AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2019:000027

O'Donnell J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.

BETWEEN/

DEFENDER LIMITED

PLAINTIFF/APPELLANT

AND

HSBC FRANCE (FORMERLY HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED)

DEFENDANT/RESPONDENT

AND

RELIANCE MANAGEMENT (BVI) LIMITED, RELIANCE INTERNATIONAL RESEARCH LLC, FIMAN LIMITED AND DAVID WHITEHEAD

THIRD PARTIES

Judgment of O'Donnell J. delivered on the 3rd day of July, 2020.

I - Introduction

A. Background

1. On 3rd April, 2007, the appellant, Defender Limited ("Defender"), was incorporated. Three weeks later, it appointed Reliance Management (BVI) Limited as its investment manager. On 3rd May, 2007, Defender agreed with the respondent herein, HSBC Institutional Trust Services (Ireland) Limited ("HSBCITS"), that HSBCITS was to act as Defender's custodian for the purposes of investment. On the following day, 4th May, 2007, HSBCITS in turn entered a sub-custodian agreement with Bernard L. Madoff Investment Securities LLC ("BLMIS"). Between May, 2007, and 11th December of the following year, Defender invested more than US$502m through HSBCITS and BLMIS, an investment which was worth US$540m by December 2008. During that period, it received redemptions of US$93m.

2. BLMIS was a company, the sole shareholder of which was Bernard L. Madoff, and which had been incorporated in 2001 to carry on the business previously carried on by him as a sole proprietor. Mr. Madoff was, at this time, a highly successful businessman in financial markets in New York. The business of BLMIS consisted of market making, proprietary trading, and investment management. The market making and proprietary trading businesses were genuine and successful. The investment management business was a large and sophisticated Ponzi scheme that collapsed on 11th December, 2008, when Bernard Madoff was arrested. The liquidation of BLMIS was commenced the following day in the United States Bankruptcy Court for the Southern District of New York. Irving Picard was appointed trustee under the Securities Investor Protection Act 1970 ("SIPA").

3. On 2nd March, 2009, a claim was lodged by HSBCITS, on behalf of Defender, in the bankruptcy proceedings. On 5th December, 2010, the trustee commenced a claim against Defender seeking the return of $93m which had been redeemed, contending that those payments were a preference of Defender over other creditors. On 23rd March, 2015, the trustee and Defender, along with Reliance and others, entered into a comprehensive settlement agreement. Defender's claim in the bankruptcy was to be allowed in the sum of US$522,840,000.00, made up of US$441m (being Defender's net equity) plus 88% of the US$93m sought by the trustee. By Clause 3 of the settlement agreement, the trustee dropped any claim of fraudulent preference or otherwise against Defender, while under Clause 4 of the same agreement, Defender likewise dropped and abandoned all claims in tort or breach of contract against the Trustee and BLMIS. It will be necessary to return to this agreement in greater detail, but it is common case that it is this release of any claim against BLMIS (and not the release of any claim against the trustee, or the receipt of the substantial payments pursuant to the allowance of the customer claim by the trustee) which grounds HSBCITS's contention under s. 17 of the Civil Liability Act 1961 ("the CLA" *or* "the Act") which was accepted in the High Court. HSBCITS does indeed rely on the entire agreement as constituting the rendering of an agreed substitution for damages under s. 16 of the Act, a claim which the High Court did not determine, and which HSBCITS repeats on this appeal. By October, 2019, the trustee had returned approximately US$349,000,000.00 to Defender. Defender anticipates that it will recover 75% of its claim through the bankruptcy. HSBCITS considers that the outcome may be even more positive, and could result in a 100% repayment.

4. In November, 2013, Defender commenced these proceedings against HSBCITS, contending that it was negligent in failing to identify that the structure of BLMIS facilitated fraud and also that, as custodian, HSBCITS was vicariously liable for the wrongful acts of the sub-custodian. Three months later, Reliance and other named persons were joined by HSBCITS as third parties. On 30th October, 2018, the trial commenced. At that point, the claim was for US$141m, being the balance which Defender contended was due to it by BLMIS, and which it had not and was not likely to receive, although Defender agreed it would give credit to HSBCITS for any further monies received in the bankruptcy.

5. After hearing opening addresses on behalf of both the plaintiff and defendant, the trial judge raised the possibility that some of the issues, particularly those relating to ss. 16 and 17(2) of the CLA, which had been raised by way of defence by HSBCITS, might, if decided, be capable of determining the proceedings. Since, essentially, these were issues of law, it might be appropriate to address those issues as preliminary issues at the outset of the proceedings. If the issue was decided in favour of HSBCITS, then it would effectively terminate the proceedings and thus avoid a lengthy (and, on this view, completely unnecessary) hearing. If, however, Defender succeeded, the case would proceed and would not be adjourned to permit an appeal. On that basis, it appeared to the judge that it was a sensible use of court time to hear and determine the issue arising under ss. 16 and 17(2) of the CLA. Limited evidence was heard, submissions were made, and on 4th December, 2018, with commendable speed, the judge delivered a judgment holding that HSBCITS was entitled to succeed on its plea under s. 17(2). Moreover, it

provided a full defence to the damages claim made by Defender. It was not accordingly necessary to decide the s. 16 issue.

6. The trial was adjourned to permit an appeal of this decision. Defender also intimated an intention to, in the event that the interpretation adopted by the trial judge was upheld, challenge the constitutionality of s. 17(2), perhaps in the existing proceedings. Defender also brought a motion that the trial judge recuse himself from a further hearing. The trial judge adjourned that motion generally, pending the outcome of the appeal, as it was not apparent to him that there would be a full hearing, or that he would be assigned to hear it. That decision was upheld on appeal. HSBCITS was awarded the costs of the preliminary hearing, but not of the proceedings. Defender had maintained, and the High Court judge agreed, that the outcome of the preliminary issue disposed of the damages issue, but did not determine the entire proceedings since Defender maintained that they claimed for a declaration and a claim for restitution. HSBCITS has cross-appealed in respect of this determination, contending that the outcome of the proceedings determined the case, and that the Court ought accordingly to have dismissed the proceedings and awarded HSBCITS the costs of the proceedings.

B. The Judgment of 4th December, 2018

7. The trial judge delivered a succinct judgment, setting out very clearly the steps leading to his conclusion. In essence, that reasoning appears to be as follows:

(i) That as the matter was a preliminary issue, it should proceed on assumptions most favourable to the plaintiff's claim, taking that claim "at its height";

(ii) For that purpose, HSBCITS must be assumed to be negligent, and BLMIS guilty of fraud;

(iii) BLMIS and HSBCITS were to be treated as concurrent wrongdoers under s. 11 of the CLA, in that Defender's claim against both parties was for the same loss and same damage;

(iv) In that regard, it was relevant that "HSBC" was also a victim of the Madoff fraud (HSBCITS accepts that this was a different HSBC entity);

(v) That having regard to the evidence in relation to the law of New York, the agreement between Defender and the trustee in bankruptcy was complete and certain and therefore amounted to an accord and settlement for the purposes of s. 17 of the CLA;

(vi) That the settlement did not intend to discharge the other wrongdoer (in this case, the assumed wrongdoer HSBCITS) and therefore s. 17(1) was inapplicable;

(vii) However, ss. 17(2) and 35(1)(h) were applicable and, accordingly, Defender was to be identified with the acts of BLMIS for the purposes of contributory negligence in any proceedings against the other wrongdoer: in this case, HSBCITS;

(viii) The law of New York did not determine, and was not relevant to, the apportionment of responsibility between concurrent wrongdoers, which was a matter of Irish law;

(ix) Defender was, pursuant to ss. 17(2) and 35(1)(h), to be identified with the fraud perpetrated by Bernard Madoff which, for example, included the forging of 46 million fake transactions between 2000 and 2008;

(x) The relevant amount with which Defender was to be identified was the third of the possibilities contemplated in s. 17(2), that is the extent to which BLMIS would have been liable to contribute if Defender's total claim had been paid by the other wrongdoer HSBCITS, as this was the highest of the three possible figures contemplated in s. 17(2);

(xi) The question of the extent to which BLMIS would have been liable to contribute if Defender's total payment had been paid by the other wrongdoer, HSBCITS, required the court to conduct a hypothetical exercise as to the apportionment a court would make in a contribution claim by HSBCITS against BLMIS;

(xii) The determination of the liability of one wrongdoer to make contribution to another had to take account of the extent and sophistication of the Ponzi scheme which had remained in existence for at least 17 years and had not been discovered by any regulatory authority or any third party custodian or investor;

(xiii) The contribution between concurrent wrongdoers was to be determined by the test set out at s. 21(2) of the CLA, that is such amount as may be found by the court to be just and equitable having regard to the degrees of the contributor's fault, which meant the blameworthiness of their respective causative contribution to the accident; s. 21(2) expressly contemplated the possibility that such a contribution may amount to a full indemnity;

(xiv) It was relevant in this regard that "HSBC" (see comment at subpara. (iv) above) had invested US$1 billion of its own money with BLMIS in the same way as Defender and was likely to fail to recover 25% of that sum;

(xv) There was a qualitative difference between the criminal wrongdoing (fraud) of which BLMIS must be assumed to be guilty, and the assumed negligence of HSBC and/or HSBC's assumed vicarious liability for the wrongdoing of BLMIS;

(xvi) The difference was best illustrated by the decision of the High Court of Australia in *Burke v. LFOT Pty Limited* [2002] HCA 17, (2002) 209 C.L.R. 282 ("*Burke*"). There, the Australian High Court held that it would be "absurd" (*per* McHugh J., at para. 59) if a fraudulent property company were able to obtain contribution from a negligent solicitor since that could lead to the wrongdoer positively benefiting from the wrongdoing. The measure of damages in the case was the difference between the true value of the property and the price wrongly paid as a result of the fraudulent or wrongful misrepresentations of the defendant. If the fraudulent party

could obtain contribution from the negligent party, that would mean that the fraudulent vendor would obtain more than the property was worth. Accordingly, it was only appropriate in such a case that a contribution of 100%, amounting to a full indemnity, should be ordered in favour of the negligent solicitor;

(xvii) It would similarly be absurd in this case if BLMIS were, even hypothetically, found to be entitled to any contribution from HSBCITS;

(xviii) Even if the court was wrong in this regard, it could not envisage circumstances where HSBCITS could be found more than 25% liable, which the court considered would be necessary if the proceedings were to be successful;

(xix) While it might appear unfair that an innocent plaintiff would get less than what he felt to be his full damages, the outcome was a necessary consequence of the policy of the Act to encourage settlement of claims. There were other examples, such as the "1% rule" (per the High Court judge in this case at para. 132), where the CLA achieved results which might not appear just and equitable;

(xx) Defender ought to have been aware of the consequences of its decision to settle with BLMIS for at least 75% of its loss;

(xxi) Accordingly, BLMIS would be liable to contribute 100% of Defender's claim, and Defender was identified with that amount as contributory negligence which accordingly amounted to a total defence to Defender's claim for damages.

8. Defender appealed to the Court of Appeal, but also brought an application for leave to appeal to this Court pursuant to Article 34.5.4o of the Constitution for a leapfrog appeal. HSBCITS accepted that the issues met the appropriate constitutional terms and that the appeal appeared to involve issues of general importance. HSBCITS sought leave to cross-appeal on the High Court's order as to costs. By Determinations of 17th June, 2019, and 31st July, 2019, this Court granted leave to Defender to appeal on specified points, and granted leave to HSBCITS to cross-appeal.

9. The issues identified by the parties to arise are the following:

(i) Whether the Civil Liability Act requires a purposive interpretation;

(ii) Whether HSBCITS and BLMIS are concurrent wrongdoers vis-à-vis Defender;

(iii) The true interpretation of the CLA and, in particular, ss. 11, 17(2), 21(2) and 34 and 35(1)(h);

(iv) The extent of any reduction of Defender's claim pursuant to s. 17(2) of the CLA either by reason of the application of the deemed apportionment of liability as the trial judge found, or by reason of the operation of a contractual indemnity as HSBCITS also contends;

(v) The possibility of s. 16 of the CLA also providing a defence to HSBCITS; and

(vi) HSBCITS's cross-appeal.

10. The issue raised in this case is net, but difficult. It involves the interpretation of some rarely invoked and complex provisions of the Civil Liability Act relating to concurrent wrongdoers. It is, however, necessary to clear away some of the issues of both fact and law to allow a closer focus on the difficult question which is presented by this case.

II – Clarification of Issues Arising

11. In the course of case management of this appeal it was possible to agree on the clarification of a number of matters arising from the High Court judgment in order to allow a clear focus upon the difficult issues of interpretation which arise. First, it is apparent that there are a number of matters in the judgment which, though not central, require to be identified and clarified. In the first place, it is accepted by both parties that it is incorrect to refer to HSBCITS as having, itself, invested US$1 billion of its own money with BLMIS and, accordingly, standing to lose all but 25% of it. That particular investment was by another HSBC company. More importantly, it is accepted that even if HSBCITS was, itself, a victim of BLMIS's assumed fraud that such a situation would be entirely irrelevant to the question raised in the application and this appeal. The section must operate in the same way whether or not HSBCITS might have any separate claim against BLMIS arising out of its dealings with the company and its Ponzi scheme.

A. Contribution Action

12. This is an important point, and one worth emphasising. The issue in this case is not the respective legal rights and duties of the range of players in this complex legal drama, such as HSBC and its subsidiaries, Defender, BLMIS, Bernard L. Madoff himself, and Mr. Picard as the trustee in bankruptcy of BLMIS. The issue here is related solely to the issues that follow once it is accepted that the claim made by Defender is wholly, or even in part, that (to put it at its simplest) HSBCITS was negligent in failing to advise Defender of the risk of fraud by BLMIS, or taking steps to protect Defender against such fraud, resulting in such loss and damage to Defender when that fraud occurred necessarily meaning that, vis-à-vis Defender, HSBCITS and BLMIS were, on this claim, concurrent wrongdoers at least in respect of the damage alleged to flow from the fraud. It is this that gives rise to the possibility of a claim by one against the other for contribution under the CLA.

13. The nature of what I think can be usefully described as a CLA contribution claim is important. It is a separate cause of action which, while intended to be capable of normally being conducted within the original proceedings by simple pleadings which may themselves extend no further than the delivery of a third party notice, or a notice of indemnity in contribution, is nevertheless capable of being conducted as separate proceedings with fully developed pleadings. The cause of action is not, however, related to anything that either concurrent wrongdoer is alleged to have done to the other. It relates instead to what one concurrent wrongdoer claims the other concurrent wrongdoer did to the plaintiff.

14. If we take those well-worn models of Plaintiff ("P") and Defendants 1 & 2 ("D1" *and* "D2"), it is possible to conceive of the claim as representing three points of triangle, with the plaintiff at the top. There are, however, only two lines connecting the points of the triangle: those which connect P to D1, and P to D2, respectively. Indeed, it is not necessary that proceedings be commenced by P against both D1 and D2 since the possibility of a contribution claim can arise once the nature of the case gives rise to the possibility of the connection between P and D1, and P and D2, respectively.

15. It is, however, quite possible and likely in a complicated transaction that there would be other possible claims between D1 and D2 outside the context of the CLA, such as those arising as a matter of contract or by reason of operation of law. However, the distinct feature of a CLA contribution claim is that, irrespective of any other legal relationship between D1 and D2, it allows either or both, once sued, to make a contribution claim against the other and thus fill in the third line at the base of the triangle: that is, the line between D1 and D2.

16. This seems so obvious to modern eyes, and particularly to those used to the resolution of claims arising from accidents with multiple parties, that the significance of the statutory establishment of the contribution claim is sometimes overlooked. Prior to the statutory creation of a contribution claim between joint tortfeasors, it had been held that a contribution claim at common law was prevented by the operation of the *maxim ex turpi causa non oritur actio.* The fact that a contribution claim could only be brought by, and maintained by, a defendant determined to be guilty of wrongdoing was seen as fatal.

17. The claim made between D1 and D2 does not, as already observed, relate to anything which D1 or D2 did to each other. Once D1 is sued, he or she is entitled to make the claim that he has satisfied the P's claim, or is obliged to satisfy it, and accordingly claim contribution from D2 because it is contended that D2 was also the cause, wrongfully, of damage to P. Of course, the same can be said in reverse if D2 is also sued. The contribution claim therefore involves D1 making P's case against D2. Returning to the example of the triangle, a claim is made by P against D1. The content of the line D1–D2, that is the contribution claim, is the same content as that of the line P–D2. Thus, although the bringing of a contribution claim completes, as it were, the triangle (and it may be a double line if D2 makes a corresponding contribution claim), the liability issue is only ever that contained in the original lines: P–D1 and P–D2.

18. In the simplest case, where by definition the parties meet by accident, this may indeed be the only legal relationship between all three. In more complex cases, there will often be other claims arising from the pre-existing relationship of the parties. Accordingly, it is conceivable that other claims will arise between the defendants which would be sought to be tried alongside the plaintiff's claim against the defendants, some of which may give rise to claims for indemnity or contribution. In the simplest case, this will arise where one defendant claims a right to contractual indemnity from the other in respect of the claim brought against the first defendant. Such claims are not, however, controlled by the CLA, and, for example, the time limits for contribution claims under the CLA do not apply to

such claims. A CLA contribution claim arises once the claim made by the plaintiff gives rise to the possibility that there are concurrent wrongdoers (whether sued by the plaintiff or not) and allows the defendant sued (in this example, D1) to, at least provisionally, conscript the plaintiff's claim against D2, whether made by the plaintiff or not, to attempt to obtain contribution from D2. The complex mechanism of the CLA, insomuch as it deals with concurrent wrongdoers, is designed to manage the possibility of such claims. While the Act, on occasion, takes account of the existence of the possibility of other claims by D1 against D2 (such as the claim which must be considered here: that the existence of contractual indemnity prevents a claim for contribution from HSBCITS under s. 21(1) of the CLA), the focus of the Act is on the manner in which a CLA claim arises, may be made, and may be resolved.

19. It has been necessary to labour this point because I think it is central to an understanding of the Act and of the issues which arise to be determined here. It also illustrates why it is irrelevant whether HSBCITS (or anyone else in the HSBC Group) was also a victim of a BLMIS fraud. Further, it also explains why it is irrelevant that Defender has agreed that there must be what is described as a "dollar for dollar" reduction of the claim made by Defender against HSBCITS in respect of all monies received by it from the trustee in bankruptcy under the settlement of the SIPA claim. That corresponding reduction in the claim made against HSBCITS arises because the receipt of the monies has the effect of reducing Defender's loss. It is something that would have to be done even if there was no possible claim against BLMIS. Accordingly, although the prospective receipt by Defender of up to 75% of its customer claim looms large in these proceedings, and, it may be said, even larger in real life, given the amounts involved, it is the separate possibility of a (probably valueless) claim against BLMIS that brings this matter within the scope of Part III of the CLA dealing with the liability of concurrent wrongdoers, and it is the release of that claim which is alleged to have the consequences for the claim alleged by HSBCITS pursuant to its interpretation of s. 17 of the Act.

B. Extent of Liability to be Proven at Preliminary Hearing

20. A related point is that it is now accepted that the High Court judgment was not correct to consider that it would be necessary for Defender to establish that HSBCITS was more than 25% liable for the loss suffered by Defender if it was to succeed in the proceedings. On the contrary, on the assumption that Defender recoups 75% of its loss through the allowed customer SIPA claim from the trustee in bankruptcy, it could not recover from HSBCITS more than 25% of its loss even if a court concluded that HSBC's proportionate share of liability to Defender *vis-à-vis* BLMIS was more than that figure. For reasons which will become apparent, the parties accepted on this appeal – correctly, I consider – that even if HSBCITS is correct on the interpretation of the CLA, it would only succeed on the preliminary issue if it established that there was no possibility of any apportionment of liability between BLMIS and HSBCITS other than 100%/0%. If there was even a possibility of finding that HSBCITS was 1% responsible *vis-à-vis* BLMIS, then, even on the interpretation advanced by HSBCITS, Defender would be entitled to proceed with the action.

21. In relation to those issues set out at para. 9, it is, I think, not in dispute, at least in respect of any claims for loss of the value of the investment, that BLMIS and HSBCITS must be considered concurrent wrongdoers *vis-à-vis* Defender for the purpose of this issue. It may be the case that the SIPA claim in bankruptcy is to be treated as a separate claim to any claim for damages in tort or contract, at least for the purposes of the operation of Part III of the CLA concerning concurrent fault, although I would not so determine definitively since this issue was not argued and the trustee in the bankruptcy was not a party. It was also argued by Defender that there were certain claims which it can make against HSBCITS, such as a claim for recovery of fees paid, and restitution for unjust enrichment, which, again, do not fall immediately under Part III of the CLA, and that part of its claim against HSBCITS arose from advice given before the investment was made. However, it cannot be seriously doubted that, when analysed, the claim against HSBCITS for negligence and any claim against BLMIS for fraud would relate to the same damage, and that therefore BLMIS must, for these purposes, be considered a concurrent wrongdoer with HSBCITS, at least for the purposes of analysis of the operation of Part III of the CLA.

22. Finally, it is apparent that, while set out in separate headings, the appeal concerns the true interpretation of Part III of the CLA and, in particular, the provisions of ss. 11, 16, 17, 21, 34 and 35. It may be useful to address those provisions in a little more detail and then explain how, on the facts of this case, it is claimed by each party that the provisions should be interpreted, and applied.

C. Case Management Concerns

23. Before doing so, it is necessary to address one further matter. It is apparent that the judgment is replete with references to the importance of case management and contains some critical observations on the practices of lawyers and parties in relation to litigation. I completely agree that trial courts are not passive observers of litigation, and have to manage litigation effectively, but it remains the parties' litigation, which the court is managing. Thus, a court can: readily fix time for the delivery of pleadings and the identification of issues; insist upon clarity in what is and is not alleged; encourage realism in that regard by indicating there will be consequences in costs for unnecessarily raising or contesting issues; limit the length of submissions and, in some cases, the number of expert witnesses; and insist on realistic estimates of the time to be taken. Experienced trial judges can insist on realism where it is lacking, require efficiency, and encourage practicality.

24. But there is no reason to deprecate private parties seeking to litigate claims in courts when they cannot resolve them otherwise. That is, indeed, a core function of the administration of justice. An important part of the administration of justice is that a party, in particular the losing party, should believe that his or her case was fairly ventilated and considered. That does not mean that, in some cases, a judge may not consider that it is necessary to determine that an issue which one party seeks to raise does not properly arise in the case, or may not intervene to direct that an issue be determined where there is a clear benefit in doing so and a real likelihood that it may determine the proceedings

or, at least, considerably shorten them. But in such a case, a judge must have a high degree of confidence that he or she is right in the only sense of that word which has meaning in the context of litigation: that is, that such a decision will likely be upheld by the appellate courts.

25. Here, there were undoubtedly important issues of law which arose in respect of the Civil Liability Act claims, in particular the two interpretations of ss. 16 and 17, which HSBCITS maintained had the effect of defeating Defender's claim. These contentions were, however, to a greater or lesser extent, dependent on the determination of certain facts. There was an important indicator that HSBCITS had neither sought to have any of these issues tried as a preliminary issue in advance of the trial nor suggested that there should be a modular trial in which some or more of these issues would be tried at the outset.

26. It is normally the case that defendants who consider that they have good points which may dispose of a case entirely, whether as a result of legal argument, or supplemented by minimal findings of fact, should seek to have those matters determined in advance of the trial, since they stand to benefit substantially from the saving of costs involved and, also, the avoidance of possible risks involved in the critical scrutiny of their conduct.

27. Here, HSBCITS, advised by experienced lawyers, did not take this course. One possible explanation for this is that suggested by one reading of the judgment of the High Court, that, facing a massive law suit and the certainty of other claims in other jurisdictions, HSBCITS was nevertheless determined to follow a course that would waste its own money and expose its practices and witnesses to critical scrutiny with the prospect of adverse findings and comments, or, although the second biggest bank in the world at the time, HSBC was unable to detect that its lawyers' advice not to bring such a claim (if such was given) was coloured by self-interest.

28. This is, I suppose, a possibility, but it must reside at the outer ends of the spectrum of plausible reasons why HSBCITS did not take this course. Nor do I think the High Court judgment should be understood as so suggesting. It is more likely that HSCBITS made a calculation that, on balance, there was a real risk a preliminary application would not succeed and deliver a knock-out blow to the claim, and that, if it failed entirely on legal grounds, it would be positively damaging to HSBCITS's interests since it would remove a potential defence to the claim and a significant bargaining chip in any settlement negotiations. To try any issue on this basis, when the plaintiff's case must be taken at its highest, may have been to set the hurdle unnecessarily high from the Defendant's point of view when, in a matter of weeks, at the close of the trial, it would be reduced to more manageable proportions. This, after all, is why the plaintiff did not resist the suggestion. Counsel for Defender frankly informed the court that they considered that this was quite a propitious basis upon which to address the issues under the Act.

29. In any event, if this was indeed why HSBCITS did not bring any application, it was correct. The result of this appeal is that the decision of the High Court in this regard must be overturned and time and money which it was thought would be saved by this course has, instead, been lost. This in itself is unfortunate, but perhaps one more example of the

twists and turns of litigation. In this case, the question of the desirability of determining this issue in advance, or the likelihood that such determination might terminate the proceedings, was not assisted by considerations of the merits of case management or observations on the practices of parties and their advisers.

III - The Civil Liability Act Part III – Concurrent Fault, ss. 11-46.

A. Background to the Civil Liability Act

30. The Civil Liability Act was, undoubtedly, a considerable innovation when introduced in 1961. The assistance of a distinguished academic lawyer, Professor Glanville Williams, was publicly acknowledged at the time of the introduction of the legislation. The Act is plainly very closely modelled on the draft statute appended to Professor Williams's work: *Joint Torts and Contributory Negligence* (Steven & Sons, 1951).

31. The Act has received some extravagant praise as a "thorough and incisive analysis by a legal expert of world renown who took full account of the strengths and weaknesses of statutory reforms in other jurisdictions" (B.M.E. McMahon, and W. Binchy, *Law of Torts*, 4th edition, 2013, p. 814) ("McMahon and Binchy"), and some judicial criticism:- "a very difficult and sometimes impossible Act to construe" *(Lynch v. Lynch*, (Unreported, High Court, Murnaghan J., 24th November, 1976)). Both comments have merit. The Act was, itself, a substantial advance and a significant achievement of scholarship in conceiving a sophisticated mechanism to ensure, so far as possible, that complex litigation was capable of being resolved, and compromise of such litigation encouraged, against the background of inadequate and sometimes perverse common law rules.

32. However, the Act is now 60 years old and its intellectual genesis, in Professor Williams's work, is older still. It might be said that it concerns litigation, the model of which comprised simple private law claims in the mid-20th century in which all parties were within the jurisdiction and solvent. Professor Williams's work was published at a time when the decision in *Donoghue v. Stevenson* [1932] A.C. 562 could still be regarded as relatively youthful, so that the Act, for example, made specific provision under s. 34(2)(i) that the fact of reasonable possibility of examination after an item was parted with by a defendant should not mean that the defendant owed no duty of care to the ultimate user in relation to it. The scheme of the Act was devised, therefore, at a time when litigation was simpler, all parties were normally within the jurisdiction of the courts, and before the vast expansion of private law and, in particular, the law of negligence – such as encompassing claims for nervous shock, liability for negligent misstatement, and wrongful acts of third parties – where economic torts were a small and relatively limited field. It might also be said that the CLA functions best when all parties are solvent, and concerned only with the resolution of the issue of liability, and where quantum is fixed or reasonably easily quantified within predictable limits.

33. The scheme of the legislation begins perhaps to show its age when applied to the complexities of modern litigation. In *Hickey v. McGowan* [2017] IESC 6, [2017] 2 I.R. 196, I pointed out that the contributory negligence provisions, and, in particular, the identification of the plaintiff with the acts of a defendant against whom a claim was statute-barred under s. 35(1)(i), were capable of operating clumsily, and arguably

unfairly, in certain contexts, particularly within the expanded law of vicarious liability. It is also apparent that the provisions at issue here can operate somewhat mechanically in achieving haphazard, and sometimes surprising, results.

34. It is highly desirable that the Act, which has given considerable service in its lifetime, should be revised, rather than let become an antique, ideally with the same diligence and comprehensive knowledge that Professor Williams brought to bear 70 years ago. The Act has been the subject of very helpful annotation and explanation in successive editions of the work first authored by Anthony Kerr and the late Professor James Brady, (A. Kerr, *The Civil Liability Acts* (Round Hall, 5th ed, 2017)) which has advanced understanding of the Act considerably. But further commentary and analysis and a more comprehensive review – perhaps under the auspices of the Law Reform Commission – is surely timely. It is inevitably the case that the courts have occasion to identify flaws and problems in legislation which require attention and where remedial action is, however, slow or non-existent. It should be recognised, however, that failure to make timely amendments to a scheme may have a consequence that the operation of legislation, perhaps in unusual and highly particular circumstances, may be found to be inconsistent with the Constitution with the result that a provision which may operate fairly and effectively in the majority of cases is struck down with consequent damage both to the scheme and to the balance which it seeks to effect between litigants.

B. Sections Relevant to the Case

35. S. 11 of the Act provides for the definition of a concurrent wrongdoer as one of two or more persons responsible to the plaintiff for the same damage. Importantly, this section extends the scope of concurrent wrongdoing beyond tortfeasors and includes persons responsible by vicarious liability and other wrongdoers, including those guilty of tort, breach of contract, or breach of trust.

36. S. 12 of the Act is of tangential relevance to these proceedings, but is, however, central to an understanding of the Act. It provides that, subject to ss. 14, 38, and 46 (which provide for the possibility of a separate judgment, either by agreement (s. 14), or where the plaintiff is guilty of contributory negligence (s. 38), or in admiralty actions (s. 48)) concurrent wrongdoers are each liable to the plaintiff for the whole of the damage in respect of which they are concurrent wrongdoers. It should be noted that ss. 14 and 38 can be said to be provisional separate judgments, since both sections permit the plaintiff (or party entitled to contribution), on proof of an inability to recover against one wrongdoer, to seek a secondary judgment against the remaining wrongdoers.

37. S. 12 was the provision challenged in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321 ("*Iarnród Éireann*"), since it was the foundation of what is colloquially known as the "1% rule", of which the plaintiff in the proceedings complained. As Keane J. (as he then was) in the High Court observed, however, that section was only declaratory of the common law going back at least as far as the early 17th century and *Heydon's* Case (1612) 11 Co. Rep. 5., 77 E.R. 1150. The important innovation of the CLA was, therefore, not to make provisions for this rule, but rather to build upon the provisions of the Tortfeasor's Act 1951 and reverse the principle in *Merryweather v. Nixan* (1799) 8 T.R. 186, 101 E.R

1337: namely, that if one defendant in tort satisfied the plaintiff's judgment, or was the subject of execution by the plaintiff for the judgment, he or she could not, however, recover any contribution from the other defendant. This was a result which, as Keane J. observed, was remarkably harsh and derived, perhaps, from a strict application of the *maxim ex turpi causa non oritur actio*, a maxim that had indeed also led, in part, to the unsatisfactory development of the defence of contributory negligence, something which the Act also modernised.

C. Section 16: Satisfaction and Discharge

38. S. 16 of the CLA is invoked by HSBCITS in these proceedings. It provides:-

> "16.–(1) Where damage is suffered by any person as a result of concurrent wrongs, satisfaction by any wrongdoer shall discharge the others whether such others have been sued to judgment or not.
>
> (2) Satisfaction means payment of damages, whether after judgment or by way of accord and satisfaction, or the rendering of any agreed substitution therefor.
>
> (3) If the payment is of damages, it must be of the full damages agreed by the injured person or adjudged by the court as the damages due to him in respect of the wrong; otherwise it shall operate only as partial satisfaction.
>
> (4) An injured person who has accepted satisfaction from one alleged to be a wrongdoer, whether under a judgment or otherwise, shall, in any subsequent proceeding against another wrongdoer in respect of the same damage, be estopped from denying that the person who made the satisfaction was liable to him; and the liability of such person shall be conclusively assumed for the purpose of the said proceeding: but the injured person may litigate in the said proceeding any question of law or fact relative to the liability of the defendant to such proceeding, other than the question whether or not the said satisfaction was made by one liable to the injured person."

39. In this case, it was contended by HSBCITS that, while BLMIS had not paid any damages to the appellant, still less full damages, nevertheless, an interpretation of the settlement agreement with the trustee in bankruptcy led to the conclusion that the settlement was the rendering of an agreed substitution for damage and, accordingly, constituted satisfaction by BLMIS, discharging HSBCITS.

40. S. 17 of the CLA is the section central to the trial judge's determination. It provides:-

> "17.–(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
>
> (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other

wrongdoers in accordance with paragraph *(h)* of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.

(3) For the purpose of this Part, the taking of money out of court that has been paid in by a defendant shall be deemed to be an accord and satisfaction with him."

D. Section 17: The Contribution & Identification Scheme

41. S. 17 introduces the concept of identification of the plaintiff with the settling defendant. The plaintiff's claim against the remaining defendant is not discharged, but the plaintiff is identified with the settling defendant/wrongdoer and the claim is reduced by one of three amounts: the amount of the settlement with D1; the amount by which it is provided in the settlement that the claim would be reduced; or the extent to which the settling defendant (D1) would have been liable to contribute if the plaintiff's claim had been paid by the non-settling wrongdoer (D2).

42. The underlying theory is explained in Professor Williams's text. Under the existing law, if contributions against tortfeasors were permitted, that would leave the possibility that if D1 settled with P and P proceeded with his or her case against D2 then D2 could seek contribution from D1. This would mean that a concurrent wrongdoer, D1 (in this example), would not be able to make a final settlement with P and be discharged from the proceedings. Professor Williams considered that this was an "unfortunate consequence" of the existing law of contribution. He considered that a more satisfactory rule was easy to envisage:-

> "It should be provided by statute that where P settles with D1, he is identified with D1 in a subsequent claim against D2. The effect would be that P's claim against D2 would be reduced by the proportion corresponding to D1's share in the wrongdoing. Correspondingly D2 should be given no right of contribution against D1. Under this scheme, justice would be done to all parties. D1's settlement would be final and conclusive, so that D1 would neither be prejudiced nor advantaged by any subsequent proceeding between P and D2. P would preserve his just rights against D2, and D2 would not be prejudiced by the settlement by D1."

43. It is possible to understand the manner in which the identification principle was intended to work by reference to the example of the triangle given above at paras 14ff. The effect of the settlement between D1 and P is to extinguish the line between P and D1. A claim between P and D2 still remains, but D2 cannot now seek contribution against D1. Instead, this is converted into a claim against P and treated as contributory negligence reducing P's claim. The content of that claim is the claim, or line, linking P to D1 which D2 can now assert not against D1, but rather as contributory negligence against P.

44. Professor Williams addresses what he describes as an "apparent anomaly" in this scheme where it is determined in P's action against D2 that the share of responsibility appropriate to D1 was greater or less than the amount paid by D1 in settlement. In one case, P loses out (if it transpires that the settlement is less than the amount a court holds D1 responsible for), but would profit if the reverse situation arises and the settlement was for more than the amount a court holds D1 responsible for. Professor Williams considered that the rule required modification where the settlement was more than D1's proportionate share of liability because, otherwise, to leave the plaintiff with the benefit of the settlement and the claim "ignores the rather strong feeling that one has against allowing the plaintiff to recover double damages". Accordingly, he suggested that a settlement between P and D1 should have the effect of reducing the claim against D2 (giving D2 the benefit of the settlement) while, however, maintaining the effect of the identification rule so that, if the plaintiff settled with D1 for less than a court considers D1 was liable, the plaintiff would have to bear that loss. Professor Williams explained why the plaintiff would have to bear that loss while being deprived of the possibility of a gain.

45. Professor Williams considered this apparent anomaly was tolerable. Without a rule preventing D2 from claming contribution against D1, there would be no incentive for D1 to settle because he or she would remain liable to the possible contribution claim from D2. A rule preventing excess recovery was necessary. But there was no need for it to permit P to recover any shortfall from D2. The plaintiff was not really losing out because, under the existing law, the same situation could well arise. He considered that most – if not all – settlements between P and D1 would contain a clause whereby P would indemnify D1 against any contribution claim. If this was the case, then P would still be obliged to bear the difference between what he or she settles with D1 for and any greater amount for which the court would consider D1 responsible. Professor Williams acknowledged that the suggested provision would "in one way operate as a disincentive to the plaintiff to settle". However, under the then-existing law, there was a very strong disincentive to a defendant to settle because the settlement could not be final. The effect of the proposal was really to reach the same result that would be achieved by an indemnity clause, which he considered to be a standard provision in a settlement. Such a solution, he considered, also had the advantage of legal symmetry since the doctrine of identification also applied in other circumstances, perhaps most notably in the current context where any injured plaintiff had allowed time to elapse, thus preventing him from suing the particular tortfeasors: a circumstance now provided for under s. 35(1)(i) of the CLA. It is noteworthy that s. 7 of the draft statute contained in Professor Williams's work is in identical terms to s. 17 CLA, providing in that case for the identification of the injured party with the settling defendant in accordance with para. (g) of subs. (1) of s. 25 of the draft statute, which contained the provisions corresponding to s. 35 of the CLA. It is beyond doubt, therefore, that the Act as enacted faithfully adopts his proposed solution.

E. Part III, Chapter II: Contribution Claims

46. Chapter 2 of Part III of the CLA contains the provisions relating to contribution between concurrent wrongdoers. S. 21 provides for a right of contribution between concurrent wrongdoers, but provides that no person shall be entitled to recover contribution under

the Act from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. S. 21(2) provides that the amount of any such contribution shall be such as:-

> "may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

47. HSBCITS places heavy reliance on both these provisions. The question of how contribution is to be assessed is one which has caused some controversy.

48. Even when the question of apportionment of responsibility arises in the relatively simple circumstances where two people, in most cases the plaintiff and defendant, are alleged to have been negligent in respect of a road traffic accident, there have been some difficulties in the application of the statutory test. In *O'Sullivan v. Dwyer* [1971] I.R. 275, the Supreme Court (Walsh J.; Ó Dálaigh C.J. and Fitzgerald J. concurring) held that the provisions of s. 34(1) of the CLA requiring a court to reduce the plaintiff's damages for contributory negligence ("as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and [*the*] defendant") meant that the court should not apportion damages on the basis of the relative causative potency of the respective causative contributions to the damage, but rather the moral blameworthiness of the respective causative contributions. However, there are limits to this since faults have to be measured not by purely subjective standards but by objective standards.

49. In *Carroll v. Clare County Council* [1975] I.R. 221, Kenny J. took issue with the adjective "moral". He considered that juries should not be instructed in terms of moral blameworthiness since that was likely to mislead. He observed that the section did not say that damages were to be reduced having regard to the respective degrees of negligence, but rather the fault of the plaintiff and the defendant. The question was, however, not one of moral considerations. The "fault", he considered at p. 227 of the report, meant a departure from the norm by a person who, as a result of such departure, has been found to be negligent, and the statutory phrase "degrees of fault" expressed the "extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances". I understand, from the days when personal injuries actions were tried by a jury, that there should be caution about avoiding terms such as "moral". It is not clear to me that there is any significant distinction between fault and negligence in the test proposed by Kenny J. Indeed, in the standard case where a defendant has been found negligent and a plaintiff contributorily negligent, courts have proceeded to apportion damages on the basis of their respective degrees of negligence and without distinguishing between that and any concept of fault.

50. In *Iarnród Éireann*, Keane J. in the High Court accepted that the approach of the courts in relation to contributory negligence cases under s. 34 also applied to the case of contribution between wrongdoers under s. 21, since the statutory language – "just and equitable having regard to the degree of … fault" – was the same. He observed that there

were difficulties in making blameworthiness the sole criterion, which is particularly evident in cases of strict liability. S. 43 of the Act provided that, in determining the amount of contribution or of reduction of damages under s. 34(1) for contributory negligence, the court "may take account of the fact that the negligence or wrong of one person consisted only in a breach of strict statutory or common-law duty without fault, and may accordingly hold that it is not just and equitable to cast any part of the damage upon such person". As Keane J. observed, this provision gave no guidance as to how liability was to be apportioned between two concurrent wrongdoers, each of whom is liable only by virtue of a breach of strict common law or statutory duty.

51. The difficulty may go further than this. The expansion of the contribution claim beyond tortfeasors means that concurrent wrongdoers may also be those in breach of contract or in breach of trust. Accordingly, concurrent wrongdoers include those who are negligent and at fault, those who are in breach of a strict liability at common law, those in breach of strict liability imposed by statute, persons in breach of trust, or persons who have been found to be in breach of contract. In any of the latter four cases, the defining feature of the legal determination is that fault is not a necessary component. Indeed, it is normally irrelevant if a contract is breached intentionally, negligently, or innocently. Accordingly, a fault will play no part in the establishment of the cause of action. Yet, if contributory negligence is established, or if there is a contribution claim made between defendants, one of whom is in breach of contract and the other in breach of a duty of care, the court must, for the purposes of that assessment, attempt to determine the "degrees of fault" of the contract maker.

52. S. 43 of the Act is also somewhat troubling in that it seems to assume that a breach of a strict statutory or common law duty without fault is less serious than a breach of a duty of care so that it may be just and equitable not to cast any part of the damage upon such a person. It is important that s. 43 is not cast in mandatory terms. A court *may* hold that it is not just and equitable to cast any part of the damage upon the person found to be in breach of strict liability. Nevertheless, the assumption implicit in the section is doubtful, particularly since the areas in which a person can be found liable as a matter of strict liability and, in particular, vicariously liable, have expanded significantly since the 1950s.

53. It is not, by any means, self-evident that a breach of strict liability is less serious than a breach of duty of care. Indeed, the general theory in which strict liability is imposed is that the activity is either so dangerous or important, or the relationship between the defendant and the actor makes it appropriate, that liability should be imposed without establishing negligence. If a person brings water onto their land and it escapes then, for more than 150 years since the decision in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, the landowner is responsible because it is considered a dangerous thing. A local authority may, however, have failed to maintain its flood defences to modern standards, or an adjoining landowner may be found negligent. It may be appropriate *vis-à-vis* an injured plaintiff that there should be apportionment of liability, but it is difficult to see why the negligence of the local authority or the contributory negligence of the adjoining landowner

should absolve the original landowner on whom the common law had seen fit to impose strict liability.

54. In some cases of vicarious liability, such as between a principal and an agent, it may be appropriate that the tortious agent may be obliged to fully indemnify the principal, but it does not necessarily follow that this must apply in all cases. An employer is vicariously liable for the wrongful acts of an employee in the course of his or her employment. The policy of the law imposes liability on the employer and thus permits recovery against the defendant likely to have assets capable of meeting the plaintiff's claim.

55. But the justification for this, which I hesitate to call moral, is that such an attribution of responsibility is appropriate because the employer benefits from the economic activity. If a van driver momentarily loses attention and strays fractionally across the centre line of the road, causing an accident, which nevertheless causes catastrophic injuries to the driver of an oncoming car, would the employer be able to recover a full indemnity from the employee in the event that the employee subsequently wins a lottery and might be able to satisfy the award on the basis that the employee has been at fault, even if only minimally, and the employer has not? Such a conclusion would seem to fail to give weight to the policy of the law under which vicarious liability was imposed in the first place. The employer has established the business, and seeks to benefit from the economic activity in which it engages, and must be taken therefore to accept the risks involved in the activity including the negligence of his or her employees. The employee would not be on the road with the possibility of becoming involved in an accident were it not for the employment.

56. In *Lister v. Romford Ice and Cold Storage* [1957] A.C. 555, the House of Lords of the United Kingdom held that a negligent employee who had injured a co-employee was obliged to indemnify the employer for the damages the employer paid to the injured employee. This decision was, however, controversial. The subsequent year, in *Harvey v. R.G. O'Dell & Anor*. [1958] 2 Q.B. 78, the McNair J., in the Queen's Bench Division of the High Court of England and Wales, held that where a negligent employee was involved in a crash injuring his passenger, the employer was vicariously liable for the driver's negligence since the travel was incidental to his work, and there was no implied term in his contract to indemnify the employer for his negligence while driving. In *Jones v. Manchester Corporation* [1952] 2 Q.B. 852, 870, Denning L.J. (as he then was) stated a general proposition, which might be accepted today:-

> "In the absence of an express contract on the matter, the master has no right at law to an indemnity or contribution from his servant. It is entirely a matter for the discretion of the court under the Act of 1935 whether it should order any, and if so what, contribution or indemnity between them".

F. Part III, Chapter III: Contributory Negligence and Identification

57. S. 34 of the CLA provides for contributory negligence. This is contained in a separate chapter of Part III of the Act and, it is necessary to recall, one of the significant innovations of the Act. It provides at s. 34(1) that, where damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or a person for whom

he is responsible, and partly by the wrong of the defendant, "the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant", subject to certain qualifications which it is useful to note. At s. 34(2)(b), it is provided that a negligent or careless failure to mitigate damage should be deemed to be contributory negligence. This seems to include a general proposition of the law under the heading of contributory negligence, which suggests, perhaps, that the novel contributory negligence provision is seen as an omnibus provision including matters which would not give rise to a primary duty of care and therefore be capable of being described normally as "negligence or want of care of the plaintiff". S. 34(2)(d) provides that, in an action for conversion of the property, a failure to exercise reasonable care in the protection of his own property may constitute contributory negligence "except to the extent that the defendant has been unjustly enriched".

58. While s. 34 is the general provision permitting the apportionment of damages for contributory negligence, s. 35 sets out, under the heading with the side note "Identification", a series of cases which may amount to statutory contributory negligence, even without personal negligence on the part of the plaintiff. Thus, s. 35(1)(a) provides that the plaintiff shall be responsible for the acts of a person for whom he is vicariously liable. In this regard, the appellant points out that there are specific cross-references to s. 21 in some of the provisions of s. 35, notably s. 35(1)(d). S. 35(1)(g) provides that:-

> "[W]here the plaintiff's damage was caused by concurrent wrongdoers and before the occurrence of the damage the liability of one of such wrongdoers was limited by contract with the plaintiff to a sum less than that wrongdoer's just share of liability between himself and the other wrongdoer as determined under section 21 apart from such contract, the plaintiff shall be deemed to be responsible for the acts of that wrongdoer…"

59. S. 35(1)(h) is the subsection which, it will be recalled, is the subsection cross-referenced in s. 17. It provides:-

> "[W]here the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged…"

It is useful to note in this regard, the immediately succeeding subsection, s. 35(1)(i), which provides that:-

> "[W]here the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer…"

60. Finally, and importantly, s. 35(4) provides that where a plaintiff is held responsible for the acts of another and his damages are accordingly reduced under subs. (1) of s. 34 (for contributory negligence), "the defendant shall not be entitled to contribution under section 21 from the person for whose acts the plaintiff is responsible". This is the logical consequence of the identification of the plaintiff with another person and, in the case of s. 35(1)(h), the settling wrongdoer. The plaintiff becomes identified with the acts of the settling wrongdoer, so as to give rise to a claim for contributory negligence, but the corollary is that the settling defendant is protected from a claim for contribution from the remaining defendant. This provision, it should be said, is of general application, and applies when the plaintiff is identified with the acts of another pursuant to the provisions of s. 35(1).

G. Other Provisions

61. It is may be useful to note some other provisions of the Act. The most important is perhaps s. 38 which, as already noted, provides for a several judgment against each defendant in the case of a claim by a plaintiff against concurrent wrongdoers and where the plaintiff is found contributorily negligent. Notably, however, s. 38(2) provides for a secondary judgment if the plaintiff can establish that, after taking reasonable steps, he has failed to obtain satisfaction of any part of the judgment. In those circumstances, the plaintiff may apply for a secondary judgment, having the effect of distributing the deficiency among the other defendants in such proportions as may be just and equitable. This parallels with the provisions of s. 28 which grant a concurrent wrongdoer who has obtained judgment for contribution against two or more concurrent wrongdoers, and who fails to obtain satisfaction of any portion of the judgment, liberty to apply for a secondary judgment to distribute the deficiency among the remaining defendants in such proportions as may be just and equitable. Both of these provisions recognise the possibility of insolvency or inability to pay on the part of one defendant and, in such circumstances, provide that the loss should not be borne by the plaintiff, or the concurrent wrongdoer who has obtained a judgment for contribution, but the deficiency is instead distributed between the remaining concurrent wrongdoers.

62. Finally, s. 43 of the CLA may be noted. This, as mentioned earlier, seeks to address, at least in part, the circumstances in which a court is asked to apportion damages between a plaintiff and defendant where one party is guilty of negligence and the other has been in breach of a strict statutory or common law duty without fault. In addition to the observations made by Keane J. in *Iarnród Éireann* on this provision, it might also be noted that it appears that this provision, limited as it is, only applies in respect of a reduction of damages under s. 34 for contributory negligence and does not seem to apply in the case of a contribution claim between concurrent wrongdoers.

IV - Application of the CLA in the Circumstances

A. The Parties' Relationship

63. It is now possible to return to some of the facts in greater detail to consider how the interpretive issue arises. It was accepted by both sides that BLMIS was guilty of fraud, indeed Defender and HSBCITS, for their different purposes, vied with each other in describing how comprehensive and long-running a fraud it was. HSBCITS presented the

expert report of Andrew Richmond, Vice President of Cornerstone Research, a specialised independent consulting firm, and the officer in charge of the Chicago office and co-leader of their Government Enforcement and Corporate Investigations practice. Prior to that, Mr. Richmond had been a director in the forensics practice of KPMG, and prior to that a senior manager in economic and financial consulting practice at Arthur Anderson LLP. Mr. Richmond was called to give evidence. The burden of his report is summarised in the conclusion as follows:-

> "63. The Madoff fraud was a massive, sophisticated fraud and concealment scheme that was designed to avoid detection by individual investors, investments advisors, fund administrators, regulators (SEC, NASD/FINRA, FSA), external auditors of investors, taxing authorities (IRS, State of New York) and forensic accountants (KPMG). Mr. Madoff and his co-conspirators executed their scheme by leveraging the legitimate, well respected broker-dealer business and Mr. Madoff's reputation in the industry and community to provide an aura of legitimacy and to conceal the fraudulent IA [Investment Advisory] activity. Mr. Madoff and his co-conspirators carefully planned the scheme in order to make the IA business appear to be a legitimate operation and to anticipate and respond to inquiries from outside parties.
>
> 64. BLMIS invested in a dedicated infrastructure to design, test, execute and falsely document the fraud scheme. The participants were able to generate and present to outsiders the entire "audit trail" of documentation that would be expected to exist at BLMIS. This included creating falsified paper and electronic DTC reports to demonstrate that BLMIS held custody to the aggregated IA customer assets. To assist with the design and execution of the scheme, Mr. Madoff successfully recruited and retained a large group of co-conspirators inside and outside of the organization. The participants in the scheme repeatedly lied to and deceived customers/investors, regulators, auditors, and other interested parties. The scheme was so well designed and executed that it only came to light when BLMIS ran out of money in late 2008 and Mr. Madoff confessed to his crimes."

64. For its part, Defender pointed to a number of documents extracted from discovery which appeared to indicate that HSBCITS had, at different times, significant doubts about the structure of the Madoff firm. This included the Global Head of Credit and Chief Risk Officer of HSBC Holdings London expressing her view that they required a process "in terms of arms' length" that could be relied on to "be satisfied it is not the biggest and cleverest sham in the world". The same individual described the Madoff scheme as "a perfect structure for fraud". Indeed, another HSBC employee involved in risk referred to "concerns … they are not a Ponzu [*sic*] scheme".

65. Defender had entered into a custodial agreement with HSBCITS on the 3rd May, 2007. The following day, HSBCITS entered into a sub-custodian agreement with BLMIS. That agreement was to be governed and construed in accordance with the law of Ireland and both parties submitted to the non-exclusive jurisdiction of the Irish Courts. The

agreement provided for indemnities. In these proceedings, HSBCITS pointed to para. 10.1 which provided as follows:-

> "Subject as provided in this agreement, the Sub-custodian will be liable to HSBC for and indemnify HSBC against all actions, claims, losses, damages, charges, liabilities, demands, taxes, levies, imposts or duties suffered by or occasioned to HSBC or HSBC's clients with respect to the Property or the Accounts arising directly or indirectly from the performance or non-performance of the Services and all costs and expenses (including, but not limited to, HSBC's reasonable legal fees and expenses and any other legal fees and expenses for which HSBC is liable) incurred by HSBC and/or HSBC's clients with respect to the Property or the Accounts arising directly or indirectly from the performance or non-performance of the Services (the "Liabilities") to the extent that the Sub-custodian or any of its delegates, nominees or agents (other than Clearing Systems) has been negligent, fraudulent, or has acted in bad faith, in wilful default or recklessness of its duties under this Agreement or (as the case may be) any agreement delegating duties set out in this Agreement. Negligence, fraud, wilful default, bad faith and recklessness will be judged by reference to the standards prevailing in the jurisdiction of the Sub-custodian."

66. HSBCITS have sought to contend in these proceedings that this provides a further ground to support the trial judge's decision. It is argued that, under s. 21(1), a concurrent wrongdoer is not entitled to recover contribution under the CLA "from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought". HSBCITS argue that s. 21 is applicable in this case by reason of the identification effected by ss. 17 and 35(1)(h) and that, accordingly, even if it were established that HSBCITS might otherwise be obliged to make contribution to BLMIS, any such contribution would be precluded by the existence of this indemnity. This argument was not ruled on by the trial judge, but is maintained by HSBCITS in these proceedings.

B. Settlement Agreement

67. A central piece of evidence was the settlement agreement between Defender and Mr. Picard the trustee for the liquidation of BLMIS. The trustee sought and obtained the approval of the United States Bankruptcy Court for the Southern District of New York, of a settlement between the trustee on the one hand, and Defender, Reliance Management (BVI) Limited, Reliance International Research LLC, and others, on the other hand. The preliminary statement to the court by the trustee explained that the trustee had brought proceedings seeking to recover US$93 million from Defender as fraudulent and preferential transfers made in respect of Defender's BLMIS account within a statutory period prior to the liquidation. A motion to the court recorded that the parties had entered into an agreement representing a complete settlement of all disputes between the trustee and the defendants raised in those proceedings, and the customer claim that Defender had submitted in connection with its account. That claim had been submitted by HSBCITS on behalf of Defender. Under the agreement, the trustee was to recover 100% of the

US$93 million and allow Defender's customer claim in full plus 88% of the US$93 million recovered. The settlement was approved by the court.

68. The settlement agreement of 23rd March, 2015 was executed by Mr. Picard, Defender Limited, Reliance International Research, and Reliance Dormant Limited. The agreement contained a number of provisions. First, the payment to the trustee of the US$93 million; second, the allowance of Defender's customer claim, including the return of the US$93 million. It was also provided that there would be an immediate payment by the trustee to Defender of US$254,317,906.40, being 48.546% of the allowed claim, plus the SIPC advance of US$500,000.00, which was described as a catch-up distribution. Thereafter, Defender was to be entitled to rateable distributions owing on the allowed claim in due course as distributed by the trustee and approved by the bankruptcy court from time to time, on the same basis and timetable as the holders of other admitted claims.

69. Under the agreement, the trustee also, on his own behalf and on behalf of BLMIS, released the defendants from any claim of whatever nature arising out of, or in any way related to, the direct or indirect relationship with BLMIS other than certain specified proceedings. Clause 4 contained a corresponding release of claims made by the defendants. Since particular reliance is placed on it, it should be set out in full:-

> *"Release by the Defendants*
>
> In consideration for the covenants and agreements in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, except with respect to the obligations, rights and considerations arising under this Agreement, upon the Closing (as defined in paragraph 8*), the Defendants shall release, acquit and forever discharge* the trustee and all his agents, representatives, attorneys, employees and professionals, and *BLMIS and its consolidated estate, from any and all past, present, or future claims or causes of action (including any suit, petition, demand or other claim in law, equity, or arbitration) and from any and all allegations of liability or* damages (including any allegation of duties, debts, reckonings, contracts, controversies, agreements, promises, damages, responsibilities, covenants, or accounts), of whatever kind, nature, or description, direct or indirect, in law, equity or arbitration, absolute or contingent, in tort, contract, statutory liability, or otherwise, based on strict liability, negligence, gross negligence, fraud, breach of fiduciary duty, or otherwise (including attorney's fees, costs, or disbursements), known or unknown, existing as of the date of the Closing that are, have been, could have been, or might in the future be asserted by the defendants, based on, arising out of, or in any way related to BLMIS or Madoff, except that the Defendants retain the right to enforce the terms and conditions of this Agreement." (*Emphasis added.)*

70. In the first place, HSBCITS relies upon this release of BLMIS as constituting a release of the claim against BLMIS as a concurrent wrongdoer, and thus falling under s. 17 of the CLA.

71. The claim under s. 17 was the ground upon which HSBCITS succeeded in the High Court, but HSBCITS also maintained that the effect of the agreement meant that it also gave HSBCITS a defence under s. 16 of the Act. It was not contended that the settlement by the trustee was the payment of the full damages agreed by the injured party or adjudged by the court as damages due in respect of the wrong. However, it was argued that the agreement amounted to satisfaction on the grounds that the effect of the agreement was an agreed substitution for the damages to which Defender was entitled and accordingly constituted satisfaction under s. 16(2) which had the effect of discharging HSBCITS pursuant to s. 16(1) of the Act.

V - Just and Equitable

72. At para. 130 of the judgment the High Court judge observed that "[i]t might appear unfair than an innocent plaintiff, P, will get less than what he feels are his full damages in settling in this manner". However, he considered that this was a consequence of the Act, and an example of "the CLA achieving a result which is not 'just and equitable' to plaintiffs in certain instances". He considered the CLA needed to be looked at as a whole since there were other cases in which the CLA could achieve results which might not be regarded as '*just and equitable'* to defendants, the best example of which was, he considered, the so-called "1% rule", whereby a concurrent wrongdoer was found by a court to be only 1% liable for the damage caused by the plaintiff but may nevertheless be liable to pay 100% of the damages.

73. It is worth considering this issue in a little more detail. "[*J*]ust and equitable" is used repeatedly through the Act, so much so that it might be said to be its *leitmotif*. It is not, I think, merely that it "may appear" unfair that a plaintiff may receive less than "what he feels" are his full damages. On the example posed, the plaintiff does not receive his full damages, even though there is a defendant guilty of a wrong causing that damage who is able to compensate him but is not required to do so by operation of the Act as interpreted. This, on any view of civil liability, is unfair. Nor is it an answer, either in theory or in reality, to observe that the CLA is capable of producing other unfair results. If this was truly the case, then that would be reason to reconsider the Act as a whole and perhaps to doubt its constitutionality.

74. However, the "1% rule" is not unfair, and certainly not in the same way as the identification rule applies in the example just given. As explained in *Iarnród Éireann*, the basic rule, which has existed as part of the common law for centuries, is that any concurrent wrongdoer is liable for the whole damage. Contribution is secondary to that and was introduced by the law, and codified in the Act, to avoid the injustice that the plaintiff could choose to recover against one defendant alone and leave another guilty defendant free from any responsibility for the wrong. If one concurrent wrongdoer finds that a right of contribution is of little or no value because of the insolvency or lack of means of the other wrongdoer, that is no more unjust or unfair than if a plaintiff finds that a sole wrongdoer is insolvent. Furthermore, as observed by the Supreme Court in *Iarnród Éireann*, a decision that, as between a guilty defendant and an injured but innocent plaintiff, the risk of the insolvency of one wrongdoer should fall on someone who

was at fault in relation to the incident is a valid and defensible policy choice consistent with the principles of civil liability.

75. The unfairness, or at least harshness, of the outcome of the decision in the High Court is, I apprehend, why the trial judge had regard to the loss the HSBC Group had more generally suffered by reason of its own investment with BLMIS, and why HSBCITS was at pains to establish, both in evidence and in argument, that it was at least possible for Defender to have settled its claim with the trustee in bankruptcy without releasing HSBCITS from any claim. It would obviously strengthen Defender's argument of unfairness if it was the case that it was truly caught in a "Catch-22" where HSBCITS would insist that any failure to settle with the trustee would be a failure to mitigate its loss; where the trust was entitled to, and did insist upon, a release of any claim against BLMIS; and where HSBCITS could contend that under s. 17(2), this discharged its liability. Conversely, if HSBCITS could show that it was at least possible to settle with the trustee on terms which did not involve a full release of the claim against BLMIS, then the outcome of the case – and the working of the Act – would simply be a consequence of an advertent decision by Defender which, perhaps sensibly, had valued the present reality of a substantial payment from the trustee in bankruptcy over the uncertainties of a residual claim against HSBCITS.

76. On that issue, the evidence seems to show that the release of BLMIS was something included in the settlement at the behest of the trustee, and was invariably required by him on any settlement. There was, however, some evidence of tailored settlements, and in principle it seems that, although difficult, since without release there was a possibility of a further claim by Defender (or indeed HSBCITS) against BLMIS which had the possibility at least of becoming a claim in the bankruptcy, nevertheless it would be possible to avoid the consequences under s. 17 (or s. 16) by either insisting on the removal of that provision from the settlement, or refusing to settle and seeking to prove the claim which might well have resulted in the same or similar recovery under the bankruptcy, albeit at greater expense and with some added risk.

77. However, counsel for HSBCITS had to acknowledge, and did so frankly and correctly, that HSBCITS would have made the same argument and would have contended that the Act would operate in exactly the same way even if the release of BLMIS in the settlement was unavoidable and mandatory, and even though HSBCITS would have argued that Defender had failed to mitigate its loss if it did not enter such a settlement. HSBCITS's case depended ultimately on the interpretation of the section, not its perceived fairness or harshness. The fact, if it be so, that Defender could, with some foresight, skill, and perhaps some good fortune, have navigated a path past the trap that s. 17 appeared to pose, while at the same time securing a beneficial settlement with the trustee, does not, in my view, remove the potential unfairness of the operation of the Act as construed by the High Court. The fact that a trap for the unwary may be avoided by the skilful and fortunate does not make it any the less of a trap, nor any more desirable in legislation which has as its object the simplification of multiparty claims and the removal of harsh, haphazard and arbitrary rules.

VI - The s. 17 Issue

A. An Alternative Interpretation of s. 17

78. Building upon the claim of unfairness, Defender places significant reliance on the provisions of s. 5 of the Interpretation Act 2005 ("the 2005 Act") and also the double construction rule. It is argued that the terms of s. 17 fall within s. 5(1)(b) of the 2005 Act on the basis that a literal interpretation of the provision would fail to reflect the plain intention of the Oireachtas and that, accordingly, the provision should be given a construction that reflects that plain intention of the Oireachtas when it could be ascertained from the Act as a whole. A related argument is made by reference to the double construction rule: where there are two or more available constructions of the provision, and one would lead to unconstitutionality, then a court should accept the other, constitutional, interpretation, even if it involves a substantially less plausible, though still possible, interpretation of the statutory language.

79. Interpretation by reference to the double construction rule and s. 5 of the 2005 Act have something in common since both may be deployed where there is ambiguity in interpretation. However, there is a significant difference in that s. 5, in particular in the aspect of the provision invoked by Defender, seeks to secure an interpretation consistent with the intention of the Oireachtas as discernible from the legislation. On the other hand, under the double construction rule, the intention of the Oireachtas as discerned from the Act may indeed have been that the Act would receive the interpretation which it is now considered would give rise to unconstitutionality. In such circumstances, a court adopts what might be described as an artificial interpretation if it is nevertheless available and possible on the statutory language and will avoid unconstitutionality.

80. Defender argues that the intention of the CLA is that an injured plaintiff should always be in a position to recover full damages as a result of wrongdoing causing damage to him or her. In particular, it relies upon a portion of the judgment of O'Flaherty J. in the Supreme Court in *Iarnród Éireann*, which approved a passage in McMahon and Binchy, which identified three principles underlying Part III of the CLA. These are set out at pp. 374 – 375 of the report as follows:-

> "(1) Subject to the rule that the plaintiff cannot recover more than the total amount of the damages he has suffered, the injured plaintiff must be allowed full opportunity to recover the full compensation for his injuries from as many sources as possible;
>
> (2) Concurrent wrongdoers should be entitled to recover fair contributions from each other in respect of damages paid to the plaintiff;
>
> (3) All matters relating to the plaintiff's injuries should as far as possible be litigated in one action."

81. It is argued forcibly by Defender that the outcome of the interpretation adopted by the High Court is inconsistent with these provisions and, in particular, the first principle that the plaintiff should be allowed full opportunity to recover full compensation for his injuries from as many sources as possible. In this regard, Defender also points to the provisions

of ss. 14, 18, and 38 of the CLA, which together permit secondary judgments to be obtained by a plaintiff if it becomes apparent that one defendant is insolvent or that judgment cannot be enforced against them.

82. As set out above, where a plaintiff has obtained a separate judgment against concurrent wrongdoers under s. 14 but discovers that it is not possible to enforce the judgment against one concurrent wrongdoer, then the plaintiff can apply to have the deficiency redistributed between the remaining defendants. Similarly, under s. 38, where a plaintiff is found guilty of contributory negligence and liability is apportioned between the plaintiff and two or more concurrent wrongdoers, the plaintiff may apply for a secondary judgment where he or she is unable to enforce a judgment against one wrongdoer and, again, it can have the deficiency apportioned between the remaining wrongdoers. Defender says, with some apparent justification, that the operation of s. 17(2) in this context, as found by the High Court, appears to run counter to the policy which is expressed in both provisions, since the consequences of insolvency fall on the plaintiff and the remaining concurrent wrongdoer escapes responsibility. Finally, Defender argues that the express purpose of s. 17 is to facilitate settlements but, if interpreted and applied as in the High Court, it would deter plaintiffs from entering any settlements because the additional level of risk created would be unacceptable.

83. It is perhaps implicit in this argument that Defender accepts, at least tacitly, that the literal interpretation and natural interpretation of s. 17 would lead to the conclusion found in the High Court. In reliance on s. 5, it is argued, however, that this fails to achieve the plain intention of the Act. However, s. 5 cannot avail a plaintiff unless a different construction is available which would achieve the asserted legislative intention. In that regard, Defender proposes a different interpretation of the legislation.

84. It is argued that the High Court judgment ignored the clear signpost in s. 17 itself, which directs the reader and, it is said, the courts, to s. 35 and the provisions relating to contributory negligence. S. 17 does not contain any, or at least any explicit, reference to s. 21 and the apportionment of contribution between wrongdoers. Moreover, it is said, it is striking that s. 35 contains a number of provisions which do make explicit reference to s. 21 (see s. 35(1)(d)(i) and (ii), and also s. 35(1)(g)). The provisions of s. 35(1)(h), which are expressly referred to in s. 17, contain no such reference, but merely have the effect of deeming the plaintiff responsible for the acts of the discharged wrongdoer. The proper interpretation, therefore, of the legislation is that the courts should proceed from s. 17 to s. 35(1)(h) and thus to apportion liability under s. 34, and therefore, and significantly, between the plaintiff (Defender) and the remaining wrongdoer (HSBCITS) and reducing the plaintiff's award by such amount as the court thinks "just and equitable" having regard to the degrees of fault of the plaintiff, Defender, and the defendant, HSBCITS.

85. Defender accepts that, in this apportionment, it is identified with the wrongdoing of BLMIS and also accepts that the language of apportionment is, indeed, identical to that contained in s. 21: namely, that the court should have regard to what is just and

equitable between the parties having regard to their respective fault. Nevertheless, it is said that the exercise of carrying out such apportionment under s. 34 would involve a broader consideration of what was just and equitable between the plaintiff (Defender) and the defendant (HSBCITS), and which would allow for a broader and more comprehensive view of the merits and avoid the apparent unfairness of the outcome in the High Court.

86. By contrast, it was said that the High Court wrongly approached the question under s. 21, and therefore considered the issue as between BLMIS and HSBCITS alone, with the wronged plaintiff dropping out of the picture. This, it was said, was wrong in principle and perverse, and led inevitably to an outcome where an injured plaintiff recovered less than the full damages and a wrongdoer nevertheless escaped responsibility.

B. Functioning of the Section

87. I regret that I am unable to accept this interpretation of the section, and I doubt that s. 5 can be invoked to achieve it. S. 5 was an important development of the law, but it assumes, perhaps, a classic textbook opposition between text and plain intention which is, however, clear from the text. There are some cases which satisfy this simple version, but the more common and complex cases are where there are arguments about the text and doubts as to the intention. In any event, while courts profit considerably from the overarching perspective and detailed analysis of textbook writers and other academic authorities, a court should, however, be cautious before accepting an identification of some principles as the exclusive objective sought to be achieved by the legislation and a mandate to interpret the legislation to achieve those objects. Inevitably, the dispute in a case is more fine-grained, and illuminated by the concentration on the facts giving rise to the competing interpretations. A court must look both at the entirety of the legislation, and the particular provisions in question, which may disclose separate and discrete intentions not apparent from, or reproduced elsewhere, in the Act.

88. Here, the fundamental difficulty for Defender is created, in my view, by the identification mechanism which is, however, a central provision in the Act. Once it is accepted that the release of BLMIS necessarily has the effect that Defender must be identified with the actions of BLMIS, it is difficult to avoid the conclusion at which the High Court arrived, whether by reference to s. 21 or s. 34.

89. That outcome cannot be evaded by an appeal to a broad principle found elsewhere in the Act. It is quite correct to say that the Act, particularly in the innovative provisions permitting secondary judgments, and in its endorsement of the "1% rule", goes to some lengths to ensure that the risk of a deficiency arising from insolvency should not fall on an injured plaintiff, but should rather be borne by remaining solvent defendants, if they are available. But it is, however, unavoidably the case that that principle is not carried through and, in particular, is not maintained in s. 17. Leaving aside any question of insolvency, it is beyond argument that s. 17 is intended to apply where the plaintiff settles with D1 for less than a court subsequently finds D1 would have been liable for, and in which case both D1 and D2 are protected, and the deficiency falls upon the plaintiff.

90. It is said that this outcome is not unfair, since it is a result of the plaintiff's own decision, and is moreover necessary, since without it, D1 would have little incentive to settle, as D1 would remain open to the possibility of a contribution claim, which would in effect negate the benefit of D1's settlement. D2 is explicitly protected in that the plaintiff cannot recover more from D2 than D2's share of the liability. This was considered necessary to avoid the possibility of collusion between P and D1. It follows unavoidably, however, that the CLA specifically contemplates that, in these circumstances, the plaintiff will bear the possible deficiency. It is not possible to appeal to any supposed overarching objective of avoiding loss to an injured plaintiff: here, the Act specifically contemplates, indeed mandates, it.

91. It is possible to observe that the Act operates in perhaps an overly rigid abstract and theoretical way in this regard. While it achieves the objective of providing encouragement D1 to settle, it discourages P. If cases are assumed to have a defined value and a predictable outcome, then it may make sense to make the plaintiff bear the risk (which, on this view, might be small) of a deficiency between the settlement and the outcome. But experience shows that litigation has a number of variables, and outcomes can vary considerably. A plaintiff may value his or her case at €100,000 but consider that he or she has only a 25% chance of success, and be happy to accept €30,000 in settlement and be oblivious to the view of the defendant, who values the case at €50,000 but thinks, on the limited information available to him or her, that the plaintiff has a 60% chance of success. Both sides are making predictions and educated guesses as to the likely outcome before a composite judge, knowing that the outcome in fact may differ between judges, and allowing for the uncertainties of the availability of witnesses, the impression they create, and the dynamic of litigation, all of which is very difficult to predict. A plaintiff who settles for less than what a court subsequently considers to be the 'correct' amount, is not necessarily 'wrong', still less unreasonable. Furthermore, while it may be necessary to encourage D1 to settle by providing finality for the settlement, it would encourage D2 to participate in that settlement if he or she knew that they ran even some risk of having to make up any deficiency in D1's liability if, for example, a court considered that P had acted reasonably in settling with D1.

92. There are many cases where certainty and predictability should be valued more highly than the precision that ultimate adjudication may provide in a particular case. It is sensible in many cases, particularly where parties are in control of their choices, to make clear-cut readily understandable rules with clearly predictable outcomes. As has been observed, there are some occasions when it is more important that the law be clear rather than clever. A rule that depends upon the circumstances of each individual case, and can therefore only be applied after perhaps expensive litigation, purchases the value of correctness at a high price, and if it is predictable and fair, and cheap, it may be preferable to instead have a clear rule well advertised in advance. There is, indeed, no guarantee that the court hearing will always produce the perfect outcome. However, here, the rule is addressed to litigation, and indeed court adjudication. For s. 17 to apply, the case, or at least some part of it, must go to court. A blanket rule is less appropriate in such circumstances. It is difficult to think, therefore, that a proviso to s. 17 that provided

that it would not take effect if a court considered it was not just and equitable in the circumstances, or perhaps where the plaintiff had acted reasonably in making the settlement, would not meet the policy objectives of the Act more clearly.

93. However, it is quite clear that the CLA in s. 17 explicitly and deliberately contemplates the possibility of a plaintiff recovering less than full damages, even though there is a solvent defendant who has been determined to be a wrongdoer and, moreover, responsible for the damage who does not have to make good the deficiency. The section does not distinguish between the case where the deficiency results from a failure of the plaintiff to properly value the claim and the liability of D1 and those cases where the plaintiff accepts the settlement as the best that is possible in difficult circumstances.

94. It can also be said that such a conclusion is not an anomaly limited to s. 17. Both ss. 35(1)(g) and 35(1)(h) contemplate different circumstances where the outcome is that the plaintiff, rather the remaining defendant, bears the deficiency and may therefore recover less than his or her full damages. In the case of s. 35(1)(i), a plaintiff may be acting entirely reasonably in not suing a potential concurrent wrongdoer, and the plaintiff's failure to do so does not prevent the defendant from seeking to join that wrongdoer as a third party, or indeed bringing a contribution claim within the extended limitation period provided by s. 31. Nevertheless, the plaintiff is identified with the wrongdoing of the non-sued and now statute-barred defendant. Similarly, where one defendant has a limitation of liability clause by contract with the plaintiff, and another does not, a rule which threw any deficiency upon the remaining concurrent wrongdoer would be consistent with the broad policy identified in McMahon and Binchy, and relied upon by Defender, but is not what the Act provides.

95. The Act in s. 17, as in ss. 35(1)(i) and 35(1)(h), pursues a policy that the remaining defendant should not have to pay more than his or her 'fair' share and the plaintiff must bear the deficiency and thereby recover less than their full damages. It is impossible, therefore, to appeal to some general principle that the plaintiff should always be able to recover in full from the widest range of defendants possible, to override the clear contrary language, and indeed statutory intent of the legislation in this respect.

96. Moreover, not only is this clearly an advertent choice of the legislation, but to interpret the Act as contended for by the appellant would possibly interfere with the balance of the intricate mechanism established by the Act in perhaps unforeseen ways. In particular, s. 35(4) of the Act complements the identification provisions of s. 35(1) by providing that a defendant who becomes entitled to plead contributory negligence by reason of the identification of the plaintiff with the acts of another wrongdoer is not entitled to bring a contribution claim under s. 21 from the person for whose acts the plaintiff is treated as responsible. Identification and deemed contributory negligence under s. 35 exclude contribution. Therefore, if D2 has to pay more than his or her 'fair' share, he or she cannot recover contribution from D1, even if D1 were to experience an upturn in its fortunes.

97. S. 35(4) illustrates the logic of the Act in its identification provisions. The fact that a contribution claim is not possible between D1 and D2 means that D1 cannot rely on P's claim against D2, which is now extinguished by the settlement. In return for this, D1 is able to claim against P what he or she would have been able to claim against D2, that is a contribution claim arising from the acts of D2 in respect of P. There is an undeniable symmetry in the arrangement which confirms my view that even if Defender is correct to say that the apportionment of liability takes place under s. 34, rather than directly pursuant to s. 21, this cannot lead to any different outcome. Once the statute operates to identify the plaintiff with the acts of the settling defendant, the non-settling defendant has its contributing claim converted into a claim in contributory negligence against the plaintiff. It is, however, the same claim, and (subject to one qualification, to which it will be necessary to return) could not therefore arrive at a different conclusion whether as between the defendants under s. 21, or as between the non-settling defendant and the plaintiff, under the combined effects of ss. 35(1)(h) and 34. Accordingly, in this respect, I must conclude that the High Court judge was correct to interpret the Act in the way he did and to reject Defender's argument that s. 5 of the 2005 Act led to any different outcome.

C. The Double Construction Rule

98. As already touched upon, this conclusion, however, does not dispose of the appellant's argument that, under the double construction rule, the CLA must be given a different interpretation because, it is argued, the application of the CLA as interpreted by the High Court would lead to unconstitutionality. Accordingly, it is said that the "just and equitable" language of s. 34 should be interpreted in the context of the entire relationship between Defender and HSBCITS so that the court would be entitled to consider whether it would be just and equitable to make Defender responsible, by way of identification with BLMIS, for all of the loss, thus extinguishing any possible liability.

99. It cannot be said that this interpretation is entirely implausible or impossible, but there are some difficulties with applying this interpretive approach at this point in the proceedings and by reference only to the arguments of the plaintiff and the defendant. The double construction arises most naturally when there is a direct challenge to the constitutionality of a statute and where the possibility of a differing, but constitutional, interpretation may arise. However, where the constitutionality of an Act of the Oireachtas is challenged, the Attorney General is a mandatory party to the proceedings. It is at least possible that the Attorney General might advance arguments – and possibly adduce evidence – showing that the first interpretation, presumptively deemed unconstitutional, is in fact constitutional and, indeed, intended. If the double construction rule is applied in private law proceedings between private parties it is possible that an unjustified unconstitutionality will be assumed and an unjustified interpretation accepted, which moreover would become applicable generally, defeating the legislative intention.

100. If this case had to be resolved at this point in the proceedings, it might be necessary, nevertheless, to attempt the interpretive exercise. However, since, for reasons I will shortly address, I consider that the case cannot be disposed of at this point, I think it is

preferable to leave the residual argument by reference to the double construction clause to the conclusion of this case, at which point both the interpretation and constitutionality of the operation of the section could be argued with the addition of the Attorney General. This is particularly so since, if Defender were to establish that the operation of the section was unconstitutional, that would have the effect of removing it and any bar to the Defender's claim, and it is accordingly particularly appropriate that that claim be adjudicated in the context of Defender's claim versus HSBCITS.

VII - Threshold at Preliminary Stage

A. Apportionment of Liability

101. However, it was not sufficient for HSBCITS to succeed on a preliminary issue for it to establish that its interpretation of s. 17 was, as I have found, at least presumptively correct. In order to succeed on the preliminary issue, HSBCITS must establish that any apportionment of responsibility between BLMIS (with whose Acts Defender is identified) and HSBCITS, must *always* amount to a full indemnity from BLMIS to HSBCITS. It is accepted that if there is a possibility that a court might find HSBCITS even 1% responsible, then the preliminary issue cannot succeed. In such a case there might still be a substantial shortfall and Defender might still have a live complaint in relation to the operation of the Act, but the proceedings could not be dismissed.

102. It was also accepted that the issue was to be approached by reference to the plaintiff's case at its highest. In this respect, that meant that all allegations of negligence against HSBCITS were to be assumed established. Nevertheless, HSBCITS contended, and the trial judge agreed, that even on the most benign scenario from Defender's point of view, there was no basis BLMIS could ever obtain contribution from HSBCITS, or conversely, no circumstances in which HSBCITS could ever be obliged to contribute to BLMIS. Indeed, the court considered that any such an outcome would be absurd. In this regard, the High Court considered, there was what was described as a "qualitative difference between a criminal wrong and a civil wrong". At para. 105, the trial judge observed:-

> "However, what is determinative in this Court's view, is that whether one is dealing with a claim that HSBC was negligent in not monitoring Madoff or a claim that HSBC was vicariously or otherwise liable for Madoff's fraud, in considering contribution between wrongdoers, there is a qualitative difference in the relative blameworthiness on the one hand, between an action between wrongdoers where one wrongdoer is guilty of a criminal activity and the other is guilty of a civil wrong such as negligence, and on the other hand an action between two wrongdoers who are both guilty of a civil wrong (or indeed both guilty of a criminal wrong)."

The trial judge considered that this qualitative difference was best illustrated by the decision of the High Court of Australia in *Burke*.

103. The facts of that case are relatively simple. A company, Hanave, of which Mr. Burke, a solicitor, was a director, bought commercial property from LFOT comprising certain retail or commercial units. LFOT represented that the tenants were of high quality when in truth the principal tenant had been in arrears of rent on a number of occasions. Also, LFOT did

not disclose that an incentive payment had been made to the tenant. These were found to constitute misleading and deceptive trade practices under s. 52 of the Australian Trade Practices Act 1974. Mr. Burke had also acted as the solicitor to Hanave. Hanave initially sued LFOT alone, which then joined Burke as a third party. After protracted litigation, it was established that LFOT had been guilty of false and misleading conduct, and that Mr. Burke had been negligent and that both had caused the loss to Hanave. Hanave had paid AU$2.55 million for the property when its value, had the true position been known, was, it was held, AU$1.8 million. The loss was therefore AU$750,000, and by the time reached the High Court of Australia, the only issue was the apportionment of that amount between LFOT and Burke pursuant to equitable principles. The trial court had held that both were liable and, applying an established principle, divided the loss 50:50 between them, with the effect that LFOT become entitled to a contribution of AU$375,000 from Burke. On appeal, the full Federal Court agreed by a majority. The High Court, however, reversed this, with Gaudron A.C.J., McHugh, Hayne and Callinan JJ. in the majority and Kirby J. dissenting.

104. The views of the majority are well expressed in two paragraphs of the joint judgment of Gaudron A.C.J., and Hayne J. (quoted by the trial judge in this case at para. 109):-

> "19. …[I]f regard were to be had to culpability and causation, there would be much to be said for the view that the culpability of LFOT and Mr Tressider and the causal significance of their conduct to the loss suffered by Hanave was of such a different order from that of Mr Burke that they should not be entitled to contribution. Their misleading conduct was a positive inducement to Hanave to purchase, whereas Mr Burke's omission to advise further inquiries merely had the consequence that [LFOT's] misleading conduct remained undetected.
>
> 20. Further and as earlier indicated, it must be accepted that Mr Burke, who conducted negotiations with LFOT and Mr Tressider on Hanave's behalf, was, himself, misled by their conduct. Had Mr Burke been induced by their conduct not to advise the making of inquiries, he would be entitled to indemnity from them for any liability he incurred to Hanave, thus defeating any claim to contribution."

At para. 67 of the judgment, McHugh J. concluded that since the loss was the difference between the value of the property at the time it was purchased and what was paid, the difference was gained by LFOT and an order requiring it to pay damages to Hanave was no more than an order requiring it to reimburse Hanave for the loss it had suffered and LFOT gained. At para. 59 he stated that, in paying the entire damages, LFOT was merely accounting for a profit it had wrongly made from the transaction by reason of misleading and deceptive conduct. It would be inequitable to make Burke contribute to LFOT's repayment of Hanave's loss, a loss which was LFOT's gain:-

> "It would be absurd to suggest that a person who stole money and was ordered to repay it could obtain contribution from a person who negligently failed to safeguard the money. And in substance, I do not think that there is any difference between that example and the present case".

105. The dissent of Kirby J. took a different tack. He considered that epithet unjust enrichment was one which could only be applied at the conclusion of the analysis. Here, he considered that, once it was found that Burke's negligence was a cause of the damage to Hanave, to direct a full indemnity to Burke to LFOT was to allow him to walk away from the case, even though had he been sued alone he would have been held liable to Hanave in the full amount. An apportionment of liability was, he considered, fair. It would make LFOT more careful about what it said, and Mr. Burke more careful about what he did. While Australian law had until then applied a principle of equal distribution, Kirby J. would have been prepared to consider proportionate distribution of the loss which he considered would have addressed most of the arguments made in Mr. Burke's favour.

106. The trial judge here relied on the approach of the majority in *Burke* and, in doing so, preferred that approach to that of two cases decided by the courts of England and Wales which appeared to take the view that it was at least possible that a party whose negligence arose from a failure to detect or prevent the wrongdoing by another could nevertheless be obliged to make contribution to the primary wrongdoer if that wrongdoer had satisfied the plaintiff's claim.

107. In *K. & Anor. v. P. & Ors*. [1993] Ch. 140 ("*K. v. P.*"), the plaintiffs brought proceedings against the defendants for conspiracy to defraud by obtaining inflated fees by commission payments in respect of a number of property transactions conducted on the plaintiffs' behalf. The defendants then sought to join the plaintiffs' accountants as a third parties, arguing that, as accountants, they had failed to advise the plaintiffs in respect of the risks of the transaction. The accountants sought to have the proceedings dismissed *in limine*. The application therefore had some similarities to the manner in which this case proceeded in the High Court.

108. The accountants sought to argue that the principle of *ex turpi causa* would prevent wrongdoers from recovering contribution from another party who may have been guilty of negligence in failing to detect or prevent that wrongdoing. It was contended that in any event it was inconceivable that a party who had been held to be merely negligent should be required to contribute to the damages payable by a party who had been found guilty of fraud:- "[i]t is rather as if a burglar, when sued for the recovery of stolen property or its value, sought contribution from a security guard who, by falling asleep while on duty, had made the burglary possible". Ferris J. was plainly unimpressed by the third party claim and accepted that insomuch as the plaintiffs' claim might be to recover any sum the defendants had received, there would be an overwhelming argument that no contribution should be ordered since it would allow the defendants or its fellow conspirators to retain the proceeds of their conspiracy. However, he considered that if the plaintiffs' claim went further and extended to a claim of loss occasioned to the plaintiffs, then while the third party might still have a strong argument for an indemnity, it could not be said to be inevitable, and such an issue could not be determined without evidence.

109. *Nationwide Building Society v. Dunlop Haywards Ltd.* [2007] EWHC 254 (Comm.), [2010] 1 W.L.R. 258 ("*Nationwide Building Society*") was a case decided after complex and

protracted legal proceedings. A building society had suffered loss as a result of advancing loans in respect of fraudulently overstated valuations of property. The society sued the valuers in deceit and negligence, and its own solicitors for negligence in failing to detect the fraud. The solicitors settled with the society, and sought contribution from the valuers. The High Court of England and Wales (Christopher Clarke J.) held that the solicitors were entitled to contribution of 80 percent. The reasoning on this issue is set out at para. 77 of the judgment as follows:-

> "In my judgment the relative proportions should be 80%/20%. The moral blameworthiness of DHL and the causative potency of the fraud of its agent are very much greater than that of Cobbetts [*the solicitors*]. DHL's deceit was bare-faced fraud, for the reasons set out in para 48 of the judgment of Steel J. It was not the only one of its kind: see para 54. That deceit was the prime reason for CBS making the advances that it did. Cobbetts should have alerted CBS to the indicia of fraud, in particular the fact known to them that the site had been sold for £4.7m in November 2004; and, in relation to the further advance, that none of the leases had been entered at the Land Registry in the five months since the original loan. But their failing was not to pick up on the fraudulent scheme rather than to play any part in it."

110. HSBCITS would seek to distinguish these cases, principally on the ground that, under the law of England and Wales, a court is to have regard both to fault and to causative potency in apportioning liability between concurrent wrongdoers. HSBCITS invites the court to prefer the reasoning of the majority in *Burke*, which has been approved in academic commentary, See, for example, C. Mitchell, 'Partners in Wrongdoing?' (2003) 119 L.Q.R., 364 and C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford University Press, 2003), paras. 10.49 – 10.52.

B. Discussion

111. Counsel for Defender criticised the High Court and particularly the approach which appeared to have been applied, that potential criminal liability always trumped tortious responsibility. This, he said, was not always the case. He gave, as an example, a garage which negligently failed to repair the brakes of a defendant's car. The defendant leaves the garage and while driving inadvertently crosses the white line in the road, is not able to recover his position, and collides with the plaintiff's car. Even if the defendant's driving could be characterised as driving without due care and attention, no one would suggest that the defendant bore a greater share of fault and responsibility even though the garage was only guilty of negligence and the defendant guilty of, in theory, a criminal offence. Other examples, he said, could be imagined. Given the historical origins of the law of tort and crime, it was, in any event, the fact that most criminal conduct was also capable of constituting tortious wrongs, and it was wrong to adopt such a simple and one-dimensional approach to the question.

112. Even if the case was taken as one where it was considered that fraud was always a more serious form of civil wrongdoing than "mere" negligence, I think that the proposition that fraud almost always obliterated negligence in terms of fault could not be safely adopted,

at least at this point, to dismiss a claim *in limine*. It is true, as counsel for HSBCITS points out, that the conduct of BLMIS was on a greater scale than was contemplated in any of the decided cases, and the law treats deceit as an extremely serious wrong so that different rules are applied to it, perhaps most notably that the rules on remoteness of damage do not apply and a plaintiff is entitled to recover all loss flowing from a proven fraud (see *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158 and *Northern Bank Finance v. Charlton* [1979] I.R. 149). But I do not think it can be said that once it is concluded that a party is guilty of the tort of deceit that that will *always* absolve a concurrent wrongdoer from an obligation to contribute to a loss where that wrongdoer has been negligent, and particularly if the negligence consisted in failing to perform the task assigned to him or her of detecting or preventing the self same fraud.

113. The dilemma is neatly illustrated by the difference of opinion in the Australian High Court. The majority focussed on the apparent injustice that a fraudster could retain some of the benefits of the fraud, whereas Kirby J. was clearly influenced by the apparent injustice that a person found guilty of serious wrongdoing should be insulated from all responsibility for it because of the existence of another solvent wrongdoer.

114. I do not think that *K. v. P. and Nationwide Building Society* can be explained, at least at this stage of the proceedings, as being based on a difference in the legal approach in the UK, which required the court to have regard to both fault and causative potency in apportioning liability. Certainly the decision in *Nationwide Building Society* was not expressed in terms that an apportionment would not be justified, having regard to the relative fault, but rather arose by considerations of causative potency. It is also the case that the Australian courts, upon which HSBCITS rely, have regard to causal matters. In my view, the exercise carried out in each jurisdiction is sufficiently similar to the approach an Irish court might adopt under the CLA to allow for useful comparison, particularly since this is an area which has not been much explored in academic writing or judicial decisions.

115. I am prepared to accept for the purposes of the argument that where a fraudster has retained the benefit of a fraud, then it would be inequitable, unjust and indeed absurd, if a contribution could have the effect of allowing that person to retain part of the proceeds of fraud. On the facts of *Burke*, and leaving aside any question of the costs incurred, contribution between the wrongdoers would have the result of ensuring that while Hanave received the property for its "true" value of AU$1.8 million, nevertheless, LFOT would obtain AU$2.15 million for it.

116. But that principle is, at least in its broadest sense, a principle of unjust enrichment. It is driven not so much by attribution of fault (or causation) as by = the overall imperative that fraudsters should be obliged to disgorge property obtained as a result of fraud. I am inclined to agree with Ferris J. in *K. v. P.* that it may well be different where the claim is for damages suffered by reason of the joint wrongdoing. In that case, there is no unjust enrichment objection to the apportionment of damage, and to fail to apportion damage would give rise to the problem, identified by Kirby J., that a negligent party whose core

function was to prevent or protect the plaintiff against the very fraud which occurred would nevertheless be allowed to escape any obligation to contribute to the plaintiff's loss. I take the point urged by HSBCITS that BLMIS's wrongdoing was of a completely different level to anything perpetrated in any of the three cases under consideration, but the simplest resolution of this issue at this stage is to conclude that I cannot be satisfied that it could be said with the requisite degree of confidence that there was no prospect of any apportionment of liability and damages other than 100% to 0%. In those circumstances, it is accepted that the application, at least in this regard, must fail.

VIII - Additional Arguments

117. This conclusion would result in the reversal of the decision of the High Court. It is, however, necessary to consider two additional arguments which HSBCITS advanced which would support the order of the High Court, if not the judgment leading to it. These arguments were, firstly, that the court could arrive at the same conclusion on apportionment of liability without any troublesome consideration of relative fault. This was because, HSBCITS contended, it was entitled to rely on s. 21 of the Civil Liability Act which provides that no concurrent wrongdoer shall be obliged to make contribution under the Act to a party who is entitled to an indemnity from the wrongdoer. In this regard, HSBCITS says that it is entitled to a contractual indemnity from BLMIS, and therefore that, on the assumption that BLMIS is to be treated as identical with Defender for the purposes of any contribution claim, then even if a court might otherwise order HSBCITS to make contribution because of its conclusion as to relative fault, it would not do so because of the provisions of s. 21 and the existence of the contractual indemnity. Finally, it is said that the provisions of the settlement agreement constituted an agreed substitution for satisfaction, which, it is contended, has the effect under s. 16 of the CLA of barring the appellant's claim.

A. Indemnity

118. This argument was not developed at particular length in the written submissions and was not addressed in the judgment of the High Court. However, the argument runs that the third option under s. 17(2) (and the only option relevant here) requires the court to conduct a hypothetical exercise and consider the amount the settling wrongdoer "would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers". This, it was argued, required the court to go to s. 21 which provides for contribution between wrongdoers but which contains the proviso that "so, however, that no person shall be entitled to recover contribution under this Part from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought". Under the terms of the sub-custodian agreement set out at para. 65 above, BLMIS was obliged to indemnify HSBCITS in respect of any loss occasioned as a result of its fraud or negligence. It followed, it was argued, that BLMIS could not obtain contribution from HSBCITS and would, moreover, be obliged to indemnify HSBCITS if it satisfied Defender's claim. Accordingly, if Defender was to be identified with BLMIS, it could not be in a better position. It was therefore irrelevant whether it was possible, on some apportionment of fault, that HSBCITS might be obliged to make contribution. This provision operated as a matter of law and, if HSBCITS's interpretation was correct, it had

the effect of barring Defender's claim irrespective of an apportionment of fault that a court might otherwise make.

119. I do not agree that this is the true interpretation of what are, admittedly, somewhat complex provisions. If correct, it could have startlingly unjust results. A settling plaintiff may be unaware of the contractual position between potential concurrent wrongdoers or, indeed, such factual circumstances as might give rise to an indemnity at law separate and distinct from that available under the CLA. That plaintiff may properly settle with one concurrent wrongdoer, and navigate the difficulties of s. 17 by correctly estimating the share of liability on a fault basis that could be attributed to the settling wrongdoer, only to discover that the further claim against the other wrongdoer which, as a matter of fact and fault is properly grounded, is now barred because of the existence of an indemnity between the wrongdoers, of which the plaintiff was perhaps unaware.

120. I consider that, in this regard, Defender's reading of the Act is correct. It is noteworthy that neither s. 17 nor the companion provision of s. 35(1)(h) make any reference to s. 21, which seems to be advertent. S. 21 addresses the position in relation to contribution between concurrent wrongdoers properly so-called (and without any question of statutory identification). In that context, it may make sense to provide that a right of contribution – which is, after all, created, or at least codified, by the CLA and which is a right of contribution arising from the position of concurrent wrongdoers alone – does not override any contractual indemnity. The settling plaintiff is, under s. 35(1)(h), identified with the *acts* of the settling wrongdoer, not with the wrongdoer himself or herself in every respect. The plaintiff is deemed responsible for those acts for the purpose of apportionment of liability under the CLA alone. The acts of the settling wrongdoer are attributed to the plaintiff for the purposes of the deemed contributory negligence created by s. 35 and for the consequent assessment and apportionment under s. 34.

121. This interpretation is also consistent with the logic of the Act, at least as I read it. The identification provisions for the purposes of contributory negligence mirror the extinction of the contribution claim under s. 35(4). Because the non-settling wrongdoer can plead the acts of the settling wrongdoer now as contributory negligence, the settling wrongdoer cannot rely on the same acts to found the contribution claim against the settling wrongdoer. The scheme can also be looked at in reverse: the fact that the Act effectively immunises the settling wrongdoer against not just the plaintiff's claim, but also any contribution claim by the non-settling concurrent wrongdoer is balanced by permitting the non-settling wrongdoer to plead those acts as contributory negligence against the plaintiff. Either way, there is an essential symmetry in the Act which is consistent with its logic.

122. This logic, however, does not and could not extend to allowing the non-settling wrongdoer the benefit of a contractual indemnity against the plaintiff when there is no contractual or other relationship between the plaintiff and the concurrent wrongdoers other than that created by the fact of concurrent wrongdoing. S. 35(4) does not deprive the non-settling wrongdoer of any contractual indemnity claim, or indeed any claim to contribution which

does not arise under the Act, by virtue of the status of the parties as concurrent wrongdoers. There is no reason, therefore, why the Act should permit the non-settling wrongdoer to assert the non-CLA indemnity right against the plaintiff.

123. In this regard, it is important to remember that Part III is intended to regulate the position of CLA claims for contribution and indemnity: that is, claims that arise only by virtue of the fact that the parties are concurrent wrongdoers. Accordingly, I consider that the correct interpretation of these sections is that on a settlement with one concurrent wrongdoer, the plaintiff is identified with the acts of that wrongdoer for the purposes of assessment of contributory negligence, and any such settlement prevents a claim for contribution by the non-settling wrongdoer against the settling wrongdoer, but would not preclude a claim for a contractual or other non-CLA indemnity or right of contribution. This would have the effect in this case, at least in theory, of allowing HSBCITS to make a claim under its contractual indemnity against BLMIS, which would presumably become a claim in the bankruptcy. In this way, the risk and effect of BLMIS's insolvency falls upon the concurrent wrongdoer rather than the plaintiff. For these reasons, I cannot accept the interpretation of the Act advanced by HSBCITS.

124. It is, accordingly, unnecessary to consider the further argument that, even if HSBCITS was correct in its interpretation of the Act, so that s. 21 would become applicable to the assessment of the hypothetical contribution claim pursuant to s. 17, the terms of s. 21 would, if applicable, merely prevent BLMIS (and therefore, on this argument, Defender) from seeking contribution from HSBCITS, whereas the exercise required under s. 17 is to consider what contribution BLMIS would be obliged to make to HSBCITS by reference to their respective degrees of fault, something to which the saver in s. 21 does not apply.

B. The S. 16 Defence

125. Finally, HSBCITS sought to argue that s. 16 of the Act also operated to bar Defender's claim *in limine.* S. 16 is already set out at para. 38 above. In essence, it provides that satisfaction of the plaintiff's claim discharges other wrongdoers. Satisfaction is defined as meaning payment of damages whether after judgment or by accord and satisfaction or "the rendering of any agreed substitution therefor". HSBCITS advanced a carefully constructed argument that, on its true interpretation, the settlement agreement of 23rd March, 2015, amounted not to the payment of damages but to the rendering of an agreed substitution for damages.

126. Counsel pointed out that the Act distinguishes between satisfaction and the nature of damages which must be the full damages either agreed or adjudged, otherwise any such payment will only operate as partial satisfaction, and the question of an agreed substitution for damages. In the latter case, there was no question of partial satisfaction or indeed partial substitution. The only question was whether the settlement agreement amounted to the rendering of an agreed substitution for damages, and thus satisfaction under s. 16, having the effect of discharging the other wrongdoers and, in this case, HSBCITS.

127. It is argued that Clause 4 of the agreement of the 23rd March, 2015, constitutes a broad release by Defender of its claim for damages against BLMIS. By its terms, Defender (and the other parties described as the defendants):-

> "shall release, acquit and forever discharge…BLMIS…from any and all past, present or future claims or causes of action…and from any and all allegations of liability or damages…of whatever kind…in tort, contract, statutory liability, or otherwise, based on strict liability, negligence, gross negligence, fraud, breach of fiduciary duty, or otherwise…known or unknown, existing as of the date of the Closing that are, have been, could have been, or might in the future be asserted by the defendants based on, arising out of, or in any way related to BLMIS or Madoff".

This release was furthermore stated by its terms to be in consideration for the covenants and agreements contained in the agreement of the 23rd March, 2015, and for other good and valuable consideration, the receipt and sufficiency of which was acknowledged by Defender.

128. It is argued that the covenants and agreements received by Defender under the agreement were in substitution for damages. First, the conclusive allowance of Defender's customer claim in the sum of approximately US$522 million meant that Defender achieved this position without the necessity for formal proof or further proceedings. This, on its own terms, was undoubtedly something of considerable value. Second, Defender received an immediate payment on account of its allowed claim in the sum of approximately US$254 million. Third, Defender became entitled to a rateable distribution in the bankruptcy in respect of the balance of its customer claim. Finally, Defender received a corresponding release by the trustee on its own behalf, and on behalf of BLMIS and its consolidated estate, of any claim against Defender. It was pointed out that the trustee had brought claims requiring both the repayment of the US$93 million received by Defender from BLMIS within the certain statutory period prior to the bankruptcy and had also sought to have Defender's customer claim disallowed. Again, HSBCITS has argued that this release was something of real value to Defender. Each of these matters were received by Defender (which, indeed, acknowledged the receipt) so that, even if under the agreement Defender was to receive future distributions, it had, by the execution of the agreement, received a present right to such future distribution. Accordingly, it was said that this amounted to the rendering of an agreed substitution in place of the payment of damages and was, therefore, satisfaction under s. 16 of the CLA.

129. While the benefits relied on by HSBCITS in this regard emanated from the trustee, rather than directly from BLMIS, it was argued that they were in return for, *inter alia*, the release by Defender of any claims it had against BLMIS and, accordingly, the receipt by Defender of these benefits, constituted an agreed substitution for damages, and amounted therefore to satisfaction, which under s. 16(2) had the effect of discharging any other wrongdoer which, on the assumptions on which the issue was tried in this case, included HSBCITS.

130. The argument is carefully constructed and attractively presented. However, I do not agree. The argument is somewhat contrived and the factual circumstances are far removed from the type of situation which appears to be have been envisaged by s. 16. Satisfaction under the section means, in the first place, payment of damages, whether after judgment or by way of accord and satisfaction. The definition of satisfaction is then extended somewhat by including an agreed substitution for such damages. Accordingly, the circumstances which seem to be contemplated involve either the adjudication, or agreement, of damages. A simple example of an agreed substitution might be where a plaintiff obtains an award involving monetary damages and a defendant agrees to transfer property in substitution for those monetary damages, either adjudicated or agreed.

131. That is not what occurs here. There has been neither adjudication against, nor agreement with, BLMIS in respect of damages. What is done here is that, in the course of a comprehensive agreement with the trustee, and in consideration of the benefit being conferred on Defender by the trustee, Defender released any claim it may have against BLMIS (among others). I do not agree that such a release can be treated as akin to the payment of damages by BLMIS or as an agreed substitution therefor. In simple terms, it is a release of a claim rather than an adjudication or agreement of damages. Nor, if viewed in the broader perspective, can the agreement here be made fit easily within the mischief to which s. 16 appears designed to address or the logic of the Act in this regard.

132. Once a plaintiff has received satisfaction from one concurrent wrongdoer, that discharges the others, meaning that the plaintiff cannot pursue another concurrent wrongdoer (at least in respect of such damages), although s. 16(4) contemplates the possibility of proceedings for other relief. However, the paying wrongdoer may pursue a claim for contribution against the concurrent wrongdoer. It does not seem easy to characterise the settlement between the trustee and Defender as a satisfaction by BLMIS of Defender's claim, giving BLMIS a right to claim contribution from HSBCITS. There is no reason to interpret the provision in such a contrived way and to achieve such a bizarre and unjust result. It is not necessary to consider if there are any circumstances in which an agreement involving the release of a claim, perhaps together with the payment of damages, could properly be characterised as satisfaction for the purposes of the Act. Any such agreement would require to be construed on its own terms. It is sufficient to conclude that the agreement of the 23rd March, 2015, should not be so interpreted.

IX - Conclusion

133. I would allow Defender's appeal against the order of the High Court. It is, accordingly, unnecessary to consider HSBCITS's cross-appeal against the High Court's refusal to dismiss Defender's claim in its entirety, an issue which only arose in the event that this court upheld the determination of the High Court. I conclude that while the High Court was, at least as a matter of orthodox statutory interpretation, correct in its construction of s. 17 of the CLA, it was, nevertheless, wrong to conclude that the only possible outcome of the application of ss. 17 and 35(1)(h) of the Act was an apportionment of liability of 100% against Defender. I also conclude that neither s. 16 nor s. 21 has,

properly construed, provided a basis for dismissing the damages claim *in limine*. Accordingly, the order of the High Court must be set aside.

134. If the case proceeds, then it is possible that HSBCITS will defeat Defender's claim or, conversely, that HSBCITS will be liable to Defender in a proportion and amount that is equal to, or exceeds, the balance of Defenders claim after payment under the settlement with the trustee. In either case, the proceedings would come to an end and it would not be necessary to address the matters which are outstanding on the interpretation of the Act. There remains, however, the possibility that the trial court could find that HSBCITS was negligent in fact but decide to apportion liability between HSBCITS and the plaintiff (deemed responsible for the acts of BLMIS) in an amount less than 25% (or whatever may turn out to be the shortfall in the claim after giving credit for the recovery of the customer claim in the bankruptcy). If this outcome were to eventuate (and there are a number of variables), there may be a shortfall in the recovery by the plaintiff of the damages found to have been occasioned to it by the negligence of HSBCITS (assuming that is established). In such circumstances, Defender may consider it necessary to revisit the interpretation of s. 17 by reference to the double construction rule. That issue should, however, be determined in proceedings with the presence of the Attorney General, whether by hearing the constitutional challenge in conjunction with the legal argument in these proceedings or by joining the Attorney General to these proceedings for that sole purpose. It may be necessary to address this issue within the present proceedings, or at least contemporaneously with them since, if the Court was persuaded court that s. 16 was only capable of one interpretation, but that on such interpretation the section was unconstitutional, HSBCITS would presumably not be able to rely on the sections against Defender. The manner and sequence in which these issues should be resolved will be a matter for the trial judge, in the light of such steps as may be taken by the parties.

135. Finally, by order on consent on 14th May, 2020, HSBC France was substituted for HSBCITS in the proceedings. Accordingly, the action will proceed against that entity.

136. For the moment, however, it is sufficient to set aside the order of the High Court, and permit the matter to proceed to trial.