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Judgment: approved by the Court for handing down | *Delivered:* **26/06/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN

AN DROICHEAD LIMITED

Plaintiff

and

LORCAN MACGABHANN and others,

as the Trustees of

IONTAOBHAS NA GAELSCOLAÍOCHTA

Defendants

WEATHERUP J

[1] The plaintiff claims £120,000 as due to the plaintiff by the defendants on foot of a loan made on 2 February 2009. Mr Dunford appeared on behalf of the plaintiff and Mr Lavery QC and Mr M Lavery appeared on behalf of the defendant.

[2] Scoil an Droichid is an Irish Language School in Belfast operated by trustees. The plaintiff, An Droichead Limited, is a limited liability company that owns the lands on which the school is built. The plaintiff's memorandum of association states the company's objects as being the advancement of education for children at primary and pre-primary level and for adults in the Short Strand, Markets and lower Ormeau areas and their environs in south and east Belfast called the area of benefit through the medium of the Irish Language. The defendants, the trustees for the time being of Iontaobhas na Gaelscolaíochta (InaG), are an organisation that provides funding for the promotion of the Irish language, having been set up in 2001 as an outworking of the commitment in the Good Friday Agreement to facilitate and encourage Irish medium education.

[3] The plaintiff relies on an agreement in writing dated 21 July 2008 from Sean Maguidhir of InaG to Pol Deeds of the plaintiff –

> "An Droichead has agreed to loan Iontaobhas na Gaelscolaíochta/The Trust Fund for Irish Medium Education up to £120,000 to enable it to provide accommodation for Scoil an Droichid. The accommodation – a double classroom block - has been approved by the department of education - letter enclosed - and the expenditure will be reimbursed by the department of education when the school Scoil an Droichid meets the capital grant threshold, which will happen in October/November 2008. The expenditure will be reimbursed in two tranches: the first tranche whenever the DE is satisfied that the school has met the criteria for capital grant funding - it needs to have at least 20 children in P1 in September – and the second tranche in October 2009 when the school intake increases to 118 which would entitle it to the additional classroom. The chairperson of the board of governors Scoil an Droichid has assured me that 24 children are registered for Primary 1 starting in September 2008.
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> Half of the loan will be repaid within a year and the remainder to be repaid within 18 months according to the terms of the letter of approval in the Department of Education.
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> Ionaobhas na Gaelscolaíochta is responsible for providing accommodation for Irish medium schools that have not met the capital grant threshold, however at this point in time it does not have the resources to provide the classrooms. An Droichead sees the need for this intervention to ensure the needs of the children are met and that they receive their entitlement under the educational system."

[4] InaG failed to repay the sum of £120,000 to the plaintiff. It is common case that InaG received from the plaintiff the sum of £120,000 by way of a loan in order to fund additional classrooms at the school. The defendants contends that it was a 'fundamental term' of the agreement for the loan that it would be repaid only when the Department of Education reimbursed the monies and that the plaintiff knew this would occur only when the viability criteria for grants were met and the lands were transferred. The defendants refers to the letter of 21 July 2008 and say that it should not be considered in isolation but must be considered against the full background, which includes an email of 9 June 2008 and correspondence between Dr Pol Deeds on behalf of the plaintiff and the Ulster Bank, a letter from the Department of 10 July 2008 in relation to approval of the grant aid, and a letter of 9 February 2009 from the plaintiff to the defendants confirming the loan for the accommodation where it was agreed to provide the money on condition that it be repaid as soon as the costs were paid by the Department. As the money had not been paid by the Department the defendants resists the plaintiff's claim.

[5] The personnel principally involved were Dr Pol Deeds, who since 2010 has been the Chief Executive Officer of the plaintiff and prior to that from January 2004 he was the project co-ordinator and Mr Pilib O'Ruanai, Chief Executive Officer of InaG and also Chairman of the plaintiff until 2009. Mr O'Ruanai therefore had a dual role, being involved with both the plaintiff and InaG at the time of the loan, and no question was raised about his authority to sign various documents on behalf of the plaintiff. Further Dr Deeds gave evidence on behalf of the plaintiff and no question was raised as to his authority to speak for the plaintiff after Mr O'Ruanai's departure. Prior to that date Dr Deeds and Mr O'Ruanai differed on the understanding of the corporate plaintiff as to the vesting of the lands and the grant from the Department. No evidence was given from the Department and thus the discussion of the Department's role is based on the stated belief of the parties only.

[6] The basic framework of the arrangements was this. The school required additional classrooms. The plaintiff went to the Ulster Bank to arrange a loan. A loan was provided by Ulster Bank to the plaintiff. A loan was then made by the plaintiff to InaG. The money was used to pay the contractors who built the classrooms. The intention was that the money would be recovered from the Department and would make its way back through InaG to the plaintiff to Ulster Bank.

[7] There appear to be two schemes which were considered to involve the Department. One was a vesting of the lands on which the school was built, which lands were owned by the plaintiff. It was believed by the plaintiff that a sum in the order of £2.25M would be received upon vesting of the lands and that there would a rebuilding of the school. Secondly, the Department could provide grant aid for the development of the additional classrooms and this required the title to the lands to be transferred to the school trustees with the Department being a party to the Deed. This process was also referred to as 'vesting'. There was uncertainty on the part of some of those involved as to the two schemes.

[8] It is necessary to refer to some of the background. The proposal was discussed with the bank in February 2008, the letter relied on by the plaintiff was dated 21 July 2008 but the agreement was not approved by the plaintiff until 6 November 2008 and the loan was not made until February 2009. An email of 7 February 2008 between Dr Deeds and Ulster Bank set out a proposal for funds to be advanced to make payment for additional classrooms for the school. When the school qualified for capital grant in September 2008, as was stated to be certain because of the pupil numbers, and the lands were vested by the Department, the funds would be available, within the following year or two, to repay the loan. Accordingly the plaintiff was seeking £120,000 repayable within 12 to 24 months.

[9] The scheme did not proceed at that date but on 9 June 2008 in a further email from Dr Deeds to Ulster Bank the funds were sought on the basis that the plaintiff would receive, within the following 12 to 18 months, payment of approximately £2.25M from the Department for the lands. Thus the plaintiff proposed to proceed

with a loan from the bank to finance the building of the additional classrooms at the school.

[10] An email from Mr O'Ruanai to Dr Deeds of 20 June 2008 set out a draft of a comfort letter for the bank as to the nature of the project. The email foreshadowed the form of the letter of 21 July 2008 to Dr Deeds.

[11] On 24 June 2008, by email from Dr Deeds to Ulster Bank, it was stated by Dr Deeds that he had misunderstood what the Department had agreed with the school. He outlined that the Department had agreed to reimburse the plaintiff, the school's landlord, for the additional classrooms, separate from the £2.25M associated with the vesting of the lands. Dr Deeds forwarded the letter from the chairperson Mr O'Ruanai, being the letter drafted for the benefit of the bank. At this point the understanding was stated to be that reimbursement of the funds advanced for the building of the additional classrooms was to be achieved from the Department from the grant scheme rather than from the vesting scheme.

[12] A letter from the Department of 10 July 2008 to Mr O'Ruanai at InaG stated that the Department has considered the request for funding based on pupil numbers at the school which would entitle it to one additional classroom for September. However, there were noted to be restrictions on the site and while the Department approved the provision of a double temporary classroom, the school was still in a viability period and InaG were to be responsible for providing the accommodation in the interim. Approval of the grant by the Department could not recognise the second classroom until the numbers at the school permitted.

[13] Then came the letter of 21 July 2008 from InaG to An Droichead Limited set out above.

[14] An email of 20 September 2008 from Dr Deeds to Ulster Bank attached a draft business plan and explained how the plaintiff expected to recover the amount of the loan, namely that the Department had confirmed that over the following two years they would repay the expenditure for the classrooms and that rent was also due from the Department. The email explained that the school had qualified for capital status in September 2008 because they had 20 children on the P1 roll three years in a row. Dr Deeds then stated "…. the Department must now begin the process of building a new, permanent school for us. The first stage of this involves the vesting of the land on which the school is built and which belongs to An Droichead Limited. LPS [Land and Property Services] has valued our land at £2.25M".

[15] On 4 November 2008 Mr O'Ruanai circulated to Dr Deeds and others a copy of Form V3 and a 'summary of the vesting process'. The copy of the Form V3 was stated to be an application for a grant under the relevant Order and Regulations towards the provision of a new school or the alteration of an existing school. The summary of the vesting process stated that the statutory regulations required the school premises to be vested in the Trustees of the school who were applying for the

capital grant in respect of the premises; that the Department would be joined as a party to the Deed to secure the grant; that the premises could not be disposed of without the Department's consent and repayment of the grant if required; that as soon as Building Branch [of the Department] was advised that the school was viable and recognised for capital grant aid status the vesting process would commence; that Land and Property Services would be requested to provide a valuation of the land because grant aid was limited to the LPS value or the actual purchase price, whichever was the lesser; that it was the school Trustees' responsibility to acquire the land in the first instance and claim grant aid from the Department on completion of vesting.

[16] The covering email of 4 November named the four trustees who were to hold the lands for the school. The solicitor was to be contacted and it was stated that it was assumed that he had the deeds, that is, the deeds to the lands that were to be transferred to the trustees.

[17] The summary of the vesting process drew a request for clarification from Dr Deeds to Mr O'Ruanai which read "One thing I'm not clear on… they're talking about 'grant aid', 'towards the provision of a new school, or the alteration of an existing school' - what is this, is this not the same as them giving us the value of the land to build a new school ourselves? I thought they would buy the land and they would build a new school, but that doesn't seem to be the case. They say somewhere else 'grant aid is limited and the LPS valuation or actual purchase price, whichever is the lesser' - who decides the 'actual purchase price'? There was no reply to that request for further information.

[18] Dr Deeds on behalf of the plaintiff did not consider the vesting scheme and the prospect of a payment of £2.25M for the lands to be related to the payment of the grant for the additional classrooms. However in respect of the grant from the Department 'the summary of the vesting process' specified the requirement to transfer the title to the lands to the school trustees. At that stage it was the belief of all concerned that there was also the prospect of receiving £2.25M for the lands from the Department.

[19] The issue of the grant came before the meeting of the plaintiff company on 6 November 2008, at which both Mr O'Ruanai and Dr Deeds were present. At that meeting under 'Any Other Business' the minutes record "School meets the capital grant status and vesting should be given priority and progressed swiftly. Solicitor M Flanigan has been appointed to act for An Droichead Ltd. Pol Graham will act for the school; the Trustees are agreed and legally appointed. Pilib advised how important it was to plan and prepare for the vesting/purchase which should happen around Feb/Mar '09".

[20] At this meeting the plaintiff gave approval for the overall arrangements for the borrowing from the bank and the loan to InaG, as well as the transfer of the lands, in respect of which solicitors were instructed, all of which it was anticipated

would be completed in February/March 2009. Whatever confusion there might have been about the vesting of the lands it would have been apparent that the payment of the grant by the Department required the transfer of the title to the lands from the plaintiff to the trustees of the school.

[21] The next step was the formal application to the Ulster Bank for the business loan, which was for the sum of £200,000 and completed by Mr O'Ruanai on 6 November 2008. A formal written loan agreement between the Ulster Bank and the plaintiff provided for a repayment of £200,000 within 24 months from the date on which the loan was drawn. This agreement provided for security for the loan from the plaintiff in the form of all existing security held by the bank, a first mortgage over premises in Cooke Street and a debenture on the company. The agreement was signed by Mr O' Ruanai on 12 December 2008.

[22] The cheque was issued by the plaintiff on 2 February 2009 and paid by the Ulster Bank on 11 February 2009. A letter dated 9 February 2009 from the plaintiff to the defendants written in Irish, referred to in the Defence, reads in translation -

"…. we are prepared to loan £120,000 to InaG for the accommodation for Scoil an Droichid which was provided in November 2008. It was agreed to provide this money on condition that it is repaid as soon as the costs are paid by the DE. If you wish to discuss any of the above please don't hesitate to contact me."

[23] Thereafter, a number of difficulties arose that prevented the arrangement being completed as appears to have been contemplated.

In relation to the lands at the school there were concerns about boundaries, there were issues about the siting of part of a mobile classroom, about the siting of a dining hall, about vehicular access and about financial matters, all of which conspired to prevent progress.

The Department will not pay the capital value of the lands and it appears that that was not apparent to the plaintiff until 2010. The reason is believed to be that public funds were provided for the original purchase of the lands and the Department has refused to commit further public funds to the vesting of the lands.

The plaintiff has incurred debts amounting to some £240,000. Accordingly a release of the title to the lands to the trustees of the school in order to trigger the payment of the £120,000 grant from the Department leaves the plaintiff in debt and with no assets. Mr Lavery was critical of the plaintiff for imposing conditions on the transfer, which he characterised as failing to put the interests of the children before the interests of the company. I am unable to share that criticism as the plaintiff is in a financial dilemma and it will be to the disadvantage of all if the company is not able to further its objectives.

Rents are claimed to be due to the plaintiff as owner of the school lands and there are ongoing discussions on the subject.

InaG purchased various properties and also finds itself in a difficult financial position because values have fallen and they do not have funds.

[24] The result of all this is a stalemate. The plaintiff feels unable for financial and other reasons to release title to the lands. The Department is unable to pay the grant without the security of the title to the lands. InaG does not have the funds to repay the plaintiff. The plaintiff's loan is repayable to the bank. Circumstances have arisen that were not contemplated by the parties at the time when the arrangements were made, namely that there might be no agreement to the transfer of the title to the lands to the trustees of the school as that would be seen to prejudice the plaintiff's position. What was to happen in those circumstances was not provided for in the arrangements between the parties.

[25] The starting point for the interpretation of contracts is Lord Hoffman in Investor's Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 at page 912G (**words in bold added**)–

> "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 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.
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> 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 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).

[26] The meaning of the agreement is to be ascertained on an objective assessment of the words used and the relevant background. Similarly when terms may be implied there should be an objective approach based on the terms agreed and the relevant background, the context. Thus the meaning of an agreement is not what the parties declare to be the meaning each intended but is the objective meaning based on the wording and the relevant background. Chitty on Contracts, 31st Edition at page 385 states that in considering whether to imply terms into a contract the Court is seeking to establish what the contract would reasonably have been understood to mean having regard to the commercial purpose of the contract as a whole and the relevant and available background to the transaction. The circumstances in which terms are implied into contracts have been traditionally based on business efficacy and what may be said to be the obvious intention of the parties. However a broader approach may now be taken in the light of Lord Hoffman's opinion in Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10 (**words in bold added**) -

> 17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. **The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so.** Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
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> 18. **In some cases**, however, the reasonable addressee would understand the instrument to mean something else. He would consider that **the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen.** The event in question is to affect the rights of the parties. The

> instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
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> 21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, **the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. …. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?**

[27] Mindful that the agreement in the present case did not involve a formal commercial contract I refer to the letter of 21 July 2008 which was relied on as containing the terms of the agreement. This letter was not the final step as arrangements were made after that date. However the letter continued to reflect the agreement for the loan. The first sentence "An Droichead has agreed to loan InaG £120,000 to provide accommodation for the school" identifies the nature of the arrangement, a loan, the parties, An Droichead and InaG, the amount, £120,000 and the purpose, to provide accommodation for the school. The second sentence indicates that the proposed accommodation has been approved by the Department and the expenditure will be reimbursed by the Department whenever the school meets the pupil threshold. What is apparent is the link with the Department, the approval by the Department for the proposed development of the two classrooms and the reimbursement of the expenditure by the Department on attaining of the capital grant threshold anticipated in October/November 2008. The third sentence indicates that the expenditure would be reimbursed in two tranches, the first tranche based on 20 pupils and the second tranche based on a total pupil numbers of 118. The figures reflect the conditions for the payment of the grant by the Department. The fourth sentence states that half the loan will be paid within a year and the remainder will be paid within 18 months according to the terms of the approval from the Department. The repayment is intertwined with the role of the Department. However the letter does not state expressly that there will have to be a transfer of title to the school lands before the Department will pay the grant.

[28] What was the state of knowledge of the plaintiff in relation to the transfer of the lands? The corporate mind of the plaintiff was aware of the loan from Ulster Bank to the plaintiff to InaG to pay for the additional classrooms. It was aware that the Department would reimburse the payment when the school reached the viability criteria based on pupil numbers. It was aware that the payment by the Department also required the transfer of the title to the lands to trustees. At the meeting of the plaintiff company on 6 November 2008 the scheme was approved on the basis that the plaintiff's solicitors complete the transfer of the title to the trustees.

[29] On 6 November 2008, when the scheme involving the transfer of the lands to the trustees was approved, the plaintiff believed that a sum of £2.25M would ultimately be received for the lands and therefore any anxieties about repayment of the loan may have been tempered in that light. How that might have been arranged when the title was being transferred to the trustees was not considered. Nor did the plaintiff consider what would happen if there were to be no transfer of the lands to the trustees to secure the grant. At that time it was the intention of the plaintiff to make the transfer of the lands to the trustees. Circumstances have arisen that were not contemplated and to that extent the terms of the agreement might be said to be incomplete.

[30] The agreement does not expressly provide for what is to happen in the events that have happened. The usual inference is that nothing is to happen because had the parties intended something to happen the agreement would have said so. This is the plaintiff's position and would result in InaG being required to repay the loan as the viability of the school has been established. On the other hand the defendant's position is that the only meaning consistent with the agreement and the relevant background is that the repayment by InaG is subject to payment of the grant by the Department upon the transfer of the lands to the trustees.

[31] Much was made of the defendants' reference to it being a 'fundamental term' of the agreement that repayment was conditional on viability and vesting. The use of this expression does not add to the argument. What was reasonably contemplated by this scheme was repayment by InaG when the Department paid the grant. The repayment by the Department was subject to the transfer of the lands to the trustees and the Department having the security of the title to the lands. The Department has not paid without that security.

[32] It was contended on behalf of the plaintiff that they would not have made the loan had they known of the circumstances that have now transpired. Of course, the plaintiff would not have lent the money to InaG had they known in advance what would happen. Nor would the defendants have taken the loan if they had known in advance that they might have to repay without having recovered the money from the Department.

[33] I conclude that the loan is repayable by InaG upon payment by the Department upon the transfer of the lands to the trustees. This is what the plaintiff agreed when the arrangements were approved at the plaintiff company meeting on 6 November 2008. I am satisfied that this is the conclusion that accords with the question - is that what the agreement, read as a whole against the relevant background, would reasonably be understood to mean?

[34] The plaintiff emphasises that an implied term has to be reasonable and equitable, give business efficacy to the contract, be obvious, capable of clear expression and must not contradict any express term. These factors must be read

subject to the overarching approach in Attorney General of Belize. In that setting the factors have been taken into account in reaching a conclusion on the interpretation of the agreement.

[35] There will be judgment for the defendants.

[36] Is mór an trua gur cheart na cistí teoranta atá ar fáil le haghaidh oideachais trí mheán na Gaeilge a chaitheamh ar imeachtaí dlí idir iad siúd a roinnt ar an cuspóir an teanga Gaeilge a chur chun cinn.