act provided for the payment by insurers to the Minister for Enterprise and Employment of a percentage of their aggregate income in order to fund the insurance

compensation fund established by s. 2 of the self-same Act. If, therefore, the payments required to satisfy the liabilities of insolvent insurers are not covered by the MIBI, such payments will now fall to be made out of the Fund (subject, since 2011, to a maximum percentage and upper threshold limit), which payments will in turn have to be funded by individual insurance companies. The existence, accordingly, of a statutory obligation imposed on insurance companies to fund payments designed to cover the insolvency of other insurance companies undermines the commercial business sense argument .

61. There is, moreover, an important public policy argument which should not be overlooked. The entire public policy upon which the compulsory motor insurance regime rests is that a plaintiff who obtains a judgment against a motorist should have that award satisfied. In this respect, so far as such a plaintiff is concerned it really matters not whether the failure to satisfy the award is by reason of a culpable failure on the part of the driver to secure any or any adequate insurance on the one hand or by reason of the insolvency of the insurer on the other. From the public policy perspective, it is important, for example, that a judgment providing compensation to a severely injured plaintiff should not go unsatisfied, irrespective of the cause of the failure to satisfy the judgment.

62. In these circumstances it does not seem to me inherently unlikely that the parties should have provided – as I am otherwise compelled to conclude that they have – that Clause 4.1.1 of the 2009 Agreement provides for the payment by the MIBI in the case of insurer insolvency or that such would be contrary to sound business sense.

The intentions of the parties

63. Reliance was next placed on the supposed intentions of the parties as disclosed by a sequence of 2014 correspondence to which I will presently refer. The MIBI contended that it was clear that both parties to the agreement were agreed that it did not cover the case of an insurer insolvency. In the case of any ordinary contract if the parties to the contract

were all agreed that it bore a particular interpretation it would be hard to see how such an interpretation could (or would) be gainsaid by any court. It is clear, however, that for the reasons which I have already set out this is no ordinary contract, since with privity of contract waived, the 2009 Agreement must be deemed to subsist for the benefit of any third party who might properly take advantage of it. In these circumstances, the Supreme Court has repeatedly made clear that the court must look to the intention of the parties *as disclosed by the wording of the Agreement*, in much the same way as it would do in the case of an ordinary contract if there had been a dispute between the parties to that contract: see, *e.g., Kramer v. Arnold* [1997] 3 I.R. 43, *per* Keane J., *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511, *per* Murphy J. and the judgment of Geoghegan J. in *Analog Devices*.

64. Turning now to a consideration of the relevant correspondence, following the liquidation of Setanta, the then President of the Law Society, Mr. John Shaw, wrote on 1st May 2014 to Mr. John Casey, Chief Executive of the MIBI, stating that many solicitors had been inundated with queries from concerned Setanta customers and persons with claims outstanding against Setanta policyholders regarding the consequences of the liquidation. Mr. Shaw stated that:

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

65. Following further correspondence Mr. Casey responded on 25th July 2014 stating that the MIBI had received legal advice on the issue of liability:

> "The legal opinion obtained, which analysed the legal and regulatory framework in which the MIBI operates in Ireland, was unequivocal in its conclusion that the 2009 Agreement does not require the MIBI to satisfy awards against drivers covered by a

policy of insurance where the insurer is unable to pay all or part of an award because of insolvency."

66. Further correspondence from the MIBI demonstrates that the MIBI had contacted the Department of Transport in relation to the issue. On 28th November, 2014, the Minister for Transport wrote to the incumbent President of the Law Society, Kevin O'Higgins, stating that:

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

67. I cannot think that this correspondence demonstrates a convincing consensus *ad idem* as between the Minister and the MIBI. All that this correspondence shows is that the legal advice obtained from the Attorney General was to the effect that the 2009 Agreement did not include insolvent insurers. As was acknowledged by Mr. Gallagher S.C. in the course of the hearing, this is a somewhat different matter from contemporary evidence from the two parties that they had never intended the Agreement to extend to the case of insolvency.

68. In view of the conclusions I have reached it is unnecessary to express any views on what the situation would have been had there been such a mutual understanding between the two parties immediately prior to the conclusion of the 2009 Agreement. Nor is it necessary whether that evidence of mutual intent should be held to defeat the objective meaning of the Agreement as disclosed by its wording, given that the Agreement was

intended to benefit third parties, none of whom would have been aware of the private intentions of these parties.

The *vires* of the MIBI

69. The MIBI relied on the terms of clause 3.1 of its Memorandum of Association which declares that the objects "for which the Bureau are established" are to make arrangement with the Minister:

> "for the compensation of victims of road accidents…involving either uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers or untraced drivers which are required to be covered by contracts of insurance under the Road Traffic Acts…or by common law, or a provision of the treaties of the European Communities, or an act, regulation or directive adopted by an institution of the European Community, or otherwise."

70. Mr. Gallagher S.C. argued forcefully that it was clear from the terms of the Memorandum that the MIBI would not have had the *vires* to inter into an Agreement that provided for liability in the case on insurer insolvency. In response to questions from members of the Court, Mr. Gallagher S.C. acknowledged that even on his own case the 2009 Agreement went somewhat further than the Memorandum in that uninsured drivers (and not simply uninsured vehicles) are admittedly covered, but he submitted that this was a cognate issue, so that the power to cover uninsured drivers was impliedly covered. It was quite different to suppose that the MIBI had the authority to accept a completely different type of liability of the kind now suggested.

71. It seems to have been agreed between the parties that this issue should be dealt with on the basis that the Companies Act 2014 (which entered into force on 1st June 2014) did not apply to the present appeal. In these circumstances, the most straightforward answer is that there is no reason at all to suppose that any of the road traffic victims who had

unsatisfied judgments against Setanta policy holders by reason of the Setanta insolvency could possibly have been "actually aware" of this lack of *vires* on the part of the MIBI. In these circumstances, any such lack of *vires* could not be pleaded by the MIBI so as exclude any entitlements otherwise conferred by the 2009 Agreement on such third parties: see s. 8(1) of the Companies Act 1963 and *Northern Bank Finance Corporation v. Quinn* [1979] I.L.R.M. 221.

The MIBI's financial statements

72. Counsel for the Law Society, Mr. Murray S.C., sought to rely on a number of other documents which suggested that the MIBI believed or considered that it had a liability in the case of insurer insolvency. These included the MIBI's financial statements (in which the auditors assumed that there would be such a liability in the case of insolvency) and the MIBI's Articles of Association (Clause 10.1 of which seems to assumes the existence of a liability to pay in the case of the insolvency of a member). In view of the conclusions I have already reached, it is not necessary to express a view on either the relevance or the probative value of the statements contained in this material.

Conclusions on the first question

73. I would therefore answer the first question by saying that the wording of Clause 4.1.1 of the 2009 Agreement extends in principle to that of insurer insolvency.

The second question: the position of the Accountant of the Courts of Justice

74. In the light of the conclusion I have just reached on the first question, it is not, as such, necessary to answer the second question posed. In any event, it would be not be appropriate for this Court to give any comprehensive answer to that question as the proper determination in any given case will, however, very much depend on the circumstances of each individual claimant. As the Supreme Court made clear in *Campbell*, each claimant must, for example, be able to demonstrate that they have complied with the procedural

requirements of the 2009 Agreement before any obligation on the part of the MIBI to pay pursuant to Clause 4.1.1 could even arise. There may naturally be special circumstances in any given case which will call for individual and particular consideration.

Conclusions

75. In summary, therefore, I would conclude as follows:

76. First, despite my reservations about the true character of the MIBI agreement, I am prepared to treat it for the purposes of this appeal as an agreement of a commercial, contractual character, albeit that it is a contractual agreement with very special – almost unique - features.

77. Second, viewed in isolation, the language of Clause 4.1.1 of the 2009 Agreement cannot be read as other than including the case of insurer insolvency. The more difficult question is whether that interpretation is negatived by a consideration of the remainder of the 2009 Agreement by reason of the application of the principle of *noscitur a sociis.*

78. Third, while I agree that there are some other features of the 2009 Agreement which tend to negative this interpretation (in particular, the provisions of Clause 3.11 providing for the assignment of any judgment to the MIBI), the argument based on textual incongruity is itself counter-negatived by the all-embracing and comprehensive language of Clause 4.1.1. The very breadth of these express and particular words ("… whatever may be the cause of the failure of the judgment debtor") itself rebuts the contextual ambiguity argument as these words go beyond the generality of words which simply describing the failure to satisfy a judgment.

79. Fourth, the historical context arising from the collapse of Equitable in 1963/1964 and the background to the enactment of the 1964 Act provides further support for the conclusion that insurer insolvency is within the scope of Clause 4.1.1.

80. Fifth, I do not agree for the reasons set out in the judgment that the conclusion that Clause 4.1.1 covered the case of insurer insolvency would be at odds with commercial sense or general business efficacy.

81. Sixth, I agree that the formal answers to the questions posed should be as stated in the judgments of Ryan P. and Finlay Geoghegan J.

82. For these reasons, therefore, I would dismiss the appeal brought by MIBI and affirm the decision of Hedigan J. in the High Court.

Approved

Fred Hog

2nd March 2016