THE COURT OF APPEAL

[2015 No. 522]

Ryan P.

Finlay Geoghegan J.

Hogan J.

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 the President delivered on 2nd March 2016

Introduction

1. Setanta Insurance Company Ltd., a company registered in Malta, carried on motor insurance business in Ireland until it went into liquidation. At an Extraordinary General Meeting that was held in Malta on 16th April 2014, it was decided that Setanta would surrender its insurance business licence and be immediately dissolved. A liquidator was appointed on 30th April, 2014. At the time it went into liquidation, Setanta had issued approximately 75,000 motor insurance policies, all of which were

in respect of risks in Ireland. All of its policies were cancelled with effect from 29th May 2014.

2. The question that arises in this case is how the outstanding claims against Setanta policyholders are to be met, in circumstances where it is clear that there will be insufficient funds available. The number of claims is estimated to be between 1,700 and 2,000. In this action, the Accountant of the Courts of Justice sought the direction of the High Court as to whether the claims should be met by payments out of the Insurance Fund which he administers under the direction of the President of the High Court pursuant to the Insurance Act, 1964 as amended, or by the Motor Insurers Bureau of Ireland, pursuant to its agreement with the Minister for Transport dated 2009.

3. The Insurance Act 1964 established the Insurance Compensation Fund. Section 3 authorises payment to be made out of the fund to a person under a policy issued by an insurer in liquidation in respect of a risk in the State, if it is unlikely that the claim can be met otherwise. The amount is limited to the lesser of 65% of the sum payable or €825,000. Subsection (7) excludes payment out of the fund where a payment equal to the whole of the sum is made by the Motor Insurers Bureau of Ireland and restricts the amount where the Bureau has made part payment. Insurance companies carrying on motor business in the State have had agreements with the Minister responsible for transport and road traffic since 1955. By an agreement made in March of that year, the motor insurers agreed to set up a body that would enter into an agreement with the relevant Minister to provide for payment of claims of persons injured by drivers who were not insured. Thus was born the Motor Insurers Bureau of Ireland, which mirrored a similar organisation that was then in existence for some years in the United Kingdom. The first agreement between the

MIBI and the Minister was made in November 1955. That was replaced successively by subsequent agreements, each of which terminated its predecessor, but also cited as part of its terms and to be read with it the original agreement of March 1955 that is the foundation of the Bureau itself. The present operating agreement is the 2009 edition. Membership of the Bureau and compliance with the agreements is a condition of providing motor insurance in the State, under section 78 of the Road Traffic Act, 1961. Setanta was a member of the MIBI as required by the 1961 Act.

4. A central issue in the case is the interpretation of the agreement between the Bureau and the Minister. Clause 4.1.1 is the provision whereby the Bureau undertakes its liability to pay compensation. The precise terms will have to be considered in due course, but it may broadly and loosely be described for the purpose of introduction as providing that if a court judgment for damages for personal injury or death or damage to property arising out of a liability which is required to be covered by an approved policy of insurance under s. 56 of the Road Traffic Act 1961 is not satisfied, the MIBI will, subject to the provisions of the agreement, satisfy the judgment, whether or not the person is covered by an approved policy of insurance and whatever may be the cause of the failure of the judgment debtor. This is subject to a reduction for money received under an insurance policy covering the loss or damage.

5. The Accountant of the Courts of Justice raised the issue whether the claims of persons bereaved or injured or suffering loss arising out of liability covered by approved policies of insurance issued by Setanta should be provided for by payments out of the Insurance Fund or by the MIBI. By order of 27th April 2015, the President of the High Court directed to questions to be decided by way of preliminary issue, as follows:

(a) Whether the Motor Insurers' 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'

6. In its judgment delivered on 4th September 2015, the High Court (Hedigan J.) answered the questions as follows: (a) The MIBI is liable to pay out in respect of claims against persons were insured with Setanta at the time of its entry into liquidation in April 2004; (b) The High Court may not approve payments under s. 3 of The Insurance Act 1964 (as inserted by s. 4 of the Insurance (Amendment) Act 2011) unless it appears to it that the MIBI is unlikely to meet the claim notwithstanding its obligation to do so.

7. The MIBI appeals against this interpretation of its 2009 agreement with the Minister for Transport. The question for decision by the court is whether in the circumstances that arise out of the insolvency of Setanta, the MIBI agreement applies to drivers whose insurer is wound up because of insolvency.

Judgment of the High Court

8. The trial judge applied the principles of interpretation set out by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 All E.R. 98 which enjoy general acceptance in this jurisdiction as well as in England and Wales. There is no dispute between the parties as to the approach but there is in respect of the application of the principles. It is sufficient therefore simply to refer to the briefest summary. The meaning of the agreement is what a reasonable well-informed person would understand by the words used in light of the relevant background against which the words are to be understood. That does not however include the previous negotiations or what the parties said they intended. Words should be given their natural and ordinary meaning. If the parties could not have intended what the words appear to mean, or if they lead to a conclusion that flouts business common sense, then the meaning must be made yield to business common sense.

9. Hedigan J. held, first, that the phrase in the clause "whatever may be the cause of the failure of the judgment debtor" was sufficiently wide to cover failure caused by the insolvency of the judgment debtor's insurer. The court then looked to the background to see if there was anything to suggest a different meaning that would exclude the insurer's insolvency from the ambit of the clause?

10. Secondly, the court found that the Irish approach was modelled upon the British and that the schemes were all but identical at their inception. The judge referred to the cases of *Gurtner v. Circuit* [1968] 2 Q.B. 587, and *Jacobs v. MIB* [2010] EWCA Civ. 1208 as well as a comment appearing in the Modern Law Review pp. 275-292 that he said made it clear that in the United Kingdom, the MIB was liable in respect of insolvent insurers.

11. In *Gurtner v. Circuit*, Diplock L.J. referred to the UK 1946 Agreement:

> "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.
>
> Under those Acts although insurance against third party risks was made compulsory and insurers made directly liable to satisfy judgments against the insured an injured person although he had recovered judgment against a negligent driver could whistle for his money if (a) the defendant was not insured at the time of the accident or (b) his policy was avoided in the circumstances specified in Section 10.3 of the Act 1934 for non-disclosure or misrepresentation or (c) his insurer too was insolvent. To fill this gap the insurers transacting compulsory motor vehicle insurance business in Great Britain, acting in agreement with the Minister for Transport, formed a company, the Motor Insurers' Bureau, to assume liability to satisfy judgments of these three kinds. But instead of amending the legislation so as to impose upon the Motor Insurers' Bureau a statutory liability for the unsatisfied judgment creditor as had been done by the Road Traffic Act 1934 in respect of the liability of insurers to satisfy judgments against defendants covered by a valid policy of insurance, the matter was dealt with by an agreement of June 17 1946 between the Minister of Transport and the Motor Insurers' Bureau."

12. The position in the United Kingdom is now quite different. However, in *Jacobs v. MIB* [2010] EWCA Civ. 1208 Lord Moore-Bick described the relevant background:

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

13. An academic article entitled 'Insurers Agreements Not to Enforce Strict Legal Rights: Bargaining with the Government and in the Shadow of the Law' (1985) 48(3) Modern Law Review 275-292 by Lewis, states:

"Today, the role of the MIB has been extended. It covers, at least in theory, not only the bankrupt insurer, but also the driver who has taken out a policy

> but liability under it is successfully challenged by an insurer, with the driver being left uninsured for the accident in question."

14. The trial judge was satisfied that these references were relevant, helpful and persuasive in regard to the interpretation of the Irish agreement. They supported his reading of the meaning.

15. Thirdly, the Court referred to the fact that following the collapse of the Equitable Insurance Company in Ireland in 1963, the MIBI paid out in respect of certain claims under motor policies. Departmental memoranda to Government were not admissible to prove MIBI liability for insolvent insurers but could be admitted to show the understanding of the parties at the time. Moreover, the 1964 MIBI Agreement did not exclude liability for insolvent insurers. Indeed, the subsequent Insurance Act of 1964 explicitly recognises at s. 3(7) a liability of the MIBI to make payments in the event of an insolvency. "This background, far from supporting the respondent's interpretation of the meaning, goes the opposite way in my view. It is highly suggestive that the parties to the MIBI took the same view as the United Kingdom courts in the cases cited above and accepted that the MIBI had liability for insolvent insurers as the agreements seem to state".

16. Fourth, Section 3(7) of the Insurance Act, 1964 as amended, which is identical to s. 3(4) of the original 1964 Act, provides:

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

> exceed the amount of the sum less the amount of the payment by the said Bureau."

The court held that the Act clearly contemplates a liability of the MIBI in respect of insolvent insurers.

17. Fifth, the Articles of Association (the Domestic Agreement) of 1st January 1993 and the updated Articles of 2009 have provisions referring to liquidation of a member and the consequent obligations.

18. Sixth, in the MIBI Directors' Report of 2012, the following appears under the heading of the principal activities of the bureau:

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

In their report for the same year, the auditors included "notes to the financial statements" as follows:

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

19. The judge held that the statements were not admissible to establish liability or truth but there are nonetheless relevant in regard to the "understanding or conduct of the parties in relation to the MIBI's obligations whether correct or incorrect".

20. The court seventhly, and finally, addressed the argument made by the MIBI that the 2009 agreement did not mean what the Law Society contended because no

reasonable motor insurer would agree to take on such a liability. It did not make business common sense. Therefore, even if the words appeared to mean that the insurers were commission themselves to such liability, in light of the principles of interpretation as agreed between the parties, it simply did not make sense as a business proposition by reference to business common sense and therefore that meaning should be rejected.

21. The meaning proposed by the Law Society would mean that each insurer accepted responsibility for the business practices of all of its competitors. It would be impossible to make proper provision for underwriting such risks. The judge rejected that submission on the basis that it was apparent from the time of the EIC liquidation but nothing had been done to remedy the situation. And of course the other points that are made above are also relevant in this connection. The judge went on to remark that it might well be that developments in the insurance market on a European level had significantly changed the risk profile which might result in alterations to the arrangements between the MIBI and the Minister in the future. However, such considerations did not impact upon the issue presented to the court.

22. The High Court did not consider that the case of *Csonka v. Magyar Allam* (Case C-409/11) was relevant or decisive. It was clear and not in dispute that the MIB agreements had to comply with EU Directives, but there was nothing to prevent a Member State providing by its arrangements for something more than the minimum required by Union law. Therefore, the fact that it can be shown that the 2009 Agreement goes substantially further than the Sixth Directive requires to be implemented in our law is not a basis for arguing that the 2009 agreement only goes as far as the Directive.

The Relevant Documents of Agreement

23. The question to be decided in this case is whether the MIBI agreement of 29th January 2009 covers drivers who were insured with Setanta Insurance Company which is now in liquidation. The question in essence, although it is framed in proceedings somewhat differently is whether clause 4.1.1 of the agreement covers drivers whose insurance company is insolvent.

24. The agreement of 29th January 2009 between the Minister for Transport and the Motor Insurers Bureau of Ireland is stated to be supplemental to an agreement called the principal agreement made on 10th March 1955 between the Minister for Local Government and "THOSE INSURERS GRANTING COMPULSORY MOTOR VEHICLE INSURANCE IN IRELAND". The actual contract documents to be considered and which are the essence of the issue here are the 2009 and March 1955 agreements. What happened in March 1955 was that the insurers providing motor insurance came together and agreed with the Minister that they would set up an organisation to cover the claims of victims of motor accidents in certain circumstances, including where the drivers of the vehicles involved were not insured in accordance with the compulsory requirements of the Road Traffic Act 1933.

25. The organisation was called and has since been known as the Motor Insurers Bureau of Ireland. It made an agreement with the relevant Minister in November 1955 which came into effect on 1st January 1956. Over the years since then, the agreements have been replaced from time to time and each new agreement recites that the principal agreement is the March 1955 one and describes itself as supplemental thereto and it terminates the predecessor supplemental agreement. In the case of the 2009 agreement, it recites all the previous supplemental agreements from November 1955.

The Principal Agreement: 10th March 1955

26. We have to begin with the agreement of 10th March 1955 whereby the insurers agreed to set up the organisation. It recites that "the Insurers are desirous of creating an Organisation to ensure the satisfaction of claims in respect of any liability for injury to person which is required to be covered by the Act". The insurers agreed to form an organisation and that they would become members of the MIBI. Paragraph 2 is important and it contains a provision that is in its essential particulars repeated in every subsequent agreement *i.e.* that is in all the supplemental agreements that followed on from this foundation text which is the essential matter that now has to be interpreted in this case. Paragraph 2 is as follows:

> "The Insurers engage themselves to procure the MIB of I to enter into a direct agreement with the Minister in a form approved by the Minister which shall contain provisions to the following effect:-
>
> That if judgment in respect of any liability for injury to person which is required to be covered by an approved policy of insurance under section 56 of the Act is obtained against any person or persons in any court established under the Courts of Justice Act 1924 (No. 10 of 1924), whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgment is not satisfied in full within 28 days from the date upon which the person or persons in whose favour such judgment was given become entitled to enforce it, then the MIB of I will so far as such judgment relates to injury to person and subject to the provisions of these pay or caused to be paid to the person or persons in whose favour such judgment 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 only to injury to person) or satisfy or cause to be satisfied such judgment whatever may be the cause of the failure of the judgment debtor to satisfy the same."

27. Paragraph 3 of the agreement provides that nothing in the proposed agreement is to prevent vehicle insurers providing by conditions that sums they pay on behalf of the MIB of I shall be recoverable from the policy holder or any other person.

28. Paragraph 4(c) provides:

> "That the judgment or judgments (including such judgments as may be obtained under paragraph (b) of this Clause) be assigned to the MIB of I or its nominee".

Sub-paragraph (d) of paragraph 4 is:

> "That the plaintiff shall give credit to the MIB of I for any amounts paid to him by or on behalf of the defendant in respect of any liability for injury to person or property arising out of the event which occasioned the claim against the MIB of I."

29. The MIBI was established in July 1955. The Memorandum of Association is dated 27th July 1955. The Articles of Association in the original form are dated 14th July 1955.

30. The first supplemental agreement is dated 30th November 1955. This is the first proper MIB agreement with the Minister. It is noteworthy that it refers to the "absence of insurance or of effective insurance".

Agreement of 29th January 2009 between Minister for Transport and MIBI

31. The agreements have been updated from time to time, and the present version is the 29th January 2009 edition. Under the heading 'Agreement', the following appears:

> "Text of an agreement dated 29th January 2009 between the Minister for Transport and the Motor Insurers Bureau of Ireland, extending, with effect from dates specified in the agreement, the scope of the Bureau's liability, with certain exceptions, for compensation for victims of road accidents involving uninsured or stolen vehicles and unidentified or untraced drivers to the full range of compulsory insurance in respect of injury to person and damage to property under the Road Traffic Act 1961."

32. This text appears in different places in earlier editions of the MIB agreements. Its position under the word 'agreement' may not be of any particular significance. It appears to be prefatory or introductory, but it is descriptive and is of assistance in interpreting the actual agreement which is introduced by the words "MEMORANDUM OF AGREEMENT". The paragraph introduced by this phrase provides that the instant agreement is SUPPLEMENTAL to the Principal Agreement of the 10th of March 1955.

33. Clause 1.1 of the 2009 agreement determines the agreement of 2004. The recitals refer to the termination of previous agreements with the relevant Minister. Clause 1.2 says that the agreement encompasses the Sixth Motor Insurance Directive which codifies the five existing Directives.

34. Clause 2 concerns enforcement of the agreement and specifies what a claimant for compensation under the agreement must do in seeking to enforce it. It specifies that a claimant seeking to obtain compensation by enforcing the agreement must do so

by making a claim directly to MIBI or to the Injuries Board citing MIBI as a respondent, citing MIBI as co-defendants in any proceedings against the owner or user of the vehicle involved or citing MIBI as the sole defendant in appropriate circumstances.

35. Clause 3 contains conditions precedent to MIBI's liability and some reference will be made to individual provisions in that clause. They include giving prior notice of the claim, furnishing material information, answering questions in relation to an untraced motorist claim, co-operating fully with the Gardai, furnishing documents and giving notice of the proceedings to the Injuries Board and/or to the MIBI. There are provisions for dealing with disputes as to compliance with the clauses. Of particular note is clause 3.11 as follows: "All judgments shall be assigned to MIBI or its nominee".

36. Clause 3.13 requires the claimant to give notice to the Gardaí of the accident within two days of the event or as soon as he or she can reasonably do so.

37. Clause 4.1.1 is headed 'Satisfaction of Judgments by MIBI' and provides as follows:

> "Subject to the provisions of clause 4.4, if judgment/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 judgment is not satisfied in full within 28 days from the date upon which the person or persons in whose

favour such judgment 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 judgment 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 judgment whatever may be the cause of the failure of the judgment debtor."

38. Clause 4.4 provides:

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

Those latter provisions refer to property damage.

39. Clause 9 contains a recoveries provision similar to the original March 1955 agreement.

40. Clause 13 is headed 'Domestic Agreement' and provides:

> "The agreement entered into between MIBI and the insurers of even date with the agreement of 1955 and referred to in the agreement of 1955 as 'the Domestic Agreement' or any subsequent or amended agreement made in renewal or replacement of the said Domestic Agreement or incorporated into the Memorandum and Articles of Association shall not discharge MIBI from its liabilities or obligations under this agreement."

Memorandum and Articles of Association of MIBI

41. Since this is the body that entered into the 2009 agreement with the Minister, it is the up to date version of the constitution and rules documents that is relevant. The memorandum introduces the objects for which the Bureau is established in paragraph 3 with 3.1:

> "To enter into agreements and make arrangements in compliance with current agreements or future agreements with the Minister for Transport (hereinafter called 'the relevant Minister') of the Republic of Ireland responsible for compulsory motor vehicle insurance and connected matters for the compensation of victims of road accidents (other than the exceptions as provided in the agreement dated 29th January 2009 between the Minister for Transport and the Motor Insurers Bureau of Ireland) involving either uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers which are required to be covered by contracts of insurance under the Road Traffic Acts 1961-2006 as amended or by common law, or a provision of the Treaties of the European Community, or an Act, Regulation or Directive adopted by an institution of the European Community or otherwise."

42. Clause 3.10 of the memorandum empowers the Bureau to make compassionate payments or allowances to persons injured and to the dependents killed through the use of motor vehicles. Clause 3.12 gives power to make payments which the Bureau may think expedient, notwithstanding that there may be no obligation to do so in law.

43. Some provisions of the Articles of Association require to be noted. In the Definition section at clause 1.2, "insurer concerned" is defined to mean the member of the Bureau "who at the time of the accident which gave rise to a road traffic act

liability was providing motor insurance in respect of the vehicle from the use and/or ownership of which the liability of the judgment debtor arose".

44. Article 10.1 featured in submissions and provides that a member of the Bureau shall cease *ipso facto* to be a member where such member goes into liquidation or has a receiver appointed over its assets or goes into examinership or is otherwise insolvent. The same result comes about if the member ceases to transact motor vehicle business in the State. Article 10.1 continues as follows:

> "Any such member ceasing to be a member shall nevertheless remain liable for its or his share (*pro rata* or otherwise) of all obligations (including but not limited to the obligations of a member under Article 63.3) arising prior to such resignation and during that current year in which the resignation takes effect. Upon the occurrence of any event listed in Article 10.1.1 or 10.1.2 any payments which the Bureau may as a result be called upon to make on a member's behalf to any creditor shall be contributed solely by the other members respectively. In each case, contributions actually payable by each of the other members shall be made in proportion to their respective levies within their respective group's actual percentage of the total Bureau levy (relative to the year in which the Bureau meets the said contribution)."

45. The Bureau is funded by levies on its members in accordance with Article 62. This provides for payment of a levy by each member in accordance with the member's share of the market. It is actually based on the gross written premiums of each member.

46. Articles 71 to 76 are entitled 'The Domestic Regulations – Insurer Concerned'. These articles provide for a situation where a member of the Bureau has written a policy of insurance, but where for some reason the insurer is entitled to

repudiate the policy *e.g.* because it has been obtained by fraud or misrepresentation or non-disclosure of material facts. It might also be because the person driving the car at the time of the accident was in unauthorised possession thereof. In those situations, the insurer concerned arrangement is that the member of the Bureau that issued the policy in respect of the vehicle has to bear the liability of the Bureau as insurer concerned. In that circumstance, the Bureau as a whole does not rateably apportion the amount of the payment to the injured party, but the insurer that received the benefit of the premium is obliged to take on the liability.

MIBI Submissions

47. The High Court failed to address serious issues concerning the implications of its findings as to the meaning of the agreement and its application in the case of an insolvent insurer. The court also erred in interpreting and understanding the agreement. The points may be summarised as follows:

(i) The two parties to the agreement were in accord that it did not apply in a case of insolvency.

(ii) Claimants in the case of Setanta drivers were entitled to claim from the Insurance Fund. The 1964 Act applies generally to insolvent non-life insurers and there is no exception for motor insurers. Historically, the fund compensated injured parties in cases of other insolvent motor insurers.

(iii) A Setanta claimant may not be in a position to satisfy the strict pre-conditions in the agreement.

(iv) If the judgment is correct, the MIBI would be entitled to an assignment of the judgment in favour of a claimant and to enforce it against the Setanta insured

notwithstanding that he or she had complied with the compulsory insurance obligation under the Road Traffic Acts.

(v) The High Court focused too narrowly on Clause 4.1.1, "a clause relating to the timing of payment." The court did not address the significance of the absence of any reference to insolvency in the 2009 Agreement.

(vi) The court did not address the limitation imposed on the MIBI by reason of object 3.1, a limited principal object, in its Memorandum of Association.

48. The MIBI submitted that the trial judge failed in interpreting clause 4.1.1 by considering certain extrinsic events, and in concluding that the MIBI had an obligation in respect of insolvent motor insurers. The court did not give any explanation, nor did it analyse why there is no reference to insolvent insurers in the 2009 Agreement despite the fact that the other categories of drivers captured by the 2009 Agreement are expressly referenced therein. It was submitted that the trial judge failed to address the issue of whether in the context of a limited principal object, such as object 3.1 of the Memorandum of Association; it was *ultra vires* to suggest that the 2009 Agreement encompassed vehicles which had the benefit of insurance cover, but where the relevant insurer had become insolvent. It was also submitted that the court failed to consider the position of the Minister as counterparty to the 2009 Agreement and his expressed position that the MIBI had no obligations in respect of insolvent insurers. The counterparties to the 2009 Agreement are agreed in affirming that it was not the intention to impose an obligation on the MIBI in relation to Setanta-related claimants. Indeed, the parties consensus *ad idem* is that the 2009 Agreement was not intended to impose an obligation on the MIBI in relation to claims arising in the context of an insolvent insurer, such as Setanta.

49. It was submitted that the essence of the 2009 Agreement is that it contains an obligation to compensate injured persons other than the parties to that agreement. An injured person enjoys no privity with the Minister or the MIBI, but pursues the MIBI by a derivative action in which he has the same cause of action against the MIBI as against the uninsured driver. Accordingly, it is not open to a claimant (who is not a party to the agreement) in respect of a liability owed by a motorist insured with an insolvent insurer, such as Setanta, to argue that the obligations contained in the 2009 Agreement go beyond what the parties thereto consider their agreement to be. This must be so where the interpretation results in the imposition of an enormous and unanticipated potential liability on one contracting party with huge financial and regulatory implications and which was not intended by the only other contracting party.

50. The point of view of the Setanta-insured driver was not represented before the learned trial judge. One of the significant shortcomings of the judgment is its failure to fully consider the position from the perspective of a Setanta policyholder, and also for that matter, of a Setanta claimant. Firstly, the court failed to take into consideration the strict conditions laid down in clause 3 of the 2009 Agreement as pre-conditions to MIBI's liability. Secondly, the court failed to consider the position of a Setanta policyholder where judgment is obtained, registered and potentially enforced against him/her. Thirdly, the court failed to consider the fact that a Setanta policyholder, and indeed all motor policyholders, will have contributed to the fund, but on the basis of the judgment no benefit arises to those policyholders.

51. The learned trial judge failed to address the issue of whether in the context of a limited principal object, such as object 3.1 of the Memorandum, it was *ultra vires* the MIBI to bind itself to an agreement to pay liabilities of a motor insurer who had

become insolvent. Accordingly, it is clear that in his consideration of the Memorandum that the learned trial judge erred in seeking to extend the primary object clause, being object 3.1, by considering Article 10. The approach adopted is erroneous and led to an incorrect interpretation.

52. The MIBI submitted that the primary focus of the court's decision was the interpretation of clause 4 of the 2009 Agreement and the court failed to take into account a number of issues, including the position in insurer-concerned cases where a policy of insurance is in place at the time of the relevant accident, but where the insurer repudiates liability by reason of breach of the conditions of the policy. The position in insurer-concerned cases is captured by the MIBI agreements, albeit that such claims are in fact dealt with differently. Secondly, it is clear that the court failed to consider other clauses of the 2009 Agreement when contextualising clause 4, and in particular failed to note the absence of any reference to insolvent insurers. The interpretation given flouted business commonsense since the Court failed to address the fact that if MIBI members are liable for insolvent insurers in the market, significant implications arise in the context of each member's capital and solvency and their ability to meet regulatory requirements in that regard.

Law Society Submissions

53. The Law Society submitted that clause 4.1.1 very clearly encompasses a situation in which a negligent driver insured by Setanta does not satisfy a judgment or PIAB order. MIBI's liability in an insolvency situation is clearly captured by the broad terms of the clause. The clause is emphatically not concerned with timing. It defines the liability, subject of course to the other provisions of the Agreement.

54. It follows that MIBI's argument in this litigation is dependent upon reading some or all of the relevant words of clause 4.1.1 out of existence. On any standard rule of statutory interpretation, this would be an impermissible exercise in amendment as distinct from interpretation. Thus, in *Re Strand Music Hall Co. Ltd.*(1865) Beav. 153, Lord Romilly MR stated:

> "The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed."

55. To the extent that MIBI seeks to utilize the preamble to limit liabilities envisaged in vlause 4.1.1, it is clear that that would be an incorrect approach. In *Young v. Smith* (1865) L.R. 1 Eq. 180, Romilly MR stated: "I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious and the recitals inofficious".

56. In *Mackenzie v Duke of Devonshire* [1896] AC 440, Lord Halsbury L.C. stated:

> "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down or qualified by a recital or narrative of intention."

57. Moreover, as noted below, courts in the UK have stated that both the original MIB Agreement of 1946 and the most recent 'Uninsured Drivers Agreement' of 1999 affords protection to victims in an insolvency situation. In so stating, they clearly were not inhibited by 'uninsured' being in the very title, as opposed to merely the preamble here. In this regard, it may be noted that Murphy J., giving the majority judgment in the Supreme Court in *Bowes v. MIBI* [2000] 2 IR 79 stated at 89: "… the

Motor Insurers' Bureau of Ireland may be liable on foot of a judgment obtained against an uninsured or inadequately insured driver ..." [emphasis added].

58. A situation where an insurer goes insolvent can be considered to be an instance of 'ineffective insurance'. This is apparent from case law. In *Morgans v. Launchbury & Ors.* [1973] AC 127, Lord Pearson remarked *obiter* at 143:

> "Apart from the transitional difficulty of current policies of insurance being rendered insufficient by judicial changes in the law, there is the danger of *injustice to owners who for one reason or another are not adequately covered by insurance or perhaps not effectively insured at all (for example, if they have forgotten to renew their policies or have taken out policies which are believed by them to be valid but are in fact invalid, or have taken their policies from an insolvent insurance company)."* [Emphasis added]

59. Of course, one could have taken insurance from a company, such as Setanta, without knowing that it was insolvent or otherwise in grave financial difficulty at the time. Although, on one view, such persons might be considered to have had an 'approved policy of insurance' at the time of the accident, on another view they can be considered to have had 'ineffective insurance', or even to have been *de facto* 'uninsured', albeit that this may not have become apparent until after the accident in which they were involved.

60. MIBI has not put before the court any contemporaneous evidence of its understanding, or indeed any evidence pre-dating the threat of Setanta-related litigation which indicates that its understanding of the agreement was what it now asserts it to be. Although MIBI (unlike the Law Society) has access to all information relevant to the formation of the Agreement, it did not in these proceedings adduce a

single item of evidence of the factual matrix to the Agreement which supported its construction of the Agreement.

61. Section 3(7) is relevant to this case because the case is concerned with the powers of the High Court to make payments from the Fund pursuant to section 3. But it is also relevant to the understanding of both the Minister and the MIBI of the 2009 Agreement.

62. Lewison, 'The Interpretation of Contracts' (4th Ed., 2007) notes at para 4.06:

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

63. That the legal background is relevant to contractual interpretation is apparent from *MDIS Ltd. v Swinbank* [1999] 2 All ER (Comm) 722 where Clarke L.J. stated:

> "Both the decision and the dicta in that case can in my judgment properly be treated as relevant to the construction of this clause since they have been known amongst insurance lawyers and indeed brokers for many years and would likely to have been in the back of the minds of those negotiating ..."

64. At the very minimum, if the parties to the 2009 Agreement had intended a result contrary to that envisaged by, what is now section 3(7), and what was formerly s. 3(4) of the Insurance Act 1964, it is submitted that they would have expressly and clearly contracted to provide that MIBI would not be liable in an insolvency situation.

65. Even if the parties had done so (and they did not), it must be at the very least questionable whether the parties could lawfully have contracted to the suggested effect. Here, one of the parties to the 2009 Agreement is part of the Executive branch

of Government and is accountable to Dáil Éireann. MIBI's case entails the Minister (and his predecessors) entering into any Agreement which would have had the effect of releasing MIBI from a liability which the Oireachtas had clearly envisaged it to have. Moreover, the Minister's actions would be to increase the potential charges upon a statutory Fund beyond that which the Oireachtas, as creator of the Fund, had envisaged. It would have been of dubious legality, and susceptible to judicial review, for a Minister to have contracted contrary to a state of affairs envisaged by the Oireachtas. Regardless of what legal advice the Minister has received on MIBI's obligations under the Agreement (and that legal advice has not been tendered to the court), that is not an intention which should readily be imputed to the Minister, and, if not, it cannot in turn constitute the presumed shared common intention of the parties

Principles of Interpretation

66. In *Investors Compensation Scheme* at pp.912G-913F, Lord Hoffmann summarised the development of the principles of contractual interpretation in this well-known passage:

> "The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

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

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

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749).

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

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

67. Keane J., then in the High Court, said in *Kramer v. Arnold* [1997] 3 I.R. 43:-

> "In this case, as in any case 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."

That approach was endorsed by the Supreme Court in *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511.

68. Commercial commonsense was recently considered by the United Kingdom Supreme Court in *Rainy Sky S.A. v. Kookmin Bank* [2011] 1 WLR 2900. Lord Clarke said:-

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person,

that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

Discussion

Consensus

69. The first point is the consensus between the contracting parties as to the effect of the agreement. By letter of 10th of September 2014, the Department of Transport, Tourism and Sport set out its understanding as follows:

> "It is the Department's position that there is no legal obligation, under the MIBI Agreement 2009, on the MIBI to satisfy judgements or claims made against customers of Setanta Insurance in liquidation when they have an existing approved policy of insurance at the time of the accident which has not been declared void or cancelled up to May 2014. Furthermore the Department is of the view that the Insurance Compensation Fund, established under the Insurance Act 1964 as amended, please the express statutory mechanism for providing compensation for claimants against insurers, both foreign and domestic, in liquidation. This would include any claims made by injured victims against Setanta who have not had their judgements or claims satisfied by Setanta."

70. The MIBI did not, in its submissions, argue that the intention of the parties was clearly established and that that excluded any further consideration of the meaning of the agreement. In normal circumstances in the case of a private contract, if the parties were agreed there would be no issue: nobody would go to court to establish something that was not in dispute. In this case, there clearly is a dispute and the Bureau has engaged cooperatively with the court process of ascertaining the extent of application of the agreement. That engagement strikes me as being inconsistent with the proposition that the consensus of the contracting parties is decisive in the sense of excluding outside interference. In this case, it is quite clear that the contending party, the Law Society of Ireland, would not otherwise have standing to make the argument were it not that their involvement was a convenient method of bringing the dispute before the High Court. The Bureau's consent to that process limits its capacity to rely on the Department's expressed position.

71. There is moreover the third of Lord Hoffmann's points on interpretation concerning the subjective intentions of the parties. That imposes a significant qualification on the meaning and effect to be ascribed to the contracting parties' consensus. Consideration of this submission must take place subject to that principle of interpretation. In my judgment, even if one leaves aside this precept, the declaration by the Department is of limited value. It represents the opinion of the contracting party as to the meaning of the agreement expressed retrospectively in light of the issue that had then arisen. The view if relevant cannot be decisive. It is not something that represented the state of mind of one of the parties at the time when the agreement was entered into. It is not as if one party to an agreement communicated its view as to what was to go into the formal document. "We are agreed as follows as

this letter confirms and are now instructing our solicitors to draw up the formal agreement".

72. The Department is expressing what is, in substance, a legal view as to the meaning and effect of the agreement. Interpretation of a contract document is a search for the intention of the parties as expressed in the agreement and here the parties have so declared their intention.

73. In my opinion, this agreement is more than a contract between two parties. There is a public element because motor accident victims are given specific rights which are exercisable if they fulfil certain conditions. The agreement has provision for resolving disputes as to compliance with conditions. It is envisaged that there will be court proceedings arising out of the agreement and in order to enforce it. A claimant who is not otherwise party to the MIBI Agreement can invoke its provisions and indeed is required to join the Bureau in his action.

74. The Agreement represents the compliance by the State with his obligations under the Sixth Directive.

75. My view is that the Department's position cannot be considered to be decisive or determinative because it does not reflect the contracting party's intention at the time of the execution of the agreement but rather a retrospective analysis as to interpretation, which is the function of the court. More fundamentally and substantially, this agreement is not simply a matter between motor insurers through their Bureau and the Minister with responsibility for motor insurance because it bears on rights that are conferred on the public generally if they are injured in accidents and their claims are not satisfied. In addition, the public element that is necessarily associated with fulfilment of the State's obligations under EU law takes the matter of interpretation of the agreement outside the confines of a private contract.

Satisfying Pre-Conditions

76. Pre-conditions as to the liability of the MIBI are set out in clause 3 of the Agreement. The MIBI submit that a claimant may find it difficult or impossible to comply with these conditions if he or she has a claim against an insolvent insurer. The courts have upheld the Bureau's entitlement to insist on strict compliance. Because there is no reference to insolvency in clause 3 or elsewhere in the relevant part of the Agreement, leaving out of account the Domestic Agreement, and there are circumstances in which it would be difficult or impossible for such a person to comply with the terms, it is suggested that those considerations imply that the agreement does not cover insolvent insurer's drivers.

77. I do not think it is necessary to the interpretation of the agreement to find that every claimant against a Setanta driver will be able to comply with the conditions in clause 3 or elsewhere. Obviously, any claimant will want to comply in order to avoid the possibility of a defence of non-compliance. It does not follow that every occasion of non-compliance will be met with refusal to meet the claim. In such event, that is a matter for consideration by the Bureau. It strikes me indeed in looking at the conditions in Clause 3 that otherwise entitled claimants may in some circumstances find difficulty in fulfilling the requirements precisely. Just what the legal significance of any particular default might be is, I think, impossible to predict. One cannot say that any failure of compliance will necessarily lead to refusal and that the courts would not provide a remedy. It is quite possible to envisage circumstances in which it would be unjust to uphold insistence on a term of the agreement. Indeed, the claimant might be able to argue that in the event of refusal by the Bureau to meet the amount of the award, the Minister would have an obligation under the Directive. It seems to me

that the agreement is general and applies to all claimants and if some of them have difficulty in complying, that is not a reason for a particular interpretation. It would be otherwise perhaps if it could be shown that the agreement could not apply to all members of a particular class, for example, every victim of the negligence of a Setanta driver, but that is not the case.

The Setanta Policyholder

78. The MIBI makes the point that an award paid to a claimant is made on condition of the assignment of the judgment to the Bureau which can then enforce it against the uninsured driver. Obviously, if the driver did indeed have an approved policy of insurance in compliance with the statutory obligation under the Road Traffic Acts, he or she is in a very different position legally and morally from a person who has not taken out insurance at all.

79. This is clearly an important consideration and a significant matter, as submitted by MIBI. If the MIBI were to pursue a remedy against the driver in those circumstances and to succeed, it would be a very unsatisfactory and even unjust result. It has to be acknowledged that the provision in clause 3.11 tends to support the MIBI's case. This provision has been in every agreement from the beginning, providing for the assignment of the judgment obtained by the injured party against the driver to the MIBI. The intention is that the Bureau will then pursue the uninsured driver if it believes that there is any prospect of recovering some significant amount from him. Obviously, the Bureau is not going to waste costs pursuing a person who has nothing. Clause 3.11 is in principle inconsistent with the moral and legal innocence which is the case with the driver who was insured with Setanta before it became insolvent. I do not think it makes any sense to criticise a driver who got his

insurance from that company on the basis that he should have known that it was offered to him at too small a cost. How can one justify imposing on that driver the same liability for the full amount of the claim as is visited on the person who drives uninsured and causes injury?

80. This is a troubling argument, I confess. Although it is not an entirely satisfactory answer, the point that arises here is that because the consequence of applying clause 3.11 to seek reimbursement of a judgment from an innocent but as it happens uninsured or underinsured driver is evidently unjust, it does not necessarily follow that the interpretation of the agreement must be able to avert that outcome.

The Insurance Fund

81. The scheme established by the 1964 Act and continued with modifications by the Amendment Act of 2011 is undoubtedly of general application to insolvent insurers, as the MIBI submits. There is, however, as the trial judge found, explicit acknowledgement that there may be circumstances in which the Bureau makes payments in respect of a liability that is covered by a policy issued by an insolvent insurer. Subsection (7) provides as follows: –

> "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."

82. The judge held that this was significant. He was not satisfied that it could be accounted for by the provision made for the insolvency of Equitable Insurance Company which happened prior to the enactment of the 1964 legislation. The 2011 Act inserted a new s. 3 containing the same subsection.

83. Whatever about the full significance in the case of insolvency of a motor insurer, it does appear to be beyond dispute that this provision in existence since 1964 manifestly contemplates a role for the MIBI in the case of an insolvent insurer, which necessarily must mean a motor insurer. It is difficult in those circumstances to understand the criticism of the judge on the basis that he failed to understand the nature of this provision.

Ultra Vires

84. The Bureau submits that the proposed liability for drivers covered by policies issued by an insolvent insurer is not one that is provided for by its own Memorandum of Association. The relevant object is 3.1 which is "to enter into agreements and make arrangements in compliance with current agreements with the Minister for Transport . . . involving either uninsured vehicles, stolen vehicles, unidentified drivers or untraced drivers. . ." The submission is that this does not permit coverage of insolvent insurers.

85. The first important point on this is the reference to current agreements. The Principle Agreement is that dated 10th of March 1955 which recites that "the Insurers are desirous of creating an Organisation to ensure the satisfaction of claims in respect of any liability for injury to person which is required to be covered by the Act" and which proceeds to provide as above set out. There is a sense, therefore, in which this

is a somewhat circular argument because the debate returns to the question whether the liability in issue is encompassed in current agreements.

86. The Law Society submits that it is by no means clear that driver insured by an insolvent company should not be considered to be uninsured, although it may actually be more correct to consider that such a person is partly insured but to an unknown extent until the completion of the liquidation. The Society also cites s. 10 of the Companies Act 1963 and Regulation 6 of S.I. 163 of 1973.

87. In my view, the argument about the Memorandum and Articles brings one no further along the road of interpretation of the 2009 agreement taken with that of March 1955. There is no clear exclusion in the constitution of the company or in its rules and I find myself in agreement with the trial judge in his view on this issue. The question still remains as to whether the liability the Bureau took on in its agreement with the Minister covers drivers who had policies with the insolvent insurer.

Interpretation of Clause 4.1.1

88. The trial judge laid emphasis on two phrases in this critical clause. The first is "whether or not such person or persons be in fact covered by an approved policy of insurance". The second is "whatever may be the cause of the failure of the judgment debtor." It is of course also relevant to note that the clause contains the words "and subject to the provisions of this Agreement".

89. The whole case can be reduced to the interpretation of this clause. In one part of the written submissions made by the MIBI, it is proposed that this clause is a reference to timing of payment only, but that interpretation cannot withstand analysis. This is undoubtedly the crucial statement of the obligation that the Bureau is

undertaking. That this is clear is obvious from the Principal Agreement of March, 1955.

90. The first requirement of the clause is that there should be a judgment or an order to pay by the Injuries Board. The judgment or order has to be in respect of any liability for injury to person or death or damage to property. Such injury *etc.* must be required to be covered by an approved policy of insurance under s. 56 of the Road Traffic Act 1961. The judgment has to be obtained in a court or the order made by the PIAB. If the judgment is not satisfied within 28 days, the Bureau agrees to satisfy the judgment or to have it satisfied. All that is subject to the terms of the Agreement, some of which are set out and discussed elsewhere in this judgment. The Bureau accepts such liability, whatever the cause of the failure to pay, and also whether or not the person sued was in fact covered by an approved policy of insurance.

91. The breadth of this provision is obvious. It seems to be irresistible as a matter of interpretation and the meaning of words that the clause is wide enough to cover a driver whose insurer is insolvent. The High Court so found and I agree. Indeed, I think it would be difficult to justify an interpretation that held otherwise. It does not follow because the provision is wide enough to cover insolvency that it necessarily does so. Hedigan J began with the proposition that I have outlined and proceeded to consider whether there was anything else in the agreement or elsewhere that would lead to a different interpretation. In fact, for a variety of reasons that are summarised earlier he concluded that the factual matrix was such that it confirmed the proposed liability rather than excluded it.

92. The phrase that makes the liability subject to the terms of the agreement do not suggest to me and intention to restrict the ambit of clause 4.1.1 in regard to its application to injured claimants. Where can one find in this clause or in the

agreement as a whole at provision withholding the generous benefit accorded to injured persons from those who happen to be the victims of drivers whose policies were issued by an insolvent insurer? I do not think it is there. It seems to me that this clause is expressed in terms that are intended to cover persons injured in road accidents, whether the law requires there to be insurance, irrespective of whether there is insurance or not and whatever may be the cause of the failure to pay. It may be that it is a mistake to look for cover of particular classes of driver and to neglect the coverage of claimants in general arising from road traffic liability.

93. It is possible, in my view, to find interpretations of the critical phrases that I have mentioned in which restrictions of liability can be accommodated. This is what the MIBI have done in the submissions. However, it seems to me that there is the plain meaning of the words and their location in the scheme generally, and in the context of the March 1955 agreement, and all of that leads me to a broad rather than a narrow interpretation. However, I look at the words, it seems to me to be irresistible that they can indeed covered the liability we are now addressing. In the other provisions of the agreement, I cannot find anything that excludes the application to claimants against drivers with policies from insolvent insurers.

94. I do agree, as I said above, that clause 3.11 is difficult to reconcile with the general policy of the agreement, seen in its context with the March 1955 text and the Domestic Agreement contained in the Articles. But I do not think that I could justify finding implicit restriction in the potential unfairness that arises if 3.11 were to be enforced by the Bureau. That would not be a rational interpretative method.

95. I am reinforced in my conclusion on this interpretation by other features of the context, as was the trial judge.

Business Commonsense

96. The argument on this point is at first sight very convincing. In a word, senior management figures in the major motor insurance companies described in affidavits the serious and worrying implications that arise if they are required, in effect, to offer cross-guarantees to all their competitors. Prudent underwriting policies are put at risk, to say the least, by such obligation. Capital requirements are affected. There could be consequential effects on the whole motor insurance market. For a host of reasons, this obligation presents a very serious problem.

97. Clearly, if the liability exists the fact that there are potentially very serious consequences will not remove it. Having said that, it is clearly reasonable of the insurers to point out these problems and to argue that the proposed liability does not make sense and therefore that the agreement cannot have the suggested meaning.

98. The trial judge felt that these concerns might warrant alterations to the agreements but did not consider that the consequences envisaged by the deponents alter the meaning to be given to the clause accepting liability.

99. It seems to me that other evidence available to the court revealed that the insurers had themselves envisaged insolvent insurer liability arising for the MIBI and had apparently considers that prospect without thinking it was an apocalyptic outcome. They also had the opportunity, as the judge pointed out, since 1964 of agitating for a change in the legislation whereas in fact the subsection acknowledging the potential role of the MIBI was re-enacted as recently as 2011.

100. In the circumstances, I cannot find evidence to support the proposition that the proposed liability represents a catastrophic consequence the like of which could not even be countenanced by any prudent insurer. I am indeed impressed by the contents of the affidavits sworn by such senior figures in the industry and it may well be time

as the judge in the High Court felt for the process of change to be undertaken or for better regulation to be installed in the EU generally.

The Position in England

101. The situation in England is now quite different and scarcely comparable. However, it was not always so, and the High Court was correct in saying that the Irish arrangements appear to have been modelled on the English. The judge quoted English authorities as appears earlier in this judgment from the summary of Hedigan J's findings. Diplock L.J. considered the terms of the 1946 MIB agreement in England and specifically mentioned insolvent insurers as being a reason why the Bureau would be involved. It is worth quoting the Agreement dated 17th of June 1946 between the Minister of Transport and the Motor Insurers' Bureau. Paragraph 1 is entitled 'Satisfaction of Claims by MIB' and is as follows: –

> "If judgment in respect of any liability which is required to be covered by a policy of insurance or a security (hereinafter called "a contract of insurance") under Part II of the Road Traffic Act 1930 is obtained against any person or persons in any Court in Great Britain whether or not such person or persons be in fact covered by a contract of insurance or if judgment in respect of any liability which is not so required to be covered by reason only of the provisions of Sub-section (4) of Section 85 of the said Act is in fact covered by a contract of insurance and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given became or would apart from the provisions of the Courts (Emergency Powers) Act, 1939 or similar legislation have become entitled to enforce it then MIB was subject to the provisions of Clauses 5 and 6 of these presents they are

satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment 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 aforesaid liability) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment."

102. It is apparent from this quotation just how similar is the text of the 1955 agreement, which confirms the accuracy of the observation by the trial judge as to the historical antecedents of our scheme.

103. It is also quite clear that the similarity of relevant provisions makes it difficult to understand how it could be thought that Diplock L.J. was incorrect in considering that this provision applied to an insolvent insurer's policy. For my part, I find this a relevant precedent from a high judicial authority in the neighbouring jurisdiction construing a very similar text to the one now before this court.

Equitable Insurance Company

104. The circumstances in which the MIBI made payments in respect of the failure of Equitable Insurance Company as happened prior to the enactment of the 1964 legislation are anything but clear. There was no satisfactory evidence before the High Court. I agree with the trial judge as to the non-admissibility of the materials that went to the Government. The significance that I see in these materials is the absence of any sense of how it would be wholly inappropriate or even unthinkable to countenance liability on the part of the MIBI in the case of insolvency.

MIBI Internal Documents

105. In the Report and Financial Statements for y/e 31st December 2012 under the heading 'Report of the Board' and the subheading 'Principal Activities', the following appears: –

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

106. The Independent Auditors' report to the members of the MIBI dated 5th April 2013 contains in the Notes to the Financial Statements at Item 16 under the heading 'Contingent Liabilities' the following:

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

107. It is suggested that the Bureau considered itself to have the liability or to be at risk of having the liability for Setanta drivers. I am less concerned with the point that this represents an interpretation of clause 4.1.1 that the court should accept, although I acknowledge that these are significant representations or understandings. The significance, as I see it, of these acceptances is that they rather tend to undermine the case made by the Bureau that it would simply be unthinkable that this kind of liability might be taken on by a group of companies providing motor insurance in the State. If it had been regarded as something quite outlandish, one would have expected to find a protest of some kind in the documents.

Section 3(7) of the 1964 Act

108. I do not agree with the MIBI submissions on subsection (4)(7). I do not read it as prohibiting double recovery. We have to remember that s. 3 provides for payments to the person insured by the insolvent insurer in respect of insured risks in the State. The payments envisaged as being made by the MIBI are payments to claimants, namely, injured persons who bring claims against allegedly negligent drivers. The subsection in question provides that where the MIBI makes a payment equal to the whole of the sum due under a policy, a payment will not be made out of the fund. If a payment were to be made out of the fund, it would go to the person insured to meet the liability that he had covered in his policy with the insolvent insurer.

109. I think it is irresistible that this subsection envisages payments by the MIBI in cases of insolvent insurers. What else can it mean? I just do not see how the trial judge can be said to have misunderstood the situation when he made these comments.

110. The MIBI say that the subsection applies to a limited number of circumstances such as an untraced vehicle. But how can that be? What is there in the section to give rise to that interpretation? Now I should say that untraced vehicles did not until quite recently enable a claimant to recover so that cannot have been what was the original intention back in 1964. But apart from that, there is nothing in the words of the subsection to indicate restrictions of the kind proposed.

111. It is true that the section does not say that the MIBI is liable. There is actually no provision as I understand in any Act that says that. The trial judge held that this subsection necessarily contemplated involvement of MIBI in cases of drivers whose insurer became insolvent.

112. I agree that it is not decisive as a matter of interpretation of the MIBI agreement that subsection (4) as originally enacted in 1964 was re-enacted in recent

times. It does not prove that one interpretation is to be preferred over another. But I do not think it is neutral. It demonstrates that the Legislature thought it was necessary to continue this measure. It might have been argued that legislation like that is always subject of consultation with interested parties which in this case would be the insurance companies.

113. These arguments do not, as I see it, demonstrate any flaw in the High Court judge's reasoning on this point.

Conclusions

114. Ultimately, I am persuaded that the MIBI Agreement does mean what it appears to say, which is that the Bureau accepts responsibility to pay whatever the circumstances of the failure to satisfy the judgment. I do not think it is possible to achieve a process of reasoning that is completely satisfactory in the sense of arriving at a result that is logically impregnable. However, I think that a judgment in favour of the interpretation advanced by the Law Society does make sense and represents a more satisfactory reading of the agreement than that proposed by the MIBI. I am, accordingly, in agreement with the judgment of the High Court.

115. Overall, therefore, I would dismiss this appeal and affirm the order of the High Court, but with some modifications of the orders. A claimant is required to comply with the terms of the MIBI agreement and it follows that the only declaration that can be made in respect of the issue at (a) as set by the President of the High Court is in respect of potential liability. In respect of the issue at (b) I do not think it is necessary or appropriate for the court to make any declaration. The jurisdiction under the Insurance Act 1964 is exercised under the terms and conditions specified by the

legislation and it is not for this Court to make a general rule as to how that is to be done.