Neutral Citation No. [2011] NIQB 33 | *Ref:* **WEA8122**

Judgment: approved by the Court for handing down | *Delivered:* **08/02/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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ULSTER BANK LIMITED

-v-

RAYMOND ACHESON

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WEATHERUP J

[1] This is an application by the plaintiff for summary judgment under Order 14 of the Rules of the Court of Judicature. Mr Aiken appeared for the plaintiff and Mr McEwen for the defendant.

[2] The plaintiff's claim is for £800,000 due on foot of a guarantee entered into between the parties, together with interest from the call in of the guarantee on 3 November 2009.

[3] It is the plaintiff's case that the defendant provided the plaintiff with a personal guarantee in respect of the borrowings of a limited liability company known as Euro Construction Corporation Limited and I will refer to that corporate entity as "the Corporation".

[4] On 24 September 2007 the defendant executed a personal guarantee in favour of the plaintiff in respect of present or future indebtedness to the plaintiff of the "Principal", defined in the guarantee as "Euro Construction Company limited", up to a limit of £800,000 plus interest at the plaintiff's base rate plus 2½%. I will refer to this corporate entity as "the Company".

[5] On 13 July 2009 the plaintiff made a formal demand to the Corporation for payment of loans due in the total sum of £2.7M. On 3 November 2009 the plaintiff wrote to the defendant calling upon him to pay to the plaintiff on

foot of the guarantee the sum of £800,000 plus interest in respect of the Corporation's debt to the plaintiff.

[6] The guarantee, which as noted above defines the principal debtor as the Company and not the Corporation, refers to the Company as having its registered office at 57 Crowhill Road, Waringstown, Craigavon, County Armagh, which is the home of the defendant.

[7] The defendant's replying affidavit sworn in the name of Raymond Wesley Acheson stated that the guarantee referred to the Company and not the Corporation and thus the defendant denied any liability under the guarantee for the debts of the Corporation. The defendant accepted that the Corporation was an entity to which the plaintiff may have lent money. However the defendant stated that any liability on foot of the guarantee related to the debts of the Company due to the plaintiff. There was no evidence that the plaintiff advanced any money to the Company. The evidence of the plaintiff was that the advances were made to the Corporation.

[8] The rejoinder affidavit of Seamus McGuikin, the plaintiff's Associate Director, described the guarantee as containing a clerical error in defining the principal debtor as the Company rather than the Corporation. He explained that, following the provision of the guarantee, the plaintiff continued to extend facilitates to the Corporation, that the defendant was a Director of the Corporation, that at no time did the plaintiff have a client or lend money or grant facilities to the Company and that the Corporation was registered at the defendant's home address. Thus Mr McGuikin stated that it was the clear intention of the parties that the guarantee of 24 September 2007 was provided as security for borrowings by the Corporation.

[9] Mr McGuikin referred to a subsequent facility letter of 25 February 2008. It is to be noted that this reference placed reliance upon a document that post-dated the guarantee. The letter of 25 February 2008 was sent by the plaintiff to the Corporation at the defendant's home address, set out the facilities being granted by the plaintiff to the Corporation and referred to the £800,000 personal guarantee required from the defendant. The affidavit of Mr McGuikin further referred to the Corporation having as its Directors the defendant and his wife Lynn, both of whom gave an additional guarantee in respect of the facilities offered to the Corporation. In addition, the defendant, as Chairman of the Board of the Corporation, signed off the minutes of a Board meeting which approved the contents of the facility letter of 25 February 2008.

[10] The letter of 25 February 2008 was addressed to the Directors of Euro Construction Corporation Limited (NI) and made an offer of facilities to the Corporation that also required acceptance of a further facility letter of the same date to Euro Construction Corporation Limited (ROI). The parties were

Euro Construction Corporation Limited (NI), meaning Northern Ireland, and Euro Construction Corporation Limited (ROI), meaning the Republic of Ireland. The facilities were stated to have been approved by Ulster Bank Limited and Ulster Bank (Ireland) Limited. Thus by the time of the 2008 facility letter there were four companies involved. First, Euro Construction Corporation Limited (NI), which is registered in Northern Ireland at the address of the defendant in Waringstown. Secondly, Euro Construction Corporation Limited (ROI), which was registered in the Republic (which I shall refer to as the Corporation registered in the Republic). Thirdly, Ulster Bank Limited, the plaintiff in this action. Fourthly Ulster Bank (Ireland) Limited, which had jointly approved the facilities being arranged by the letter of 25 February 2008.

[11] The letter also referred to the personal guarantee of the defendant for £800,000 and the joint and several guarantees of the two Directors, the defendant and his wife, for £60,000. It provided that notices under the agreement may be given to the Corporation at the Waringstown address for the attention of Raymond Acheson. The letter was signed by an Associate Director for and on behalf of Ulster Bank Limited and Ulster Bank (Ireland) Limited and it was also signed RW Acheson and L Acheson as Directors. In addition there was a Minute of a meeting of the Board of Directors of the Corporation where the Directors considered the facility letter and unanimously resolved that the terms of the facility letter be approved. The Minutes were signed by RW Acheson, as Chairman, who also signed a certificate of the Minutes and the resolution duly passed.

[12] The defendant filed a further affidavit in which he referred first of all to the Company as a company registered in the Republic of Ireland with an address in Dublin. A company search revealed that the Company had been incorporated on 21 April 1972 and its designation was stated to be "Dissolved". Further the affidavit from the defendant indicated that reference to the facility letter and the company approval of the facility post-dated the guarantee of 24 September 2007 and could not be relied on. In addition the affidavit referred to facilities being provided for the Corporation registered in the Republic and in addition drew attention to the facility letter relating to properties in the Republic of Ireland and to advances made in the name of Ulster Bank (Ireland) Limited.

[13] The next step in the unfolding saga was a further affidavit on behalf of the plaintiff from Frank Woods, Senior Manger, who invited the Court to construe the guarantee by reading the name stated as the Principal as being the Corporation rather than the Company because, as Mr Woods put it, "…. to do other would make no commercial or any sense". He stated that it would appear that the plaintiff had inserted the incorrect name of the principal debtor. He referred to the Company as having been dissolved in December 1986 in the Republic of Ireland.

[14] Mr Woods stated that pursuant to paragraph 2.3 of the guarantee he certified that on the date of call up, 13 July 2009, the Corporation, which he described as the relevant Northern Ireland Company, had Sterling debts to the plaintiff in the sum of £2.7M. He added that, to the extent that it is relevant, he further certified that the Corporation had Euro debts in the sum of €9M, although some of that related to Ulster Bank (Ireland) Limited. A letter dated 13 July 2009 certifying the indebtedness of the Corporation to the plaintiff, and issued to the Directors of the Corporation, quoting the registration number of the Corporation in Northern Ireland, stated that there was a balance on the overdraft facility of some £2M, a bridging loan of some £600,000 and a Home Bond of some £45,000, making up the total debt said to due by the plaintiff to the Corporation of some £2.7M.

[15] A further affidavit was then filed on behalf of the plaintiff by Dermott Mullan, Director, which set out the history of the transactions between the plaintiff, the defendant and the corporate entities. He, among others, dealt with the defendant and two companies both named Euro Construction Corporation Limited, one registered in Northern Ireland and the other in the Republic of Ireland. Initially facilities were available through the plaintiff and related to business in Northern Ireland and only involved the Corporation registered in Northern Ireland at the defendant's home.

[16] From 1 February 2006 the business of the Corporation expanded to carry out construction work and to purchase land in the Republic of Ireland. The plaintiff agreed to provide €1.7M to the Corporation in Northern Ireland to purchase a development in Drogheda. On 22 March 2006 the plaintiff granted the Corporation in Northern Ireland a further loan of €5.58M to purchase additional lands in Drogheda. Although the facilities were being provided by the plaintiff in respect of lands in the Republic as well as in Northern Ireland, the funds were being provided to the Corporation registered in Northern Ireland.

[17] The three stages referred to above were supported by the relevant facility letters completed prior to the signing of the guarantee. The first, dated 18 August 2005, referred to the facility being provided by the plaintiff to the Corporation for £2.9M for developments in Lurgan and Drogheda and a Home Bond Guarantee. Security included charges over various properties and joint and several guarantees by Raymond Acheson and Lynn Acheson for £60,000 and the assignment of a life policy on the life of Raymond Acheson. Notices under the agreement were to be sent to the Corporation at the defendant's home address for the attention of Raymond Acheson. The offer was signed as having been accepted by RW Acheson and LM Acheson. By a Board resolution for the Corporation of 8 December 2005 the facility letter of 18 August 2005 was approved by the Directors, signed RW Acheson as

Chairman who certified that the minute was correct and the resolution had been passed in accordance with the requirements of the Corporation.

[18] A further signed facility letter of 1 February 2006 between the plaintiff and the Corporation registered in Northern Ireland related to the additional €1.7M and was to the same effect, signed as before and supported by a further Board resolution for the Corporation approving the letter of 1 February 2006. Additional security related to a charge over the new purchase. On 22 March 2006 a further facility letter between the plaintiff and the Corporation related to additional facilities for €5.58M repayable on demand and if not withdrawn by 30 September 2008 to be reviewed. This letter was similarly signed and supported by a Board Resolution of the Corporation signed as before. Additional security related to a charge over the new purchase.

[19] At the same time as the Corporation was expanding its business in Northern Ireland and in the Republic, facilities were being provided by the plaintiff and Ulster Bank (Ireland) Limited to the Corporation registered in the Republic. On 26 September 2006 the banks began to deal with the Corporation registered in the Republic, which borrowed to purchase land in Drogheda. On 18 December 2006 further facilities were provided for the purchase of additional lands in County Louth. Thus additional facilities were being provided for the Corporation registered in the Republic for the purchase of additional lands in the Republic.

[20] The facility letter of 26 September 2006 was between the plaintiff and Ulster Bank (Ireland) Limited and the Corporation registered in the Republic and provided for the advance of €775,000 for the Drogheda lands, with a Board resolution from the Corporation registered in the Republic. Similarly on 18 December 2006 the facility letter between the plaintiff and Ulster Bank (Ireland) Limited and the Corporation registered in the Republic extended to an additional €3.9M for the lands in County Louth.

[21] Mr Mullan's affidavit stated that the defendant was asked to provide the plaintiff with a personal guarantee of £800,000 in respect of the borrowings of the Corporation. This sum was stated to be in effect the amount of the extension of the overdraft facility on the sterling account beyond the last signed facility letter. He also stated that the plaintiff never had any dealings with the defendant other than in relation to the Corporation registered in Northern Ireland and the Corporation registered in the Republic and that the reference to the Company in the guarantee was "a clear mis-description error" and that the guarantee clearly ought to refer to the Corporation.

[22] The plaintiff contends that this is a matter of interpretation of the guarantee. There has been a mistake and to give commercial sense to the guarantee it is necessary, according to the plaintiff, to interpret the guarantee

to refer to the Corporation and not the Company. On the other hand the defendant contends that there is not sufficient information before the Court to enable it to interpret the document to refer to the Corporation rather than Company. Further, if proceedings are to be undertaken to secure a finding that the guarantee relates to the debts of the Corporation, the defendant contends that the appropriate proceedings would for rectification of the guarantee and not by interpretation of the guarantee under Order 14 proceedings. In any event the defendant contends that there are grounds for refusing summary judgment under Order 14 as a triable issue arises from the material that has been produced.

[23] If this is to be a matter of interpretation of the document, as the plaintiff contends, there is certain information that cannot be relied on as an aid to the interpretation of the guarantee. One such source of information is the reference to the subjective intention of the parties, because it is the document that speaks and not the intention of those who are party to the document. Therefore there must be left out of account the evidence that relates to the parties intentions. The second matter that should be left out of account is the prior negotiations between the parties, although I should draw a distinction between on the one hand the background information which sets the context for the document and which is relevant to the interpretation and may be taken into account and on the other hand any prior negotiations between the parties which must be left out of account. Thirdly the exercise is to determine how the document is to be interpreted at the time it was completed and therefore subsequent events, such as the later facility letter and the record of the later Board meeting, do not assist in determining the meaning of the document at the time that the document came into existence.

[24] Investor's Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 contains at page 912G the general principles set out by Lord Hoffman in relation to the interpretation of documents –

> "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.
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> 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 reasonable 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 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 the 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 Company Limited v Eagle Star Life Insurance Limited (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 linguist mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera v Salen Rederierna (1985) AC 191 at 201 when he said:

> '…. if detailed semantic and syntactical analysis of words in a commercial

> contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'."

[25] In relation to whether a mistake has been made in connection with the meaning of words I refer to an example which arose in Vodafone Limited v GNT Holdings (UK) Limited (2004) EWHC 1526. A letter of guarantee was drafted by the plaintiff, VL, for the defendant, GNT(UK), as guarantor but the guarantee mistakenly referred to a subsidiary company known as Vodafone (UK) Limited, V(UK)L, which was not trading with the defendant, and Vodafone Connect Limited, VCL, the trading name of VL. Mr Moger QC, sitting as a Deputy Judge of the High Court, at paragraph 73 of his judgment, referred to the background knowledge reasonably available to the parties. First, all the deals GMT(UK) had ever had with Vodafone were with VL and not with VCL, that is the subsidiary company which was a shell company, or with V(UK)L, which was a holding company which did not trade with customers. At the date of the letter there was no liability of GMT(UK) to VCL or V(UK)L and none in contemplation. Secondly, VCL, to whom the letter was addressed, was the trading name of VL. Thirdly, discussions were between GMT(UK) and VL. Fourthly the purchase note which was placed with VL by GMT(UK) was the order that VLT had agreed conditionally to supply subject to the provision of the guarantee.

[26] Against that background to the Vodafone transaction it was concluded that something went wrong with the drafting of the letter. It could not have been intended by the parties to confer a guarantee on VCL for GMT(UK)'s liabilities to VCL or V(UK)L. It could not have been intended to refer to consideration in the form of V(UK)L entering an agreement with GMT (UK). To have construed the guarantee literally would have been a commercial nonsense. Moreover it was concluded that there was enough in the background circumstances to ascertain what the letter did mean. It was to be read as a guarantee of GMT(UK)'s liabilities to VL, given to VL in consideration of it agreeing to supply the 56 connections to GMT(UK) which were the subject of GMT(UK)'s purchase order.

[27] I look to the background material in the present case. The Corporation was a customer of the plaintiff and was borrowing substantial sums from the plaintiff; the defendant was a Director and a shareholder of the Corporation; the Corporation has its registered address at the home address of the defendant; prior to the guarantee the defendant on behalf of the Corporation made the arrangements for borrowings from the plaintiff; the defendant as a Director and Chairman of the Corporation approved the borrowings of the Corporation from the plaintiff; the defendant was the party to whom notices were to be given on behalf of the Corporation; the guarantee refers to the Principal debtor having its registered address at the defendant's home; the

plaintiff did not have a client by the name of the Company as specified in the guarantee; there has not been a registered corporate entity in Northern Ireland of the name referred to in the guarantee; there has been a corporate entity of that name registered in the Republic of Ireland, although dissolved in 1986; the plaintiff's lending related to the Corporation and not to the Company; the facility letters prior to the guarantee set out the development of lending facilities between the plaintiff and the Corporation and the involvement of the defendant on behalf of the Corporation; the affidavits outline the development of the relationship between the plaintiff and the defendant and the Corporation and the extension of the borrowings by the Corporation and the engagement of the defendant in that process on behalf of the Corporation and in providing security for the loans both with his wife and by his life assurance policy. The plaintiff's dealings with the Corporation registered in the Republic are not related to the present claim under the guarantee. There were no dealings between the plaintiff and the Company.

[28] Against the above background a guarantee by the defendant of £800,000 for the indebtedness of the Company does not make commercial sense. However the guarantee makes commercial sense if the reference to the Company as "Principal" is read as referring to the Corporation. There has been a mistake in the drafting of the guarantee which should be read as referring to the Corporation rather than the Company.

[29] Accordingly I am satisfied that the guarantee is effective to provide for the liability of the defendant in respect of the indebtedness of Euro Construction Corporation Limited. I am further satisfied that the Corporation was indebted to the plaintiff at the requisite date for a sum in excess of £800,000 and that the defendant is liable to the plaintiff for that amount plus interest on foot of the guarantee.

[30] In an application under Order 14 the Court will enter Judgment for the plaintiff where there is a clear case and no arguable defence, but a defendant may resist by showing cause. Mr McEwan for the defendant resists the application not only by reference to the dispute about the principal debtor being the Company rather than the Corporation. He contends that the information available to the Court is not such as would warrant an Order for summary judgment. The White Book (1999) at paragraph 14.43 states that the defendant may show cause against the plaintiff's application and may do so in the first place by technical objection and in the second place on the merits. By way of example the defendant may show an arguable defence to the claim on the merits or that a difficult point of law is involved or that there exists a dispute as to the facts which ought to be tried or a real dispute as to the amount due which requires the taking of an account or any other circumstances showing reasonable grounds for a bona fide defence.

[31] I am satisfied that there is not any arguable defence to the plaintiff's claim. The funds are shown to have been made available by the plaintiff and to be due by the Corporation to the plaintiff. The defendant was the guarantor of the Corporation's debt to a limit of £800,000. The Corporation defaulted on the loans. The guarantee was called in. The defendant has not paid on foot of the guarantee. I am satisfied that liability has been established against the defendant and that the defendant has not raised any arguable case by way of defence.

[32] There will therefore be judgment for the plaintiff against the defendant on foot of the guarantee in the sum of £800,000 together with interest from 3 November 2009 at the contractual rate of Ulster Bank base rate plus 2½%. The total judgment to date including interest will be £830,443.83.