THE COURT OF APPEAL

Ryan P.

Finlay Geoghegan J.

Hogan J.

Court of 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

CLAIMANT/APPELLANT

AND

THE MOTOR INSURERS' BUREAU OF IRELAND

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 2nd day of March 2016

1. I had the opportunity of reading in draft the judgments proposed to be delivered by Ryan P. and Hogan J. and I am in agreement with the conclusion each has reached upoholding the construction by the High Court (Hedigan J.) on the fundamental question as to the potential liability of the Motor Insurers' Bureau of Ireland (MIBI) to a plaintiff or other person who obtains a judgment or PIAB order against an insured of Setanta Insurance Company Limited (in liquidation) pursuant to the 2009 Agreement between the

Minister for Transport and the MIBI.

2. I only want to make one observation on the construction issue which relates to the answers given by the High Court to the questions directed to be heard by Kearns P. and to deal with the answers given which appear to me to require variation.

3. The background to the issues in dispute and the manner in which questions were directed to be heard by Kearns P. with the Law Society as claimant and MIBI as respondent is fully set out by the trial judge and by the President. As appears the principal issue in the High Court and again on appeal was whether or not the 2009 Agreement imposes a liability on MIBI to satisfy a judgment which otherwise meets the conditions set out in clause 4.1.1 (and the other provisions of the 2009 Agreement) where the judgment debtor or person against whom the Injuries Board ordered to pay is made was insured with Setanta. Another way of putting it is where the cause of the failure to satisfy the judgment or order is the insolvency of Setanta.

4. As has been observed, the 2009 Agreement is a highly unusual agreement. MIBI agrees with the Minister that it will meet certain liabilities to third parties upon terms and conditions specified therein. It is an agreement between two parties according to which one, MIBI, agrees with the other, the Minister, to grant certain benefits to third parties or undertakes liabilities to third parties albeit subject to those third parties complying with terms to which of course they have not agreed. It is also a means by which the State discharges certain obligations it has pursuant to the Motor Insurance Directives.

5. Nevertheless, it is a commercial agreement, and as the parties to the appeal were agreed, correctly in my view, falls to be construed in accordance with well known principles starting with those in *Investor Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 *per* Lord Hoffman applied in this jurisdiction in *Analog Devices BV v. Zurich Insurance Co.* [2005] IESC 12, [2005] 1 I.R. 274, 281 *per*

Geoghegan J.which are fully set out in the other judgments.

6. Clause 4.1.1 of the 2009 Agreement is the only clause by which MIBI agrees to its liability to third parties. It provides:-

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

7. Whilst in this clause MIBI agrees to meet a judgment or payment order of the injuries board, nevertheless clause 2.1 envisages that MIBI may settle a claim "with or without admission of liability" which presumably may be prior to institution of proceedings. However that does not take away from the fact that clause 4.1.1 is the provision of the 2009 Agreement which determines the ambit of the potential liability of MIBI.

8. For the reasons given by the trial judge and the other members of this Court clause 4.1.1 by inclusion of words "whether or not such person or persons be in fact covered by an approved policy of insurance" and later "whatever may be the cause of the failure of the judgement debtor" explicitly by the ordinary meaning of the words used includes the situation where the failure to pay is caused by the insolvency of the insurer which issued the approved policy to the judgment debtor (or respondent to payment order). Further its construction in the context of the background facts and in particular the Principal Agreement of 1955 to which the 2009 is supplemental and the 1955 and all intervening MIBI Agreements supports such a construction.

9. The court must consider the meaning of the Agreement as a whole and Clause 4.1.1 must be set "in the landscape of the instrument as a whole" as put by Lord Mustill in *Charter Reinsurance Co. ltd v Fagan* 1997 AC 313. However given the clarity of the words used in clause 4.1.1 an exclusion of potential liability of MIBI in the case of insolvency would in my view require an express provision from which the exclusion may be construed.

10. I am in agreement that the provision in the 2009 Agreement which appears most potentially inconsistent with liability of MIBI in case of insolvency is clause 3.11 which includes as a condition precedent to MIBI's liability: "All judgments shall be assigned to MIBI or its nominee". A similar condition precedent has appeared in all MIBI Agreements since 1955. I agree that it does not rest easily with liability of MIBI to meet a judgment which through no fault of the judgment debtor /insured his insurer fails to meet by reason of its insolvency. Nevertheless it cannot in my view, require a construction of the liability of MIBI under the 2009 Agreement which is different to the meaning of clause 4.1.1 construed in accordance with the ordinary meaning of the words used in relevant background to the 2009 Agreement.

11. I would also add two further considerations which appear to weaken the argument against exclusion of liability of MIBI on insolvency in reliance on clause 3.11. First, assignment only appears to arise where a judgment is obtained and the 2009 Agreement now includes in clause 4.1.1 a liability of MIBI to meet an Injuries Board Order to pay in relation to which there is no similar assignment precondition. Similarly clause 2 requires a claimant to enforce the agreement by one of four ways specified in clauses 2.1 to 2.4 only one of which (2.3) may involve a judgment against the insured which might be assigned pursuant to clause 3.11. The remaining three ways may result in payment by MIBI without judgment being obtained against the insured and hence no assignment to MIBI.

12. The second reason relates to the construction of s.3 of the Insurance Act 1964 (as inserted by s.4 of the Insurance (Amendment Act 2011)). This provides:-

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

difference between the sum that would have been due to the person under the policy and the sum that remains due after the assets of the insurer in liquidation have been used to satisfy a portion of the sum otherwise due under that policy.

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

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

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

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

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

13. The question which arises is if MIBI takes an assignment of a judgment obtained by an injured person against an insured of Setanta and seeks to enforce the judgment is the insured entitled to be paid out of the Fund pursuant to s.3 or is the payment prohibited by s.3(7). Mr Murray SC for the Law Society submitted that it was arguable that an insured was entitled to be paid out of the Fund. That issue does not fall to be decided in these proceedings. I only wish to observe that there does appear to be an issue which may require to be determined if MIBI seek to recover from an individual insured with Setanta on a judgment assigned pursuant to clause 3.11 of the 2009 Agreement.

14. As appears from s.3(1) the sums which may be paid out of the Fund to a person are amounts ". . . in respect of any sum . . . due to a person under a policy issued by the insurer in liquidation . . . together with costs and expenses . . . incurred by the person in endeavouring to secure payment of the sum".

15. I have noted that the Accountant in his grounding affidavit in the High Court at para 7 identifies four broad categories of eligible claims covered by the Fund. One is a claim by an individual who is a policy holder of the insurer and another is a claim by a body corporate against a policyholder of the insurer. A question may arise as to whether an insured who is a judgment debtor of a judgment assigned to MIBI pursuant to clause 3.11 of the 2009 Agreement is entitled to be indemnified pursuant to his/her policy of insurance with Setanta against liability to pay the amount of the judgment and if so whether he is eligible to receive a payment from the Fund pursuant to s.3(1) or excluded by s.3(7). The answer is not in my view obvious.

16. If an insured is entitled to recover then it diminishes the arguments of inconsistency of clause 3.11 with the construction place on clause 4.11 but even if it does not it cannot alter the construction of the 2009 Agreement as a whole in accordance with the ordinary meaning of the words used by the parties to the Agreement in clause 4.11.

17. In relation to the other submissions made by MIBI against the construction of the 2009 Agreement as including liability in case of insolvency of the insurer I am in agreement with the reasons given by the trial judge and those given in relation to the appeal by the President and Hogan J.

Answers to Questions

18. The questions directed by Kearns P. by order of the 27th April, 2015, in the application brought by the Accountant of the Courts of Justice are:

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

19. The High Court (Hedigan J.) by order of the 14th October, 2015, following the delivery of his written judgment on the 4th September, 2014, answered the questions as follows:-

1. The respondent is liable to pay out in respect of claims against persons who are insured with Setanta Insurance Company Limited (in liquidation) at the time of its entry into liquidation in April 2014.
2. The High Court may not approve payments under s. 3 of the Insurance Act

1964 (as inserted by s. 4 of the Insurance (Amendment) Act 2011) unless it appears to it that the respondent [MIBI] is unlikely to meet the claim notwithstanding its obligation to do so.

20. On the first question the trial judge having considered carefully the arguments made by the claimant and respondent ultimately concluded at para. 9.12 of his judgment that "the wording of the 2009 Agreement means that the MIBI have a liability to pay out in respect of claims against persons who were insured by an insurer which has become insolvent". That conclusion was reached in a context where the submission made on behalf of MIBI was that the agreement did not impose on it a liability to pay where the cause of the failure to pay by the judgment debtor was insolvency of the insurer.

21. As appears from the above, the obligation of MIBI pursuant to clause 4.1.1 to pay to the person in whose favour the judgment was given is "subject to the provisions of this agreement".

22. As already observed clause 2 of the 2009 Agreement provides that a person claiming compensation by virtue of the Agreement "must seek to enforce the provisions of this agreement" by one of the four ways specified in clauses 2.1 to 2.4 inclusive. In addition clause 3 sets out a series of conditions which are stated to be "conditions precedent to MIBI's liability".

23. As appears from the facts deposed to before the High Court, there are now approximately between 1,700 and 2,000 claims in existence by and against Setanta policy holders which are potentially eligible for payment out of the Fund. Further there are significant numbers of proceedings or claims in which a plaintiff has already either joined or made a claim against MIBI where the defendant was insured with Setanta.

24. The issue determined in the High Court on the construction of the 2009 Agreement appears to me to relate to no more than a potential liability of MIBI to a person with a

claim against an insured who held an approved policy of insurance with Setanta. The actual liability of MIBI to individual claimants for compensation pursuant to the MIBI 2009 Agreement remains to be determined on an individual basis.

25. Accordingly whilst I am in agreement with the trial judge on the construction of the 2009 Agreement I would vary the answer given by the High Court to the first question to:

> "The respondent [MIBI] is potentially liable to pay out in respect of claims against persons who are insured with Setanta Insurance Company Limited (in liquidation) at the time of its entry into liquidation in April 2014."

26. The second question directed by Kearns P. received little attention by the trial judge or by the parties on appeal. I do not consider that the answer to be given to the second question is as straightforward as it appeared to the trial judge nor is the answer given appropriate. Apart from any other consideration the decision on the construction of the 2009 Agreement does not mean the MIBI has an "obligation" to any individual claimant.

27. I am in agreement with the President that the Court should not give any specific answer to the second question. The High Court will have to decide on individual claims for payment having regard *inter alia* to the answer given to the first question.

Order

28. I would propose that the Order made in the High Court be varied so that the only answer given on the questions directed is:

> The Motor Insurers' Bureau of Ireland is potentially liable to pay out in respect of claims against persons who are insured with Setanta Insurance Company Limited (in liquidation) at the time of its entry into liquidation in April 2014.

Subject to the above variation that the appeal be dismissed.